January 31, 1996

Dear Members of the Subcommittee on Permits, New Source Review and Toxics Integration:

As many of you know, EPA has been carefully considering how to respond to recent court decisions regarding federal enforceability of potential to emit limits. These decisions have created a need for the Agency to clarify through rulemaking what constitutes an "effective" limit on a source's potential to emit air pollutants. We wish to enlist your help in this process. The Agency recognizes the need to move expeditiously to resolve any uncertainties that may have been created regarding the applicability of many CAA requirements.

At this stage, before drafting the rulemaking proposal package, we believe it is important to solicit the views of subcommittee members on the issues and options that should be considered. Staff have drafted the attached discussion paper to aid in this process.

The paper is intended to lay out the legal and policy issues that EPA will address in response to the court decisions. The paper discusses components that may be needed for a limit to be "effective" in ensuring that a source does not emit major amounts. The Agency believes that defining what makes a limit "effective" is our central task in the wake of the National Mining Association decision. In addition, the paper describes options for addressing the issues raised.

As part of EPA's response to the National Mining Association and Chemical Manufacturers' Association decisions, and as part of its continuing effort to reconsider its regulations and streamline them where possible, the Agency now is re-examining all aspects of EPA's historical policy on potential to emit limits. Accordingly, EPA is setting forth for serious discussion and consideration an option that would recognize "effective" state-enforceable requirements as limiting a source's potential to emit. The Agency also is presenting an option that would retain federal enforceability as a necessary condition of effective limits, but streamline administrative requirements for

creating such limits to address concerns raised in the past.

The Agency plans to issue a proposed rule that includes both these options, as well as proposing ways to address other issues that influence whether limits are effective. Taking comment on these options will ensure that all stakeholders have an opportunity to express their views on implications of different options for the regulated community, states and the public. The Agency's overarching goal is to establish a system that avoids unreasonable burdens on industry or states, and ensures that major sources of air pollution comply with Clean Air Act requirements that protect public health.

Discussion of these issues is planned for the next meeting of the subcommittee, which we anticipate will be scheduled for March. We look forward to hearing your thoughts and recommendations at the meeting. If any members wish to make comments in writing, we of course will be happy to review them.

Sincerely yours,

Steven A. Herman
Assistant Administrator
for Enforcement and
Compliance Assurance

Sincerely yours,

Mary D. Nichols
Assistant Administrator
for Air and Radiation

Attachment

"Effective" Limits on Potential to Emit: Issues and Options

January 31, 1996

Note to reviewers

This paper presents a discussion of the issues that EPA intends to address in response to recent court decisions by the D.C. Circuit on the subject of potential to emit limitations. This paper is intended as the first step in the development of a formal rulemaking proposal, and is intended to list and discuss various options for regulatory amendments that are available to the EPA as a result of these court decisions.

To aid the stakeholder discussion process, the paper presents options for addressing the issues raised in the court decisions. On the issue of federal enforceability, two distinct approaches are presented with specifics on how these two approaches could be implemented.

It is hoped that the critical review of the options will help identify the most important issues to be resolved in promulgating rulemaking amendments on this issue. Additionally, EPA hopes that the review will serve to identify areas of consensus among stakeholders on the importance of issues and the feasibility of solutions, particularly the ones EPA is offering in this document. The EPA would appreciate comments from stakeholders on whether there are any additional options and approaches, beyond those addressed in this paper, that should be discussed in the rulemaking process.

Because the primary purpose of the paper is to identify options, the paper presents only a minimal discussion of the rationale for each option. A more detailed rationale will be set forth in the preamble to the proposed rule.

I. Framing the issues: The NMA and CMA decisions and their implications

Several provisions of the Clean Air Act (CAA) require that "major" sources be regulated more stringently than sources that are non-major. A "major" source is defined for purposes of section 112, title V, and the title I new source review (NSR) and prevention of significant deterioration (PSD) programs as one that either "emits or has the potential to emit" above a specified amount. Because sources that are major are generally

subject to more stringent controls, the Act creates an economic incentive for many sources to limit their potential to emit so as to avoid those requirements.[1] The integrity of these limits is important to ensure that major sources comply with Clean Air Act emission control requirements, and that the reductions in air pollution expected from these requirements are actually achieved.

