MEMORANDUM April 13, 1993

SUBJECT: Title V Program Approval Criteria for Section 112 Activities

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

TO: Director, Air Division, Regions I-X

Under title V of the Clean Air Act (Act) and its implementing regulations published at 40 CFR part 70, States are required to submit operating permits programs to the Environmental Protection Agency (EPA) by November 15, 1993. Section 112 of the Act (hazardous air pollutants) contains several types of applicable requirements which are intended to be carried out by States as a precondition of their title V program approval. While the broad authority contained in most States enabling legislation should support the mandated program for section 112, States may find it necessary to take certain interim steps in order to incorporate section 112 requirements into title V permits. Although ongoing EPA rulemakings related to section 112 may ultimately affect the final response to such questions, several Regions and States have asked for guidance now to direct the development of title V operating permits programs submittals. This memorandum, with its attachment, is intended to respond to these requests based on the part 70 regulations and the general structure and requirements of section 112. However, the policies set out in this memorandum and its attachment are intended solely as guidance, do not represent final Agency action, and cannot be relied upon to create any rights enforceable by any party.

This memorandum defines current Agency policy for evaluating part 70 submittals with respect to section 112 requirements. Under this guidance, in order to obtain a full approval from EPA, the part 70 submittal needs to contain authority and/or commitments to assure the compliance of part 70 permits issued by the State, or by independent permitting authorities therein, with all applicable section 112 requirements. Specifically, the Attorney General's statement should certify that the State has authority to issue part 70 permits that assure compliance with all currently applicable requirements (including section 112 of

the Act), and that the State will expeditiously adopt any new authority needed to implement future EPA section 112 requirements. Where general statutory authority to issue permits implementing section 112 is present, but the Attorney General is unable to certify explicit legal authority to carry out specific section 112 requirements at the time of program submittal, the Governor may instead submit commitments to adopt and implement additional regulations as needed to issue permits that implement applicable section 112 requirements. The EPA will rely on these commitments in granting part 70 program approvals provided that the underlying legislative authority would not prevent a State from meeting the commitments.

As for part 70 program revisions, no formal amendment to the initial title V program should typically be needed with respect to section 112 requirements taking effect after the effective date of the program. The State's up-front commitment and demonstrations (i.e., legal authorities and mechanisms to adopt additional section 112 requirements) coupled with EPA's ability to review individual permits and to audit part 70 programs periodically should provide reasonable assurance of adequate State implementation.

The EPA will make reasonable efforts to communicate to States when additional legal, technical, and financial resources may be necessary to implement new section 112 requirements as they become applicable. The State, however, remains responsible for maintaining and enhancing as necessary its authority to implement section 112, including any new regulations. In light of the demonstrations and/or commitments required for part 70 approval, the EPA will presume that a State's request for approval of its operating permits program will be an implicit request under section 112(l) for delegation of authority to implement federally-promulgated section 112 requirements in the same form in which EPA issues them. In lieu of this arrangement, States can opt to establish specific delegations where needed. In the latter case, States should revise the implementation agreement with a schedule for the timely adoption of all EPA requirements promulgated after the time of program submittal.

Under the above approaches, there should be few concerns which would require the process in 40 CFR 70.4(i) to revise the part 70 program. This process involves public participation and publication in the Federal Register. An example of where this process might be needed would be a pattern of proposed permits which fail to assure compliance with a certain section 112 requirements due to a lack of State authority. In such a case a part 70 program revision may well be needed. The EPA will be prepared to

veto any permit that does not assure compliance with the Act and part 70, as required in section 70.8(c) and call for appropriate correction to the State program.

The attached information summarizes the guidance for Regions to follow when reviewing State title V submittals for specific section 112 concerns. The attachment also provides, where indicated, the "current best advice" with respect to certain future section 112 rulemakings as they may affect title V programs. Please note that States are responsible for implementing all applicable requirements of section 112, including making and enforcing the case-by-case maximum achievable control technology decisions under sections 112(i)(5), 112(g) and (j), as well as making any offset determinations required under section 112(g). The attachment also summarizes EPA's position regarding fee demonstrations and interim approvals for section 112 activities.

