ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[FRL-_____]

Approval of State Programs and Delegation of Federal Authorities

AGENCY: Environmental Protection Agency (EPA)

ACTION: Proposed amendments; notice of public hearing.

SUMMARY: The EPA is proposing to change the Agency's current procedures for delegating to State, local, territorial, and Indian tribes as defined in 40 CFR 71.2 or agencies (i.e., S/L's) the authority to implement and enforce Federal air toxics emissions standards and other requirements. Specifically, these regulatory amendments propose to revise procedures and criteria for approving S/L rules, programs, or other requirements that would substitute for Federal emissions standards or other requirements for hazardous air pollutants (HAP) established under section 112 of the Clean Air Act (Act). Section 112(l) of the Act authorizes us to approve S/L programs when S/L alternative requirements are demonstrated to be no less stringent than the rules we promulgate.

These amendments would increase the flexibility of our existing regulations in 40 CFR part 63, subpart E that implement section 112(l) of the Act. They would provide a greater number of approval processes from which S/L's can

choose, increase the flexibility S/L's have to demonstrate equivalency for their alternative requirements, and provide options that will expedite the approval process. In addition, the policy guidance in this notice clarifies what S/L's must or can do to obtain delegated authority under subpart E, including how they can demonstrate equivalency for alternatives to Federal requirements.

These changes are in response to requests we received from State and local air pollution control agencies to reconsider our existing regulations in light of implementation difficulties they have experienced or anticipated. We believe this effort is consistent with the President's regulatory "reinvention" initiative, and it will result in less burden to S/L's, regulated industries, and the Federal Government without sacrificing the emissions reduction and enforcement goals of the Act. These amendments reduce the potential for redundant or conflicting air regulations on industry while they accommodate a wider variety of S/L program needs.

This rulemaking addresses requirements that apply to S/L's, should they choose to obtain delegation or program approval under section 112(l). (Obtaining delegation under section 112(l) is voluntary). This rulemaking does not include any requirements that apply directly to stationary sources of HAP or small businesses that emit HAP.

DATES: Comments. Comments must be received on or before [Insert date 60 days after publication in the Federal Register].

Public Hearing. Anyone requesting a public hearing must contact the EPA no later than [Insert date 2 weeks from the date of publication in the Federal Register].

ADDRESSES: Comments. Comments should be submitted (in duplicate, if possible) to: Air and Radiation Docket and Information Center (6102), Attention Docket Number A-97-29, Room M-1500, U. S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. The EPA requests a separate copy also be sent to the contact person listed below (see FOR FURTHER INFORMATION CONTACT). Comments and data may also be submitted electronically by following the instructions listed in Supplementary Information.

Public Hearing. If a public hearing is held, it will be held at the EPA's Office of Administration Auditorium, Research Triangle Park, North Carolina. Persons interested in attending the hearing or wishing to present oral testimony should notify the contact person listed below.

Docket. Docket No. A-97-29, containing information relevant to this proposed rulemaking, is available for public inspection and copying between 8:00 a.m. and

5:30 p.m., Monday through Friday, at the EPA's Air and Radiation Docket and Information Center (6102), 401 M Street, S.W., Washington, D.C. 20460; telephone (202) 260-7548. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. Tom Driscoll, Integrated Implementation Group, Information Transfer and Program Integration Division (MD-12), U. S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711; telephone (919) 541-5135; facsimile (919) 541-5509, electronic mail address "driscoll.tom@epa.gov."

SUPPLEMENTARY INFORMATION:

Regulated Entities. Entities potentially affected when the EPA takes final action on this proposed rule are S/L governments that voluntarily take delegation of section 112 rules, emissions standards, or requirements. The final action on this proposal will not regulate emissions sources directly. These categories and entities include:

Category	Examples
S/L governments	S/L governments that voluntarily request approval of rules or programs to be implemented in place of Act section 112 rules, emissions standards or requirements or voluntarily request delegation of unchanged section 112 rules

This list is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by final action on this proposal. This list contains the types of entities that EPA is now aware could potentially be regulated by final action on this proposal. Other types of entities not included in the list could also be regulated. The procedures and criteria for requesting and receiving approval of these S/L government rules or programs or voluntarily requesting delegation of section 112 rules are in §63.90 through §63.97, excluding §63.96, of this subpart.

Electronic Access and Filing Addresses. This notice, the proposed regulatory texts, and other background information are available in the docket and by request from the EPA's Air and Radiation Docket and Information Center (see ADDRESSES), or access through the EPA web site at: http://www.epa.gov/ttn/oarpg.

Electronic comments on the proposed National Emission Standard for Hazardous Air Pollutants (NESHAP) may be submitted by sending electronic mail (e-mail) to: a-and-r-docket@epamail.epa.gov. Submit comments as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on a diskette in WordPerfect 5.1 or 6.1 or ASCII file format. Identify all comments and data in electronic form by the

docket number (A-97-29). No confidential business information should be submitted through electronic mail. You may file comments on the proposed rule online at many Federal Depository Libraries.

Outline. The information presented in this preamble is organized as follows:

I. Purpose and Summary

One of the reasons Congress created section 112(l) of the Act was to recognize that many S/L's already had programs or regulations in place to reduce emissions of toxic air pollutants, and that some S/L's might wish to implement their programs or regulations in place of otherwise applicable section 112 standards. After promulgation of the initial subpart E regulations, some S/L's voiced the view that subpart E would be more useful if we could allow S/L's more flexibility in implementing their programs in place of section 112 standards. Based on these comments, we decided to investigate ways to provide more

flexibility, particularly through the use of a greater variety of regulatory pathways, so long as the result would clearly be emissions reductions equivalent to the Federal standard being replaced.

During the process of “reinventing” the subpart E regulations, we have solicited and responded to commenters through several different routes. First, we conducted two stakeholder meetings to assess the concerns not only of S/L’s, but also of industries indirectly affected by the subpart E regulations and environmental/public interest groups. We also benefited from the input of issue work groups comprised of representatives from the States, EPA Regions, and other EPA offices. We used input from the stakeholder meetings, as well as other meetings with S/L’s, to create a draft preamble and regulatory amendments which contained changes resulting from several commenters’ suggestions. We placed this draft on the Internet and solicited comments, which then resulted in additional changes which we believe will fulfill our goal of making the delegation of the section 112 standards easier, without sacrificing environmental protection.

Another way that we have involved stakeholders is through the Sacramento Protocol effort. Officials from the California Air Resources Board (CARB), the South Coast Air Quality Management District (SCAQMD), and the EPA

Headquarters and Region IX Offices collaborated to analyze five SCAQMD rules to determine whether they would achieve the same emissions reductions as the otherwise applicable section 112 standards. We discuss the results of the Sacramento Protocol in section X., of this preamble.

These proposed changes to the subpart E regulations will provide more flexibility in both accepting delegation of the section 112 standards and implementing approved alternative standards. In order to provide more flexibility to S/L's, we are proposing several broad-based changes: (1) allowing more approval options; (2) allowing use of holistic demonstrations to evaluate the stringency of S/L rules; and (3) providing more flexibility in monitoring, reporting, and recordkeeping (MRR).

First, to provide more flexibility and clarity, we have taken §63.94, "Approval of a State program that substitutes for section 112 emissions standards," and split it into two sections: §63.94, Equivalency by Permit (EBP) and §63.97, State Program Approval(SPA). The SPA option addresses approval of a broad variety of regulatory and enforcement vehicles. The EBP option could be used to expedite the section 112(l) review process significantly in those cases where just a handful of sources required to obtain permits under title V of the Act are affected by delegation of a

section 112 standard to a S/L (for example where a source category consists of just a few sources in a State).

We have included partial approval as another way to increase the flexibility S/L's will have when accepting delegation of the section 112 standards. When using partial approval, a S/L would only accept delegation for part of its program or its rule.

We also intend to add flexibility by allowing S/L's to implement their delegated standards through a greater variety of regulatory vehicles. The original subpart E regulations only allowed implementation of alternative rules through rulemaking or title V permits. However, we are proposing to expand the options for the implementation of alternative S/L rules by allowing S/L's to implement the delegated standards through rulemaking, title V permits, S/L permits, general permits, permit templates, and administrative orders.

In addition, we intend to increase the ability of S/L's to demonstrate that their standards are equivalent to the otherwise applicable section 112 standards by adopting a holistic approach to evaluating S/L standards. In other words, we would evaluate S/L standards as a whole to determine whether they would achieve equal or better emissions reductions than the otherwise applicable section 112 standard.

Finally, we propose to increase the amount of flexibility S/L's would have in comparing their compliance assurance measures to the compliance assurance measures in the otherwise applicable section 112 standard. Section X.D.3. of this preamble contains a detailed discussion of how we would compare the compliance assurance measures in an alternative S/L standard to the compliance assurance measures in the otherwise applicable section 112 standard. In general, we want to guarantee that S/L compliance assurance measures will ensure the same rate of compliance that our compliance assurance measures would ensure. Furthermore, we are proposing to allow the process developed under the Sacramento Protocol to be used as a supplement to the overall evaluation of S/L standards.

II. What is the subject and purpose of this rulemaking?

A. Reasons for revisiting section 112(l) regulations

Before the Act was amended in 1990 (1990 Amendments), many S/L's developed their own programs for the control of air toxics (i.e., HAP) from stationary sources. Some of these S/L programs have now been in place for many years and, for some of the source categories regulated by Federal emissions standards under section 112 of the Act, the S/L programs may have succeeded in reducing air toxics emissions to levels at or below those required by the Federal standards. For purposes of this discussion, the Federal

emission standards established under section 112 authority are codified in 40 CFR part 63. These standards are referred to as NESHAP.

These programs, developed to address specific S/L needs, often differ from the Federal rules we develop under section 112. As a result, S/L programs may result in controls or other requirements that, on the whole, are more stringent than, equivalent to, or less stringent than controls resulting from the corresponding Federal emissions standards in terms of the emissions reductions they achieve.

The U. S. Congress was very aware of S/L air toxics programs in the course of developing the 1990 Amendments to the Act. Seeking to preserve these programs, Congress included provisions in section 112(l) that allow us to recognize S/L's air toxics rules or programs in place of some or all of the corresponding Federal section 112 requirements. In other words, we may approve S/L rules or programs if they meet certain criteria (such as demonstrating adequate resources, legal authorities, level of control, and compliance and enforcement measures) and allow them to substitute for part 63 NESHAP regulations established under sections 112(d), 112(f), or 112(h) (or other section 112 requirements such as the Risk Management Program addressed in section 112(r) and 40 CFR part 68). In addition, section 112(l) allows us to delegate to S/L's the

authority to implement and to enforce part 63 NESHAP exactly as we promulgate them, that is, without any changes.