EPA regulations governing NSR and PSD programs have, since the 1970s, required that limitations[2] on potential to emit (PTE) be federally enforceable before they can be recognized under the Clean Air Act. Following the 1990 amendments to the Act, EPA promulgated regulations implementing section 112 and title V of the Act, both of which mirrored the NSR/PSD regulations in this respect. On July 21, 1995, the D.C. Circuit Court of Appeals issued a decision in National Mining Association v. EPA, in which it held that EPA had not adequately justified the requirement in the section 112 regulations that limits on PTE must be federally enforceable. The Court noted that, while EPA was correct in requiring PTE limits to be "effective," it had not adequately explained how federal enforceability furthered effectiveness. On September 15, 1995, the D.C. Circuit issued a summary decision in Chemical Manufacturers Association v. EPA, vacating and remanding relevant portions of the NSR/PSD rules in light of the NMA decision.

The NMA case makes clear that EPA has the authority and the obligation to ensure that only those limits that are "effective" in limiting emissions are considered in determining PTE. However, the meaning of the term "effective," as the Court used it, is not self-evident. EPA believes that the primary purpose of this rulemaking should be to incorporate the notion of "effectiveness" into the regulatory scheme in a manner that provides clear guidance to States and the regulated community.

Tens of thousands of small emitters lack the potential to emit major amounts even in the absence of controls. It is important to note that under the Clean Air Act these sources do not need to obtain a permit or other legal limit to avoid major source requirements. Therefore, the issues discussed in this paper are not relevant to these sources.

For simplicity, this paper uses the terms "limit" and "limitation" to refer to both operational restrictions such as limits on hours of operation or throughput and to emissions control devices. Also, references to States apply equally to local air pollution control districts.

EPA's overarching goal in conducting this rulemaking is to establish a system that provides administrative flexibility and avoids unnecessary paperwork while ensuring the effectiveness of limits on PTE that are used to avoid major source requirements under the Act. This rulemaking presents an opportunity to re-examine EPA's historical policy on PTE in its totality, to carry forward those elements of it that still make sense, and to explore innovative ideas for achieving this goal.

This rulemaking proposal will include two fundamental alternatives on the issue of federal enforceability. The first approach would recognize "effective" State-enforceable requirements as limiting a source's potential to emit. The second would retain federal enforceability as a necessary condition of effective limits, but take comment on options for streamlining administrative requirements for creation of federally enforceable limits.

Although the federal enforceability issue is rightly a focus of attention, EPA believes it is critical to recognize that the "effectiveness" of limits includes considerations other than who may enforce them. The requirement that limits on PTE be enforceable by EPA and citizens under the Act has historically been just one aspect of EPA's policy on PTE.[3] Effectiveness of limits is a multi-faceted concept that can be broken down into component parts.

Three overarching considerations govern the "effectiveness" of PTE limits:

- Enforceability as a practical matter. To be "effective," limitations must be written so that it is possible to verify compliance and to document violations when enforcement action is necessary. Therefore, a key issue is how to define minimum criteria that limits must meet to be "enforceable as a practical matter." A related question is

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The term "federally enforceable" historically has been used in two ways -- first, to refer narrowly to the authority of EPA and citizens to bring suit for a violation; and, second, to refer to the collective set of elements that the Agency believed contribute to effectiveness of limits (e.g., practical enforceability of limits, approval of state programs as meeting certain criteria, notice of proposed limits to the public and EPA, enforceability in federal court by EPA and citizens). Most of these other elements are separable from enforceability by EPA and citizens, and are treated separately in this paper.

whether procedural safeguards are necessary to ensure those criteria are met.

- Compliance incentive effectiveness. EPA believes that a limit cannot be deemed effective if there is insufficient incentive to comply with it.[4] The "effectiveness" of a limit, therefore, depends in part upon the strength of the incentive it provides for a source to comply -- which in turn is tied to the probability of an enforcement action in the event of a violation. The federal enforceability issue is related to this consideration.

