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Part III

Environmental Protection Agency

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40 CFR Part 63

Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources; Final Rule

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[FRL-5667-8]
RIN 2060-AD06

Hazardous Air Pollutants: Regulations Governing Constructed or Reconstructed Major Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is promulgating regulations implementing certain provisions in section 112(g) of the Clean Air Act as amended in 1990 (1990 Amendments). Section 112(g) applies to the owner or operator of a constructed, reconstructed, or modified major source of hazardous air pollutants (HAP). After the effective date of this rule, all owners or operators of major sources that are constructed or reconstructed will be required to install maximum achievable control technology (MACT) (unless specifically exempted), provided they are located in a State with an approved title V permit program. This rule establishes requirements and procedures for the owners or operators to follow to comply with section 112(g). This rule also contains guidance for permitting authorities in implementing section 112(g). When no applicable Federal emission limitation has been promulgated, the Clean Air Act (Act) requires the permitting authority (generally a State or local agency responsible for the program) to determine a MACT emission limitation on a case-by-case basis. This rule assures that effective pollution controls will be required for new major sources of air toxics during the period before EPA can establish a national MACT standard for a particular industry. This rule establishes procedures for making such determinations. This rule does not require new source MACT for modifications to existing sources.

EFFECTIVE DATE: The rule announced herein takes effect on January 27, 1997.

ADDRESSES: Supporting information used in developing the proposed and final rules are contained in Docket No. A-91-64. The docket is available for public inspection and copying from 8:00 to 4:00 p.m.,

Monday through Friday, except legal holidays, at the EPA's Air Docket Section, Waterside Mall, Room M1500, U.S. Environmental Protection Agency, 401 M Street, South West, Washington, DC 20460. A reasonable fee may be charged for copying. This rule is also available on the Office of Air Quality Planning and Standards (OAQPS) electronic bulletin board, the Technology Transfer Network (TTN), under Clean Air Act, Title III, Recently Signed Rules. For information on how to access the TTN, please call (919) 541-5384 between the hours of 1:00 and 5:00 p.m. eastern standard time. This rule is also listed on the EPA web site address, ``http:// www.epa.gov/oar''.

FOR FURTHER INFORMATION CONTACT: Dr. Gerri Pomerantz, telephone (919) 541-2317, Mr. Andy Smith, telephone (919) 541-5398, or Ms. Kathy Kaufman, telephone (919) 541-0102, Information Transfer and Program Integration Division (MD-12), OAQPS, US EPA, Research Triangle Park, NC, 27711.

SUPPLEMENTARY INFORMATION: The information presented in this preamble is organized as follows:

This preamble provides an overview of the requirements of the regulation being promulgated and a detailed discussion of the changes made from both the proposed and draft final regulations.

Section I of the preamble provides an overview of the requirements of the regulations being promulgated.

Section II provides background on section 112(g) in the context of the 1990 Amendments.

Section III provides a detailed discussion of the requirements of this rule, including significant comments as well as significant changes made since the proposal and/or draft final rule.

Section IV of the preamble discusses the relationship between the requirements of this rule and other important Act implementation activities.

Section V demonstrates that this rule is consistent with a number of Federal administrative requirements.

This preamble makes use of the term ``State,'' usually meaning the State air pollution control agency which would be the permitting authority implementing title V of the Act (i.e., 40 CFR Part 70) and the section 112(g) program. The reader should assume that use of the term ``State'' also applies, as defined in section 302(d) of the Act, to the District of Columbia and territories of the United States, and may also include reference to a local air pollution control agency. In some cases, the term ``permitting authority'' is used and can refer to both State agencies and to local agencies (when the local agency directly makes the determinations or assists the State in making the determinations). The term ``permitting authority'' may also apply to the EPA, where the EPA is responsible for the program.

I. Purpose and Summary of Final Rule

A. Purpose of This Rule

The 1990 Amendments require the EPA to issue emissions standards

for all major sources of 188 listed HAP (also known as air toxics). These pollutants are known or suspected of causing cancer, nervous system damage, birth defects or other serious health effects. On July 16, 1992, the EPA published an initial list of source categories for which air toxics emission standards are to be promulgated. By November 2000, EPA must develop for all these categories rules that require the maximum achievable reduction in emissions, considering cost and other factors. These rules are generally known as ``maximum achievable control technology'' (MACT) standards.

In developing the 1990 Amendments, Congress recognized that the EPA could not immediately issue MACT standards for all industries, and that as a result there was a potential for significant new sources of toxic air emissions to remain uncontrolled for some time. Congress also recognized that, in general, it is most cost-effective to design and add new air pollution controls at the time

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when facilities are being built or significantly rebuilt.

As a result, section 112(g) of the Act requires MACT-level control of air toxics when a new major source of HAP is constructed or reconstructed. The permitting authority must determine MACT for the facility on a case-by-case basis when EPA has not yet issued a relevant MACT standard. This gap-filling program assures Americans in every State that effective pollution controls will be required for new major sources of air toxics during the period before EPA can establish a national MACT standard for a particular industry.

Section 112(g) also requires MACT-level control when major sources are modified. For reasons explained later in this preamble, this rule does not implement the modifications provision of section 112(g).

B. Summary of This Rule

1. What Sources Must Comply With 112(g)?

This rule implements section 112(g)(2)(B) of the Act by adding new regulatory sections to 40 CFR Part 63, subpart B. The new sections appear as Secs. 63.40 through 63.44 of subpart B. These sections impose new control requirements on ``constructed'' and ``reconstructed'' major sources of HAP. (The definition of ``major source'' can be found in section 112(a) of the Act and 40 CFR Part 63 subpart A).

This rule does not apply to any source already covered by a MACT standard under section 112(d) of the Act. Therefore, sources already covered by a MACT standard under section 112(d) will not be required to

undergo a review process under section 112(g). (Any section 112(g) review process already underway when a section 112(d) MACT standard is promulgated should be terminated.) This change was made to the final rule in response to comments that indicated that section 112(g) review would be inappropriate once a MACT standard was promulgated. For those sources not yet subject to section 112(d), section 112(g) applies to either (i) a major source constructed on a greenfield site, or to (ii) a new or reconstructed ``process or production unit'' at an existing plant site, provided that the ``process or production unit'' emits hazardous air pollutants in amounts that exceed the major source threshold. A new process or production unit at an existing major source must itself be inherently major-emitting; the EPA does not intend that a new process or production unit causing increased emissions at another unit downstream be covered by this rule. The definitions of ``construct a major source,'' ``reconstruct a major source,'' and ``process or production unit'' are set forth in section 63.41 of this rule and discussed in detail in section III.B. below.

2. What Must a Source Do To Comply With Section 112(g)?

If equipment additions or overhauls meet the definition of ``construct a major source'' or ``reconstruct a major source,'' then the owner or operator must demonstrate to the permitting authority that emissions will be controlled to a level consistent with the ``new source MACT'' definition in section 112(d)(3) of the Act. A MACT determination under section 112(g) is referred to as ``case-by-case'' MACT. The requirements and procedures for case-by-case MACT determinations are contained in section 63.43 of this rule.

If an owner or operator wishes to construct or reconstruct a major source, then prior to construction or reconstruction, the owner or operator must apply to the state or local title V permitting authority for a case-by-case MACT determination under section 112(g). The application can take different administrative forms, at the permitting authority's discretion, but must contain basic information about the source and its potential emissions. The application must also specify the emission controls that will ensure that new source MACT will be met. The permitting authority must review and approve (or disapprove) the application, and provide an opportunity for public comment on the determination.

3. When Will Section 112(g) Be Effective?

Section 112(g) will be effective in a State or local jurisdiction on the date that the permitting authority, under title V of the Act, places its implementing program for section 112(g) into effect. Permitting authorities have up to 18 months from the date of publication of this rule in the Federal Register to initiate

implementing programs. After the 18-month transition period, if a State or local permitting authority is unable to initiate a section 112(g) program to implement this rule, there are two options for obtaining a MACT approval: either (1) the EPA will issue section 112(g) determinations for up to 1 year; or (2) the permitting authority will make section 112(g) determinations according to procedures specified in section 63.43 of this rule, and issue a Notice of MACT Approval that will become final and legally enforceable after the EPA concurs in writing with the permitting authority's determination. Requirements for permitting authorities are contained in section 63.42 of this rule.

To place its implementing program into effect, the chief executive officer of the State or local jurisdiction must certify to the EPA that its program meets all the requirements set forth in this rule, and publish a notice stating that the program has been adopted and specifying its effective date. The program need not be officially reviewed or approved by the EPA.

4. Do Section 112(g)-regulated Sources Have To Comply With Subsequent MACT Standards?

Once a section 112(d) MACT standard is issued for a source category, the source must comply with it by the designated deadline. A major source regulated under section 112(g) may be granted up to 8 years extra time to comply with a subsequently-promulgated MACT standard under section 112(d). The EPA may specify, in the MACT standard, the length of the extension. If the EPA does not so specify, then the permitting authority may grant such extensions on a case-by-case basis. The EPA believes that in many cases the section 112(g) determination will be equivalent to MACT under section 112(d) or section 112(j), but that this determination should be made on a case-by-case basis under section 112(d) or section (j).

Regulated entities. Entities potentially regulated by this action are those which are major sources of HAP under section 112 of the 1990 Amendments. Regulated categories and entities include:

Category	Examples of regulated entities
Industry	Industries that use or manufacture chemicals listed under section 112.
Federal Government	Federal agencies which handle chemicals listed under section 112.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your facility is regulated by this action, you should carefully examine the applicability criteria of this rule. If you have questions regarding the applicability of this action to a

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particular entity, contact your state or local air permitting authority.