Thus, a S/L may obtain delegated authority to implement and enforce a NESHAP in either of two circumstances: (1) when the S/L has taken delegation for unchanged Federal standards, a process called "straight" delegation, or (2) when the S/L obtains approval for rules or other requirements that substitute for the Federal NESHAP requirements. Under section 112(l), submission of any rules or programs by S/L's for approval and delegation is voluntary. If S/L's do not obtain approval or delegation, we continue to have primary authority and responsibility to implement and to enforce section 112 regulations.

Overall, the goal of section 112(l) is to allow S/L regulators to implement and enforce their programs (or rules) to control emissions of HAP from stationary sources, provided those programs achieve results that are equivalent to the Federal program. We believe that Congress intended S/L's to be the primary authorities responsible for carrying out the mandates of the Federal air toxics program. Where S/L air toxics regulations control emissions of HAP as stringently as NESHAP, we believe that it is Congress's intention in section 112(l) to integrate these programs with the Federal air toxics program as it was revised in 1990. (S/L's may also have volatile organic compounds (VOC),

particulate matter (PM), or lead (Pb) regulations developed under section 110 of the Act that indirectly control emissions of HAP and that may, in some cases, be substituted for section 112 requirements.)

Section 112(l) allows the integration of Federal and S/L programs in order to minimize the potential for "dual regulation." Dual regulation refers to a situation in which sources of HAP are subject simultaneously to S/L and Federal requirements that overlap, conflict, or are otherwise duplicative. By working together to minimize the potential for dual regulation, we and our S/L co-regulators hope to reduce unnecessary burden associated with (1) complying with section 112 air toxics control requirements, and (2) issuing permits and otherwise implementing or enforcing those requirements. We consider burden "unnecessary" when it does not materially contribute to assuring that sources of HAP achieve the emissions reduction goals established by our Federal section 112 requirements, or it does not contribute toward assuring compliance with those requirements.

Under section 112(l)(2) of the Act, we are required to publish "guidance" that governs how S/L's may develop and submit, and how we may approve, S/L air toxics rules or programs that meet the goals of the Act and the Federal air toxics program. On November 26, 1993, we finalized regulations that carried out this mandate. (See 58 FR

62262, Approval of State Programs and Delegation of Federal Authorities, Final rule). The November 26, 1993 regulations, which can be found in 40 CFR part 63, subpart E, provide regulatory "guidance" regarding approval of S/L rules or programs that can be implemented and enforced in place of Federal section 112 rules as well as the delegation of our authorities and responsibilities associated with those rules. Under subpart E, such agencies may obtain approval from us to implement and enforce provisions of their own air pollution control programs in lieu of federally promulgated NESHAP and other section 112 requirements for stationary sources. Once approved, S/L rules and applicable requirements resulting from those rules are considered federally enforceable and substitute for the Federal requirements that would otherwise apply to those stationary sources. Overall, the subpart E regulations assure that all sources of HAP that are subject to regulation under section 112 achieve the emissions reductions that are intended by the Federal emissions standards or other requirements.

The current subpart E provides several different processes (that we also refer to as options) that a S/L may pursue to obtain delegation or program approval. A S/L would pursue one or more of these delegation/approval processes based on the particular programmatic needs and

goals of that agency. A S/L may "mix and match" the various processes provided in subpart E to minimize the overall burden associated with program approval and to obtain the desired delegation outcome. In addition to providing the procedural requirements for delegation and program approval, subpart E describes the necessary criteria and other requirements a S/L rule or program must meet in order for us to approve it.

After subpart E was promulgated, several S/L's raised concerns to us about making these regulations more workable. Since August 1995, we have been engaged in discussions with S/L representatives to understand their concerns and to rethink how subpart E might be better structured to accomplish its goals. These discussions have focused on and benefitted from experiences to date actually implementing the approval processes included in subpart E. Based on these experiences and the relative maturity of the air toxics and the title V operating permits programs since promulgation of the subpart E rules in 1993, we believe it is appropriate at this time to revise the subpart E regulations.

Thus, in this notice, we are proposing to amend the existing subpart E regulations to make them easier to use. One goal of this effort is to introduce additional flexibility into the subpart E approval processes and

criteria in order to accommodate a wider variety of S/L program needs, without sacrificing the emissions reduction and enforceability goals of the Act. Through this effort, we hope to provide additional flexibility to S/L in how they accept delegation for the section 112 program, including how they are required to establish the equivalency of their alternative requirements. We believe this will result in less overall burden to S/L in seeking approval for delegation requests, to us in approving such requests, and to regulated industries in complying with the array of S/L and Federal regulations to which they are subject. In making it easier for S/L to obtain delegation (and in minimizing disruption of S/L programs), we hope to achieve the second critical goal of this effort to revise subpart E, to further minimize the likelihood of dual regulation of stationary sources.

B. Legal and policy framework for revising section 112(l) regulations

In proposing revisions to the subpart E regulations, we have provided as much additional flexibility as we believe is appropriate, both in light of the statute and given our need to assure the American public that they are getting the same or better environmental protection from the S/L requirements that would replace the Federal section 112 requirements. We believe that the flexibility provided in

the subpart E delegation/approval processes cannot compromise the environmental results or the enforceability of the otherwise applicable Federal requirements.

Equivalency demonstrations that S/L's submit for specific alternative section 112 requirements must show that the alternative requirements achieve the emissions reductions required by the otherwise applicable Federal requirements. They also must demonstrate equivalency on an affected source basis.[1] However, this does not mean that S/L's must demonstrate "line-by-line" equivalency with the section 112 requirements.

As a legal matter, only the EPA has the authority to approve alternative section 112 requirements that apply to a category of sources for which we have promulgated Federal emissions standards. In other words, we may not delegate to S/L's the authority to make findings of equivalency between their programs' requirements and the requirements of the otherwise applicable Federal standards.

In these rule revisions, we are proposing that the "test" for equivalency between the S/L and Federal requirements should be the same no matter which delegation/approval option a S/L chooses to pursue among the

[1]Affected source is a defined term in §63.2 of the part 63 General Provisions. It refers to the portion of a stationary source that is regulated by a Federal section 112 emissions standard or requirement.

options that allow alternative requirements to be substituted for Federal requirements. By "test" we mean the criteria that we would use to determine whether S/L requirements are as stringent as ours in terms of the effect they would have on achieving the required emissions reductions, assuring compliance, and enabling appropriate enforcement actions.

Before discussing the proposed changes to subpart E, we thought it would be useful to identify who is subject to this rulemaking, describe the process that was used to arrive at the decisions in this package, review background on the existing structure and content of subpart E, and summarize the key S/L concerns that we have addressed in this and previous actions.

III. Who is subject to this rulemaking?

This rulemaking addresses requirements that apply to "States," should they choose to obtain delegation or program approval under section 112(l) of the Act. Submission of rules or programs by "States" for approval and delegation under section 112(l) is voluntary. The definition of "State" in subpart E covers all non-Federal authorities, including local air pollution control agencies, statewide programs, Indian Tribes, and U.S. Territories. Because these authorities are the primary intended audience for this regulation, from this point on we use "you" or "your" to

address our comments directly to any or all of these authorities. In addition, we may also refer to these authorities as S/L. Note, however, that any requests for comment on these proposed amendments are directed to the public-at-large, not just S/L.

Consistent with the existing subpart E regulations that govern section 112(l) delegations and approvals, this rulemaking does not include any requirements that apply directly to stationary sources of HAP. We regulate HAP sources by developing NESHAP and other types of requirements under section 112. The subpart E regulations that are the subject of this rulemaking merely establish criteria and procedures for determining the governmental agency that will have primary responsibility within a jurisdiction for implementing and enforcing our emissions standards (and other substantive section 112 requirements), and they establish the processes by which you may implement regulations that, while not identical to our emissions standards, achieve the same or better results.

IV. What process was used to arrive at the decisions in this rulemaking?

In August 1995, S/L air pollution control program officials, presented to us their views as to why the current subpart E rule needs to be revised. They indicated that subpart E does not provide sufficient flexibility for you to

use its delegation options, and that the requirements for establishing that your programs result in equivalent or better emissions reductions are too burdensome. During the succeeding 2 years, we held numerous discussions with representatives of S/L air pollution control program officials to better understand their views and to develop options for addressing their concerns while still assuring that the requirements of the Act are met. After developing some approaches for responding to S/L air pollution control program officials' concerns, we involved a wider group of stakeholders, e.g., industry and public interest groups, to alert them of our plans and to ask for their input. For example, we held meetings with the Toxics/Permitting/New Source Review Subcommittee of the Clean Air Act Advisory Committee in Washington, DC, with stakeholders in Los Angeles, California on December 5 and 6, 1996, and with stakeholders in Washington, DC on February 26, 1997 and July 9 and 10, 1997 to gather their input. We also undertook a study with CARB and SCAQMD to analyze emission reductions of their rules compared with the otherwise applicable section 112 standards.

V. How do the delegation options currently in subpart E work?

A. Four ways to obtain delegation under the current subpart E

The following discussion explains the delegation options currently available to you under the existing subpart E regulations. Sections VII. through X. of the preamble, below, explain how we are proposing to modify and expand these delegation options to give you more choices in how you may seek delegation for one or more section 112 emissions standards or requirements.

Subpart E as currently written contains four ways for you to obtain delegation. You may use any one or any combination of these options in your request for approval of your rules, authorities, or programs. (If you are accepting delegation of all Federal section 112 rules without changes, streamlined delegation mechanisms are available. See the original subpart E proposal preamble, 58 FR 29298, May 19, 1993, and the direct final amendments in 61 FR 36295, July 10, 1996.) Under each of these delegation options, you must demonstrate that each of your rules, standards, or requirements (as appropriate) for an affected source is no less stringent than the Federal rule, emissions standard, or requirement that would otherwise apply to that same affected source.

The four ways to obtain delegation are listed.

1. Unchanged Federal Standards -- "Straight" delegation to implement an unchanged Federal standard or requirement. Under this process, you may receive delegation

for Federal standards and requirements that are unchanged from the promulgated requirements, as well as delegation of authority for unchanged rules and standards that we will issue in the future. These provisions are addressed in §63.91 and in various guidance memoranda and documents, including "Interim Enabling Guidance for the Implementation of 40 CFR Part 63, Subpart E" (EPA-453/R-93-040, November 1993).

2. Rule Adjustment -- Delegation to implement a Federal standard through approval of your rule (or rules) that adjusts a Federal rule in minor ways that are already listed in subpart E, §63.92. Each adjustment taken individually must be no less stringent than the corresponding requirement in our standard. If your rule meets the criteria listed in §63.92, you can receive approval to replace our rule with yours very quickly.

