December 10, 1993

MEMORANDUM

SUBJECT: Straight Delegations Issues Concerning Sections 111 and 112 Requirements and Title V

FROM: John S. Seitz, Director /s/
Office of Air Quality Planning and Standards (MD-10)

TO: Director, Air, Pesticides and Toxics
Management Division, Regions I and IV
Director, Air and Waste Management Division,
Region II
Director, Air, Radiation and Toxics Division,
Region III
Director, Air and Radiation Division,
Region V
Director, Air, Pesticides and Toxics Division,
Region VI
Director, Air and Toxics Division,
Regions VII, VIII, IX, and X

Several questions have been raised concerning the ways in which authority to implement and enforce sections 111 and 112 requirements exactly as promulgated by EPA (i.e., "straight delegations") can now be delegated to the States, both independent of and in conjunction with State part 70 operating permits programs being developed to meet the requirements of title V. This memo and its attachment, my April 13, 1993 memorandum ("Title V Approval Criteria for Section 112 Requirements"), and the final section 112(l) rules should be taken as Agency policy regarding straight delegations of these requirements. This guidance, however, does not represent final Agency action and cannot be relied upon to create any rights enforceable by any party. Approval of State requirements that differ from and are no less stringent than section 112 requirements are addressed in EPA's recently signed regulations to implement section 112(l).

Some of the key points found in the attachment are summarized as follows:

1. The Environmental Protection Agency's (EPA) ability to delegate section 112 requirements to States is now governed by the new section 112(l) rulemaking process added by the Clean Air Act Amendments (CAAA) of 1990. The approval of a part 70 operating permits program provides an excellent opportunity for States to receive concurrent EPA approval under section 112(l) of a "mechanism" by which straight delegation of section 112 requirements, as they apply to sources covered by the permitting program, can occur expeditiously. The detailed procedures comprising this mechanism and the responsibilities of each party should be specified in a title V implementation agreement or other memorandum of agreement (MOA). (For the purposes of this memorandum and attachment, the term "MOA" will refer to the specific agreement used by a State and associated EPA Regional Office for establishing specific procedures to implement the section 112 delegations process, regardless of whether this agreement is in the form of a title V implementation agreement or a more general MOA between the State and the Region.) This approval will

eliminate the need to conduct a section 112(l) rulemaking for each new requirement that applies to these sources. In addition, this rulemaking should presumptively accomplish section 112(l) delegation for any currently applicable section 112 requirements which are delegatable, still undelegated, and applicable to sources covered by the State's part 70 permit program. As noted in paragraph number 4 below and discussed in the attachment there may be certain exceptions to this (see question 6). It may also be possible for this rulemaking to provide for partial delegation of certain information-receipt responsibilities for some future section 112 requirements, as long as the details of this delegation are agreed to in an MOA, and the State has the ability to obtain necessary enforcement authority on a timely basis.

2. Until the time of part 70 approval or in cases where sources not subject to the part 70 program are covered by a section 112 requirement, Regions can, in many instances, effectively transfer much of the technical and administrative burden of implementing and enforcing a particular standard by establishing an MOA with the State. Alternatively, the Region can delegate responsibility for section 112 requirements by accomplishing notice and comment rulemaking under section 112(l)(5) in the most efficient manner. Possible approaches include use of "direct final" actions, where appropriate, and programs which prospectively deal with delegation of section 112 requirements.

3. The options for delegation of section 111 standards prior to the 1990 CAAA remain available to the States and EPA since the language in section 111(c) was not changed. Again, the title V program approval provides an excellent new opportunity for delegation.

4. States must acquire any new legal authority as needed to implement the applicable requirements of sections 111 and 112 on a timeframe sufficient to assure timely issuance or revision of part 70 permits. For applicable requirements existing at the time of the State's part 70 program submittal, the State must demonstrate adequate existing legal authority to implement these requirements presumptively by the effective date of the part 70 program. Under certain circumstances, a State may negotiate with the Region a later date for acquiring such responsibility for a particular standard. This approach will be acceptable only if it is consistent with the timely phase-in of the part 70 program, and if the State presents a detailed implementation strategy convincing the Region that the necessary legal authority will be secured consistent with its strategy.

5. There is no immediate need for a State to obtain delegation for a standard which currently applies to sources not in that State. However, the State and Regional Office should develop a strategy describing how new sources of this type will be addressed without delaying issuance of their part 70 permits.