II. Background

A. The 1990 Amendments: Section 112 and Section 307

The 1990 Amendments [Pub. L. 101-549] contain major changes to section 112 of the Act, pertaining to the control of HAP emissions. Section 112(b) includes a HAP list that is composed of 189 chemicals, including 172 specific chemicals and 17 compound classes. Section 112(c) requires publication of a list of source categories of major sources emitting these HAP, and of area sources that warrant regulation. Section 112(d) requires promulgation of emission standards for each listed source category according to a schedule set forth in section 112(e).

Under section 307(b)(1) of the Clean Air Act, judicial review of this final action is available only by filing a petition for review in the United States Court of Appeals for the District of Columbia Circuit within 60 days of publication of this rule in the Federal Register. Under section 307(b)(2) of the Act, the provisions which are the subject of today's rule will not be subject to judicial review in any civil or criminal proceedings for enforcement.

B. The 1990 Amendments. Provisions for Constructed, Reconstructed and Modified Major Sources of HAP

The amendments to section 112 include a new section 112(g). This section is entitled ``Modifications,'' but it contains control technology requirements for constructed and reconstructed major sources

as well as major source modifications. For reasons discussed below, this rule addresses only requirements for constructed and reconstructed major sources.

1. Statutory Requirements for Constructed and Reconstructed Major Sources

Section 112(g)(2)(B) contains requirements for constructed and reconstructed major sources, as follows:

> After the effective date of a permit program under title V in any State, no person may construct or reconstruct any major source of hazardous air pollutants, unless the Administrator (or the State) determines that the maximum achievable control technology emission limitation under this section for new sources will be met. Such determination shall be made on a case-by-case basis where no applicable emission limitations have been established by the Administrator.

This section mandates a more stringent minimum level of control for ``constructed'' and ``reconstructed'' major sources than for ``modified'' sources. In addition, this section mandates the setting of a case-by-case emission limitation based on a technology determination for major sources that are constructed or reconstructed after the effective date of a title V permit program.

C. Streamlined Nature of This Rule

Section 112(g) is primarily a transitional program designed to operate until MACT standards issued under section 112(d) are in effect for all categories of major sources of HAP. To date, the EPA has issued 21 MACT standards covering 46 categories of major sources of HAP emissions, and has proposed five additional MACT standards covering five source categories. The EPA is currently developing all of the MACT standards that are due to be completed in 1997, as well as several of the standards due to be completed in 2000.

Because of the transitional nature of section 112(g), the EPA has concluded that the greatest benefits to be derived from section 112(g) would be from the control of major source construction and reconstruction in the period before MACT standards go into effect. Therefore, the EPA has determined that this rule will implement only that portion of section 112(g) which requires new source MACT determinations for constructed and reconstructed major sources, and will not implement that portion which requires existing source MACT determinations for modifications of existing sources.

The EPA's decision to implement only the construction and reconstruction provisions of section 112(g) is premised in part on the Agency's ability to issue the remaining MACT standards under section 112(d) in a timely way, and also in part on the assumption that where there are existing State air toxics programs that address modifications, they will continue to operate as they do currently. If there were substantial delays in issuance of MACT standards, or radical changes to existing State programs, increased exposure to emissions from unregulated sources of HAP could occur and threaten public health and the environment. If such delays were to occur, the EPA would reconsider whether to issue a regulation to cover modifications under section 112(g).

III. Summary and Rationale for Subsection 63.40 Through 63.44 of This Rule

This section of the preamble provides a detailed discussion of the provisions of this rule. It is organized by each topic area in subsection 63.40 through 63.44 of subpart B, and contains a detailed discussion of the principal regulatory issues and changes made in the final rule, particularly in response to public comments. It also discusses some comments that did not result in regulatory changes.

A. Section 63.40 Applicability

Section 63.40 describes the timing of the requirements of this rule and the sources to which section 112(g) applies.

1. Section 63.40(a) Subpart B Applicability

Section 63.40(a) of this rule indicates that the intent of the rule is to implement section 112(g)(2)(B) of the Act.

2. Section 63.40(b) Overall Requirements

Section 63.40(b) of this rule indicates the overall applicability of section 112(g) to the owner or operator who constructs or reconstructs a major source of HAP after the ``effective date of section 112(g)(2)(b) and the effective date of a title V program'' in each State. This rule contains an exemption for sources specifically exempted by promulgated standards in other subparts of 40 CFR 63. The EPA believes that this exemption is consistent with ``MACT'' because a MACT evaluation was made in establishing the exemption.

In addition, there will be instances in which a ``presumptive MACT'' determination has been made for a source category. A presumptive MACT determination is a preliminary MACT determination made by the EPA, in consultation with States and other stakeholders, after data on a

source category's emissions and controls have been collected and analyzed, but before a final MACT standard has been promulgated. The ``presumptive MACT'' determination is intended as preliminary guidance for States and sources. The EPA believes that the presumptive MACT determination would thus serve as the best information available on the eventual MACT standard. Therefore the EPA recommends to sources and States that applications for section 112(g) determinations use as guidance any presumptive MACT determinations. Presumptive MACT determinations can be found on the TTN (referenced above) under Clean Air Act, Title III, Policy and Guidance or at the EPA web site address ``http://www.epa.gov/oar''.

It should be noted that there may be source categories which have not yet been listed on the source category list for standards. The language of section 112(g)(2)(B) of the Act reads: ``no person

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may construct or reconstruct any major source of hazardous air pollutants'' without a case-by-case MACT determination, and makes no mention of whether or not the source is in a listed category. (In fact, the EPA is required to list these categories as it becomes aware of them.) Therefore, the EPA believes that section 112(g) does apply to any major source which is not yet in a listed category.

(a) Effective date. Many commenters noted inconsistencies in the provisions of the draft final rule pertaining to the effective date of section 112(g), which in different sections referred both to the adoption of a section 112(g) program in a State or local jurisdiction by the responsible permitting authority and to the effective date of a title V permit program in a State. The EPA agrees with the commenters that these provisions were confusing and inconsistent. Sections 63.41 and 63.42(a) of this rule make it clear that section 112(g)(2)(B) will take effect in a State or local jurisdiction only after the permitting authority has been afforded an opportunity to adopt a program to implement this provision. The effective date of section 112(g)(2)(B) in a given State or local jurisdiction will be the date on which the permitting authority places its implementing program into effect or the date which is 18 months after the date of publication of this rule in the Federal Register, whichever is earlier. This affords those permitting authorities which are prepared to implement section 112(g)(2)(B) quickly an opportunity to do so, but also recognizes that some State permitting authorities will need additional time to take the necessary steps to plan for and adopt a satisfactory program.

The meaning of ``effective date of a title V permit program'' is

indicated in the final regulations for implementation of title V of the Act, which are contained in 40 CFR Parts 70 and 71, and which were published on July 21, 1992 (57 FR 32250) and July 1, 1996 (61 FR 34202), respectively. Under these regulations, States were required to submit a permit program for review by the EPA on or before November 15, 1993. The EPA was required to approve or disapprove the permit program within 1 year after receiving the submittal. The EPA's title V program approval date is termed the ``effective date.''

The effective date of title V permit programs is defined in section 502(h) of the Act, which says:

> The effective date of a permit program, or partial or interim program, approved under . . . [title V] . . . shall be the effective date of approval by the Administrator. The effective date of a permit program, promulgated by the Administrator shall be the date of promulgation.

This definition is incorporated into the operating permit regulations as 40 CFR 70.4(g).

If a project does not receive its air quality construction permits before the effective date of section 112(g), then this rule will be applicable. The EPA requested comment on other alternatives, such as grandfathering projects for which a complete application has been submitted to the permitting authority, or grandfathering projects from the date of ``onsite fabrication, erection, or installation.'' Some commenters agreed with the EPA's current approach; however, many commenters supported grandfathering projects that had applied for, but not yet received, a permit. The EPA believes the chosen approach reflects the best option for ensuring adequate controls on sources seeking to add new equipment, while grandfathering sources which have already made significant investments in equipment. This approach assures that if prior to the permit issuance, new approaches to control HAP emissions are considered appropriate, the source will apply the latest control technology. This approach is also most consistent with current Federal policy in the prevention of significant deterioration program (PSD), in which sources with an approved permit are grandfathered when the attainment status of the region changes. In the new source review (NSR) program as well, while sources with a complete application which might otherwise be considered major modifications are grandfathered, these modifications do not escape review; they are treated as minor modifications instead.

(b) Major Source. Section 112(g) applies only to major sources as defined in section 112(a)(1) of the Act. This definition, from 40 CFR

63, subpart A, (the general provisions of part 63), is as follows:

The term `major source' means any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants.

The definition also allows the EPA to establish a lesser quantity than 10 or 25 tons to define ``major source'' with respect to particular HAP where warranted on the basis of potency, persistence, and other factors. To date, no such lesser quantities have been established.

As a result of this definition, the section 112(g) requirements do not apply if the total emissions from an entire ``contiguous area under common control'' (in general, the entire plant site) do not exceed the major source level.

An important element of the major source definition is the term ``potential to emit.'' ``Potential to emit'' is based on the source's capability to emit HAP considering enforceable limitations. Such limitations include restrictions on capacity, restrictions on the types of materials used, emission limitations, and other types of restrictions. A definition of ``potential to emit'' is contained in 40 CFR 63, subpart A (General Provisions), as well as in further guidance provided by the EPA available on the Technology Transfer Network (referenced above), under Clean Air Act, Title III, Policy and Guidance, as well as on the EPA web site address (also reference above).

3. Section 63.40(c) Exclusion for Steam Generating Units

Section 63.40(c) of this rule clarifies that electric utility steam generating units are not yet subject to the requirements of section 112(g).

Section 112(n)(1) requires the EPA to perform a study of the hazards to public health associated with HAP emissions from electric utility steam generating units. This paragraph states that:

The Administrator shall regulate electric utility steam generating units under this section, if the Administrator finds such regulation is appropriate and necessary after considering the results of the study required by this paragraph. (emphasis added)

The EPA reads the phrase ``under this section'' as a broad

exemption from regulation under section 112, including section 112(g), pending the results of the utility health hazards study.