I trust this guidance will be useful. If you have any questions, please contact Karen Blanchard at (919) 541-5503 on section 112 concerns, Michael Trutna at (919) 541-5345 on how title V interfaces with section 112 requirements, and Kirt Cox at (919) 541-5399 on general approval criteria for title V programs.

Attachment

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ATTACHMENT - TITLE V APPROVAL CRITERIA FOR SECTION 112 ACTIVITIES

The following information summarizes the Environmental Protection Agency's (EPA's) guidance for evaluating title V program submittals due on or before November 15, 1993 as well as EPA's current best advice regarding future rulemakings under section 112 in relation to title V programs. The result of granting approval under title V is important because it confers responsibility on the State for implementing all section 112 requirements. Citations are to the regulations published at 40 CFR part 70.

SCOPE OF THE PROGRAM

States must issue part 70 permits to all major sources of hazardous air pollutants (HAP's) regardless of whether there is any section 112 standard or requirement which currently applies to such sources (section 70.3(a)). A source meets the definition of "major" in section 70.2 if its potential to emit is 10 tons per year (tpy) or more of any pollutant listed in section 112(b), or 25 tpy or more for a combination of these pollutants. A source that reduces its potential to emit HAP's below the major source threshold would eliminate the need to obtain a part 70 permit and to comply with section 112 requirements that apply only to major sources. Future EPA rulemakings may identify additional means beyond those identified in the proposed part 70 regulations (see 56 FR 21725 which identifies several mechanisms, including SIP limits and permit conditions taken under EPA approved new source review and operating permits programs) for sources to reduce their potential to emit HAP's.

Under the final title V regulations, States may grant a temporary exemption to nonmajor part 70 sources (other than acid rain-affected sources and municipal waste incinerators) from the requirement to obtain a part 70 permit, including any nonmajor sources subject to section 112 standards in existence on July 21, 1992. The Agency intends to propose through rulemaking within 4 years of the first EPA-approved permit program whether to continue some exemption opportunity for these sources. The need to permit additional nonmajor sources which become subject to section 112 standards promulgated after the final part 70 regulations will be determined at the time a new standard is promulgated. In addition, EPA may at a later date establish lesser quantity emission rates for some or all HAP's under section 112(a) which increase the number of major sources which are required to have part 70 permits.

LEGAL AUTHORITY

Under this guidance, in order to obtain a full approval from EPA, the part 70 submittal needs to contain authority and/or commitments to assure the compliance of part 70 permits issued by the State, or by independent permitting authorities therein, with all applicable section 112 requirements. Specifically, the Attorney General's statement should certify that the State has authority to issue part 70 permits that assure compliance with all currently applicable requirements (including section 112 of the Act), and that the State will expeditiously adopt any new authority needed to implement future EPA section 112 requirements. Where general statutory authority to issue permits implementing section 112 is present, but the Attorney General is unable to certify explicit legal authority to carry out specific existing section 112 requirements at the time of program submittal, the Governor in the part 70 program submittal may instead submit commitments to adopt and implement additional regulations as needed to issue permits that implement section 112 requirements. The EPA will rely on these commitments in granting part 70 program approvals, provided that the underlying legislative authority would not prevent a State from meeting the commitments.

The approach with regard to part 70 approvals should minimize the need for part 70 program revisions. Part 70 merely requires States to have authority to incorporate applicable requirements into part 70 permits, and to issue permits that assure compliance with those applicable requirements. Part 70 does not, however, dictate or restrict the legal mechanisms by which States may accomplish this result. The availability of particular mechanisms will likely be determined by the legal regime of the individual State. A State may, by virtue of its own legal regime, be required to seek formal delegations from EPA for each section 112 requirement before it can incorporate those requirements into permits (this mechanism reflects the historical practice in many States that have chosen to implement and enforce section 112 standards). Where the State does make use of recurring delegations from EPA in order to meet the part 70 requirement, these delegations will not in the normal course require a concomitant revision to the part 70 program.