6. The EPA anticipates that States will accept full delegation to implement and enforce applicable sections 111 and 112 requirements for all major and nonmajor sources subject to them. Some States have requested that EPA partially delegate certain sections 111 or 112 requirements on the basis of source coverage. This would be done by withholding delegation of requirements as they apply to nonmajor sources and retaining this responsibility for EPA implementation. The EPA Regions can consider such requests on a case-by-case basis but this type of delegation should be reserved for those rare cases where a State can demonstrate that the approach would still meet the requirements of title V (e.g., a standard clearly applies in part to a set of smaller sources which are not potentially subject to part 70).

The responses contained in the attachment have been previously coordinated with your staff and will be placed on the Technology Transfer Network bulletin board. If you have any further questions on title III/title V delegation concerns, please contact Michael Trutna at 919-541-5345, Rich Damberg at 919-541-5592, or Julie Andresen at 919-541-5339. For other title III issues not involving title V, please contact Karen Blanchard, who is managing the effort to guide the implementation of section 112, at 919-541-5647.

Attachment

cc: K. Berry
B. Jordan
A. Schwartz
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ATTACHMENT

QUESTIONS AND ANSWERS TO STRAIGHT DELEGATION ISSUES CONCERNING SECTIONS 111 AND 112 REQUIREMENTS AND TITLE V

1. How can "straight delegation" (i.e., where the State will implement and enforce the requirement exactly as promulgated by EPA) of section 112 requirements be accomplished before and after the approval of a part 70 program?

a. Section 112(l) Rulemaking Required for Future Delegations

Section 112(l) of the Clean Air Act (CAA) provides the mechanism for approval of programs for the delegation of Federal standards and programs to the States: "A program submitted by a State under this subsection may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emission standards and prevention requirements. . . ." This language in section 112(l) was enacted in 1990 and replaces that formerly found in section 112(d). Thus, section 112(l) now provides the exclusive pathway for delegation of section 112 requirements. Section 112(l)(5) prescribes the specific requirements for EPA approval, following notice and comment rulemaking, of State air toxics programs addressing, among other things, delegation of standards. There is no basis to distinguish this rulemaking in its application to pre-1990 section 112 standards versus its application to the "new" standards and programs. As a result, this rulemaking requirement applies to all future section 112 delegations, regardless of whether they are for new MACT standards, infrastructure programs (such as those in sections 112(g) and (j)), or pre-1990 NESHAPS for which a State failed to take delegation in the past.

Once a State's part 70 program has been approved, the State typically will not have to submit a separate request for approval under section 112(l) for straight delegation of section 112 requirements which apply only to sources subject to the part 70 program. A separate request is presumptively not needed for two main reasons: 1) meeting part 70 approval requirements will suffice in meeting the section 112(l) approval requirements, and 2) approval of a part 70 program confers the responsibility to implement and enforce all "applicable requirements" of section 112 for sources subject to the part 70 permit program. The extent to which a part 70 program meets the requirements of section 112(l) is further discussed in section (d).

States will need to take additional steps to receive "straight delegation" of section 112 requirements which apply to sources not covered by that State's part 70 program. For many States, only major sources will initially be subject to the part 70 program. As a result, certain sources subject to section 112 requirements will not face part 70 permitting obligations, including area sources deferred from permitting requirements in the part 70 rule, area sources deferred from permitting by specific section 112 standards (e.g. dry cleaners), or sources subject to the 112(r) accidental release program but not required to obtain a part 70 permit.

There are two primary options for obtaining delegation of requirements as they apply to sources not subject to the part 70 permit program. Both involve section 112(l) rulemaking. The most administratively streamlined rulemaking option is for a State to submit a request to EPA for approval of a program for "straight delegations" under subpart 63.91 of the 112(l) rule. Here EPA would conduct a 112(l) rulemaking which would provide for public notice and comment on the State's proposed program for receiving straight delegation from the EPA for section 112 requirements as they apply to sources outside the part 70 permit program. Under this program, States would then,

without further rulemaking, receive delegation for specific section 112 requirements upon their request in accordance with the memorandum of agreement (MOA) between the State and EPA.