4. Section 63.40(d) Relationship to State and Local Requirements

Most state and local regulatory agencies maintain regulatory programs that involve toxic air pollutant reviews for constructed and reconstructed sources. Section 63.40(d) clarifies that the requirements of section 112(g) do not supersede any requirements of these programs that are more stringent than this rule. Any such State requirements which are more stringent than the requirements of this rule would not be federally enforceable under section 112(g).

5. Section 63.40(e) Source Categories Deleted

This rule provides an exclusion for sources in source categories which have

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been deleted by the EPA from the source category list for standards [57 FR 31576, July 16, 1992]. These sources are excluded because for any such category the EPA will have determined, in lieu of making a MACT determination, that MACT should not apply.

6. Section 63.40(f)--Research and Development Facilities

This rule also provides an exclusion for research and development facilities that meet the specific definition in section 63.41. The proposed rule requested comment on whether to provide this exclusion, and the EPA received significant comment in favor of providing it, based on the potential resource burden of reviewing operations which by design change frequently and do not produce a product for commercial use. The title V operating permit program has issued a policy memorandum aimed at reducing the permit requirements for such facilities. In the interest of consistency with previous exclusions for research and development activities and its anticipated use in the title V program, this rule adopts the definition of research and development facilities provided in section 112(c)(7) of the Act.

B. Section 63.41 Definitions

1. Terms Defined in the General Provisions

A number of terms used in the rule have already been defined for all of 40 CFR Part 63 by the General Provisions contained in subpart A. Readers interested in the definitions and rationale for those terms should refer to subpart A. Relevant terms defined in the General Provisions include:

--Act
--Approved permit program
--Capital expenditure
--Federally enforceable
--Hazardous air pollutant
--Major source
--Permit program
--Potential to emit
--Relevant standard
--Title V permit

In the definition of Construct a Major Source, the threshold level for a major source is a source which emits or has the potential to emit (PTE) 10 tons/year of any HAP or 25 tons/year of any combination of HAP. The PTE means the maximum capacity of a source to emit any air pollutant under its physical and operation design. A source's PTE may also take into account enforceable requirements for air pollution control equipment, and enforceable restrictions on operation such as maximum hours of operation or types of materials consumed.<SUP>1

\1\ Currently, there is a requirement in the general provisions to part 63 that PTE limits must be federally enforceable in order to be credited. In a 1995 court case (National Mining v. EPA, 59 F. 3d 1351, D.C. Cir. 1995), the court required EPA to reconsider this requirement. The EPA is currently developing rulemaking amendments that will address the concerns raised by the court. It is expected that these rulemaking amendments will be finalized in mid-1998.

The EPA believes that virtually all of the new constructed or reconstructed sources with a possibility of triggering section 112(g) requirements, and requiring emission limitations in order to avoid section 112(g), will need to obtain a preconstruction minor NSR permit from a State and local air quality agency. Because those minor NSR permits are federally enforceable, the practical implications of the above-mentioned PTE rulemaking may not be as pronounced for section 112(g) as for other requirements of part 63.

There may be a few situations where a source seeks to attain ``synthetic area'' status for section 112(g) for a new greenfield site, or seeks PTE limits to ensure that a newly constructed source avoids becoming a 10-ton ``affected source'' under section 112(g), and the limitation issued by a State program is not federally enforceable. For example, a State's air toxics preconstruction permitting program that creates limits for non-VOC HAP's such as

methylene chloride may not in some circumstances yield federally enforceable limits. For any such circumstances that arise before EPA issues its rulemaking amendments addressing the National Mining decision, the EPA will accept, for purposes of section 112(g), limitations that are practicably enforceable by a State and local air pollution control agency.

This means that if a source keeps its emissions below the threshold limits for a major source through enforceable limits, it will not meet the definition of ``Construct a Major Source'' under section 112(g), and thus will not have to apply new source MACT. For example, if a plant to be constructed will have uncontrolled emissions of a HAP of 40 tons/year, it would normally be subject to new source MACT under section 112(g). The owners are, however, able to install emission controls achieving a 75 percent reduction in emissions of the HAP in question. By imposing on themselves this control system and making their emissions limit and operating conditions enforceable, as a practical matter they can keep their PTE below the major source threshold of 10 tons/year. Such a source would not be subject to section 112(g), even if the 75 percent emissions reduction did not achieve a ``new source MACT'' level of control.

2. Terms Related to Construction and Reconstruction

The following terms are included in section 63.41:

--Construct A Major Source
--Reconstruct A Major Source
-- Greenfield Site

The definition of ``construct a major source'' in this rule refers to two types of sources. The first is any ``major-emitting'' construction at a greenfield site (i.e., construction which emits or has the potential to emit HAP in amounts that would make it a major source). The other is any construction of a new ``process or production unit'' at an existing site where the process or production unit is itself major-emitting. (The definition of ``process or production unit'' is discussed below in this section.)

It should be noted that a major source ``construction'' or ``reconstruction'' project may require more than one MACT determination. As outlined in paragraph (3) of the definition, the EPA believes that MACT determinations consistent with section 112(d) of the Act may not include combinations of emission points involving more than one category on a published list of source categories (57 FR 31576).

For example, most types of combustion sources appear as individually listed categories. As a result, a ``construction'' or ``reconstruction'' involving boilers and other process equipment must make a separate MACT determination for the boilers.

In response to EPA's request for comments on the exclusion from section 112(g) for major sources that use existing emission controls, several issues were raised. Most industry commenters supported the exclusion, but favored broadening it and wanted the rule to state clearly that the decision for what constitutes the best control technology is left to the discretion of the permitting authority. Industry supported replacing the phrase ``control equipment'' with ``control technology'' to cover pollution prevention approaches. Environmental groups and several States opposed this exclusion. They felt the use of the phrase ``one of the best control technologies'' was too open to interpretation and could be abused. These commenters cited the following concerns: the statute requires MACT or its equivalent, the technology determination should be based on recent standards (not standards used when the controls were originally constructed), all significant HAP should be controlled by the existing controls, and public review and comment should be required of the permitting authority's decision. Several States indicated that review of applications for this exclusion would be too resource intensive for their staffs.

The EPA agrees with the comment that the phrase ``one of the best control technologies'' is too ambiguous and open to varied interpretation. Nevertheless, the EPA recognizes that many sources will have previously

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installed controls at the plant site, and that such controls may be sufficient for case-by-case MACT when new process or production units are added to them. It is our intent to provide flexibility to the permitting authority in making case-by-case MACT determinations, but believe we are obligated to provide guidance as to how those determinations are evaluated. Consequently, the final rule clarifies the criteria that must be met for a new major process or production unit to qualify for this exemption from section 112(g) review.

The definition of ``construct a major source'' excludes such process or production units, provided the controls meet six specific criteria.

One criterion is that all HAP that would otherwise be controlled by a case-by-case MACT determination are controlled by the existing

technology. For example, if a source has previously installed controls designed for total volatile organic compounds (which may also be HAP), those controls must achieve a MACT level of control for all of the HAP in the emission stream that would normally be expected to be controlled by a MACT determination. (For example, a MACT standard might reasonably be expected to address all the HAP emitted in a stream except for those emitted in trace amounts.) In addition, the control efficiency of the equipment for HAP prior to addition of the new process or production unit must be maintained after addition of the new equipment.

The definition also requires either that the previously installed control technology has been reviewed and approved within the last 5 years under another air quality program that requires best available control technology (BACT), lowest achievable emission rate (LAER), or State-level toxics BACT (T-BACT) or MACT. Alternatively, the permitting authority may determine that the previously installed control technology is equivalent to what would be currently required by another similar air quality program. Use of the exclusion must be documented in the title V permit at the time of permit issuance or renewal. These requirements provide a safeguard that the new process or production unit will be adequately controlled, even if it does not undergo section 112(g) review.

In addition, an opportunity is required for public review of the permitting authority's decision to allow use of this exclusion. If any commenter questions the permitting authority's view that previously installed controls are adequate for section 112(g) purposes, then the permitting authority must explain its decision in response to those comments. In general, the EPA believes that controls that were constructed in accordance with an earlier determination could be adequate; however, such previously installed controls may not be adequate if that same determination, made currently, would be significantly different. For example, a BACT determination made in 1992 could be significantly different from a determination made in 1997 on similar equipment if advances in control technology have occurred during that time.

Finally, the EPA generally does not view this ``good controls'' exclusion under section 112(g) as satisfying MACT for new sources under section 112(d) or section (j). As such, sources subject to later MACT determinations pursuant to section 112(d) or section 112(j) may have additional compliance requirements placed upon them.

3. Terms Related to MACT

Definitions for the following terms related to levels of control technology are included in section 63.41 of this rule:

--Available information
--MACT
--Control Technology
--MACT Emission Limitation for New Sources

The basis for the MACT definitions is statutory language contained in section 112(d) of the Act. The term ``MACT'' appears only in section 112(g) of the Act, and does not appear elsewhere in section 112. There is, however, considerable legislative history indicating that this term refers to the level of control required by section 112(d) emission standards. The term ``MACT'' was used in this context in the House Bill, H. R. 3030. For purposes of the definitions in this rule, the EPA assumes that MACT is a reference to the ``maximum degree of reduction in emissions'' language contained in section 112(d)(3).

The term ``available information'' is used to define the extent of review for permitting authorities and applicants for case-by-case MACT determinations. This rule defines ``available information'' to include information made available by the EPA in the process of setting emission standards, including but not limited to MACT standards. The EPA intends that information made publicly available in background or other documents in the process of developing a ``presumptive MACT'' for a source category should be considered ``available information.'' In this rule, information is considered to be ``available'' if it is available as of the permitting authority's final determination, i.e., the date the permitting authority makes the final determination after receiving all comments. Some commenters argued that information should only be considered ``available'' if it has been available as of the date of application for a MACT determination. The EPA believes, however, that new information presented during a public comment period should be considered in the MACT determination. The issue of ``available information'' is discussed in more detail in section III.D.3. below.