3. Authority Substitution -- Delegation to implement a Federal standard through approval of your rule (or rules, or other authorities) that adjusts a Federal rule in significant ways that are not predefined in subpart E and are no less stringent. Taken as a whole, the adjustments must result in rules (or other authorities) that are equivalent to, or no less stringent than, the Federal standard in terms of the emissions reductions that they require. These provisions are addressed in §63.93.

4. Program Approval -- Delegation to implement some or all Federal emissions standards through development of terms and conditions in 40 CFR title V operating permits, rather than through approval of your substantive rules. First, through an "up-front" approval, we ratify your commitments to develop appropriate permit terms and conditions; later, we review the proposed permits for sources affected by the NESHAP. Through the title V permitting process you may change requirements in the Federal emissions standards, provided that the results of each change are equivalent to (i.e., unequivocally no less stringent than) the corresponding Federal requirements and you demonstrate the equivalency of your alternative requirements by presenting the proposed permit terms and conditions in the "form" of the Federal standard. By "form" of the Federal standard, we mean the terms and units of measurement in which the requirements are expressed. These provisions are addressed in §63.94.

B. General approval criteria for delegations under the current subpart E

To obtain delegation under any of these approval processes, you must demonstrate that you have met certain basic approval criteria that are listed in §63.91 as well as any additional process-specific approval criteria that are included in the sections that address the delegation

mechanisms that you choose to pursue. To obtain approval for your rule or program, §63.91 requires you to demonstrate to us that you have adequate legal authority and resources to implement and enforce your rule or program upon approval. You must also demonstrate that your rule or program assures that all sources within your jurisdiction will comply with each applicable section 112 rule. In addition, you must provide an expeditious implementation schedule, a plan that assures expeditious compliance by all sources subject to the rule or program, and a copy of each of your statutes, regulations, and other requirements that contain the appropriate provisions granting authority to implement and enforce your rule or program upon approval. In general, title V program approval is sufficient to demonstrate that you have satisfied
subpart E's general approval criteria in §63.91, at least for sources permitted under your title V program.

C. Specific approval criteria and administrative process requirements for delegations under the current subpart E

1. §63.91 "straight" delegation

Under the "straight" delegation option in §63.91, you may implement Federal section 112 requirements without changes. You may use this option when you want to accept delegation of an existing or a future Federal section 112 standard as promulgated. The approval process under

§63.91 consists of notice and comment rulemaking in the Federal Register. Upon approval of your request for delegation of Federal section 112 rules as promulgated (there are some variations for section 112(r) accidental release programs), we would publish the approval in the Federal Register and incorporate it, directly or by reference, in the appropriate subpart of part 63. In addition, you can establish a mechanism for future delegation of section 112 standards as promulgated (e.g., automatic or adoption by reference) that is suitable for your State's method of adopting regulations. Future delegations of promulgated section 112 rules would not have to go through an additional Federal Register public notice and comment. This mechanism can be similar to the process established under EPA's 1983 guidance in the "Good Practice Manual for New Source Performance Standards (NSPS) and NESHAP."

Alternatively, you could choose to submit separate §63.91 requests for delegation of each specific 112 requirement. If no adverse comments are expected, we can do direct final rulemaking to streamline the delegation of these section 112 requirements. Under this option, the Federal Register notice would state something like "...unless adverse comments are received, this action will be considered final in 21 days."

For additional detail on how this and the other current subpart E delegation options work, see "Interim Enabling Guidance for the Implementation of 40 CFR Part 63, Subpart E" (EPA-453/R-93-040, November 1993).

2. §63.92 rule adjustment

Under the rule adjustment option in §63.92, we can approve one (or more) of your rules that is structurally very similar to, and is clearly at least as stringent as, the Federal rule for which you want to substitute your rule(s). Under this option, you may only make an adjustment to the Federal rule that results in emissions limits and other requirements that are clearly no less stringent, on an affected source basis, than the Federal rule. There can be no ambiguity regarding the stringency of any of the proposed adjustments. Section 63.92 includes a list of rule adjustments that may be approved under this option -- for example, lowering a required emissions rate or subjecting additional emissions points within a source category to control requirements. We consider all of these adjustments to result in requirements that are more stringent than the corresponding Federal requirements. In addition, your rule must have undergone public notice and provided an opportunity for public comment in your jurisdiction before you submit it to us for approval. If we find that the necessary criteria are met, we would approve your rule with

adjustments, and it becomes federally enforceable in lieu of the otherwise applicable section 112 rule. Upon approval, your rule would be published in the Federal Register and incorporated directly or by reference into part 63, without additional notice and opportunity for comment.

3. §63.93 substitution of authorities

Under §63.93, substitution of authorities (which is commonly referred to as the rule substitution option), we can approve substitution of one (or more) of your rules or requirements for a Federal rule, where your rule is structurally different from the corresponding Federal rule. Under this section, we also may approve a rule that is different from the Federal rule in ways that do not qualify for approval under §63.92 -- that is, in ways that are not "unambiguously no less stringent." This situation might arise when you submit a rule that was written independently of the Federal rule or when, for example, your rule achieves equivalent emissions reductions, but with a combination of levels of control and compliance and enforcement measures not addressed in or by the Federal rule. (Level of control and compliance and enforcement measures are terms that are defined in §63.90.) Any rules or other requirements that you submit under this section must be enforceable under your State law.

Under the existing subpart E rule language, authorities that you may submit for approval under this section include the following:

(1) S/L rules or other requirements enforceable under State law; or

(2) in the case of alternative work practice standards, specific title V or part 71 permit terms and conditions for the source or set of sources in the source category for which you are requesting approval under subpart E. The permit terms and conditions must address control requirements as well as compliance and enforcement measures.

Under §63.93, you must make a detailed demonstration that your rule (or other authorities) would achieve equal or greater emissions reductions (or other measure of control stringency where appropriate) for each affected source regulated by the Federal section 112 rule. Upon receipt of a complete request for approval of a substituted rule (or other authorities), we would conduct a rulemaking to request public comments on the proposed substitution. If we find that your demonstration is satisfactory and the public comments do not dissuade us, we would approve your rule, publish it in the Federal Register, and incorporate it directly or by reference into part 63. Your approved rule and/or requirements would be federally enforceable and they

would replace the otherwise applicable Federal rule in your jurisdiction for the affected sources.

The approval criteria in §63.93(b)(2) require that, in any request for approval under this section, you provide detailed documentation that your authorities contain or demonstrate:

(1) Applicability criteria that are no less stringent than those in the respective Federal rule. Applicability criteria is also a term that is defined in §63.90;

(2) Levels of control and compliance and enforcement measures that would achieve emissions reductions from each affected source that are no less stringent than would result from the otherwise applicable Federal standard;

(3) A compliance schedule that assures that each affected source is in compliance no later than would be required by the otherwise applicable Federal rule; and

(4) Additional criteria specified in §63.93(b)(4) that are not repeated here.

To obtain approval under §63.93, you must demonstrate that you have satisfied the approval criteria in §63.93(b) in addition to the approval criteria in §63.91(b). As we mentioned earlier, you may usually demonstrate that you have satisfied §63.91(b) if you have an approved title V or part 71 operating permits program. In addition, once you have demonstrated that you have satisfied the §63.91(b) criteria

under a §63.93 approval action, you generally would not have to repeat the §63.91(b) demonstration when you submit additional rules for approval in the future, provided that your approved resources, authorities, and other program elements are still adequate to implement and enforce the rules for which you are seeking delegation, and provided that you are not seeking delegation for rules that affect sources that your original program approval did not address (e.g., area sources). Another example of a situation in which you may need to resubmit §63.91(b) approval elements is when you submit for approval an alternative compliance and enforcement strategy that involves a more resource-intensive inspection program than the one previously approved.

4. §63.94 program approval

Under the current program approval option in §63.94, we may approve your program so that you can substitute alternative requirements for one, some, or all section 112 emissions standards through the title V or permitting process. Currently, this option is available only for sources that will be permitted under title V.

For approval to implement and enforce your program in place of the otherwise applicable Federal section 112 emissions standards, you must make a number of legally binding commitments:

(1) First, you must commit to regulating every source that would have been regulated by the Federal section 112 emissions standards for which your program is intended to substitute;

(2) Second, you must provide assurance that the level of control and compliance and enforcement measures in each 40 CFR title V permit you issue for these sources is at least as stringent as those that would have resulted from the otherwise applicable Federal emissions standards;

(3) Finally, you must commit to expressing the 40 CFR title V operating permits conditions in the "form" of the otherwise applicable Federal standard. This means that you must commit to translating your standards from the "form" you have used in your rules to the Federal "form" so that operating permits conditions are expressed in the same terms and units of measure and include the same monitoring and test procedures as in the Federal rule or federally approved alternatives. This means that you must use monitoring and testing methods which we have approved for application under the Federal rule.

To approve these commitments and identify the list of sources or source categories for which you intend to use this option, we would do a notice and comment rulemaking in the Federal Register. We refer to this rulemaking as the "up-front" approval. Our approval of alternative

requirements for specific sources would take place during the title V permit issuance process. Thus, beyond the "up-front" approval of your commitments and other legal authorities, under this option we do not conduct rulemaking to approve your alternative, source-specific requirements.

This mechanism, including the "form" of the standard approval criterion in §63.94(b)(2)(D), was intended to provide us with an opportunity for expedited review of your alternative requirements in the form of title V permit terms and conditions during the permit issuance process, instead of requiring us to examine and approve source category rules through the authority (rule) substitution option in §63.93. The title V permit issuance process includes opportunities for public and EPA review, and for EPA objection, of the proposed alternative S/L requirements; therefore, it can serve as the approval mechanism in lieu of Federal rulemaking under this option. In addition, the permit itself acts as the Federal enforcement mechanism under this option. Upon our approval of the proposed permit, the alternative requirements become federally enforceable and replace the otherwise applicable Federal section 112 requirements for that particular standard (or standards) for that particular source.

The program substitution option as currently written allows you to substitute an entire program of alternative

air toxics rules for all or some of the Federal section 112 rules. This type of situation might arise if you have a mature air toxics program with many regulations affecting source categories regulated by Federal section 112 standards. If we approve your program under this option, you can implement and enforce alternative NESHAP requirements for specific emissions standards that are identified in the "up-front" program approval. These emissions standards and/or requirements may have been established under sections 112(d), 112(f), 112(h), or other section 112 provisions.

D. Federal enforceability of approved requirements

Our promulgated section 112 standard is the applicable and federally enforceable standard until we approve your rule or program to take its place following the procedures and criteria in subpart E. Your rule or program requirements become the applicable and federally enforceable standard starting on the date of approval of your rule, program, or other requirement (or in the case of §63.94 program approval, starting on the date of permit issuance). Under subpart E, §63.91(a)(6), the date of approval is the date of publication in the Federal Register. After the approval date, our promulgated standard is no longer applicable or enforceable for the sources in your jurisdiction.