- State program effectiveness. Whether the first two aspects of effectiveness are achieved is influenced by the effectiveness of a State program for issuing and enforcing PTE limits. The nature of a State's program affects whether PTE limits are typically issued in a form that is practically enforceable, and whether sources have substantial incentives to comply with their limits. Relevant factors include the State's permitting requirements and program "infrastructure," including the adequacy of its enforcement authority and the level of resources available. In question here is whether a State *program* should have to meet certain criteria in order for the limits it creates to be considered effective, and whether procedures to assure *program* effectiveness should be required.

This paper is structured around the three considerations listed above. Because a key question in the litigation was whether limits need be federally enforceable to be effective, this paper begins by discussing the effectiveness of limits in encouraging sources to comply.

II. Effectiveness of limits: Strength of compliance incentive

The EPA believes that, in order to be effective, a limit must carry with it a credible expectation of enforcement. This aspect of effectiveness, referred to here as "compliance incentive effectiveness," is not revealed by an examination of

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EPA assumes that a limit on potential to emit, in order to be cognizable, must be legally enforceable by an appropriate governmental entity. Though some have made the suggestion that even voluntary limitations should be recognized, EPA does not believe that calculation of a source's potential to emit in the future should take into account pollution control measures that can be freely disregarded.

the PTE limit itself and cannot be definitively evaluated through an up-front evaluation of a State rule or program. Rather, compliance incentive effectiveness is an ongoing consideration related to the strength of a State's enforcement program.

A central question arising from the court decisions is whether sufficient compliance incentives exist if EPA and citizens cannot directly enforce PTE limits in federal court in cases where a State's enforcement program fails to secure compliance with PTE limits. The conclusion that compliance incentive effectiveness is substantially improved through the enforcement authority of EPA and citizens was historically the basis for the requirement that limits on PTE be enforceable by EPA and citizens under the Act.

In light of the NMA and CMA decisions, EPA intends as part of the PTE rulemaking to propose the two options below as ways to ensure compliance effectiveness.

Under Approach 1, *State or locally enforceable limits*, EPA would give formal recognition to effective State limits, so long as the source owner and operator assume the responsibility for demonstrating that the limits are effective and that the source is complying with these limits. Under this approach, if a source failed to comply regularly with its State permit, EPA and citizens could not sue to enforce the permit, but the source would be in violation of major source requirements of the Clean Air Act.[5]

Under Approach 2, *Streamlined federal enforceability*, the EPA would substantially reduce the administrative objections that have been raised regarding the process currently required for limits to be recognized as federally enforceable. The Agency would consider changes that would enable sources to obtain relatively quickly and easily limits that are enforceable by EPA and citizens.

Approach 1: State or locally enforceable limits

EPA will consider proposing as part of Approach 1 several additional components described later in this paper. For example, State and local programs could be allowed to issue PTE limits without the program undergoing up-front EPA review. EPA would take comment on what requirements for public participation or notice to EPA, if any, may be appropriate for limits that are not federally enforceable.

1. Description of Approach

EPA would promulgate rule amendments that would recognize limitations that are enforceable by State and local air quality agencies as adequate to restrict a source's potential to emit, as long as the limits are enforceable as a practical matter. Under this approach, EPA and citizens could bring legal action in federal court alleging violations of the major source requirements of the Act in cases when a source fails to obtain or comply with State or local permits that are actually effective in restricting the source's PTE. Under this approach neither EPA nor citizens would have authority under the Clean Air Act to enforce directly the terms of the State or local permit.

In such an enforcement action, EPA or citizens would allege that a source is in violation of the Clean Air Act in that 1) the source would be a major source in absence of any limits on the source's PTE, 2) there are no effective PTE limits in place, or the source has failed to comply with limits that would be effective if complied with, and 3) the source has failed to comply with major source requirements.