The second rulemaking option would involve separate submittals from the State requesting delegation of specific section 112 requirements as they apply to sources not required to obtain a part 70 permit. The EPA would need to conduct a 112(l) rulemaking for each individual State request, although "direct final" rulemakings could be used wherever appropriate [the "direct final" process is discussed in section (b)]. Separate section 112(l) rulemakings may be appropriate for expedited delegation of section 112 requirements promulgated before the State receives part 70 program approval (e.g., degreasing National Emissions Standard for Hazardous Air Pollutants (NESHAP), the Hazardous Organic NESHAP, chrome electroplating NESHAP, and cooling towers NESHAP).

Both of these rulemaking options require submittal of State demonstrations that the State has adequate legal authority, resources and an expeditious schedule for implementation. The content of these submittals is discussed in section (c).

Another option, one which does not constitute section 112(l) rulemaking but can provide quick transfer of many implementation responsibilities to States, involves the expanded use of MOA's. Where a section 112(l) rulemaking is not practical (e.g., short time before part 70 approval expected), EPA can still enter into an MOA with a willing State to transfer the effective workload of a particular section 112 requirement. These MOA's, which can be similar in form to the pre-1990 delegation practices under section 112(d), can be used to contract with the State to perform the technical and administrative implementation of the requirement (and enforcement as well if the State has adequate legal authority to enforce in State court). However, an MOA cannot, standing alone, be the basis for a formal delegation under section 112(l). Therefore, while this approach is potentially valuable in certain situations, it would not serve to formally delegate a section 112 requirement and so would not, for example, allow the State to replace EPA as a point of receipt for required reports or other information. The EPA Regions and States must weigh the relative merits associated with this use of MOA's as compared with delegations accomplished by section 112(l) rulemaking before selecting the most appropriate means for implementing a particular section 112 requirement.

b. Nature of Section 112(l) Rulemakings by EPA

Procedurally, section 112(l) requires a State submittal of a request for approval, notice in the Federal Register that EPA has received a request for approval, a public comment period of at least 30 days, and notice in the Federal Register that EPA has approved or disapproved the request. The content of the EPA rulemaking to transfer the responsibility to implement and enforce section 112 requirements as promulgated can vary widely. As discussed in section (d), the substance of a section 112(l) notice can be extremely short where implementation in large part depends on the adequacy of resources and legal authority otherwise required under the part 70 permit program. Where the State intends to implement and enforce the section 112 requirement as promulgated by EPA, this notice and comment rulemaking, even where it cannot be combined with the part 70 approval process, can also be expeditiously accomplished in many cases.

One approach available to expedite future straight delegations outside of a part 70 program approval is based on EPA's ability to approve a program

for the delegation of section 112 requirements as promulgated. Such an approval would have a prospective effect in that it would obviate the need to repeat the notice and comment procedures of section 112(l)(5) for each delegation. The function of this rulemaking is to take comment on a mechanism for the transfer of section 112 responsibilities from EPA to the State, as well as on the State's general authority and resource strategy to implement that mechanism. The proposed section 112(l) approval notice would discuss the delegations mechanisms proposed by the State and would include a finding that the State has the broad statutory authority necessary to implement the mechanism, as well as a finding that the State now has or will be able to obtain the resources necessary to implement and enforce section 112 requirements.

The approval of a program for straight delegation of section 112 requirements must also be accompanied by an MOA between EPA and the State which details the mechanism for transfer of responsibilities. Options for structuring such an agreement are essentially those that existed prior to the 1990 Amendments, as described in the Good Practices Manual. The MOA must also establish some method of continuing oversight, so that EPA can continue to assure that the criteria of section 112(l)(5) are met. If the State fails to meet these criteria subsequent to approval of a program for straight delegations because it was unable to meet its commitment to provide adequate resources, the auditing and withdrawal mechanism in the section 112(l) regulations would allow EPA to withdraw approval for all or part of the program.

The approval of a program for straight delegation and the actual delegation of existing section 112 standards are not mutually exclusive. A section 112(l) approval can accomplish both simultaneously if the State wishes to structure the approval in that way. Accordingly, as part of any program for straight delegations, a State that wishes to establish any delegations for specific requirements under section 112(l) or modify any delegations approved in the past might submit documentation of adequate authorities, resources, and expeditious schedule for section 112(l) at the same time it submits a request to EPA for the program authorizing straight delegations. Alternatively, a State could obtain approval of a program for straight delegations and then accomplish those same specific delegation actions pursuant to that program.