4. Terms Affecting Extent of Coverage by MACT

The following terms are used to describe equipment subject to a MACT determination:

--Affected source
--List of source categories
--Process or production unit

As explained above, the EPA believes that Congress did not intend section 112(g)(2)(B) to be so limited in scope that it would apply only to construction or reconstruction of entire facilities, and that this

section was also intended to apply to construction of new process or production units and reconstruction of existing process or production units at existing facilities. Accordingly, it is necessary for EPA to decide what types of new equipment constitute the unit to be controlled under section 112(g).

A number of commenters expressed concerns regarding the exclusion for an ``integral component of a process or production unit,'' in the draft final rule, which required that the component be an ``essential part'' of a larger process or production unit. The nature of the comments made it clear that this definition was subject to greatly differing interpretations. Many commenters stated that the definition was too narrow, while some argued that it could be construed so broadly that no new equipment would qualify. Several commenters who believed the proposed definition of ``integral component'' to be too narrow suggested that EPA use alternative criteria such as ``functions as a part of'' or ``integrated with'' a larger process or production unit instead. The EPA believes the concept of a functional relationship to be a useful one, but by itself this concept is susceptible to an unduly broad interpretation.

The EPA is concerned about the varying interpretations given to this term by the commenters. Therefore, instead of defining the equipment which should be excluded from section 112(g), the EPA has chosen to define the

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equipment to which section 112(g) should apply controls. This rule applies section 112(g) to equipment which meets the definition of a ``process or production unit.''

The definition of ``process or production unit'' requires that the unit to which section 112(g) applies should be ``any collection of structures and/or equipment that processes, assembles, applies, or otherwise uses material inputs to produce an intermediate or final product,'' and notes that the process or production unit may be a part of a facility which contains several such units. By requiring that the unit produce a product, the EPA intends section 112(g) to apply to units which are discrete, not units which are just one essential part of a larger function. The EPA also intends that the requirement that the unit produce a product be read to include those units whose product is energy, such as boilers.

At the same time, some commenters suggested that an entire plant site should generally be considered the unit to which section 112(g) applies, an interpretation which the EPA does not share. Therefore, by

specifying that the process or production unit may be a part of a facility, the EPA intends that the definition be interpreted to cover a process line or production operation within a facility.

The draft final rule contained separate definitions of ``process'' and ``production unit.'' Under the draft language, storage tanks would have been considered processes or production units in some situations. Because the final rule consolidates the two definitions, the EPA has changed the definition of process or production unit to include the storage of materials, where storage is the primary function of the facility (e.g., tank farms), as a process or production unit. These issues are discussed and illustrated further in section III.D. below.

5. Electric Utility Steam Generating Unit

The definition of electric utility steam generating unit in the proposed rule is taken directly from section 112(a) of the Act.

C. Section 63.42 Program Requirements Governing Construction or Reconstruction of Major Sources

Several commenters expressed concerns regarding the provision in the draft final rule under which section 112(g) would have taken effect immediately upon promulgation of this rule in those States which have already developed section 112(g) programs. Some of these commenters noted that it is illogical to assume that a program adopted by a State in advance of issuance of this rule will meet its requirements, and that States should be required to evaluate their programs for conformity to this rule before they take effect. The EPA agrees with this comment, and has therefore required that each permitting authority certify that its implementing program is in conformity with the provisions of this rule as part of its adoption of a program.

Some commenters requested that EPA provide a fuller description of the steps by which a permitting authority can adopt a section 112(g) program. Other commenters argued that a program should not take effect without some sort of notice to affected facilities. The EPA agrees with these comments and has therefore also required that a permitting authority establish in advance an effective date for its program, and publish notice of the adoption of the program prior to that effective date.

One commenter argued that section 112(g) programs adopted by a State permitting authority cannot take effect unless they are expressly approved by EPA, either as part of a title V program or as a delegation of authority to the State under section 112(l). The commenter argued that EPA must also afford an opportunity for public comment prior to any such approval. The EPA does not agree with the position expressed

by this commenter.

The EPA interprets section 112(g) as assigning to the permitting authority for each State, whether it be the State or the EPA Regional Office acting on behalf of the Administrator, the responsibility for making section 112(g) determinations. This construction of section 112(g) is implicit in the language which makes the applicability of the prohibitions in section 112(g)(2)(B) contingent on the effective date of a title V permit program in each State. Moreover, the EPA has previously taken steps to effectuate this construction of the Act. Each State which received approval to operate a title V permit program was required to state that it had the requisite authority to implement section 112(g). While an individual State (or the EPA Regional Office if it is the permitting authority under title V) is not in a position to adopt a section 112(g) program which satisfies Federal requirements for such programs until after EPA has issued its general guidance concerning the nature of these requirements, there is no indication in the language of section 112(g) that EPA must then ``delegate'' to each State the authority already assigned it by the statute itself.

The EPA believes that it would be permissible for EPA to require that State section 112(g) programs be approved by the EPA before they could take effect, but does not intend to do so. The EPA acknowledges that the difficulties it has encountered in devising guidance on implementation of section 112(g) which is both effective and practicable have resulted in unfortunate delays in implementation, and that EPA must necessarily afford State permitting authorities some additional time after issuance of this rule to plan for and adopt their implementing programs. However, inclusion of additional EPA comment and review procedures which are not mandatory would only serve to further delay implementation of this provision, thereby undermining the congressional intent.

Section 63.42(c) says that no person may ``begin actual construction or reconstruction'' of a major source unless a case-by-case MACT determination has been made. The EPA intends that the phrase ``begin actual construction or reconstruction'' have the same meaning as the phrase ``begin actual construction'' in 40 CFR 51 and 52 [the NSR and PSD programs], i.e. initiation of physical onsite construction activities as set forth in those programs.

If a facility which wishes to undertake construction or reconstruction of a major source after the effective date of section 112(g)(2)(B) in a State or local jurisdiction is unable to obtain the case-by-case MACT determination required by that provision, this could prevent the facility from proceeding with construction or reconstruction. Although the potential for constraints on construction

or reconstruction when no section 112(g) program is in place is inherent in the structure of the statute itself, the EPA has included in the final rule two provisions which are intended to avert such a result in the event that a State permitting authority is unable to adopt a section 112(g) program in a timely manner.

First, in those instances where a State has not adopted a section 112(g) program within 18 months but concludes that it can still make the required case-by-case MACT determinations, the State may elect to make such determinations subject to written concurrence by the EPA Regional Office. Upon written concurrence by the EPA, the MACT determination will become final and federally enforceable. Second, in those instances where a State has not adopted a section 112(g) program within 18 months and concludes that it is unable to make case-by-case MACT determinations in the absence of such a program, the State may request that the EPA Regional Office implement a transitional section 112(g) program for a

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period not to exceed 1 year. Although it is clear that failure to adopt a section 112(g) program would constitute a material deficiency in a State's title V permitting program, the EPA would prefer to afford those States who have encountered practical difficulties in timely adoption of a section 112(g) program additional time rather than immediately applying the sanctions and remedies set forth in section 502(i).

Industry commenters have expressed concern that individual States might use adoption of a section 112(g) program to ``federalize'' elements of existing State air toxics programs which are not required to implement section 112(g) with respect to construction or reconstruction of major sources. Conversely, some States have expressed concern that adoption of a section 112(g) program might operate to preempt other existing provisions in State air toxics programs which are not required to implement section 112(g). The EPA does not intend or support either of these results. The program adopted by each State to implement section 112(g) will be intrinsically less extensive in its scope than many existing State air toxics programs. When this is the case, the section 112(g) program should not be treated as either subsuming or superseding extraneous State program elements. Accordingly, the EPA has included in the final rule explicit language making it clear that nothing in the section 112(g) rule can be construed to require compliance with State program elements not intended to implement section 112(g) with respect to construction or

reconstruction of major sources, and nothing in the rule can be construed to preclude enforcement of such State program elements under any other provision of applicable law. State permitting authorities may examine their existing State air toxics programs to determine if they contain the requirements of this rule. If so, a permitting authority may use its existing air toxics program as a vehicle for implementing section 112(g) requirements.

D. Section 63.43 MACT Determinations for Constructed and Reconstructed Major Sources

Section 63.43 (in combination with a number of definitions contained in section 63.41) contains the requirements for constructed and reconstructed major sources described in section 112(g)(2)(B) of the Act. Equipment affected by this section must comply with a ``new source MACT'' level of control.

Applicability

1. ``Greenfield'' Facilities. The most straightforward case for section 112(g) is for a new plant site emitting (or having the PTE) more than major amounts of HAP (that is, 10 tons/yr of one HAP, 25 tons/yr of multiple HAP, or amounts that exceed any lesser quantity cutoffs that may be established under subpart C of part 63). The EPA believes that the statute clearly requires such a new plant site to be treated as a ``constructed major source'' subject to a ``new source MACT'' level of control.

2. Addition of Equipment at an Existing Plant Site. This rule treats addition of a new ``process or production unit'' as construction, as discussed above, and requires application of new source MACT to that process or production unit. This ensures that new major-emitting process or production units (that is, those emitting more than 10 tons/year of a HAP, or 25 tons/year from all HAP, or amounts exceeding a lesser quantity cutoff), which generally would represent sizeable investments, will be built with state-of-the art control technology. It is generally recognized that it is more straightforward to build such a level of control technology into the original design, and that it is difficult or sometimes even impossible to retrofit such controls at a later date. A fundamental goal of many EPA programs, such as the new source performance standards program under section 111 of the Act and the effluent guidelines program under the Clean Water Act, is to achieve long-term reductions in emissions by requiring ``best'' controls as old production operations are replaced with new operations. In addition, this requirement prevents inequities in the implementation of the 112(g) program, because a new process or

production unit at an existing plant would be subject to the same standard as a ``greenfield'' plant site with identical equipment. If this rule only covered greenfield sites, as some commenters suggested, then that same new process or production unit would not be controlled at all under section 112(g).