In the case of a source which has State or local PTE limits that are not federally enforceable, the regulatory amendments would allocate the burden of proof to the source owner to demonstrate that 1) the source has such State or local limits, 2) that the limits meet EPA's definition of "enforceable as a practical matter," and 3) that the source has regularly complied with the limits. Such a demonstration would constitute an affirmative defense to the allegation that the source is operating as a major source without complying with major source requirements.[6]

This allocation of responsibility is consistent with case law holding that those seeking to be excluded from a generally applicable regulatory scheme bear the burden of establishing their entitlement to the exclusion. This approach has precedent in the RCRA program; 40 C.F.R. 261.2(f) provides that a person

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In the case of a source that has PTE limits which are federally enforceable, EPA or a citizen (rather than the source) would continue to have the burden of showing that the PTE limit is not effective as a practical matter or that the source has not complied with it. In other words, there would be no change from the current system when EPA or a citizen seeks to establish that a source with federally enforceable limits has violated either the PTE limits or major source requirements.

claiming an exemption [from a RCRA permitting requirement] has the burden of proof of establishing that he is entitled to the exemption. This regulation has been upheld and interpreted to include both the burden of producing evidence and the burden of persuasion (that is, the burden of convincing the judge of all elements of the case). See, United States v. Eastern of New Jersey, 770 F. Supp. 964, 978 (D.N.J. 1991); Hazardous Waste Treatment Council v. EPA, 862 F.2d 277, 289 (D.C. Cir. 1988), cert. den. 490 U.S. 1106 (1989).

Initially, EPA believes it could implement this approach through a rule provision stating that a PTE limit that is not complied with regularly will not shield the source from enforcement for operation as a major source. This would make clear that a State PTE limit that is not regularly complied with will not be considered effective, and therefore will not be considered in calculating the source's PTE if there is an enforcement action asserting that the source is major. This is the current law today for federally enforceable permits. In United States v. Louisiana-Pacific Corp., 682 F. Supp. 1122 (D. Colo. 1987), the Court determined that, where a source had not regularly complied with its minor source permit purportedly limiting PTE, that permit would not serve as a shield to liability for violation of PSD requirements, notwithstanding the fact that the permit was enforceable by EPA.

Approach 1 envisions that source owners would bear the responsibility for having effective limits for the entire time period during which a limit was needed (e.g. after commencing construction of a source for which such limits are needed to avoid major source preconstruction requirements). If it were later discovered by EPA or citizens that effective limits have not been in place, the source owner could not avoid enforcement actions for the time period associated with construction and initial operation by adding effective limits at a later date.

EPA plans to propose this approach as one alternative for satisfying its obligation to assure compliance incentive effectiveness. Among the issues to be examined in considering this option are:

- whether the EPA should require notice from the source or the State that the source is relying on a non-federally enforceable permit (i.e. a permit not directly enforceable by EPA and citizens in federal court) as a shield from a major source requirement.

- the extent to which the EPA should limit the use of such permits to facilities or companies that are otherwise in compliance with the Act;

- whether this option should be limited to permits issued by State or local authorities with authority to enforce the SIP.

2. Illustrative examples

The following examples illustrate how this option would be implemented:

Example 1. A source has a permit that is not federally enforceable. Material usage and content limits in the permit are enforceable as a practical matter, and the source did not obtain a PSD permit. However, the source regularly violates the material usage and content requirements in its permit. The source's records show that, although there may be no clear record as to whether the source has actually emitted 250 tons per year for any 12-month period, the source has the potential to emit 250 tons per year. Because the source did not comply with its State permit, EPA or citizens could bring enforcement action against the source for failure to comply with major source requirements of the Act.

Example 2. A source has a permit that is not federally enforceable and that requires use of a carbon adsorber to control VOC emissions. A federal inspector observes that the carbon adsorber is not being operated and maintained properly, and observes breakthrough (that is, no control) during the inspection. Upon review of the permit, it contains no requirement for any recordkeeping demonstrating that the carbon bed is being regularly regenerated. In addition, the owner can provide no evidence that the carbon bed is being maintained with sufficient regularity. The control device needs to operate at 70 percent or better to achieve minor source levels. For this case, the source would be subject to an enforcement action for violations of major source requirements. Even though there is no evidence that the source is regularly violating its limit, the burden is on the source owner to demonstrate that the source has an effective set of requirements that would allow the EPA or citizens to determine whether it was in violation.

Approach 2: Streamlined federal enforceability

1. Description of approach

Under this approach, EPA would retain the current requirement that PTE limitations must be federally enforceable, but streamline administrative requirements to address concerns that have been raised.