Where a prospective program is not chosen, the direct final rulemaking approach may be a procedural streamlining mechanism available for accomplishing certain straight delegations. In general, direct final rulemaking is more likely to be appropriate where the only action being noticed is the delegation of a single section 112 standard. In situations where EPA does not expect any adverse comment upon publication of a notice of approval, the notice can specify that the approval would become effective in 30 days unless adverse comments were received. If adverse comments were received, then EPA would have to re-propose the approval and provide for a 30-day comment period. The time and resource savings from this use of the direct final approach would thus depend on the correctness of the Agency's judgement regarding whether or not any adverse comments would be submitted. For a more complete discussion of the direct final procedure, see 47 FR 27073 (June 23, 1982).

The content of the Federal Register notice accomplishing a straight delegation under section 112(l) can also be very brief. It can be as simple as a re-statement of EPA's findings concerning the adequacy of statements and/or demonstrations contained in the State's submittal. The contents of State submittals are discussed in the next section.

As part of the approval for either the delegation of a particular standard or of a program for straight delegation, the Region may consider the appropriateness of one or more partial delegations which would allow the State to become the point of receipt for notices and reporting required prior to the compliance date for a particular section 112 standard or requirement. Such a partial delegation would precede the more complete delegation that would occur once the State gains the ability to fully implement and enforce the standard. The partial delegation of information-receipt responsibilities may avoid redundant reporting where the State will be the primary enforcer of the standard, as will be the case, for instance, for sources covered by a part 70 program. In the case of approval of a program for straight delegations, the availability of this type of partial delegation should be detailed in the MOA that accompanies the program approval.

Regions must make case-by-case judgements as to the appropriateness of such a partial delegation based upon the nature of the particular standard and the likelihood that the State will be able to implement and enforce the standard for all covered sources on a timely basis. The shifting of information-receipt responsibilities would not be appropriate, for example, where the State's schedule for obtaining enforcement authority may result in sources reaching the compliance deadline before the State is able to enforce the standard. To guard against this possibility, any such partial delegation should be accompanied by an MOA which assures the Region that notices and reports received by the State will be transferred to the Regional Office if the State anticipates it will not be able to enforce the standard on a timely basis.

c. State Submittals Required for Straight Delegations of Section 112 Requirements

The EPA will consider a State's submittal for a part 70 operating permits program to be also an implicit request for approval of a program for delegation of all section 112 requirements as they involve applicable requirements for sources covered by the State's part 70 program (see next section). In order to take delegation of section 112 requirements for other sources, a State will need to provide EPA with a separate submittal pursuant to one of two options described in this section.

A submittal for approval of a program for the delegation of section 112 requirements as promulgated by EPA must meet the criteria in section 63.91(b). However, the content of a submittal for approval of such a program will necessarily be less detailed than a submittal for delegation of a specific requirement, since the subject of a program approval will be a more general mechanism for future delegation actions. As noted in the previous section, the primary purpose of a program approval is to provide for notice and comment on a mechanism for the future transfer of section 112 standards as promulgated. The State must therefore indicate in its submittal the type of mechanism (e.g., automatic or case-by-case delegation) it intends to use to accept delegation. The details of this mechanism will be established through the MOA between the State and EPA. A demonstration of authority to implement and enforce a particular requirement will occur at the time of delegation of that requirement pursuant to the MOA. In the case of a request for approval of the 112(r) accidental release program as promulgated by EPA, the State must also submit information necessary to meet the approval criteria specified in section 63.95.

For approval of a program for straight delegations, the State, pursuant to section 63.91(b)(1), must submit an opinion from the State Attorney General (for local agencies, a similar representative) demonstrating

that it has the broad legislative authority necessary to implement the chosen mechanism for delegation. Authority to implement a particular standard need not be demonstrated as part of the opinion, although general enforcement, inspection, and information gathering authority required by section 63.91(b)(1) must be demonstrated. Once a State has obtained approval of a program for straight delegations, the EPA will not require additional Attorney General opinions for each delegation accomplished pursuant to that program.