The guidance in this preamble is designed to help the permitting authority determine whether a new major addition constitutes a process or production unit. The EPA is providing the following examples to illustrate its intent for applicability of section 112(g). The rationale for each case is explained based on the definition of a process or production unit.

Because this rule is generic to all industries, the definition of ``process or production unit'' and the use of the terms ``intermediate or final product'' in this rule are necessarily generic. As a result, in applying this definition to individual plant sites, permitting authorities will need to exercise their reasonable judgment in determining the ``collection of structures and/or equipment that * * * produce(s) an intermediate or final product.'' The following discussion and examples provide guidance on factors and considerations that EPA believes are appropriate in making this judgment. None of the factors or considerations by itself should be considered absolute in determining applicability, but these should be weighed by the permitting authority in reaching a decision.

In applying the definition of ``process or production unit'' to a facility, a key question is: What are the intermediate or final products? There is no intention for this rule to impart any regulatory significance to informal uses of the term ``intermediate.'' The examples below illustrate EPA's intent for a variety of industries.

A second question is: Do the new equipment and/or structures constitute a collection of equipment and/or structures that produces such a product? The EPA believes that an appropriate factor for the permitting authority to consider is the extent to which the new equipment and structures are discrete--in other words, whether as a technical matter the new equipment and structures can produce an intermediate or final product independently, in substantial degree, from the existing equipment or structures. If so, this would tend to support a judgment by the permitting authority that the new equipment and structures constitute a process or production unit. If not, this would support the opposite conclusion. The EPA notes that in making this judgment concerning ``discreteness,'' one relevant consideration is whether the types of new equipment and structures in question are reasonably controlled independently.

In many cases it will be easy to discern whether changes at a plant

site will constitute construction or reconstruction of a ``process or production unit.'' For example, if a new unit is added to an existing plant site, and that type of unit is often built alone at a greenfield site, the logical conclusion is that the new unit is a process or production unit. Also, if minor changes are being made to existing equipment, it should be clear that no process or production unit is being constructed or reconstructed. Of course, there is no need to define the ``process or production unit'' at all

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unless the structures and/or equipment being constructed at an existing plant site have the potential to emit major amounts of HAP.

The following sample applicability determinations provide further guidance in judging when a source is subject to section 112(g) requirements:

Example 1. At a plant which manufactures fiberglass reinforced plastic boats, the owners wish to add more spray guns to an existing fabrication line to supplement the existing spray guns in laminating a particular model of boat hulls. The new spray guns will have a PTE greater than 10 tons/year of a HAP.

In this example, EPA views the fiberglass hull of a boat as an intermediate product in the manufacture of the final product (i.e., the boat with deck, trim, paint, engine, etc.) The collection of structures and/or equipment needed to manufacture the intermediate product, in this case, includes the existing spray guns and other operations in the building (e.g., the lamination operation and other supporting equipment) that typically are found in the production of boats. Because the newly added spray guns in and of themselves do not produce the intermediate product, the EPA does not view the additional spray guns for lamination as a process or production unit that is subject to review under section 112(g).

Example 2. Using Example 1, assume that the owner adds more spray guns to laminate a second model of boat hulls. The room is large enough to accommodate two lamination processes at the same time. The new spray guns have a PTE greater than 10 TPY.

The same rationale used in Example 1 applies here. The collection of equipment needed to produce the boat hull includes the lamination process as well as the gel coat process. Because the addition of the second lamination process does not produce an intermediate product, if no additional laminating or other essential equipment were added, it would not be subject to review under

section 112(g).

Example 3. Using Example 2, a gel coat spray booth and supporting equipment needed to manufacture the boat hulls are added in addition to the spray guns.

The process or production unit in this example is the set of equipment that consists of the gel coat spray booths, the spray gun, and the supporting equipment. This new set of equipment can reasonably operate alone and produce an intermediate product. Consequently, all sources of HAP in this set of equipment, which includes the gel coat spray booth and the spray guns in the laminating room, are subject to review under section 112(g).

Example 4. An aluminum reduction plant has several potlines which manufacture aluminum. Each potline consists of between 100 and 200 electrolytic reduction cells or ``pots'' that are connected together in series electrically to complete a circuit. Each pot produces molten aluminum. The company wishes to add more pots on each line. The additional pots will result in a major increase in emissions.

Although each individual pot contributes to the production of the aluminum, the separate pots are not considered to be discrete process or production units in that they cannot operate independently. In addition, it does not make sense from an engineering standpoint to apply new source MACT only to the additional pots. The best time to apply new source MACT is when constructing an entirely new potline. The EPA does not view each separate pot as a process or production unit and thus the individual pots are not subject to review under section 112(g). The EPA sees the pots within the potline as being both functionally and physically interconnected and unable to function alone. Thus, EPA does not consider the pots as discrete process or production units.

Example 5. Using Example 4, assume the aluminum production facility adds a new potline which is a major source of HAP.

The EPA considers the entire potline as the collection of structures and equipment that produces an intermediate product (i.e., molten aluminum). Since it fits within the definition of a process or production unit, the potline is subject to review under 112(g). Also, note that the potline is an example of a process or production unit that is part of a larger production unit, the aluminum production plant.

Example 6. At an automobile assembly paint shop, three coating steps, primer, surfacer, and top coat, are used to paint the automobile body. Another parallel topcoat step is added to the existing topcoat step. Both top coat steps then feed back into a bake oven. The new top coat step will be a major source of HAP.

The new parallel topcoat step is not subject to review under section 112(g). The intermediate product in this case is the painted automobile body. The top coating step cannot take place without the preceding primer and surfacer steps and the supporting infrastructure. Additionally, the intermediate product cannot be completed without the bake oven step. Consequently, the topcoat by itself is not a discrete process as it is only one step in a series of steps necessary to produce an intermediate or final product. (Although unlikely, if an existing automobile assembly plant were to build a second paint shop, this should be reviewed under section 112(g).)

3. Reconstruction. Section 112(g) continues the concept of ``reconstruction'' contained in past regulatory programs. The concept of reconstruction is intended to prevent the circumvention of ``new source'' requirements by completely overhauling existing equipment. Current air pollutant emission standards under previous requirements of the Act treat replacement of components as a reconstruction if the replacement represents more than 50 percent of the capital cost of the new unit.

For section 112(g), the requirements apply to the reconstruction of a ``major source,'' and this rule defines ``reconstruct a major source'' as the replacement of components at a major source such that the replacement exceeds 50 percent of the capital cost of either an entirely new major source, or of a comparable process or production unit where the process or production unit, if newly constructed, would have been considered a constructed major source under this rule. (For the sake of clarity, the EPA has deleted that portion of the reconstruction definition in the draft rule that referred to a ``group of process or production units'' being reconstructed, so that the definitions of both construction and reconstruction would refer to the same units).

MACT Determinations

Section 63.43 reflects the statutory requirement that an owner or operator who proposes to ``construct or reconstruct'' a major source must obtain a determination from the ``permitting authority'' that the ``MACT emission limitation for new sources'' will be met. The ``permitting authority'' is defined as the agency responsible for the title V permit program. Further discussion of this issue, and of other

issues related to implementation of section 112(g), is contained in section IV of this preamble.

This section of the preamble discusses the procedures for making these MACT determinations. These procedures include technical review procedures needed to establish a MACT emission limitation and a corresponding MACT control technology, and, (where appropriate), administrative procedures for submitting and reviewing applications for MACT determinations. In this rule, the overall process for MACT determinations is outlined in Sec. 63.43.

1. Overall Process for MACT Determinations. Where no MACT standard under section 112(d) has been promulgated, section 112(g) requires a case-by-case determination of the MACT emission limitation. This ``determination'' can take any of three

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forms, as described below and in Sec. 63.43(c) of this rule. Under any approach, the process for review is conceptually similar.

The process begins with a MACT analysis by the owner and operator. This MACT analysis must be consistent with general principles described in Sec. 63.43(d). The owner or operator provides an application for a MACT determination to the permitting authority. Requirements for the contents of this application are listed in Sec. 63.43(e). Commenters indicated that the source cannot certify that the control technology meets MACT because the permitting authority has not yet made the MACT determination. The EPA agrees with these commenters and has therefore eliminated the requirement from Sec. 63.43(e)(2) of the draft final rule for a responsible official to certify that the control technology meets the requirements of section 112(g) of the Act. (The EPA wishes to clarify that the requirement in Sec. 63.43(e)(2)(vi) to list emission rates is intended as background information to enable the permitting authority to identify the pollutants requiring MACT controls. The EPA recognizes that there is often a significant effort required to obtain precise estimates of HAP emission rates and speciations. The EPA does not intend in this paragraph to require a greater level of detail than is necessary for evaluating applicability and emission control issues.)

This application for a MACT determination is then reviewed by the permitting authority according to one of the following procedures (at the permitting authority's discretion): (1) the permitting authority's own review procedures (so long as they provide for public participation in the determination), (2) the administrative procedures outlined in 40 CFR part 70 or part 71, or (3) the administrative procedures described in Sec. 63.43, paragraphs (f), (g), and (h). If approvable, the

permitting authority will then either: (1) issue approval under its own procedures, (2) revise the part 70 or part 71 permit, or (3) issue a Notice of MACT Approval. Regardless of which review procedure is used, the provisions of section 63.43, paragraphs (j), (k), (l), and (m) apply.

Section 63.43(c)(3) of this rule provides that a source may seek approval of case-by-case MACT determinations for new alternate operating scenarios (that were not incorporated in a State permit) when obtaining its title V permit. As a result, the source would have met the requirements of section 112(g) at the time of permit approval, and thus would be free to activate any such alternative operating scenario in the future without having to undergo any further section 112(g) review.