In light of the D.C. Circuit's holding that EPA has not adequately explained the need for federal enforceability, EPA would provide an enhanced rationale for how the federal enforceability requirement could be considered a reasonable means of ensuring compliance incentive effectiveness. In addition, the following specific steps would be taken to streamline the current administrative process for achieving federal enforceability of limits:

- EPA would finalize the amendments to 40 CFR 51.161 that were proposed on August 31, 1995 in order to provide States with explicit discretion to limit up-front public review in minor NSR programs to those situations deemed to be environmentally significant. EPA believes that current minor NSR programs allowing such discretion already create limits that can be enforced by EPA and citizens in federal court. The proposed rulemaking amendments would significantly broaden States' discretion to limit public review, and would eliminate any ambiguity or uncertainty that may exist over the enforceability of these permits.

- EPA would also make clear in rulemaking language that similar discretion would exist for federally enforceable State operating permit (FESOP) programs.

- States would not be required to provide EPA with an up-front notification before permits are issued in cases where public notice is not required. Rather, States would periodically (semi-annually or annually) provide EPA with a list of PTE limits that have been issued to sources seeking to avoid federal major source requirements. EPA would make this information available to the public.

- States would still be required to submit rules and programs to EPA for approval into the SIP. Rule amendments would guarantee that State limits issued under such program would be recognized from the time the limits were established, so long as the limits were enforceable as a practical matter. This would ensure that such limits would be recognized

during the time period for which EPA approval of the State program is pending.[7]

2. Issues discussion

a. State discretion on appropriate level of public review.

Among the objections to preserving federal enforceability of limits as a requirement is a perception that federal enforceability cannot be accomplished without requiring public review of any permit approval action which is taken to create limitations on potential to emit. The EPA believes that a permit limit can be enforceable by the EPA and citizens under the Clean Air Act even if the permit was not issued with public review. The EPA believes that States, as recently proposed with respect to the minor NSR and Title V programs, can be given broad discretion with respect to judgements on which actions establishing or revising PTE limits are of sufficient environmental significance to warrant up-front public review. The EPA plans to solicit comment on whether providing such discretion in all programs utilizing PTE limits would help to alleviate the administrative objections to retaining federal enforceability.

b. Voluntary acceptance of the federal enforceability of State limits

Another alternative to eliminate possible delay to the source would be to require that PTE limits be federally enforceable in order to be federally recognizable, but to allow sources to voluntarily accept the federal enforceability of a State limit. This would eliminate the need for approval of the underlying State program. EPA plans to explore the viability of this approach in the PTE rulemaking.

Compliance incentives and citizen enforcement

EPA plans to take comment in the rulemaking on two broad issues involving compliance incentives and citizen enforcement. The first issue is whether differing opportunities for citizen enforcement create significant differences in the strength of

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Historically, EPA has required that State programs be approved through rulemaking before the PTE limits established under that program could be federally recognized as limiting PTE. This has created potential adverse consequences for a source possessing a limit that is enforceable as a practical matter when the State's program has not yet been approved by EPA.

compliance incentives for sources under Approaches 1 and 2. A second issue, which arises under both approaches, is whether citizens have adequate access to the information needed to identify violators and bring successful enforcement suits.

Regarding the first issue, EPA has generally presumed that the possibility of citizen enforcement action enhances compliance with environmental laws. As part of the rulemaking, EPA plans to consider whether the prospect of citizen suits can enhance the compliance incentive effectiveness of limits on sources' potential to emit.

The ability of citizens to enforce permit requirements under Clean Air Act section 304 tracks that of the federal government. The Agency will request comment on the extent to which the presence or absence of federal enforceability affects citizens' practical ability to bring enforcement actions against sources in violation. In reference to Approach 1, the Agency will seek information on the number of States in which standing issues could prevent citizen suits to enforce PTE limits. EPA also is interested in whether citizens would be able to effectively enforce major source requirements in most circumstances under Approach 1.

The second broad issue relates to citizens' access to information. One difference between the federal government’s and citizens' opportunity to bring suit is the ability of the federal government to obtain access to facility information and records through subpoena and inspection powers. It has been suggested to EPA that the relatively few number of citizen suits under the CAA is due in part to inadequate access to records. To be able to enforce a source's limit, citizens need access to the permit and compliance records. To enforce the major source threshold, citizens also need information demonstrating that the source's potential or actual emissions exceed the major source threshold. The Agency will seek comment on the extent to which citizens currently have access to the information required, and on whether there are reasonable ways to enhance citizens' access to information under either Approach 1 or 2.