Although you become the primary implementation and enforcement authority when you accept delegation for a section 112 emissions standard, we continue to have concurrent authority to enforce the standard which, depending on the delegation mechanism you used, may be either your approved rule or the unchanged Federal standard. In other words, after we approve your rule or program, we still have the authority to enforce the complete emissions standard, including any "alternative" requirements arising from your rule or program. This authority is spelled out in section 112(l)(7) of the Act and §63.90 and §63.97 of the proposed rule. Nothing in these amendments changes our interpretation of section 112(l)(7), or how it is implemented through subpart E.

E. Purpose of up-front approval for all subpart E delegation options

No matter which subpart E delegation option(s) you pursue, you must demonstrate that you have satisfied the general delegation/approval criteria contained in §63.91(b). In addition, under the current rule, to obtain delegation/approval under a particular option in §63.92, §63.93, §63.94, or §63.95, you must demonstrate that you have satisfied the additional approval criteria specified in the relevant section.

The rulemaking we conduct under each subpart E delegation option to codify our finding that you have satisfied the up-front approval criteria serves several critical functions under section 112(l). First, the process of approving the up-front portion of your program assures that you have met the delegation criteria in section 112(l)(5) (as codified in §63.91(b)), that is, that you have demonstrated adequate authority and resources, an expeditious implementation schedule, an adequate enforcement strategy, and that your program is likely to satisfy the objectives of the Act. (To the extent that these have already been satisfied through a title V program approval, you need not resubmit information demonstrating that you meet the §63.91(b) criteria. As we explain later, we believe that title V program approval often is sufficient to demonstrate that you have met the §63.91(b) criteria.)

Second, our section 112(l) approval of your program provides the legal foundation by which section 112 requirements may be replaced by your alternative requirements such that your requirements become the federally enforceable requirements in lieu of the applicable Federal requirements. By acting on your program as a whole, we are satisfying certain prerequisites for removing the Federal requirements from the list of applicable requirements to which sources are subject for enforcement

purposes (and that must be accounted for in sources' title V permits). The up-front approval component under the subpart E approval processes is necessary for you to apply your alternative requirements to section 112-affected sources and have those requirements be considered federally enforceable.

Third, the up-front approval step provides for an orderly way of identifying which authorities have been delegated to you in relation to specific Federal emissions standards or requirements. Delineation is necessary for us, the public, and the regulated community to ascertain readily what requirements apply to each affected source. Without this process, there is no way to distinguish legally and practicably which emissions standards or requirements apply to each affected source and which agency has primary implementation and enforcement authority for each affected source. (It is particularly important to clarify which agency has primary enforcement authority for Federal requirements as they apply to particular sources before those requirements are incorporated into sources' title V permits.) This is why we require you to specifically request in your submission for approval the Federal section 112 authorities for which you are seeking delegation. It would be assumed that all other existing (i.e., promulgated) or future Federal requirements not cited are not delegated to you.

If, in the future, you would like to expand the coverage of your approved program to include additional Federal requirements, you must repeat the up-front approval step to identify those requirements, the affected source categories, and any additional information that we need to approve by rulemaking to allow you to implement and enforce your alternative requirements for those categories. You would also be required to certify that nothing in your program has changed in any way that affects your ability to meet the §63.91(b) approval criteria.

This is not to say, however, that you must resubmit information that you have already submitted and had approved under title V. Previously, in the subpart E promulgation preamble (see 58 FR 62271-72), we stated that "the information which must be submitted by a State under part 70 encompasses the information required under section 112(l)(5) for approval of State programs that seek only to implement and enforce Federal standards exactly as promulgated," and "for part 70 sources, part 70 approval also constitutes approval under section 112(l)(5) of the State's programs for delegation of section 112 standards that are unchanged from Federal standards as promulgated." This means that, for delegation requests under the existing subpart E regulations where the §63.91(b) approval criteria are the only criteria that you must satisfy, i.e., for “straight” delegation

situations, you can demonstrate that you have satisfied the §63.91(b) criteria by demonstrating title V program approval (for the sources for which you are accepting delegation that are covered by your title V program).

F. EPA can withdraw approval if a S/L is inadequately implementing or enforcing its approved rule or program

Section 63.96 in subpart E addresses what happens if we find that you are not implementing or enforcing your approved rule or program according to the criteria you agreed to when you obtained delegation. Section 63.96 lays out procedures and criteria that address program corrections and program withdrawals. For example, at any time after we approve your rule or program we may ask you to provide us with information that shows how you are implementing and enforcing the rule or program. If we have reason to believe that you are not adequately implementing or enforcing your approved rule or program (or that the approved rule or program is not as stringent as the otherwise applicable Federal rule, emissions standard, or requirements, or that you no longer have adequate authorities and resources to implement and enforce), we would inform you in writing of our findings and the basis for them. You then have an opportunity to correct the deficiencies and to inform us of the corrective actions you have undertaken and completed.

If we find that your actions are not adequate to correct the deficiencies, we would notify you that we intend to withdraw approval of your previously approved rule or program (or part of it). The withdrawal process includes opportunities for a public hearing and a public comment period.

Based on public comments received, and your reaction to them, we may notify you of changes or actions that we think are needed to correct your rule or program deficiencies. If you do not correct these deficiencies within 90 days, we would withdraw approval of your federally enforceable rule or program. Upon withdrawal, your rule is no longer federally enforceable and the Federal rule that it had replaced again becomes the federally enforceable set of applicable requirements for the subject sources. With the withdrawal notice, we would publish an expeditious schedule for the sources subject to your previously approved rule or program to come into compliance with the applicable Federal requirements. You would need to revise the title V operating permits for any sources that were subject to your previously approved rule or program.

Section 63.96 also provides that you may submit a new rule or program (or portion) for approval after we have withdrawn approval of your rule or program (or portion). You may also voluntarily withdraw from an approved rule or program (or portion) by notifying us and all subject sources

and by providing notice and opportunity for public comment within your jurisdiction. If you voluntarily withdraw from approval, we would publish an expeditious timetable for sources to come into compliance with the applicable Federal requirements and you would revise their title V operating permits to reflect the new requirements.

VI. What concerns have S/L's raised regarding the current subpart E delegation options and what actions have EPA taken to address these concerns?

A. S/L issues with subpart E

On August 14, 1995, S/L air pollution control program officials presented us with a list of issues and implementation difficulties that they associate with subpart E's requirements. This list was compiled by S/L representatives based on their actual experiences with subpart E and on anticipated difficulties with forthcoming submissions for approval. As we understand their concerns, some of their major issues are that subpart E appears to require a "line-by-line" equivalency demonstration between your requirements and ours, and that you must present your alternative requirements in the "form" of the Federal standard. "Form" of the standard refers to the terms, such as units of measure, in which emissions limits and compliance and enforcement measures are expressed. (For example, if a certain Federal emissions standard requires an

emissions limit of 5 pounds per hour of a HAP from a particular piece of equipment, you would have to express an emissions limit resulting from your programs' requirements in the same units, i.e., pounds per hour, and the actual limit would have to be 5 or fewer pounds per hour in order to be no less stringent than the Federal standard.)

We think these concerns arise from language in §63.94 that requires separate equivalency demonstrations for emissions limits, compliance and enforcement measures (MRR), and compliance dates. These provisions were included because we believed it would simplify and speed our and the public's analysis that your program's alternative requirements achieve the same or better results than our rules or programs; without these provisions, we believe we would not have the resources to perform this analysis during our 45-day review period for each permit. Our understanding is that they believe these provisions limit your flexibility to substitute your requirements for the Federal requirements. They asked us to remove the "form" of the standard and line-by-line equivalency requirements from subpart E. This is the key issue we addressed through these regulatory amendments and clarifications to subpart E.

Another one of their concerns with subpart E as it is currently structured pertains to the length of the approval process for a rule substitution under §63.93. Section 63.93

allows us to take up to 180 days to review and act on your submittal, consistent with section 112(l)(5) of the Act, which allows us 180 days to approve or disapprove a "program.” They expressed concern that the 180-day review period may cause delays for the regulated community, and they requested that we explore ways to expedite the approval process.

They also expressed concern that the program approval option in §63.94 does not include a mechanism for you to accept delegation of the Federal requirements for section 112 area sources that are not required to obtain title V operating permits. You asked us to revise subpart E so that a mechanism is available to delegate changed Federal standards for both title V and non-title V sources.

They also asked us to clarify how you may substitute alternative work practice standards (WPS) for federally promulgated WPS under section 112(l). One of their concerns relates to the equivalency criteria for "nonquantifiable WPS," that is, those WPS for which the expected emissions reductions or specific performance requirements cannot be quantified.

They reiterated their concern about the potential for dual regulation if you are unable to demonstrate equivalency and obtain approval to implement and enforce your rules or programs in place of ours. As we mentioned earlier, dual

regulation describes the situation where sources must comply simultaneously with overlapping, redundant, inconsistent, or incompatible S/L and Federal requirements. While we do not think this situation will occur very frequently, we agree that it should be avoided wherever possible.

On October 30, 1997, the California Air Resources Board (CARB) presented us with detailed comments on an initial draft of these proposed rule revisions. In general, they suggested expanding the universe of acceptable regulatory vehicles that you could use to substitute for Federal standards. Our detailed response, including clarification of what regulatory vehicles may and may not be used under what circumstances, is contained in section VI.B.2. below.

B. What actions have EPA taken to address S/L's concerns?

This section describes the rule changes and policy clarifications that we are making, or have already made, in response to your comments and suggestions.

1. Summary of flexibility added to subpart E prior to these proposed amendments

Even before this rulemaking action, we took several steps to address your concerns. As a first step, through a direct final Federal Register notice that was published on July 10, 1996 (see 61 FR 36295, "Approval of State Programs and Delegation of Federal Authorities," Direct final rule), we made various changes to the rule language in subpart E.

Because there were no adverse comments, the direct final rule became effective on August 19, 1996. That rulemaking effected the following changes:

(1) It deleted a duplicative requirement in §63.93 that sources report the results of all required monitoring or testing at least every 6 months under an approved S/L rule or program. This requirement was duplicative of reporting requirements already included in individual NESHAP standards and the title V permit program regulations.

(2) It clarified the process for "straight" delegation of future NESHAP standards through a single, advance program approval.

(3) It established the regulatory framework under which you can obtain section 112(l) approval for S/L programs that create federally enforceable limits on sources' potential to emit HAP.

(4) It delayed the requirement that you coordinate with the Chemical Safety and Hazard Investigation Board (established by section 112(r)) until the board is convened.