Section 63.91(b)(3) requires a demonstration of resource adequacy and certain descriptions of State agency organization. Here, the State submittal should include descriptions of current organization as appropriate, as well as a description of how the State plans to obtain and maintain adequate resources to implement delegations that occur pursuant to the approved program. As with the requirement for adequate authority, a demonstration of adequate resources to implement a particular requirement should accompany requests for delegation performed pursuant to the program. The content of this more specific demonstration should be detailed in the MOA and can be relatively brief, consistent with prior practice under the 1983 Good Practices Manual.

The remaining criteria in section 63.91(b) concern demonstrations associated with the delegation of particular requirements. For example, section 63.91(b)(2) requires submittal of copies of all statutes, regulations, and other material granting authority to implement and enforce the requirement. Sections 63.91(b)(4) and (5) require submittal of plans for expeditious implementation and enforcement, respectively, of the section 112 requirement. These demonstrations should be provided for in the MOA that accompanies the program approval, so that EPA can ensure that these criteria are met at the time each section 112 requirement is delegated and on a continuing basis for as long as the State retains approval of the program. However, consistent with the prospective nature of such a program for straight delegations, these demonstrations will not require the repetition of a rulemaking under section 112(l)(5).

State submittals requesting delegation for individual section 112 requirements (the second option discussed in the previous section) must also meet the criteria set forth in section 63.91(b) of the section 112(l) regulation. (Requests for approval of programs to implement section 112(r) requirements as promulgated by EPA must also meet the approval criteria specified in section 63.95.) Here section 63.91(b)(1) requires an opinion by the State Attorney General stating that the State has the necessary legal authority to implement and enforce the section 112 requirement exactly as promulgated by EPA, as well as require compliance by applicable sources with all emission limits, test methods, and reporting and monitoring requirements specified in the Federal requirement. The State must also demonstrate that it has adequate legal authority to bring enforcement actions against noncomplying sources in State court.

Section 63.91(b)(3) requires in the case of a specific section 112 requirement that the State show it has adequate resources to implement and enforce the applicable section 112 requirement. A statement of resource adequacy should suffice where the State has had experience regulating similar sources through an existing State requirement. In other cases, the State should show that the estimated workload for implementing and enforcing the standard does not exceed available resources (including any grants provided by EPA for non-part 70 activities).

The EPA wishes to clarify that, in requiring section 112(l) submittals to have enforcement authority required by section 70.11, section 63.91 implicitly recognizes the same interim flexibility as would be the case for a

State seeking approval of a part 70 program. Just as a State may receive interim approval under part 70 for up to two years if its enforcement authority "substantially meets" the requirements of section 70.11, a State may receive approval of a section 112(l) program under the same circumstances and subject to the same restrictions if its enforcement authority "substantially meets" these criteria. Were this not the case, a State could obtain approval of a part 70 program, be required to implement and enforce all section 112 requirements at part 70 sources, and yet not be able to receive formal delegation from EPA to implement and enforce those same requirements. This intent of the section 112(l) rule is evidenced by statements in the preambles to the proposed and final rule that a State submittal meeting part 70 criteria would also meet the criteria for section 112(l) approval. See, e.g., 58 F.R. 29299 (May 19, 1993), and 58 F.R. 62271 (November 26, 1993).

d. Relationship to Part 70 Program Approval

In order to obtain approval of a part 70 operating permits program, a State is obligated to incorporate all section 112 applicable requirements into permits and assume the primary responsibility for enforcing these requirements. The part 70 submittal (see April 13, 1993 memorandum entitled "Title V Approval Criteria for Section 112 Requirements") must guarantee this result by containing an Attorney General's statement of adequate legal authority and/or commitments by the Governor to adopt and implement additional requirements as needed to assure timely issuance or revision of part 70 permits which implement in part these section 112 requirements. The EPA, therefore, considers the approval of the part 70 program to be an excellent contemporaneous opportunity to approve a program for straight delegations under section 112(l), to the extent that it applies to sources subject to the permit program.

The approval notice addressing section 112(l) can be extremely brief and can largely rely on the demonstrations required for part 70 approval. This is because the part 70 approval will consider essentially the same approval criteria with respect to legal authority and resource adequacy required to be met under section 112(l)(5) and will provide an adequate opportunity for oversight of future State actions to implement and enforce section 112 requirements at part 70 sources. Because part 70 approval is conditioned on a State's ability to implement and enforce section 112 requirements for sources subject to the part 70 program, EPA will treat the request for approval under part 70 as a request under section 112(l) for approval of a program for straight delegation of all section 112 requirements applying to part 70 sources subject to the permit program. The EPA will so indicate this position in notices proposing to approve the part 70 program. Unless a State specifically requests otherwise, EPA intends to establish this program for prospective straight delegations at the same time that a part 70 program would become effective for that State. This same rulemaking could also accomplish straight delegations for any existing section 112 applicable requirements for which the State had not yet taken delegation.