Information on a facility's potential to emit is particularly difficult for citizens to obtain. One possible way to address this problem would be to require a source or the State to provide notice to EPA when the source takes State or local limits on its PTE. Such notice might include a statement regarding the assumptions used in calculating the uncontrolled PTE, absent the State or locally required limits or control equipment. Citizens could then access such information through EPA. The Agency also will seek comment on providing safeguards

for claimed "proprietary business information" in releasing the notification to the public.

III. Practical enforceability of limits

Whether a PTE limit is “effective” depends in part on whether that limit is enforceable as a practical matter. EPA therefore believes that questions concerning enforceability as a practical matter will be among the most important addressed in the PTE rulemaking.

Definition of "enforceable as a practical matter"

Under either Approach 1 or Approach 2, the EPA would consider amending current rules to require that emission limitations used to limit a source's potential to emit be “enforceable as a practical matter.” The rule would require limitations to:

- be permanent;
- contain a legal obligation for the source to adhere to the terms and conditions;
- not allow a relaxation of a SIP requirement;
- be technically accurate and quantifiable;
- identify an averaging time that allows at least monthly checks on compliance (that is, monthly or shorter averages are encouraged; where this is unreasonable, longer averages would be required to be accounted for on a rolling monthly basis); and
- require a level of recordkeeping, reporting, and monitoring sufficient to demonstrate compliance with the limit.

In addition to these general criteria for ensuring that limits are verifiable and otherwise enforceable, the EPA intends to request comment on:

- Whether EPA regulations should more specifically describe the minimum elements of practicable enforceability. For example, should the regulations include language on the form in which limits must be expressed to be effective -- more specifically, principles from section III of EPA’s June 13, 1989 guidance on limiting potential to emit in new source permitting (e.g., restrictions on use of emission limits,

requirement that limits include operating parameters and underlying assumptions in cases where add-on controls operating at specified efficiency are required, independent enforceability of production and operational limits)?

- Whether EPA regulations should provide examples of terms that would be inappropriate in a PTE limit. For instance, the regulation might list as examples long-term (e.g. annual) emission rate limitations, limits that cannot be directly correlated with the relevant regulatory threshold (e.g. opacity limits to a PM threshold), or limits based on erroneous or unsupported generic emission factors.

EPA's initial thinking is that the rule would not provide specific requirements regarding the "appropriate level" of recordkeeping, reporting and monitoring, nor would the regulatory text list examples of situations that are prohibited. EPA notes that guidance issued on June 13, 1989, regarding practicable enforceability is still the most comprehensive statement from EPA on this subject. EPA would, within resource limitations, and with the help of State and local agencies, work to develop additional guidance where needed. In this regard the EPA would solicit comments on examples that could be provided in guidance or in the preamble to the final rule amendments.

IV. State program effectiveness

As stated above, the effectiveness of a State program affects both whether PTE limits are typically issued in a form that is practicably enforceable, and whether sources have substantial incentives to comply with their limits. Therefore, an issue to be addressed in the rulemaking is whether EPA should specify minimum effectiveness criteria that State programs must satisfy for the limits they create to be recognized as limiting PTE -- and if so, whether there should be a mechanism for EPA evaluation of these programs.

The Agency historically has required that State programs meet minimum criteria -- for legal authority, resources, and substantive and procedural aspects of permitting programs -- in order for the limits they create to be recognized as limiting PTE.

Some considerations influencing state program effectiveness are susceptible to evaluation before (or at the time) the PTE limits created by the program are relied upon by a source. These "front-end" considerations include questions of State air program "infrastructure," such as whether the program possesses adequate

resources and whether there exists adequate legal authority for enforcement. In addition, there are considerations related to the adequacy of each program or rule creating PTE limits -- specifically, rules governing the substantive and procedural aspects of permit issuance for individual sources, and "prohibitory" or "exclusionary" rules designed to limit the PTE of sources in particular categories.

Other considerations can only be evaluated on an ongoing basis -- notably, the effectiveness of State enforcement efforts in promoting compliance. This "back-end" aspect of State program effectiveness is discussed separately below.