In addition, since August 1995, we issued two policy memoranda to clarify the flexibility that we believe already exists under §63.93 for making equivalency determinations between S/L and Federal rules. (See,

(1) “Section 112(l) Submittal Equivalency Determination - Recordkeeping Requirements, John S. Seitz, Director, Office of Air Quality Planning and Standards (MD-10) to David Howekamp, Director, Air and Toxics Division, Region IX, June 26, 1995.” and (2) “Clarification to the June 26, 1995 Memorandum, ‘Section 112(l) Submittal Equivalency Determinations - Recordkeeping Requirements’, John S. Seitz, Director, Office of Air Quality Planning and Standards (MD-10), Regional Air Division Directors, November 26, 1996.” Both memos are located in the docket.) These memoranda clarified our interpretation of the "holistic" approval criteria in §63.93(b)(2) as it is currently written. Essentially, we stated that, in order to demonstrate the equivalency of your substitute rules (or other requirements or authorities) with one of our NESHAP standards, you must demonstrate that your rule would result in equivalent emissions reductions. Provided you can demonstrate that the level of control and MRR of your rule, when taken as a whole, result in equivalent or better overall emissions reductions, and provided that your requirements do not compromise Federal enforceability, the existing subpart E regulations allow us to approve your compliance measures even when they differ from our rules in form and stringency. In other words, line-by-line equivalency with the Federal rule for MRR is not required if

your alternative rule as a package is demonstrated to be as stringent as the Federal standard. However, we would not approve a less stringent emission limit with very stringent MRR. Your emission limits must be as stringent as the Federal emission limits. In the November 26, 1996 memorandum, we further clarified that, under a §63.93 approval, line-by-line equivalency is not required to obtain approval. In addition, we stated our intention that the flexibility discussed in the June 26, 1995 memorandum regarding the record retention period be granted "when evaluating any alternative compliance measures, including recordkeeping and reporting requirements, provided that Federal enforceability is not diminished in this process."

2. Summary of flexibility added to subpart E through these proposed amendments

Through this action, we are proposing various regulatory changes to subpart E to provide additional flexibility to you in how you may accept delegation for the Federal section 112 program, including how you are required to establish the equivalency of your alternative requirements. These changes augment the flexibility already provided in our July 10, 1996 rulemaking. In addition to proposing regulatory changes, we are providing new policy guidance that clarifies: (1) our interpretations of the existing regulations and guidance documents; (2) our

expectations regarding the equivalency demonstration process; (3) our expectations regarding equivalency demonstrations for alternative work practice standards and General Provisions; and (4) the types of situations that each subpart E delegation/approval option is designed to address. That is, we have clarified when we think it is appropriate for you to pursue a delegation request under each option according to the circumstances in your jurisdiction.

Overall, the revised subpart E regulation and accompanying policy guidance provide the following additional flexibility:

(1) more substitution options;

(2) holistic equivalency demonstration (covering both emissions limits and MRR) showing that the S/L rules and requirements, seen as a whole, are equivalent to the Federal MACT standards, rather than a line-by-line equivalency determination and "form of the standard" requirement;

(3) same equivalency demonstration test for the rule substitution, equivalency by permit (EBP), and SPA options (which are discussed at length in the next section);

(4) expedited processes for approving alternative section 112 requirements under the new EBP and SPA processes;

(5) mechanisms for approving and implementing alternative section 112 requirements for area sources;

(6) increased options in regulatory vehicles for alternatives (which are discussed later in this section);

(7) approval of some kinds of alternative work practice standards without having to quantify their effect on emissions; and

(8) approval of alternative General Provisions (as found in 40 CFR part 63, subpart A) based on a tiered classification scheme that allows for different approval criteria depending on the nature of the General Provisions requirement.

We have also added an option to this rule to partially approve S/L rules or programs. We believe that if the majority of your rule or program submitted for approval under section 112(l) meets the subpart E criteria, then you should get approval of that portion of the rule or program that meets the requirements. This option provides an additional means to minimize the dual regulation effect that the original subpart E rulemaking was designed to address. Therefore, a program that you submit under this subsection may provide for partial or complete delegation of the Administrator’s authorities and responsibilities to implement and enforce emissions standards and prevention

requirements, but may not include authority to set standards less stringent than those promulgated by the EPA.

In their current form, subpart E provisions limit us to a binary choice of either complete approval or complete disapproval. In other words, if you make an adequate equivalency demonstration for your S/L rule in its entirety, we would grant full approval of your rule or program to be used in place of the corresponding Federal requirement. However, if any part of the demonstration is found lacking, we would disapprove the submittal in its entirety.

We believe that partial approval of your air toxics rules and programs and accidental release prevention programs (ARPP) is reasonable, is authorized by statute, and is a viable policy option. Section 112(l)(1) of the Act specifically allows for either “partial or complete delegation” of EPA’s authorities and responsibilities. In addition, this partial approval option will facilitate implementation of section 112(l) in circumstances where it would make good sense, as discussed further below.

Under this approval option, you would submit your S/L rule or program for our approval. If we find that a separable portion of your rule fails to meet any of the criteria of sections 63.92, 63.93, 63.94, 63.95, or 63.97, then we would not approve that portion of your rule or program. We are proposing to define "separable portion" as

a section(s) of a rule or a portion(s) of a program which can be acted upon independently without affecting the overall integrity of the rule or program as a whole. We could still approve the remaining portion, provided that we determine that such partial approval would not unduly confuse the regulated sources or public nor confuse the delegation process itself. The Federal rule would continue to apply in place of the portion of your rule that was disapproved.

For example, we would consider the scenario where you only wished to implement and enforce NESHAP standard(s) adopted by reference into S/L law, but only as these standards apply to title V sources, as a separable portion that we could delegate to you.

To add a twist to the example in above, if we determine that the criminal enforcement provisions in your rule are not applicable to covered area sources, then we would approve the rest of your submittal and deny delegation of the rule as to criminal enforcement for area sources.

Again, in this case, all criminal enforcement of area sources would be our responsibility, and you would refer all such matters to the appropriate Regional Office for investigation and resolution. You should not have to resubmit the entire proposal with reference to the criminal enforcement for area sources removed, merely so that we

could approve the whole package. We would also specify which portions of the S/L rule or program are not approvable. This is another case where it is much more efficient for both you and us for us to allow for partial approval.

Another situation where partial approval could be used is where your rule or program covers a subcategory or subcategories of the source affected by a Federal standards, but not necessarily all sources covered by that standard. These must be logical and compelling subcategories (for example, hard but not decorative chrome plating, or storage tanks of a particular size at several different types of facilities).

There are cases where we believe that partial approval is inappropriate. An example is the case where the test methods in the alternative rule are inadequate. Since the test methods are linked to, and are thus an integral part of, the specific level of control of a standard, we cannot deem the test methods a "separable portion." Consequently, we could not approve part of a submittal that specifies the level of control and disapprove the part that specifies the test methods associated with that level of control.

If you submit a rule or program with deficient MRR, then your rule or program could be partially disapproved as to these areas of deficiency. At some point, however,

sources and governmental agencies may become confused if there are too many separate provisions, some of which are delegated and others not. If we determine that there are too many areas of deficiency or if separating the responsibilities between the Federal and State Government would be too cumbersome, then we may disapprove your whole rule or program and ask that it be resubmitted in a form that is closer to complete approval with only a few areas that must be disapproved. We are under no duty to approve rules or programs in part. We reserve the right to disapprove your rules and programs entirely, if in our judgment, partial approval is not workable.

If you, in preconsultation with us, are aware of the deficiencies in your submittal, you can merely leave the deficient parts out. In this case, your submittal would include reference to any deficiencies. As a practical matter, all parties will not be aware of all deficiency issues that may arise in the course of a review. That is why partial approval authority allows us to selectively approve the satisfactory portions of the submittal and is therefore, a more efficient mechanism. We are soliciting comments on appropriate uses of the partial approval option.

We have received recent comments from CARB, who suggested expanding the universe of acceptable regulatory vehicles that you could use to substitute for Federal

standards when regulatory adjustments therein are fairly straightforward. The following are our positions on the use of each of those specific suggestions:

(1) Proposed rules: Proposed rules cannot be used to substitute for Federal standards, simply because proposed rules are subject to change, and there is no process for us to review those changes after we have approved substitution of your proposed rule.

(2) Permits:

(a) Title V Permit Conditions: You may use title V permit conditions to substitute for a Federal standard under any of the options outlined in this rule, except for rule adjustment (§63.92). However, as we explain in section 8.C. below, you may only use a maximum of five title V permits to substitute for each Federal maximum achievable control technology (MACT) standard, unless you choose to develop General permits under the SPA option.

(b) General Permit Conditions: You may use General permit conditions under title V for any number of sources under the SPA option outlined in §63.97 of this rule. The great advantage of using General permit conditions is that we would approve specific permit terms and conditions up-front, through the subpart E approval process, and you would not then need to go through rulemaking at the S/L level. Of course, the General Permit must establish specific terms and

conditions for all emissions points and compliance measures covered by the Federal MACT standard and any other applicable requirements.

(c) Permit Templates: As we understand it, a permit template is different from a general permit in that the permit template would contain an outline for what each permit should look like, but would not contain specific permit terms and conditions for each emissions point. Therefore we believe that you could use permit templates under the SPA option, provided that we approve both the permit template and the individual permits, in order to make the individual permits federally enforceable. Because we would need to approve individual permits, we believe, consistent with our equivalency by permit approach, that permit templates should only be used for five or fewer sources in a source category. However, we request comment on how we could allow use of permit templates for more sources in a source category.

(d) Previously-Issued S/L Permit Conditions: As with title V permits, you may substitute previously-issued S/L permit conditions for a Federal standard for five or fewer sources in a source category. These previously-issued permits do not have to be initially federally enforceable to be submitted for approval, because our approval and subsequent rulemaking will confer Federal enforceability on

them. Either the SPA option (§63.97) or rule substitution option (§63.93) may be used to approve these permits, but not the rule adjustment option (§63.92). The rule adjustment option only pertains to minor pre-approved changes to Federal standards through S/L rulemaking. In addition, if a previously-issued S/L permit is used to substitute for a Federal standard, and is later modified, that modification must be subject to both public and EPA review.

(e) Enforcement Orders: A S/L level enforcement order, such as a board order in California, could be allowed, only so long as the enforcement order contains enough specific detail to meet our requirements for demonstrating equivalency (for example, the enforcement order should contain a level of detail comparable to the detail contained in a title V permit). In addition, you must provide legal assurance that the enforcement order will automatically be translated to a permit after it expires. We are seeking comments on the use of enforcement orders as a mechanism to demonstrate equivalency with federal standards.