Where EPA determines that the MACT determination made by the permitting authority fails to meet any of the requirements of Sec. 63.43, EPA may take one of two actions to address the deficient MACT determination. (a) Where the MACT determination is made part of a source's part 70 permit, EPA may veto issuance of the permit in accordance with the provisions of 40 CFR 70.8(c). The EPA may also use the veto process outlined in 40 CFR 70.8(c) where the State has ``enhanced'' its section 112(g) process to incorporate the part 70 procedures.

(b) Where the MACT determination is made before the source obtains or revises its part 70 permit, either through a Notice of MACT Approval or the permitting authority's own procedures, EPA may exercise its authority under section 113(a)(5) of the Act to prohibit construction, issue an administrative penalty order, or bring a civil action against the source upon finding that the State has not acted in compliance with any requirement or prohibition relating to the construction or reconstruction of new sources.

Many commenters have expressed opposition to the provision in the draft final rule which provides that an owner or operator shall be deemed to be in compliance with section 112(g)(2)(B) only to the extent that the constructed or reconstructed major source is in compliance with the terms and conditions of the MACT determination. The commenters contend that this provision would operate to treat sources that are temporarily in violation of the terms of a MACT determination the same as sources who completely ignore section 112(g)(2)(B) and proceed to construct or reconstruct without obtaining a MACT determination. One commenter even argues expansively that this proposed provision would operate to subject the violator to penalties for the entire period since the original construction or reconstruction, rather than only for the period of the violation itself.

It was not the intent of EPA, nor would it be appropriate, to transform prior compliance into a violation based on the occurrence of subsequent violations. The EPA has clarified the language of the provision to assure that any violation of the terms and conditions in a MACT determination will be construed as a violation of section 112(g)(2)(B) only for that period that the owner or operator is actually in violation of such terms or conditions.

In general, the commenters assume that the MACT determinations made by a State will themselves be automatically federally enforceable, regardless of whether they have been incorporated in a title V operating permit for the facility. One commenter expressly invoked the language of section 113 by referring to a MACT determination as a ``permit,'' while another argued to the contrary that Federal enforceability is not mandatory for MACT determinations under section 112(g). The EPA agrees that MACT determinations made pursuant to the authority conferred on a State by section 112(g) should be construed as federally enforceable actions, regardless of whether their terms have been incorporated into a title V operating permit. The EPA notes that a significant period may elapse between the time a facility first obtains a MACT determination and the subsequent issuance of a title V operating permit for that facility. The MACT determinations in this interim period are federally enforceable.

Congress clearly intended that the EPA should be able to enforce the requirement for sources to apply MACT prior to construction or reconstruction of a major source. If a facility obtains a MACT determination but does not adhere to its terms and conditions, then that facility should not be shielded from Federal enforcement. The provision in the final rule which makes failure to adhere to the requirements in the MACT determination a violation of section 112(g)(2)(B) itself, but only for the period that the facility is actually violating those requirements, is reasonable. It provides additional assurance that no facility will be able to avoid Federal enforcement based on a contention that the MACT determination has not yet been incorporated into a title V operating permit and should not be deemed directly enforceable.

2. Requirement for Preconstruction Determination. Section 63.43 requires the MACT determination before construction or reconstruction of the major source. The requirement is based upon the language in section 112(g)(2)(B) requiring that the Administrator (or the State) determine that MACT ``will be met.'' The EPA believes that the future tense suggests an up-front determination.

In addition, the EPA believes that there are substantial implementation disadvantages for any program that would allow equipment

to be constructed before a determination is made. The EPA's past experience in enforcing air quality regulations suggests strongly that it would be very

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difficult to require substantial changes in the design of equipment once it is in place. The EPA feels that fairness or equity arguments, based on investments already made and the costs of retrofit and shutdown, could be made by a source seeking to begin operation under these circumstances.

3. General Principles for MACT Determinations. Section 63.43(d) reviews a number of general principles that govern MACT determinations under this rule. As required by section 112(g)(2)(B), this rule requires a case-by-case determination by the permitting authority that the technology selected by the owner or operator is consistent with what would have been required under section 112(d) of the Act. For constructed and reconstructed major sources, the minimum requirement for a case-by-case MACT determination, consistent with section 112(d), is the level of control that is achieved in practice by the best controlled similar source. The definition of MACT for new source MACT in this rule does not require consideration of sources outside the U.S. However, sources and permitting authorities are expected to consider controls on sources across the U.S., as opposed to considering just those controls used on sources in a particular State.

In determining the appropriate level of control, this rule requires consideration of ``available information.'' In some instances, such information sources are readily apparent. For example, if a Federal MACT standard has been proposed, but not yet promulgated, the EPA expects that a MACT determination will strongly consider that proposal. (Other information may be available in some cases, for example, based upon public comment on the MACT proposal, but such data would need to be adequate to refute the finding in the proposal). In other cases, the EPA will have generated background documents summarizing MACT findings which should be readily available.

In some cases, during the course of developing the MACT standard the EPA will decide upon and make publicly available a ``presumptive MACT'' emission limitation that anticipates what the ultimate MACT determination will be. The EPA may do this before a proposed MACT standard has been published in the Federal Register for a source category. If so, sources and States should use such a ``presumptive MACT'' emission limitation as guidance in making case-by-case MACT determinations, because these determinations would be the best

available information on the eventual MACT emission limitation.

The most recent performance standards for existing control technologies must be met. These include standards for BACT, LAER, or State T-BACT established within the last 5 years. The EPA plans to develop guidance for performance standards for 10-year MACT categories. Any relevant performance standards established in this guidance should be used once it is available. Determinations by the permitting authority on the adequacy of equivalent controls should be evaluated by the most recent performance standards available at the time of construction. As indicated in the draft final rule, the resulting level of control must at least meet that provided by the control technology prior to the inclusion of additional sources.

In addition, the EPA currently maintains a number of data bases that may be useful as a resource for information on available control technologies. The EPA has also designed a data management system that will support case-by-case MACT determinations. This data base is called the MACT data base. The EPA is developing guidance documents on how to use the MACT data base. Section 63.43(m) requires States to report all case-by-case MACT determinations to the MACT data base.

Finally, it should be noted that the final rule changes the term ``control equipment'' to ``controls'' to include any pollution prevention strategy that effectively limits emissions and is federally enforceable.

4. General Issues with Regard to MACT Determinations. For constructed and reconstructed major sources, section 112(g) of the Act requires an emission limitation consistent with a ``new source MACT'' level of control. The Act states:

> The maximum degree of reduction that is deemed achievable for new sources in a category or subcategory shall not be less stringent than the emission control that is achieved in practice by the best controlled similar source, as defined by the Administrator.

For the purposes of section 112(g), two criteria should be used to determine if a source is similar: (1) whether the two sources have similar emission types, and (2) whether the sources can be controlled with the same type of control technology. The EPA can classify the emission source as one of five different types. They are as follows:

Process vent or stack discharges--the direct or indirect discharge of an organic liquid, gas, fume, or particulate by mechanical or process-related means. Examples would be emission discharges from columns and receiving tanks from distillation, fractionation, thin-film evaporation, solvent condensers, incinerators, flares, and closed-

looped biological treatment units.

Equipment leaks--fugitive emissions from the following types of equipment: valves, pumps, compressors, pressure valves and lines, flanges, agitators, sampling connection systems, and valve connectors.

Evaporation and breathing losses--emissions from storage or accumulation of product or waste material; for example: stationary and mobile tanks, containers, landfills, and surface impoundments, and pilings of material or waste.

Transfer losses--emission of an organic liquid, gas, fume, vapor or particulate resulting from the agitation of material during transfer or the material from one unit to another. Examples of such activities are filling of mobile tanks, dumping of coke into coke quench cars, transfer of coal from bunker into larry car, emptying of baghouse hoppers, and sludge transfer.

Operational losses--emissions resulting from the process operation which would result in fugitive emissions if uncontrolled by hoods or vacuum vent, or other vent systems. Examples of operation losses are emission resulting from spray coating booths, dip-coating tanks, quenching towers, lubricating stations, flash-off areas, or grinding and crushing operations.

These five types of emission sources can serve as a general guide in identifying available control options while also considering the concentration and the type of constituents of a gas stream. However, while two pieces of apparatus can be classified within the same emission source type, this does not automatically mean that the emission points can be controlled using the same type of control technology. For instance, storage tanks and landfills are both listed in the evaporation and breathing losses classification, but it is unlikely that a storage tank and landfill would be controlled with the same technology.

The EPA believes that because the Act specifically indicates that existing source MACT should be determined from within the source category and does not make this distinction for new source MACT, that Congress intends for transfer technologies to be considered when establishing the minimum criteria for new sources. EPA believes that the use of the word ``similar'' provides support for this interpretation. The EPA believes that Congress could have

explicitly restricted the minimum level of control for new sources, but did not. The use of the term ``best controlled similar source'' rather than ``best controlled source within the source category'' suggests

that the intent is to consider transfer technologies when appropriate.

Some commenters expressed concern that the EPA's definition of ``similar source'' could be interpreted too broadly. The EPA believes that the practical use and effectiveness of any transfer technology should be generally comparable across emission units. While the particular pollutants emitted need not be the same, the following factors may be considered: the volume and concentration of emissions, the type of emissions, the similarity of emission points, and the cost and effectiveness of controls for one source category relative to the cost and effectiveness of those controls for the other source category, as well as other operating conditions. The uninstalled cost of controls should not be a factor in determining similarity across emission units. What should be a factor is the uninstalled cost of controls plus the costs associated with installation and operation of those controls. Therefore, whenever costs are quantified, such costs should include the purchase price of controls plus the costs associated with installation and operation of those controls for the source in question. In addition, the EPA recognizes that control efficiencies across similar sources may be different. The permitting authority is expected to use its judgement in determining when operating conditions are comparable across emission units.