As discussed in section (b) above, the approval of a program for straight delegations may also, for certain standards, allow for the partial delegation of information-receipt responsibilities prior to the delegation of enforcement responsibilities. Such partial delegations may be particularly useful where there is some delay between Federal promulgation and the time when the State is able to enforce the Federal Standard. This will sometimes occur in the context of the part 70 program. In these cases, partial delegation of the information-receipt responsibilities with regard to part 70 sources may facilitate the permitting of these sources, while reducing the reporting burden. As noted in the preceding discussion, partial delegations

of this sort will not be appropriate in all instances, and should not be undertaken unless there is assurance through an MOA that any information received by the State will be timely transferred to EPA where EPA will carry an enforcement responsibility for any period of time. This understanding can be included within the more comprehensive part 70 implementation agreement.

One additional concern relates to the timing sequence of these two rulemakings. Section 112(l)(5) requires that EPA's notice and comment rulemaking occur within 6 months of a complete State submittal, while the rulemaking in response to a part 70 submittal by a State needs to occur within 12 months of a complete State submittal. Although approval under section 112(l) in not necessarily a precondition for part 70 approval, a State may want to propose the two rulemakings in the Federal Register concurrently. In such cases, the EPA Region can delay the start of the 6-month clock associated with section 112(l) rulemaking until the time that the part 70 submittal for the State is proposed for approval unless the State specifically requests a different schedule for approval under section 112(l). This delayed start will facilitate compliance with section 112(l)'s six month timeframe for approval in cases where the presumption of an approved part 70 program is needed to demonstrate adequate legal authority and resources. That is, unless a proposed approval of the part 70 program occurs or an independent demonstration of adequacy is provided, a submittal for section 112(l) rulemaking would be incomplete. Thus, a simultaneous proposal for approval of a submittal under part 70 and section 112(l) would serve to start the 6-month time period for conducting section 112(l) rulemaking. This strategy also offers sufficient flexibility to complete the part 70 rulemaking within the year following a complete submittal from the State.

The procedural steps necessary before a State may incorporate a federally-promulgated standard into the part 70 permit will vary as a matter of State law. In several instances this may require rulemaking at the State level (perhaps through incorporation of the Federal requirement by reference). A State may also have mechanisms available to satisfy part 70 requirements that allow incorporation of a Federal standard directly into the part 70 permit without any interim steps to promulgate the standard through State rulemaking or to seek formal delegation of the standard from EPA. Regardless of the necessity under State law for a formal delegation, EPA will consider the formal delegation for all delegatable provisions to have occurred, at the latest, when the part 70 permit is issued, so that the point of receipt for any reporting requirements will shift from EPA to the State at that time (unless some earlier time is established pursuant to section 112(l) rulemaking).

The EPA may request a review of individual State rulemaking and/or other actions taken to ensure that the needed legal authority and/or technical capabilities are in place at the State level in time for their use in the part 70 permit process. Such evaluations should be limited to the exceptional case where EPA has strong reasons to believe that legal and/or resource problems exist. Thus, unless a State is legislatively barred or has made a specific request for delegation under section 112(l), EPA will presume that the State receiving approval for its part 70 program will implement the Federal sections 111 and 112 requirements as promulgated and will adopt any new authority at the State level needed to assure timely inclusion as applicable in part 70 permits in order to maintain its part 70 approval.

2. How can section 111 standards be transferred before and after the approval of a part 70 program?

Section 111(c), which governs the transfer of new source performance standards (NSPS), was not changed by the 1990 Amendments. Therefore, the prior options for delegating such standards remain in effect.