(3) Subcategorization: In CARB's comments, they suggest that different approval options could be used for different subcategories of sources within a source category

regulated by a Federal MACT standard. We agree, within certain limits. You must create logical and compelling subcategories of sources that are clear and simple to delineate and understand, such as area versus major sources, new versus existing sources, or different source types within a Federal source category or NESHAP (for example, hard versus decorative chromium electroplating). In addition, our proposed revisions to §63.91 allow for partial approval of S/L rules (see discussion in section VII.C.2. below), which we would envision as being similar to subcategorization.

(4) Direct Final Rulemaking: You have requested that we use direct final rulemaking, rather than the usual procedures of separate proposed and final rules, in approving substitute S/L authorities. You say using direct final rulemaking would greatly expedite the approval process. Direct final rulemakings are generally only be used when adverse comments are not expected. That determination must be made on a rule-by-rule basis, so a generic provision in subpart E that requires the use of direct final rulemakings in a wide variety of circumstances would be inappropriate. However, on a rule-by-rule basis, we will continue to evaluate the appropriateness of direct final rulemaking.

(5) Title V Approval in lieu of Rulemaking: You have requested that we allow use of the title V permit approval process as a way of avoiding up-front S/L rulemaking for all options under subpart E. We believe we can only provide this mechanism under §63.94 (the equivalency by permit option). A proposed title V permit is approved if EPA does not act on it within 45 days; therefore the possibility exists that a S/L could substitute its requirements for a Federal standard without adequate EPA review. The equivalency by permit process is limited to five or fewer sources, which provides greater assurance to us that we will be able to review all permit changes within 45 days.

3. Sacramento Protocol

One issue you have raised is the length of time and the amount of effort required to demonstrate equivalency with Federal requirements. In July 1997, we entered into a delegation and program integration initiative, called the Sacramento Protocol, with the CARB and the South Coast Air Quality Management District (SCAQMD) to determine whether identified State and District air pollution control requirements are technically equivalent to the requirements found in five Federal NESHAPs, and whether the demonstration of equivalency could be developed quickly. The five Federal NESHAPs selected for the initiative were:

Chromium Electroplating

Secondary Lead Smelting

Aerospace Manufacturing

Gasoline Distribution

Wood Furniture Manufacturing

The Sacramento Protocol team developed a process to evaluate the requirements of the five NESHAP. The first step in the process was to prepare tables that compared the SCAQMD/CARB requirements and the NESHAP requirements. After review of the tables, EPA identified questions and potential issues for which we needed more information. We went to Southern California to observe inspections of sources in these categories, which allowed the team members to evaluate, “in the field,” the differences between the S/L and Federal requirements. The inspections also provided us an opportunity to evaluate SCAQMD permits and their associated conditions, the permit evaluation process, inspection staff capability, the inspection process, source compliance status, and local rule structure.

As a part of the inspections, the team expanded and added further detail to the regulation comparison tables. After completing the comparisons between the S/L requirements and the NESHAP requirements, the team made one of four conclusions regarding each of the NESHAP requirements in relation to the corresponding S/L requirements. First, the team found many of the CARB and

SCAQMD requirements to be directly equivalent to the NESHAP requirements. Second, a similar number of CARB and SCAQMD requirements could be made equivalent to the NESHAP requirements by making changes or revisions to the applicable permits or rules. Third, for some NESHAP requirements, the end result of the comparison appeared equivalent, but there remained some uncertainty about the determination. Consequently, the team recommended specific conditions to ensure equivalency and, with these conditions, viewed the requirements as technically equivalent. However, in recognition that the equivalency decisions reached in this effort may set a precedent for future decisions, the team believed that these issues should be referred to CARB and EPA management for final resolution. Fourth, for some requirements the team "agreed to disagree." The disagreements centered on differences of opinion about the equivalency of a substitute requirement or on the necessity of a particular NESHAP requirement.

Most of this work, including completing the equivalency demonstration, was completed within 2 months. We believe the Sacramento Protocol initiative clearly shows that equivalency demonstrations can be evaluated in a timely fashion if they contain all the elements needed in a regulation comparison table. Other ways to streamline this process include keeping the EPA Regional Offices apprised of

your intentions, and contacting the EPA Regional Offices prior to the submittal of an equivalency demonstration when you know that there may be significant issues with your submittal.

The Sacramento Protocol initiative was also beneficial in providing us with experience in evaluating S/L equivalency demonstrations and in teaching us more about how the rule substitution process works. We also believe that we learned where we could provide additional flexibility for alternative requirements. As part of this learning experience, we decided that our position on work practice standards could be modified (see section X.E. below). We also worked with CARB and SCAQMD in determining how rule effectiveness studies and frequent inspection programs could be substituted for some MRR requirements. For more information concerning the Sacramento Protocol, you may obtain a copy of "The Sacramento Protocol Final Report" by contacting Mr. Tom Driscoll at the address and telephone number referenced earlier. This report is also on EPA's TTN website, also referenced earlier.

C. Summary of proposed regulatory changes to subpart E

As we previously discussed, subpart E as currently promulgated provides four ways to receive delegation for section 112 regulations:

(1) §63.91 delegation of unchanged Federal standards;

(2) §63.92 rule adjustment;

(3) §63.93 authorities substitution; and

(4) §63.94 program substitution.

In this proposed rulemaking we are proposing that there be five ways to receive delegation:

(1) §63.91 delegation of unchanged Federal standards;

(2) §63.92 rule adjustment;

(3) §63.93 substitution of authorities;

(4) §63.94 equivalency by permit (EBP); and

(5) §63.97 program approval.

Table 1 compares the current structure of subpart E in terms of the content of each section to the structure we are proposing in these regulatory amendments. The primary changes we are proposing are to replace the current program substitution process in §63.94 with the new EBP process and to add the new SPA process to §63.97.[2] One way to think of these amendments is that we divided the former program substitution process into two separate, but related, new approval options: the EBP process, which is similar in effect to the existing program substitution process except

[2] Although we would prefer to have all the delegation process options appear in sequential sections of subpart E, we have intentionally skipped over sections 63.95 and 63.96 in order to avoid disrupting existing citations to these sections in other regulatory text and guidance materials. We believe that, on the whole, the approach we are proposing will be less confusing and less burdensome to implement.

that it may be used only for a small number of sources per source category, and the SPA process, which covers a large number of sources and is similar to the rule substitution process. These process options are discussed and compared in detail in sections VIII. and IX. of this preamble. In addition, we are proposing a number of minor changes to other sections to support these more significant regulatory amendments.

1. Proposed changes to §63.90

For §63.90 we are proposing to add and modify a number

Table 1
STRUCTURE OF SUBPART E BEFORE AND AFTER PROPOSED REGULATORY CHANGES

SECTION NUMBER IN 40 CFR PART 63, SUBPART E	TITLE AND CONTENT OF SECTION IN EXISTING REGULATIONS	TITLE AND CONTENT OF SECTION IN PROPOSED NEW REGULATIONS
63.90	Program Overview	Program Overview
63.91	Criteria Common to all approval options	Criteria Common to all approval options
63.92	Approval of a S/L rule that adjusts a section 112 rule	Approval of a S/L rule that adjusts a section 112 rule
63.93	Approval of S/L authorities that substitute for a section 112 rule	Approval of a S/L authorities that substitute for a section 112 rule
63.94	Approval of a S/L program that substitutes for section 112 emissions standards	Approval of S/L permit terms and conditions that substitute for section 112 emissions standards
63.95	Additional approval criteria for Federal accidental release prevention programs	Additional approval criteria for Federal accidental release prevention programs
63.96	Review and withdrawal of approval	Review and withdrawal of approval
63.97	[Reserved]	Approval of a State program that substitutes for section 112 requirements
63.98	[Reserved]	[Reserved]
63.99	Delegated Federal authorities	Delegated Federal authorities

of subpart E's definitions. We are proposing to revise the definition for “level of control” to say, "Test methods and

associated procedures and averaging times are integral to the level of control" in order to make explicit that test methods and associated procedures and averaging times must be considered in assessing the emissions limitation portion of the level of control and that they are not part of compliance and enforcement measures. We are also proposing to revise the definition of “compliance and enforcement measures” to delete reference to test methods and procedures.

We are proposing to add a definition for “alternative requirements” because this term is used throughout the amendments to subpart E. We are requesting comment on whether this definition is useful and whether it is complete in its current wording. We have also revised the definition for “program” to make it more appropriately reflect how this term is used throughout the subpart E regulations as they exist, and as we are proposing to amend them.

We are also proposing to add a definition to that subsection for the term “partial approval,” and to amend the existing definition of “approval” in §63.90(a) to make it consistent with the proposed definition of “partial approval.” We are seeking comment on these changes. In addition, we are adding new definitions for “minor...,” “intermediate...,” and “major changes to a test method,” and “minor...,” “intermediate...,” and “major changes to

monitoring" to help explain which General Provisions discretionary authorities may be delegated to S/L's under §63.91 (see section VI.C.2. below).

Finally, we are proposing to add a new paragraph to §63.90 to address how tribal governments may apply for delegation pursuant to the Tribal Air Rule in 40 CFR part 49.

2. Proposed changes to §63.91

In §63.91(b), we clarify that you may cite or refer to documents that you are required to submit for an approval under this subpart when these documents are readily accessible to us and to the public. This would save you the trouble of having to submit hard copies of documents that we already have or that we may obtain in other ways, for example, electronically.

We have also added a paragraph to address what S/L's must do to update their section 112(l) approvals when we amend, repeal, or revise previously promulgated Federal section 112 requirements that affect sources. Section 63.91(c)(3) would require that if we revise a MACT standard upon which you have based an equivalency demonstration for a S/L rule, program, or permit, then you must revise that equivalency demonstration within 90 days. We also propose to apply the same review procedures to a revised equivalency demonstration as we would use for an initial submittal under

section 112(l). We request comment on these requirements. We also request comment on whether you believe there is a need for us to notify you, at the time when we revise a MACT standard, of the need for you to submit a revised equivalency demonstration.

As discussed above in section VI.B.2, we are providing a mechanism for partial approval of a S/L rule or program. We propose to edit §63.91(a) and to insert §63.91(d)(2) to provide for such a partial approval of a S/L's air toxics and ARPP authorities. The EPA is seeking comments on this proposed edit and specifically on the approach described.

Section 63.91(b)(1) currently requires you to provide a written finding that you have the legal authority necessary to implement and enforce your S/L rule and to assure compliance by all sources. At a minimum, you must: (1) have enforcement authorities that meet the requirements of 40 CFR 70.11; (2) have authority to request compliance information; (3) have authority to inspect sources and records; and (4) retain enforcement authority, if you, the S/L, delegate authorities to a local agency, unless the local agency has authorities that meet section 70.11. Section 63.91(b)(6) currently contains similar language that requires you to satisfy criteria (1) and (4) above. We originally included §63.91(b)(6) to ensure that a S/L did

not receive approval for rules or programs if it lacked sufficient enforcement authority.