Front-end considerations

1. Description of approaches

Under Approach 1, EPA would not require up-front review or approval of State or local rules or programs for creating PTE limits. EPA would presume that these programs possess an adequate infrastructure, adequate legal authority for enforcement, and adequate permitting procedures. EPA would take comment on whether it should maintain authority to deem a State program generally "ineffective" at any time if clearly identifiable deficiencies in one or more of these State program elements were present, based on criteria established by EPA. Such a remedy could be appropriate, for example, if a program issued significant numbers of permits that are not enforceable as a practical matter. The result of deeming a program ineffective could be to render ineffective all limits created by that program, or to render ineffective any limits issued after the date of the ineffectiveness finding. EPA would take comment on this issue and on procedures for determining that a State program is ineffective.

Under Approach 2, EPA would continue to evaluate State rules and programs that create PTE limits, with the streamlining changes described under the heading "Approach 2: Streamlined Federal Enforceability."

Under both Approach 1 and Approach 2, the EPA would require that an "effective limit" must be obtained from the agency generally responsible for air quality permits. Limitations from other State or local authorities could not be taken into account.

2. Criteria for State program effectiveness

a. Overview

EPA initially believes the front-end State program effectiveness issues to be addressed in the PTE rulemaking are the following:

- Should a State have devoted a certain level of resources before its program can be considered effective and therefore able to create PTE limits? EPA plans to solicit comment on this issue. Though it may be possible to determine on an audit basis whether a State's resources are adequate, the level of resources needed will be particular to a State's strategy for addressing PTE, and so cannot be specified in advance by EPA.

- Should a State be required to have adequate legal authority for enforcement before its PTE limit program can be considered effective?

- Should the State's permitting regulations be required to meet minimum criteria in order to be able to create PTE limits? In its June 28, 1989 Federal Register notice on PTE, EPA required State permitting programs to meet certain criteria in order to yield federally recognizable PTE limits. Relevant to this discussion, the programs could not allow for the relaxation of a limit in the SIP, and the program had ta provide for public and EPA notice of permit issuance. (See further discussion below.)

- Are there other criteria that should be met for a State program to be able to create PTE limits? EPA plans to solicit comment on this question.

b. Procedures ta ensure practical enforceability of limits

EPA will consider in the rulemaking whether procedural requirements are needed to help ensure that the limits issued by a State program are enforceable as a practical matter. If so, such procedures could be required either as necessary elements of an effective State program, or -- if there is na up-front review of State programs under Approach 1 -- as necessary conditions of an effective limit. The procedural issues that EPA is currently aware of concern notice and an opportunity for review by the public and EPA.

This paper already has described the way that EPA would address the public participation and EPA notice issues under its streamlined federal enforceability approach (see above). However, these issues arise whether or not PTE limits are required ta be federally enforceable. EPA plans to take comment and consider the appropriate way ta address these issues under

Approach 1. One option identified by EPA is that sources receiving State-enforceable PTE permit limitations that are not federally enforceable, or the State issuing these limits, could be required to notify the EPA within 3-6 months of the permit, and to provide the EPA with a copy of the permit. EPA notification and approval would not be required before the State could issue the permit or before that permit becomes effective. The EPA would provide the public access to the permits.

In connection with public participation and EPA notice, EPA plans to take comment on:

- whether there are types of permits for which a minimum level of public participation in establishment of PTE limits should be required, in view of EPA's August 1995 proposal regarding public comment in minor new source review programs.

- whether notice and an opportunity for EPA review carries with it additional certainty for the source that its limit will not later be found ineffective.

- whether notice to EPA of draft permits should be required, or whether EPA should instead rely on a system of auditing permits already issued.

Questions of public participation and EPA notice also are relevant to issuance of "prohibitory" or "exclusionary" rules designed ta exclude certain qualifying sources from major source requirements. As these generic rules limit the PTE for potentially large numbers of sources, public participation and prior notice to EPA of the proposed State or local rule may be appropriate whether or not limits are required to be federally enforceable. EPA will seek information on the extent ta which notice ta the public is already part of State rulemaking procedures. The Agency also will seek comment on whether notice to EPA of the draft or proposed rule would be reasonable and add certainty to sources' reliance on generic rules.