Approval of part 70 programs requires, in part, that States must be able to implement and enforce current section 111 standards and commit to take any necessary steps to implement and enforce future standards promulgated by EPA so as to assure the timely issuance or revision of part 70 permits. Therefore, this approval process provides a new and convenient opportunity to establish a prospective delegation agreement with the State to implement future NSPS, as well as to implement NSPS in effect at this time. Accordingly, EPA will assume that the part 70 submittal is an implicit request to establish a delegation agreement for the State to implement, as promulgated by EPA, all section 111 requirements applicable to sources subject to the part 70 program. States retain the option, however, of submitting separate requests for delegation authority pursuant to section 111(c) when this arrangement for automatic delegation is not appropriate. Even in this case, EPA will explore options with individual States to establish the presumption where possible that the point of receipt for any section 111 reporting requirement will shift from EPA to the State and any separate delegation requests will involve petitions to obtain the remaining implementation and enforcement responsibilities.

3. Are there portions of any section 111 requirement which cannot be delegated to States?

Most provisions of these requirements can be delegated to States. However, as stated in the Good Practices for Delegation of NSPS and NESHAPS (February, 1983), certain activities such as issuance of certain waivers, approval of alternate test methods and monitoring, and some general authority provisions cannot be delegated.

4. Must States accept delegation for all existing and all new sections 111 and 112 standards, or only for those for which applicable sources currently exist in the State?

Under current part 70 rules States must have adequate legal authority to issue or revise part 70 permits in a timely fashion to all major sources of hazardous air pollutants. States may also opt to subject nonmajor sources covered by a particular national standard to their part 70 permit program. Explicit legal authority to implement a particular standard, however, may not be necessary if the State determines that there are presently no sources located in the State subject to a given standard, and there is no likelihood that such a source would construct in the State in the immediate future. It is important that States acquire the appropriate legal authority on a timeframe commensurate with the probability that sources will locate in the State. The State must be able to demonstrate that it can acquire any necessary legal authority quickly enough to issue a timely part 70 permit, or revision if a new source of this type were to locate in the State. The States are encouraged to provide for a strategy to address such a prospect (e.g., through milestones in a MOA or part 70 implementation agreement).

5. If a State applies under section 112(l) to substitute a State requirement as being no less stringent, must the State implement the otherwise applicable section 112 requirement "as is" until it receives section 112(l) approval?

Part 70 requires States to issue permits in a timely fashion which assure compliance with all applicable requirements, including those developed pursuant to section 112. The section 112 requirements are those promulgated by EPA, unless the State obtains section 112(l) approval to substitute a specific State requirement for a Federal requirement. If the State submits its own "equivalent" requirement for approval under section 112(l), the State must still incorporate the applicable Federal section 112 requirements into part 70 permits until it receives EPA approval to do otherwise.

A State may be able to obtain some relief in this interim period by structuring its transition plan such that sources affected by a different State requirement could be acted on last during the 3-year phase-in of the part 70 program. Another possibility for relief is for the State to issue a permit that includes both its own State standard (designated in the permit at issuance as not federally enforceable as required by section 70.6(b)(2)) as well as the Federal standard it would replace upon section 112(l) approval. This permit would contain a condition that upon EPA's approval of the State requirement pursuant to section 112(l), the permit will be administratively amended such that the former requirement would supersede the latter as the federally enforceable requirement.

6. Must States have delegation of authority for all existing sections 111 and 112 requirements <u>prior</u> to submitting their operating permit programs? If not, by what date must States take delegation of these standards--prior to EPA's final program approval or prior to issuing a title V permit to a source covered by one of these standards?

States must acquire any new legal authority as needed to implement both sections 111 and 112 in a timeframe sufficient to assure timely issuance or revision of part 70 permits. The procedural steps necessary before a State may incorporate a federally-promulgated standard into the part 70 permit will vary as a matter of State law. A State may have mechanisms available to satisfy part 70 requirements that do not involve a delegation from EPA under section 112(l) for section 112 requirements. For instance, State law may allow incorporation of a Federal standard directly into the part 70 permit without any interim steps to promulgate the standard through rulemaking or to seek formal delegation of the standard from EPA. Regardless of the necessity under State law, EPA will consider delegation pursuant to section 112(l) to have occurred for all applicable requirements which can be delegated, at the latest, when the part 70 permit is issued, so that after part 70 program approval the point of receipt for any reporting requirements required of sources subject to the permit program will shift from EPA to the State.