We now believe, however, that §63.91(b)(1) ensures the sufficiency of S/L enforcement authorities and that §63.91(b)(6) is an unnecessary and redundant provision. Consequently, we propose to delete §63.91(b)(6), and seek comments on the proposed deletion of this duplicative requirement.

Under the Part 63 General Provisions, the EPA Administrator has the authority to approve certain types of alternatives, or to make other decisions under the General Provisions and the subparts. Questions have been raised as to whether you may make the same discretionary decisions when S/L are delegated the General Provisions. Section 63.91, as promulgated in 1993, did not delineate which discretionary authorities are delegated to you when you take “straight” delegation of the General Provisions. Therefore §63.91(e)(1) to (e)(3) of this proposal clarify which discretionary authorities may be delegated to you through “straight” delegation of the General Provisions.

These provisions address your authority to make source-specific decisions only, not source-category wide decisions. If you wish to make discretionary decisions on a source-category-wide basis under the General Provisions, then, as with other part 63 requirements, you would need to use one

of the other section 112(l) delegation processes to substitute your own rule or program for a Federal rule or rules.

These new provisions provide clarity about those specific General Provisions authorities that would be nationally significant or would alter the stringency of an underlying standard and thus, would not be delegated to you. We believe that clarifying the delegation policy of the General Provisions' authorities will help promote national consistency.

These new provisions are intended to be generally consistent with previous policies developed for both New Source Performance Standards (NSPS) under part 60, and for changes to State implementation plans (SIP). Past guidance issued for NSPS discretionary changes has permitted delegation to S/L's of all the Administrator's authorities except those that require Federal rulemaking, or those for which Federal oversight is critical to ensuring national consistency in the application of Standards. (However, such delegations generally do not give S/L's the authority to issue interpretations of Federal law that are subsequently binding on the Federal Government). Current SIP policy, as reflected in "White Paper Number 2 for Improved

Implementation of the Title V Operating Permits Program[3]," permits you to alter SIP requirements so long as the alternative requirements are shown to be equally stringent and are within a pre-approved protocol (and so long as public review is provided and EPA approval is obtained).

The Part 63 General Provisions include 15 specific types of determinations for which the Administrator may make discretionary decisions on a source-specific basis. When the General Provisions are delegated to a S/L agency, such discretion may be appropriately delegated to the S/L agency, provided the stringency of the underlying standard would not be compromised and/or decisions such as an approved change would not be nationally significant.

We have divided the General Provisions discretionary authorities into two groups, based upon the relative significance of each discretionary type of decision. Category I contains those authorities which can be delegated. We believe that the EPA Regional Office does retain the authority to request review of these decisions, although we expect that this authority will be exercised infrequently. Category II contains those authorities which cannot be delegated.

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[3] Memorandum from Lydia Wegman, Deputy Director, OAQPS, to Regional Air Division Directors, March 5, 1996.

In general, we believe that where possible, authority to make decisions which are not likely to be nationally significant or to alter the stringency of the underlying standard, such as minor changes to test methods, should be delegated to you. (Note, however, that the authority to approve decreases in sampling times and volumes when necessitated by process variables has typically been delegated in conjunction with the minor changes to test methods, but these types of changes are not included within the scope of minor changes defined in §63.90.) Therefore, minimal EPA involvement is required. Section 63.91(e)(1)(ii) lists the authorities in category I, i.e., those authorities which may be delegated.

Section 63.91(e)(3)(ii) lists the authorities in category II, which includes those decisions which generally may result in a change to the stringency of the underlying standard, which is likely to be nationally significant, or which may require a Federal Register notice. These authorities, therefore, will always be retained by the EPA, and may not be delegated to you.

3. Proposed changes to §63.92

We have retained the provisions of §63.92 without significant changes.

4. Proposed changes to §63.93

Proposed changes to §63.93 are discussed in detail in section VII.4. of this preamble. The significant change we are proposing is to delete §63.93(a)(4)(ii), which specifies certain authorities that may be approved under this section. We believe this change will not affect the usefulness of this section to you.

5. Proposed changes to §63.94

Table 2 summarizes the flexibility offered under the new equivalency by permit process compared with the existing program substitution process.

6. Proposed changes to §63.95

Proposed changes to §63.95 are discussed in detail in section XI. of this preamble. The major changes being proposed include revisions needed to make these requirements consistent with the part 68 requirements, which implement the ARPP. We are also proposing to clarify the authority of S/L's to have more stringent standards, including lists with additional chemicals or lower thresholds. Finally, we propose that S/L's may continue to request delegation for a full or partial program, for a defined universe of sources, so long as you accept delegation of the entire section 112(r) program for that defined universe.

7. Proposed addition to §63.97

Table 3 summarizes the flexibility offered under the new SPA process compared with the existing program substitution and rule substitution processes.

D. Policy guidance provided in the preamble

This preamble provides policy guidance on the following topics:

Table 2

COMPARISON BETWEEN FLEXIBILITY UNDER EXISTING AND AMENDED SUBPART E FOR EQUIVALENCY BY PERMIT PROCESS

ELEMENT OF EQUIVALENCY BY PERMIT APPROVAL PROCESS	EXISTING RULE REQUIRES...	NEW RULE WOULD ALLOW OR REQUIRE...
Equivalency demonstrations for alternative section 112 requirements	! Permit terms and conditions in the form of the Federal standard (63.94) ! Line-by-line equivalency for levels of control and compliance and enforcement measures (63.94)	! Permit terms and conditions not necessarily in the form of the Federal standard ! Holistic equivalency for levels of control and compliance and enforcement measures
Up-front approval	! Up-front approval on S/L authorities, commitments, and eligible source categories -- 180 days with rulemaking	! Up-front approval on S/L authorities and eligible sources ! No S/L rulemaking needed to establish commitments ! Expedited up-front approval process - 90 days with rulemaking
Approval of alternative requirements	! That a title V permit be used to substitute S/L requirements for Federal requirements ! EPA and public review and comment during the permit issuance process. Affirmative EPA approval not required -- 45 days	! That a title V permit be used to substitute S/L requirements for Federal requirements ! EPA review and approval required for all alternative requirements, before public review of permit-- 90 days without rulemaking ! EPA and public review and comment during the permit issuance process. Affirmative EPA approval not required -- 45 days

Section 112 program applicability	**!** Permit terms to be substituted for emissions standards established under sections 112(d), (f), or (h) or other section 112 provisions	**!** Permit terms to be substituted for section 112(d), (f), or (h) emissions standards

Table 3

COMPARISON BETWEEN FLEXIBILITY UNDER EXISTING AND AMENDED SUBPART E FOR STATE PROGRAM APPROVAL PROCESS

ELEMENT OF STATE PROGRAM APPROVAL PROCESS	EXISTING RULE REQUIRES...	NEW RULE WOULD ALLOW OR REQUIRE...
Equivalency demonstrations for alternative section 112 requirements	! Permit terms and conditions in the form of the Federal standard (63.94) ! Line-by-line equivalency for levels of control and compliance and enforcement measures (63.94)	! Permit terms and conditions not necessarily in the form of the Federal standard ! Holistic equivalency for levels of control and compliance and enforcement measures
Up-front approval	! Up-front approval on S/L authorities, commitments, and eligible source categories -- 180 days with rulemaking (63.94)	! Up-front approval on authorities, source categories, generic requirements, implementation mechanisms -- 90 or 180 days with rulemaking
Approval of alternative requirements	! EPA/public review and approval required for all alternative requirements -- 180 days with rulemaking (63.93) ! Substitutions on a source category basis	! EPA/public review and approval required for all alternative requirements -- 180 days with rulemaking ! Substitutions on a source category basis
Area source mechanisms	! Substitutions for area source requirements by rule (63.93) or title V permit when sources are permitted under title V (63.94)	! Substitutions for area source requirements on a source category basis through S/L enforceable mechanisms other than rules or title V permits. Alternative requirements must be approved by rulemaking -- 180 days
Section 112 program applicability	! Substitutions for emissions standards established under section 112(d), (f), or (h) or other section 112 provisions (63.94)	! Substitutions for emissions standards established under section 112(d), (f), or (h) or other section 112 provisions

(1) Our interpretations of existing regulations and guidance (e.g., the holistic equivalency demonstration test);

(2) Our expectations regarding your submittal under the equivalency demonstration process;

(3) Our expectations regarding equivalency demonstrations for alternative work practice standards and general provisions;

(4) How the delegation/approval options work and compare with each other, and the S/L situations they are designed to address;

(5) Functions of the up-front approval process in subpart E delegation options; and

(6) Use of title V program approval to demonstrate that §63.91(b) criteria have been met.

E. Policy guidance provided outside the preamble

Currently, we are developing guidance which will clarify in much greater detail than the discussions provided in this preamble regarding what we are looking for from you when you submit alternative requirements for an equivalency demonstration. As part of this guidance, we intend to provide a model equivalency demonstration package that contains all the elements that are required in an equivalency demonstration for a rule substitution and examples of how we would evaluate equivalency for specific hypothetical

requirements. We are also developing guidance on demonstrating equivalency of WPS that would provide examples of quantifiable and nonquantifiable part 63 WPS standards, what we might approve as alternatives, and our rationale for the approval. Finally, we are preparing General Provisions guidance that expands on the guidance provided in this preamble and explains the criteria for how we would determine equivalency with each part 63 General Provisions requirement. We are seeking comments from you about what other kinds of guidance would be most helpful.

VII. How do the revised delegation processes work?

A. §63.93 substitution of authorities

In section VI.C.3. of the preamble, we presented a detailed discussion about the administrative process requirements and equivalency criteria for obtaining delegation/approval under the substitution of authorities process in §63.93. Because we believe that the approval criteria included in §63.93 already allow for a "holistic" review of substituted rules and authorities, we do not believe that any regulatory changes to these criteria are necessary. Thus, this proposal has not changed the equivalency criteria in this option. Because we are not proposing in this rulemaking to amend any aspects of the approval process or criteria under sections 63.93(a) and (b), the previous discussion in section VI.C.3. is still relevant.

In the following discussion we clarify and request comment on what types of authorities you may substitute for section 112 rules under §63.93, and we explain our rationale for proposing to amend rule language that deals with this topic.

Under §63.93 as written, we can approve one (or more) of your rules that is structurally different from the Federal rule for which you wish to substitute your rule(s), or we may approve a rule that is different from the Federal rule in ways that do not qualify for approval under §63.92. §63.93 as written also allows us to approve certain authorities (other than rules) that substitute for a section 112 rule when these differ in form from the Federal section 112 rule. Under the existing rule language in sections 63.93(a)(4)(i) and (a)(4)(ii), authorities that you may submit for approval under this section include:

(1) Rules or other requirements enforceable under S/L law that would substitute for a section 112 rule; or

(2) Specific title V permit terms and conditions for the source or set of sources in the category for which you are requesting approval when (a) the permit terms would substitute for standards promulgated under section 112(h); (b) we have determined that your work practice, design, equipment, or operational requirements are adequate under the

provisions of the Federal standard; and (c) you have an approved program under sections 63.94.