3. Possible mechanisms for State program evaluation

If there are some substantive criteria for an effective State program, the rulemaking must also address whether there will be a mechanism for evaluation of the State program infrastructure. EPA initially sees three options.

1. EPA articulates minimum effectiveness criteria for State programs, but does not require prior approval of a State program before limits established by the State can be federally

recognizable. Instead, EPA audits State programs and retains the ability to deem a State program "ineffective" at any time.

2. EPA establishes minimum effectiveness criteria for State programs, and EPA establishes by rule a subsequent informal review and approval process (e.g., an exchange of letters between EPA and the State). Under this option, the process would be established as part of the original rule, but no additional case-by-case rulemaking would be needed for approval of individual State programs. State programs would be deemed effective upon approval as being capable of creating PTE limits.

3. EPA establishes minimum effectiveness criteria for State programs, and EPA formally reviews and approves programs through rulemaking. State programs would be deemed effective upon completion of the rulemaking.

EPA notes that, currently, many State PTE programs have already received approval through rulemaking. EPA expects that there would be na need ta re-evaluate these programs.

Back-end considerations: Effectiveness of State enforcement

The twa approaches described above for ensuring compliance incentive effectiveness -- "State and locally enforceable limits", and "streamlined federal enforceability" -- focus on sanctions available against a source directly when the source fails to comply with its PTE limit. EPA will alsa explore whether it should retain the ability to deem a State program "ineffective" where non-compliance with PTE limits is common due ta the lack of a credible State enforcement program. This option has historically been available to EPA because approval of PTE programs inta the SIP allows EPA to withdraw that approval where appropriate, and would be retained under Approach 2.

Under Approach 1, EPA will take comment on whether it should establish a federal remedy for program-wide failure to assure effectiveness. Preliminarily, EPA believes such a remedy would involve deeming a program "ineffective" such that any limit established under that program would no longer be recognized as limiting a source's PTE. EPA will solicit comment on the appropriate procedures for deeming a State program ineffective from an enforcement standpoint.

V. Transition issues

Description of approach

In the interim, pending action ta adopt Approach 1 or Approach 2 (or some other approach), EPA would plan ta extend the transition period for section 112 and title V, contained in EPA's policy memorandum dated January 25, 1995, for an additional time period that extends from January 1997 ta allow for promulgation of a final PTE rule.

Discussion

EPA recognizes that certain approaches discussed in this paper might establish new requirements or procedures for ensuring the effectiveness of PTE limits. EPA believes that, given the general streamlining nature of the options discussed in this paper, the potential for disruption from the current state of affairs is small. However, approaches set forth in this discussion paper differ from those contemplated in EPA's January 25, 1995, memorandum, "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act," and other agency guidance on potential to emit. In the PTE rulemaking, EPA plans to request comment on any transitional issues that may be raised by past reliance on guidance contained in the January 25, 1995, memorandum or other guidance that differs substantively from the new direction that EPA will be taking in response to decisions of the D.C. Circuit. EPA will expressly consider whether any temporary measures will be needed to ensure a smooth transition ta the approach finally adopted in the PTE rulemaking.

Another issue related to potential to emit is whether EPA should adopt rulemaking amendments that would provide an exemption for sources with actual emissions significantly less than major source thresholds. In a guidance memorandum dated November 14, 1995 entitled "Calculating Potential ta Emit (PTE) and Other Guidance for Grain Handling Facilities," the EPA included a commitment ta promulgate rulemaking amendments that would extend permanent relief ta low-emitting sources, excluding such sources from being classified as "major sources" for purposes of title V permitting. (The exact cutoff for what constitutes a low-emitting source would be determined in the rulemaking process.) As discussed above, since this November memorandum was issued the EPA has developed an option which would delete the requirement for PTE limits ta be federally enforceable and allow reliance on limits that are State-enforceable. The EPA believes that allowance for use of State-enforceable limits (as well as other streamlining options in this paper) should

significantly reduce the burden ta a source in obtaining a PTE limit, and may provide an effective solution for the issues raised at that time. Accordingly, before proceeding with further rulemaking concerning such an approach, the EPA seeks comment from stakeholders on whether a small source exemption would still be needed if the Agency adopted the options being put forward today.