States may alternatively possess mechanisms to satisfy this part 70 requirement that do not involve separate delegations from EPA for each section 112 requirement. For instance, State law may allow incorporation of a Federal standard directly into the part 70 permit without any interim steps to adopt the standard as State law or to seek formal delegation of that standard from EPA.

The EPA would also consider this approach sufficient to meet the ongoing part 70 obligation for States to have adequate authority to implement through permits the applicable requirements of section 112.

Delegation agreements for all section 112 requirements can also be established on an automatic basis at the time of part 70 program approval. This approach can greatly improve the efficiency of program transfer. Accordingly, EPA will presume that in light of the required demonstration and/or commitments required for part 70 approval, a State will automatically implement each new requirement unless the State advises EPA to the contrary. The EPA may request a review of individual State actions 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. In lieu of general or automatic delegation arrangements, the State could opt to meet its obligations under part 70 by establishing a delegation agreement for each specific source category as discussed above.

SECTION 112(d),(f),AND (h) - EPA EMISSIONS STANDARDS

All National Emission Standard for Hazardous Air Pollutants (NESHAP) standards, maximum achievable control technology (MACT) standards, and residual risk standards must be incorporated and implemented within the part 70 permit. When required under specific standards, generally available control technology (GACT) standards must also be implemented within the part 70 permit. As described above, States are charged with acquiring all necessary legal authorities in order to guarantee this result and identifying a mechanism that ensures the timely acquisition of authority for future EPA standards. Under the part 70 rules, States must specifically agree: (1) not to issue any permit [or permit revision addressing any emissions unit subject to a newly promulgated section 112 standard] unless it would assure compliance with all applicable section 112 standards [section 70.6(a)(1)], and (2) to reopen part 70 permits which have 3 or more years remaining before their expiration date to incorporate any newly promulgated standard [section 70.7(f)(1)(i)]. The implementation agreement should be revised to contain specific milestones for timely State acquisition of any needed authority or capability to implement standards to prevent any unreasonable delay in permit issuance (i.e., in no event longer than 18 months after receipt of a complete application for any permit action).

GENERAL PROVISIONS

The implementation of all current NESHAP standards and future MACT (and residual risk) standards includes the implementation of any "general provisions" that EPA develops for these standards. Initial title V approval must assure that States will carry out these provisions as in effect at the time of any permit issuance or revision. States should be aware that EPA will soon be preparing revisions to the general provisions and that they may have to update their implementation authorities in accordance with EPA's rulemaking.

Revisions to the general provisions will contain (as do the existing general provisions) compliance-related requirements that supplement the compliance requirements specified in individual standards. These general provisions will also establish definitions and administrative procedures to make applicability determinations, grant compliance extensions, and perform preconstruction review and approval for new and reconstructed sources to assure compliance with applicable, promulgated standards, among other functions. Future EPA rulemakings may supplement the general provisions for new section 112 standards and programs by further clarifying how and when sources may limit their potential to emit toxic pollutants below major source threshold levels.

SECTION 112 (g) - CASE-BY-CASE MACT FOR MODIFIED/CONSTRUCTED AND RECONSTRUCTED MAJOR TOXIC SOURCES

The EPA anticipates that section 112(g) will involve a preconstruction review program with the subsequent incorporation of its results into the part 70 permit. The EPA expects States to implement this program fully.[1] Therefore, in order to obtain

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[1]The preamble to the proposed operating permits rule stated that States must have authority to "implement and enforce" certain section 112 provisions, including authority to "develop and enforce case-by-case determinations of MACT for new, reconstructed, or modified sources where no applicable emissions limitations have been yet established (112(g))." 56 Fed. Reg. 21722. The EPA believes that, for section 112(g), this is the proper interpretation of the State's duty under section 502(b)(5)(A) to have authority to assure compliance with all

approval of a title V program, a State must commit to have authority to make all required section 112(g) determinations as well as subsequently to incorporate them into the part 70 permit.