Another general problem that must be addressed in determining the MACT, is the identification of the universe of equipment that must be considered for control. When the notice of initial list of categories of sources under section 112(c)(1) of the Act was published (57 FR 31576), the EPA listed broad categories of major and area sources rather than narrowly defined categories. The EPA chose to establish broad source categories at the time the source category list was developed because there was too little information to identify technically distinct groupings within these broad categories. During the standard-setting process, EPA may find it appropriate to further subcategorize to distinguish among classes, types and sizes of sources.

In making case-by-case MACT determinations, the EPA believes that permitting authorities may find it necessary to subcategorize particular source categories into technically distinct groupings. This rule allows permitting authorities to subcategorize, at their discretion, on a case-by-case basis, giving permitting authorities the greatest flexibility in case-by-case MACT determinations. In their comments, some permitting authorities indicated that reviewing agencies may not have the resources to address this subcategorization issue. The EPA recognizes that allowing permitting authorities discretion to subcategorize or not subcategorize may lead to some national inconsistency in implementation for source categories for which the EPA

has not yet established a presumptive MACT, or has not yet collected enough information on the source category to establish subcategories. To limit inconsistencies, the EPA strongly encourages those States which have collected information on particular source categories to share that information with other States through the MACT data base.

In the proposed rule, EPA also sought comment on the criteria for which subcategorization would be allowed. Possible criteria can include technically distinct processes or operations (including differences between batch and continuous operation), fundamental differences in emission characteristics or control device applicability, differences in safety considerations, and the appropriate consideration of opportunities for pollution prevention. Most commenters supported allowing sources and/or States the discretion to subcategorize on a case-by-case basis. The EPA has not subcategorized source categories in this rule because it is most feasible to do so on a case-by-case basis.

5. Application for a MACT Determination. Section 63.43(e) of this rule describes the information the owner or operator is required to provide with an application for a MACT determination or in a title V permit application for which a MACT determination is requested. These information requirements are designed to identify the equipment to be controlled, and to demonstrate that the selected control technology for those units is consistent with or exceeds the requirements of the statute.

6. Review Process. Analysis of the relationship of section 112(g) to the operating permits program. This rule, in section 63.43, paragraphs (f), (g), (h), and (i), establishes an administrative process for reviewing a request by an owner or operator for a MACT determination. As discussed previously, the EPA believes that section 112(g) of the Act requires such a determination to be made before constructing or reconstructing a major source.

There will be cases when the title V permit process will be used for section 112(g) reviews, and there will be cases when it will not be used and MACT determinations will be incorporated into the permit after commencement of operation. Section 63.43(c) of this rule states that when the title V procedures are used, this process would be sufficient. When the title V process does not occur until after construction or reconstruction of a major source requiring a case-by-case MACT determination, this rule requires that the owner or operator follow either of the other two administrative review processes described in Sec. 63.43. Where the change that is subject to section 112(g) review is addressed or prohibited by an existing title V permit, the change would of course need to be processed as a revision to the title V operating permit prior to commencing operation.

Regardless of the timing for incorporation of section 112(g) determinations into the operating permit, there are certain 40 CFR Part 70 requirements that apply. The title V permit must be revised or issued according to procedures set forth in part 70, and must incorporate the compliance provisions of part 70. If, during the EPA's review of the section 112(g) determination, it becomes apparent that the determination is not in compliance with the Act, then EPA must object to the issuance or revision of that permit.

These requirements are obviously satisfied either if part 70 requires revision to an existing title V permit prior to operation, or if the permitting authority otherwise requires incorporation into a title V permit as a step in the section 112(g) determination process. However, even where there is no formal incorporation into a title V permit prior to operation, subsequent title V review may effectively be avoided if the State's section 112(g) process is ``enhanced'' to include the required title V procedures, thereby allowing for later incorporation into the title V permit by administrative amendment.

7. Streamlined Administrative Process. Section 63.43, paragraphs (f), (g), and (h) of this rule establish an administrative review process for case-by-case MACT determinations for permitting authorities to use at their discretion. The process begins with a 45-day completeness determination. (In this rule the EPA suggests a completeness determination of 45 days, and a public review period of 30 days, in order to be consistent with the time periods set forth in part 70 for a permit application, so that a permitting

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authority can easily combine these processes). Once a complete application is received, approval or an intent to disapprove the application is required. If an intent to disapprove is issued, the owner or operator is given the opportunity to provide further information. The proposed decision to either approve or disapprove the application is then subject to public review. This rule provides for public review through issuance of a notice containing all the relevant background information about the application and allows 30 days for the public to comment on whether the application should or should not be granted. To expedite approval of noncontroversial case-by-case MACT determinations, this rule allows such determinations to become final following the close of the comment period if no adverse comments have been received. If adverse comments are received, a final notice addressing the comments must be published either approving or disapproving the application.

8. Notice of MACT Approval or similar document. The end result of the administrative review process is a determination set forth in a State permit or other document issued by the permitting authority. Necessary elements of this document are set forth in section 63.43(g) of this rule. This document should contain the emission limitations, notification, operating and maintenance, performance testing, monitoring, reporting, record keeping and any other requirements needed to ensure that the case-by-case MACT emission limitation will be met.

The Notice of MACT Approval or other document serves to provide a mechanism for Federal enforceability of these conditions in the interim time period between initial operation of the constructed or reconstructed major source and the time the conditions are added to the title V permit. The EPA has added a provision under which a Notice of MACT Approval would expire if construction does not begin within 18 months from the issuance of the notice. Such an 18-month expiration period is included in criteria pollutant preconstruction review programs.

9. Compliance. Section 63.43(k) requires the permitting authority to establish compliance dates for MACT. For constructed and reconstructed major sources subject to a ``new source MACT'' level of control, compliance upon startup is required. Some commenters requested that compliance be required by the date 180 days after startup to allow for a ``shakedown'' period for controls. However, sources subject to this rule are also subject to the relevant requirements of subpart A of this part (the general provisions for part 63), including compliance requirements. Since subpart A does not require the first performance test until 180 days after startup, the EPA believes that a ``shakedown'' period for controls is already accounted for through subpart A.

To ensure Federal enforceability, section 63.43(l) of this rule requires that the Notice of MACT Approval or other such document contain, at a minimum, monitoring, record keeping and reporting requirements sufficient to document the source's compliance. Because major sources obtaining MACT determinations will incorporate that determination into a title V permit, this rule includes a requirement that the monitoring, record keeping, and reporting requirements required for a case-by-case MACT determination be consistent with the compliance requirements contained in part 70.

In addition to part 70 compliance requirements, additional requirements may need to be considered at the time of the MACT determination. Under section 114(a)(3) of the Act, EPA regulations for major sources must assure that owners or operators are accountable for their emissions and compliance status on a continuous basis. In this

way, the EPA is assured that the emissions reductions intended by regulations are in fact achieved. Some commenters noted that monitoring requirements were not consistent with the requirements being developed for the Compliance Assurance Monitoring (CAM) rulemaking. However, the CAM rule does not apply to new standards promulgated currently under section 112. A new program, such as section 112(g), should apply monitoring as directed by section 114(a)(3) of the Act.

It is important to distinguish between continuous compliance and continuous monitoring. Under section 112 of the Act, to demonstrate continuous compliance, a source may not be required to record emissions data on a continuous, instantaneous basis such as with a continuous emission monitor. Depending on the type of standard, regular parameter monitoring, equipment inspections, and/or maintenance of raw material records, etc., may be sufficient to demonstrate continuous compliance. For all standards, monitoring frequency must be based on the averaging time of the applicable limitation or standard, and the likely variability of potential emissions from a particular emissions unit. If the potential variability is high, monitoring must be done frequently. If the potential variability is low, monitoring may be conducted less frequently at regular intervals.

Where the Notice of MACT Approval or other such document fails to meet any requirement of section 63.43, EPA may exercise its authority under section 113(a)(5) of the 1990 Amendments to prohibit construction or reconstruction, issue an administrative penalty order or bring a civil action against the source upon finding that the State has not acted in compliance with any requirement or prohibition relating to the construction or reconstruction of new sources.

10. Reporting to National Data Base. Section 63.43(m) requires permitting authorities to provide EPA with information on all case-by-case MACT determinations issued under this subpart. The intent of this paragraph is to use EPA's MACT data base to store data on well-controlled sources and on previous MACT determinations to help facilitate the MACT determination process.

E. Section 63.44 Requirements for Process or Production Units Subject to a Subsequently Promulgated MACT Standard or MACT Requirement

The EPA anticipates that new source MACT requirements adopted with respect to construction or reconstruction of a particular source under section 112(g)(2)(B) will normally be at least as stringent as any subsequent requirements for existing sources adopted as part of a MACT standard issued under section 112(d). However, should a subsequently promulgated MACT standard impose more stringent requirements, the EPA

believes that it may be appropriate in some instances for the EPA to establish a later compliance date for those sources which have acted in reliance on a prior case-by-case MACT determination. This rule expressly provides that the EPA may establish separate compliance dates for facilities which have notified EPA of such determinations in a timely manner. Specifically, the EPA may establish, in the MACT standard, a later compliance date for those sources which have received a final and legally effective MACT determination pursuant to section 112(g), and have provided the EPA with data on their section 112(g) control determination by the end of the public comment period on the subsequent Federal standard.

In those instances where the subsequent MACT standard does not establish a compliance date for sources subject to a prior case-by-case MACT determination, this rule authorizes the permitting authority to grant up to 8 years of additional time for the affected

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source to comply with the subsequent MACT standard. The EPA has previously explained that the structure of section 112 as a whole supports such a construction of section 112(g), and a source may also be afforded up to 8 years to comply with a MACT standard in instances where a prior emission limitation has been established by permit under section 112(j).