For applicable section 112 requirements in effect on November 15, 1993 (the date for submittal of part 70 programs), the States must demonstrate adequate existing legal authority to implement these requirements presumptively by the effective date of the part 70 program. Only under unusual circumstances could the Region negotiate with the State a later date to acquire such authority for a particular standard, but it still must be consistent with the timely issuance of permits to applicable sources as they are phased-in as part of the part 70 program. This could only be done if the State presents a detailed implementation strategy to do so, has no legislative impediment to the delegation, and demonstrates to the Region that the legal authority necessary to accomplish this delegation will be secured in a timely manner.

7. If a State intends to defer area sources from title V applicability, can the State accept delegation of a section 111 or 112 requirement only for the major sources which exist in the State and not for the nonmajor or area sources to which the standard may also apply?

Although EPA strongly encourages States to take full delegation of all section 112 requirements, States may submit a request to EPA for partial delegation of such requirements. In addition to previously discussed options for shifting the initial implementation responsibilities of certain section 112 requirements (see response to question 1), partial delegations can also be accomplished with respect to source coverage. For example, the request for delegation may exclude those nonmajor sources which the State within its discretion under part 70 has allowed to be exempt from the requirement to obtain a part 70 permit. The EPA may partially delegate such standards to a State and withhold delegation of the area sources in that category for EPA implementation. However, this type of partial delegation should be reserved for those rare cases where total delegation does not meet the requirements of title V. To qualify for this delegation, the State must demonstrate that such a delegation would only apply to source categories subject to a section 111 or 112 standard which can easily be separated into exempt and subject sources (i.e., not involve difficult section 111 or 112 applicability decisions), and only to sources which are not otherwise required to get a part 70 permit (e.g., are not major sources due to emissions of some criteria pollutant).

8. Will EPA have to issue operating permits to sources if States do not take timely delegation of a particular MACT standard? If EPA has to issue the permit, will it only cover the MACT requirement(s), or will it cover all CAA requirements applicable to the source?

The EPA will object to any proposed part 70 permit which does not contain sufficient terms and conditions to assure compliance with all applicable requirements of the CAA, including those of section 112. If the State does not adequately respond to an EPA objection, (e.g., for failure to include a recently-established section 112 standard), the Agency must veto the permit and issue a Federal permit addressing <u>all</u> applicable CAA requirements (not just those pertaining to the deficiency identified by EPA). A failure to adopt new legal authority as needed to impose a new section 112 standard would likely lead to the issuance of a comprehensive EPA permit for sources subject to the new section 112 standard. A significant number of such situations may lead EPA to conclude that the State has failed to administer its approved part 70 program and that EPA should implement a Federal title V program in that State.

9. Will the delegations of section 112 standards be tracked on a national data base? Can the delegations themselves be tracked and implemented through the AFS Permitting Enhancements Title V data management system?

There are currently no plans to track the national progress in accomplishing the delegations of section 112 standards. Individual Regions may choose to use a MOA or a part 70 implementation agreement to establish milestones for State enhancement of their legal authority as needed to implement section 112 standards and to submit (at the option of the Region) evidence of this enhancement (e.g., rules or policy statements).

10. What type of sections 111 and 112 commitments can qualify a State submittal for part 70 program approval?

In order to obtain full approval from EPA, the part 70 submittal must contain authority and/or commitments adequate to ensure that the part 70 permit will assure compliance with all applicable sections 111 and 112 requirements. Where general statutory authority to issue or revise permits implementing sections 111 and 112 is present, but the Attorney General is unable to certify explicit legal authority to carry out certain specific requirements at the time of program submittal, the Governor may instead submit commitments to adopt and implement additional regulations as needed to issue part 70 permits. The EPA will rely on these commitments in granting part 70 program approvals, provided that (1) the underlying legislative authority would not prevent a State from meeting the commitments, and (2) the State can demonstrate the commitments will be satisfied by the time the State has to issue or revise permits to sources subject to the sections 111 and/or 112 requirements for which the State now lacks adequate authority to implement.

The nature of such commitments can vary widely depending on what is needed by the State to implement and enforce a particular standard. For example, one State might be able to carry out a particular section 111 or 112 requirement under its existing program while another State might require rulemaking to allow it to enforce this Federal requirement. The commitments contained in the letter of submittal from the Governor should outline the timetable by which any required additions to existing legal authority would be acquired and any major interim milestones needed to ensure that this deadline will be met.