In addition, the State must, on the effective date of the program, be able to implement section 112(g) in accordance with EPA regulations. If EPA's rulemaking to implement section 112(g) is not then final, the State must still implement section 112(g) since this program is triggered by the effective date of the part 70 program. In such cases, EPA expects to work closely with the State in making required section 112(g) determinations, including providing to the State the use of centralized EPA data bases and exploring with the State the possible use of general permits to establish a presumptive MACT for certain qualifying source categories.

SECTION 112 (i)(5) - EARLY REDUCTIONS

Each State must have adequate legal authority upon the effective date of its part 70 program to carry out EPA's final rule to implement section 112(i)(5) within the part 70 program. Section 112(i)(5) requires that States implement fully the requirements of the provision as part of its title V program. In the absence of an approval of a more stringent program under section 112(l), in designing federally enforceable permit conditions under the early reductions program, States may be more stringent only to the extent that requiring a greater than 90 percent emissions reduction for organic HAP's or 95 percent emissions reduction for particulate matter HAP's. The State may also opt to take temporary delegation of EPA's program for permitting sources that have entered into enforceable commitments under section 112(i)(5), if such a program is promulgated prior to the effective date of the part 70 program.

applicable requirements. The EPA interprets the phrase "the Administrator (or the State)" (referring to the entity responsible for making case-by-case determinations) in sections 112(g) and (j) to be a reference to the title V permitting authority. That section 112(g) is triggered on the effective date of the title V program further supports this reading of Congressional intent. This interpretation also is reasonable in that the title V permitting process will provide important information to the permitting authority implementing section 112(g). The EPA expects this benefit will begin to manifest itself even before sources are issued permits, as they will be required to assess and report emissions-related data in their permit applications.

SECTION 112(j) - CASE-BY-CASE MACT HAMMER

Section 112(j) requires that the permitting authority perform case-by-case MACT determinations in the context of issuing title V permits to categories of sources for which EPA has failed to meet by more than 18 months the regulatory schedule established under section 112(e). Therefore, to obtain approval of a part 70 program, States must first have authority upon submittal of their part 70 program to require applications from sources subject to section 112(j) within 18 months after a missed deadline. A commitment is also needed from each State that it will obtain sufficient legal authority in a timely manner to make any required section 112(j) case-by-case determination and to incorporate it into a part 70 permit. Specific legal authority to implement and enforce limits as needed can be obtained on a source category basis for those sources and pollutants which are subject to the section 112(j) hammer requirement before permit issuance is required of the State under part 70. A revision to the part 70 program would not be necessary, provided that the State has made the general commitment to issue permits which assure compliance with section 112 and any implementing regulations. States can, of course, also meet their part 70 responsibility by adopting a general legal authority to establish case-by-case MACT consistent with any final EPA rulemaking setting for the requirements of section 112(j).

SECTION 112(l) - STATE AIR TOXICS PROGRAMS

The applicable requirements, including those of section 112, must each be included in part 70 permits and enforced (as necessary) by the State. States are free under sections 116, 506(a), and 112(d)(7) to be more stringent than Federal requirements as a matter of State law. However, any additional State restrictions will in general be identified in the part 70 permit as not being federally enforceable [section 70.6(b)(2)]. Future rulemaking under section 112(l) could allow States to establish alternative terms in the part 70 permit which would be no less stringent than the corresponding requirement in section 112 and, once approved, would be federally enforceable in lieu of the section 112 requirement.

Future guidance to implement section 112(l) will provide additional insight into the available options for delegation of section 112 standards, including where the State proposes to implement the Federal standards exactly as promulgated by EPA (see previous discussion in **Legal Authority**).