This provision is a modified form of the provision that appeared in the original proposed rule. The original provision has been modified in two respects. First, commenters indicated that inequities might result from the fact that the original provision stated that the revised compliance date should not be more than 8 years after a standard promulgated under section 112(d), or 8 years after the date by which the source must comply with the MACT determination under section 112(g), whichever is earlier. For example, if a standard under section 112(d) is promulgated 7 years after a source's compliance date under section 112(g), the source might only have one year to comply with the standard under section 112(d). Therefore the EPA has removed this condition, and allowed the extension to be counted from the section 112(d) compliance date in all cases.

Second, commenters noted that the EPA had required, in Sec. 63.44(a), that a source must comply with a relevant section 112(d) standard if it has not yet obtained a ``final and legally effective MACT determination'' under section 112(g) before promulgation of the relevant section 112(d) standard. However, the EPA had required, in Sec. 63.44(b), that the source must have ``commenced construction'' in

order to be eligible for a compliance extension under section 112(d). In order to eliminate this inconsistency, the EPA has changed section 63.44(b) to require that the source must have obtained a ``final and legally effective MACT determination'' in order to be eligible for a compliance extension under section 112(d).

Several industry commenters felt that section 112(g) compliance should constitute compliance with subsequent MACT standards. The EPA is currently evaluating this issue in the context of setting policy for section 112(d) and section 112(j) standards. The EPA believes that in most cases the section 112(g) determination will be equivalent to MACT, but that this decision should be made on a case-by-case basis in the context of a determination under section 112(d) or section 112(j).

Several commenters requested EPA to clarify whether a source which met a new source section 112(g) MACT determination would be considered to be a new or existing source under a subsequent section 112(d) standard. According to section 112(a)(4) of the Act, if the source begins construction before the section 112(d) standard is proposed, then it is considered an existing source under a section 112(d) MACT standard. Sources constructed after a section 112(d) standard is proposed are treated as new sources under section 112(d). This applies as well to sources that have met new source MACT under section 112(g).

IV. Discussion of the Relationship of the Requirements of This Rule to Other Requirements of the Act

The previous sections of this preamble discuss the requirements of this rule in defining the requirements of section 112(g) of the Act as it relates to constructed or reconstructed major sources of HAP. In addition, there are a number of issues concerning the relationship between the requirements of section 112(g) and other requirements of the Act that are relevant to the implementation of the requirements of this rule. These issues are important in defining the overall responsibilities of States and the EPA in carrying out the requirements of section 112(g), and in understanding how section 112(g) requirements relate to other important requirements of the Act. The purpose of this section of the preamble is to present a number of regulatory and statutory interpretations related to these implementation issues.

A. Relationship of Section 112(g) Implementation to Title V Program Approval

Title V of the Act and the part 70 regulations provide that a State seeking to obtain or retain approval of a title V program must have

authority to assure compliance with all applicable requirements through the title V permit (section 502(b)(5)(A); 40 CFR 70.4(b)(3)(i)). The preamble to the operating permits rule explains that, in the context of section 112, the permitting authority must have authority to develop and enforce case-by-case MACT determinations under section 112(g).

This rule and preamble language represent what EPA considers to be the most natural reading of section 112(g). The EPA reads the reference in section 112(g)(2) to case-by-case determinations made by ``the Administrator (or the State)'' to mean that these determinations must be made by the title V permitting authority. This reading is consistent with the reference in section 112(g)(2) to the effective date of the title V program as the date on which the requirements of section 112(g) become applicable, and with the title V requirement that major sources of HAP submit applications for title V permits regardless of whether they are subject to a MACT standard. It is also consistent with the reference in section 112(j) to ``the Administrator (or the State)'' as the entity that must make case-by-case determinations of MACT and issue permits incorporating these determinations.

B. Relationship to the Section 112(l) Delegation Process

Under section 112(l) of the Act, States have the option of developing and submitting to the Administrator a program for implementing the requirements of section 112. The EPA promulgated a rule for the implementation of section 112(l) on November 26, 1993 (58 FR 62262). This rulemaking added sections 63.90 through 63.96 to 40 CFR 63.

During the mid to late 1980's, most States adopted regulations or procedures to review toxic air pollutant emissions from new (and modified) sources. In some cases, these programs already regulate all of the equipment covered by section 112(g). It is the EPA's view that the Act directly confers on the permitting authority the obligation to implement section 112(g) and to adopt a program which conforms to the requirements of this rule. Therefore, the permitting authority need not apply for approval under section 112(l) in order to use its own program to implement section 112(g). A State need simply certify that their State program meets the requirements of section 112(g), and notify the EPA to that effect. (For further discussion of this issue see section III.C., above.)

C. Section 112(i)(5) Early Reductions Program

Section 112(i)(5) allows owners and operators, that provide early

reductions in HAP emissions, to be granted a 6-year extension of any compliance date for emission standards issued under section 112(d). In order to participate in the section 112(i)(5) program, the owner or operator defines a ``source'' at a plant-site for which a 90 or 95 percent reduction in emissions can be accomplished before the proposal date of the emission standard. There are a few items of clarification on the relationship between the section 112(i)(5) requirements and section 112(g).

First, the extension granted by section 112(i)(5) applies only to that equipment incorporated within the ``source'' for

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which the 90 or 95 percent reduction was accomplished. Other equipment at a plant-site not included within that ``source'' definition are subject to section 112(g) requirements if they make changes that would be considered to be construction or reconstruction of a major source under this rule.

On the other hand, equipment within the ``source'' definition for which there is an approved early reductions submittal are not subject to further control technology requirements under section 112(g). Section 112(g) requires case-by-case MACT where no ``applicable emission limitation'' exist. The ``alternative emission limitation'' under section 112(i)(5) should be considered an ``applicable emissions limitation'' for purposes of section 112(g), such that compliance with such alternative emissions limitation shields a source from having to comply with section 112(g).

D. Subpart A ``General Provisions''

The EPA has promulgated ``general provisions'' to the MACT program as subpart A to 40 CFR 63. These general provisions contain a number of definitions and provisions that generally affect the subparts of part 63 that follow, including subpart B discussed here. In general, the relevant requirements of subpart A apply to sources subject to case-by-case MACT determinations under this rule. For example, requirements for monitoring, record keeping, and reporting established in subpart A apply to a section 112(g) source which uses the control equipment at which such requirements are directed. It should be noted, however, that specific preconstruction review requirements in subpart A apply only to standards promulgated under section 112(d), section 112(f), or section 112(h) of the Act--not to section 112(g), which establishes its own requirements. This is set out in section 112(i) of the Act, from which

subpart A draws its authority to require preconstruction review.

V. Administrative Requirements

A. Executive Order 12866

Under Executive Order 12866, (58 FR 51,735 (October 4, 1993)) the Agency must determine whether the regulatory action is ``significant'' and therefore subject to OMB review and the requirements of the Executive Order. The Order defines ``significant regulatory action'' as one that is likely to result in a rule that may:

(1) have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Although this rule will not have an annual effect on the economy of $100 million or more, and therefore is not economically significant, EPA has determined that this rule is a ``significant regulatory action'' because it contains novel policy issues. This action was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12866. Any written comments from OMB and any EPA response to OMB comments are in the public docket.

B. Regulatory Flexibility

The EPA considered the impact of this rule on small entities. In general, the EPA believes that very few small entities will actually be affected by the rule. Estimating the number of small entities that may be affected, however, is difficult due to the large number of industries potentially affected, and the need to predict the frequency of what is generally a fairly uncommon event, a small entity making an expansion which is itself a major source. In examining the potential

impact on small entities, the EPA took into account the factors listed in the Regulatory Flexibility Act, 5 U.S.C. 601 et seq., for conducting a final regulatory flexibility analysis.

The approach chosen in this final rule is a less burdensome option for small entities than the approach contained in the proposed rule. The proposed rule to implement section 112(g) contained requirements for modifications, as noted above. These requirements would have required control on many smaller equipment changes at industrial facilities. The EPA has chosen instead only to implement section 112(g)(2)(B) at this time (and not all of section 112(g)). By doing so, this rule eliminates much of the complexity inherent in the portion of section 112(g) which covers modifications to existing sources. It should be noted that some commenters requested that the EPA restrict section 112(g) requirements even further, to just covering construction of new ``greenfield'' facilities or reconstruction of entire plantsites. The EPA rejected this approach because the EPA believes it makes sense to control major sources at the time of construction when they are most cost-effective to control, whether or not they are constructed at existing plantsites.

C. Paperwork Reduction Act

The information collection requirements in this proposal have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. An information collection request (ICR) document has been prepared by the EPA (ICR No. 1658.01) and a copy may be obtained from Sandy Farmer, Information Policy Branch (2136), U.S. Environmental Protection Agency, 401 M Street, South West, Washington, DC 20460, or by calling (202) 260-2740.

The EPA prepared estimates of the average annual burden hours needed to collect and prepare information required under section 112(g). The burden estimates presented below are an accumulation of the estimated annual burden hours that would be experienced by industry respondents, State and local agencies, and EPA under the various regulatory scenarios. The approximate annual burden-hours that would be required would peak in 1999 at 167,134 hours, and reduce to 23,218 by 2003.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal

governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ``Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may

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significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. EPA has also determined that this rule contains no regulatory requirements that might significantly or uniquely affect small governments. This determination was made based on the analyses conducted for the proposal RIA.

E. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A) as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives and the Comptroller General of the General Accounting Office prior to publication of the rule in today's Federal Register. This rule is not a ``major rule'' as defined by 5

U.S.C. 804(2).

The statutory authority for this rule is provided by sections 101, 112, 114, 116, and 301 of the Clean Air Act as amended; 42 U.S.C. 7401, 7412, 7414, 7416, and 7601.

List of Subjects in 40 CFR Part 63

Environmental protection, Administrative practices and procedures, Air pollution control, Hazardous substances, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: December 13, 1996.
Carol M. Browner,
Administrator.