SECTION 112(r) - ACCIDENTAL RELEASE PLANS

States must demonstrate adequate legal authority to assure compliance with the applicable requirements of section 112(r) for any source subject to part 70. In order to qualify for full approval of their part 70 submittal with respect to section 112(r), a State must have legal authority sufficient to: (1) determine whether a part 70 source is obligated to register and submit a risk management plan; (2) secure verification from part 70 sources that any required submittal was prepared and submitted to appropriate authorities (permit authority, EPA, and/or another State authority);[2] (3) obtain annual certifications from these sources as to whether their risk management plans are being properly implemented; and (4) include the obligation to submit such a plan in accordance with a compliance schedule in the part 70 permit for any source failing to make its required plan submittal.

States can opt to implement more of this program through part 70 permits, but States are not encouraged to put the actual plan in the part 70 permit. In its demonstration of adequate resources, a State must account for the costs associated with the requirements listed above. The costs incurred from any other permit review and subsequent oversight of these plans that is accomplished within the permit program must also be addressed.

RESOURCE ADEQUACY

A State's submittal must contain demonstrations that adequate resources will be available to implement its part 70 program [section 70.4(b)(8)]. In general, section 112 requirements, to the extent they are carried out through title V permiting, must be supported by title V permit fees. These requirements would include activities related to determinations, incorporation and implementation of any standards under section 112(d), (f) and (h), and case-by-case MACT requirements under sections 112(g) and 112(j), and oversight of accidental release plans (to the extent required in the permit). The test for initial approval of a part 70 program is that sufficient fees must be collected to cover the costs of program implementation,

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[2]States must identify the group in the State (if not the permitting authority) which has been designated to receive the risk management plans for part 70 sources in accordance with section 112 (r).

including all section 112 requirements (section 70.9(b)). The EPA in reviewing a State's permit fee program submittal will generally presume that it is adequate if the State would collect in aggregate, revenues greater than the $25/tpy (1989 basis) presumptive fee schedule. After the program is launched, adjustments to any approved fee schedule can be required by EPA if poor implementation is linked to inadequate resources.

Some States may, instead of relying on the presumptive approach, opt to make a detailed showing that the indirect and direct costs of their permits program will be offset from fee revenues. Other States may be required to do so if compelling evidence exists that the presumptive fee schedule is inadequate (i.e., prediction of actual program costs are higher than the revenue programs which would be obtained using the presumptive fee schedules). In addition, a detailed demonstration would be required where a State is trying to demonstrate the adequacy of a fee schedule which is less than the presumptive one. States, in making detailed fee demonstrations, should be aware of the additional complexity associated with toxics programs. For example, development of emissions estimates, measurement strategies, and control technologies is much more contaminant specific. For further discussion, please contact Karen Blanchard at (919) 541-5503.

INTERIM APPROVAL

Other issues dealing with title V program approval concern when and how the concept of interim approval would be appropriate. Under part 70, the State may be able to defer applicability of the part 70 program to certain source categories and obtain interim approval. However, the EPA views the source category-limited option as a grant of extraordinary relief available only for States that substantially meet the source coverage requirements of part 70 but that, for compelling reasons, fall short of the source coverage necessary for full approval. All permits that are issued within the interim program must address all applicable requirements, including all section 112 requirements [section 70.4(d)] [but not title VI requirements] that apply to sources subject to the interim program. Therefore, a source must be totally exempted from title V coverage under an interim program to avoid incorporation of section 112 requirements into a title V permit. (Notwithstanding, any exempted source would remain subject to applicable MACT and NESHAP standards.) Of course, this could occur only the extent that the interim program nevertheless

"substantially meets" the source coverage requirements of part 70.

Another issue related to interim approval concerns the trigger for making section 112(g) determinations. Section 112(g) provides that such determinations must be made for source modifications upon the effective date of a title V program, including interim programs. States should assume, in the case of interim programs, that the section 112(g) responsibility is triggered for only those sources covered by the interim approval. This is consistent with the obligation of only sources covered by the interim program to submit applications. However, EPA will not grant interim approval where the proposed program would fail to cover certain major source categories solely on the grounds that applying section 112(g) to these sources would be too burdensome.