We have reevaluated these provisions in light of the other changes we are proposing to the delegation processes under subpart E and we think that certain changes to these provisions may be warranted. First, we are proposing to delete the provisions of §63.93(a)(4)(ii) (that deal with specific title V permit terms and conditions that would substitute for standards promulgated under section 112(h)) because we believe it is no longer necessary to have a provision in §63.93 for approval of alternative section 112(h) requirements that differ in form from the Federal standard. Specifically,

(1) section 63.94 as amended would no longer require up-front approval of legally binding S/L commitments, so these commitments should not be a prerequisite for obtaining approval under §63.93;

(2) section 63.94 as amended would require the same equivalency test as §63.93 (i.e., you would no longer be required to submit permit terms and conditions in the form of the Federal standard and make a line-by-line equivalency demonstration), so that §63.94's equivalency criteria should not be a prerequisite for obtaining approval under §63.93;

(3) section 63.94 as amended would require you to specify in your up-front approval each source or source

category (with five or fewer sources in a category) for which you will submit alternative requirements for approval in the future (in general[4]), but this requirement is not necessary for obtaining approval under §63.93; and

(4) under our revised policy for demonstrating equivalency with WPS, we are no longer requiring that alternative WPS be expressed in the same form as the Federal standard. (See the discussion in section XI.E. of this preamble for a complete discussion of our rationale.)

Under the proposed rule revisions, §63.93(a)(4) would read as follows: "Authorities submitted for approval under this section shall include State rules or other requirements enforceable under State law that would substitute for a section 112 rule."

Second, §63.93(a)(4)(i) specifies that you may submit for approval under this section rules or other requirements enforceable under S/L law that would substitute for a section 112 rule. We request comments from you and other interested stakeholders to help us understand and clarify what enforceable authorities other than S/L rules may practicably

[4]This is generally the case, except when you submit your draft permit terms and conditions at the same time that you submit your request to use the equivalency by permit process. Regardless of the timing of when you submit your permit terms and conditions under revised §63.94, the "up-front approval" step in this process only covers your demonstration of resources and authorities under title V/§63.91(b) and your identification of sources that you will cover under this delegation process.

be substituted under this option (including authorities that would substitute for section 112(r) requirements). As a policy matter, we believe it is appropriate to limit our review and approval under §63.93 to authorities that are applied on a source category-wide basis, rather than to individual sources (except when you only have one source in a source category).[5] In our proposed scheme of amended delegation options, §63.93's purpose is to allow us to approve your alternative rules on a rule-by-rule basis when you wish to substitute rules for a relatively limited number of source categories (compared with the SPA process). Depending on the comments that we receive, we may delete reference to "other requirements" from the description of authorities that may be approved under this section, change §63.93(a)(4) to read "Authorities submitted for approval under this section shall include State rules (i.e., rules that are enforceable under State law for categories of sources) that would substitute for a section 112 rule," and change the title of §63.93 to "Approval of a State rule that substitutes for a section 112 rule."

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[5] Also, under §63.93, each approval action covers both the generic §63.91(b) approval criteria and the substantive alternative requirements that you will implement and enforce in lieu of the Federal requirements for a specified source category. You cannot obtain approval under §63.93 unless you submit the enforceable conditions for that source category with your §63.93 submittal.

We are also clarifying that we believe you can implement alternative compliance and enforcement strategies, on a rule-by-rule basis, within the context of the existing regulations in §63.93. This approach is discussed in section X.C., "Using compliance evaluation studies in equivalency demonstrations."

B. §63.97 State program approval process

To address some of your concerns with the existing substitution options in subpart E, we developed the SPA process which, in this rulemaking, we are proposing to add to §63.97. Although §63.97 numerically follows §63.94 in which we address the new EBP process, we have chosen to discuss the SPA process before the EBP process to enhance the overall clarity of the next sections of the preamble.

1. Background

In your comments and suggestions to us, you requested that we explore ways to approve your alternative requirements in a more expeditious manner. You also asked us to add more flexibility to the program substitution process so you are not restricted to putting alternative requirements into title V permits. This would allow you to address area sources that are not covered by your title V programs. Finally, you asked us to eliminate the requirements for line-by-line equivalency demonstrations and the "form" of the Federal standard in §63.94 as it is currently structured.

This would give you more flexibility in how you can demonstrate that your requirements are at least as stringent as the Federal requirements.

The new SPA process addresses these concerns. Compared with the existing program approval process in §63.94, the SPA process provides you with additional flexibility by eliminating the "form" of the standard and modifying equivalency requirements. Compared with the existing rule substitution process in §63.93, it has the potential to minimize the time and burden associated with approving your alternative requirements, especially in situations where you have a well-developed program with many comparable requirements that apply to sources subject to Federal emissions standards. The SPA process would allow you to obtain approval up-front, and at one time, for generic alternative requirements that you wish to apply to more than one source category (e.g., S/L general provisions, work practice standards, or equipment standards). The SPA process also would allow you to bundle groups of regulations or requirements and submit them at one time for more efficient processing, or you could submit requirements arising from multiple S/L rules to substitute for requirements in a single NESHAP or other Federal section 112 regulation. The SPA process would allow you to substitute your alternative requirements for Federal area source requirements using S/L-

enforceable mechanisms other than source category-wide rules. And, finally, the SPA process would allow you to substitute your alternative requirements for Federal section 112 requirements arising from section 112(f), the residual risk program, section 112(k), the urban area source program, section 112(m), the Great Waters program, and others.

2. The proposed State program approval process

The SPA process, which would be codified in new §63.97, is intended to provide an additional process option for you to obtain approval of alternative requirements. The proposed SPA process is a two-step process that we believe could expedite our approval of your alternative requirements, provide you with more flexibility to submit your alternative requirements in the future as the Federal regulations are promulgated, and provide a more "holistic" approach for determining whether or not an alternative requirement assures compliance with the Federal standard or other requirement. (For a discussion on how we will determine equivalency, see section X.)

Under the proposed SPA process, you could seek approval for a program to be implemented and enforced in lieu of specified existing or future section 112(d), section 112(f), or section 112(h) emissions standards. In addition, you may seek programmatic approval to substitute your alternative requirements for requirements under sections 112(k), 112(m),

112(n), and 112(c)(6), but only after we have promulgated regulations implementing those programs. You may not seek approval under this process to implement and enforce alternative section 112(r) requirements (that address section 112's Risk Management Program); alternative section 112(r) requirements may be submitted under sections 63.92, 63.93, and 63.95 of subpart E.

The proposed SPA process consists of two steps. In the first step, you submit to us, and we approve your up-front program. Up-front approval involves assuring that you have adequate authorities and resources to implement and enforce your proposed substitute provisions, as well as informing us of which source categories your program covers. The up-front program approval consists of mandatory and optional elements. The optional elements allow you to customize the program approval to suit your particular needs, and they allow you to speed the flow of the subsequent steps. The up-front approval takes place via notice and comment rulemaking in the Federal Register and, as proposed, it may take a maximum of 90 or 180 days to complete, depending on the complexity of your submittal. In the second step, you submit to us, and we approve your specific alternative requirements. These alternative requirements may be submitted in the form of rules, permits, or requirements in other enforceable mechanisms for major and/or area sources but, as in §63.93,

they must be enforceable as a matter of S/L law before you can submit them for approval. Also, as in §63.93, in step two of the SPA process, we approve your alternative requirements through notice and comment rulemaking in the Federal Register, and this process, as proposed, may take up to 180 days to complete. Following completion of the SPA process, your approved alternative requirements must be incorporated correctly into title V permits, where required.

Both steps one and two are critical steps in the SPA process. In these steps, we approve your authorities to substitute your alternative requirements for Federal requirements, and your alternative requirements become federally enforceable. (Until we approve your alternative requirements, the otherwise applicable Federal requirements continue to apply.) It is important to note, however, that steps one and two need not take place separately in time. You may submit your program approval elements and your alternative requirements for simultaneous approval, for section 112 requirements that are already promulgated at the time of your submittal.

Alternatively, you may submit your alternative requirements at a future date (or multiple future dates), after the up-front approval has been completed, for section 112 requirements that are not already promulgated or for which you do not choose to substitute requirements at the

time of your up-front approval. Each time you submit your alternative requirements at a future date after your up-front program submittal, we would repeat the approval process under step two. (It is not necessary to repeat the §63.91(b) demonstration and approval if the basis for your earlier program approval has not changed.)

Under the SPA process, as for all the subpart E delegation/approval processes, we act on your program by taking public comment on your program submittal and promulgating a rule amending part 63 to incorporate your program. (This was discussed in the original subpart E proposal preamble at 58 FR pages 29297-98.) Because we are required to publish a Federal Register notice to approve your program, we believe it is appropriate to allow for at least a 90-day period for the up-front approval step for submittals that do not contain any alternative requirements, and the full 180 day-period for the up-front approval step for submittals that do contain alternative requirements. These time periods are consistent with the time periods allowed or proposed for comparable review and approval steps for the other substitution options in subpart E.

However, to address your concerns about how long it takes to receive subpart E approval, we are committed to processing these approvals as expeditiously as possible (i.e., in less than 90 or 180 days if possible). We are

particularly interested in receiving comments on whether an approval can take place in less than 180 days in situations where the submittal includes alternative requirements (especially when the equivalency comparison is complex). We are also interested in your thoughts about whether and how both steps of the SPA process could be completed in a combined total of 180 days, even when the alternative requirements are submitted at a future date after the up-front program approval has been completed. One suggestion is to delay rulemaking on the up-front program approval until future rulemaking takes place for approval of the alternative requirements; although up-front rulemaking would be delayed, we could still evaluate your submittal and prepare for the future rulemaking. (To help you develop your comments, we refer you to timelines describing how steps in the approval process would play out during the 180-day period. These are included in the document entitled "Interim Enabling Guidance for the Implementation of 40 CFR part 63, subpart E," EPA-453/R-93-040, November 1993. This document is included in the docket.)

In addition, to address your concerns about how long it takes to receive subpart E approval, we have shortened the up-front approval period to 90 days when your submittal does not contain any alternative requirements. To accommodate the administrative process steps that are required to take place

during this period, we shortened the individual time periods that are allowed or required for us to publish the proposed Federal Register notice (from 45 to 21 days), for the public to comment (from 30 to 21 days), for you to respond to the public comments (from 30 to 14 days), and for us to prepare and publish the final Federal Register notice (to about 30 days). We request comment on whether these proposed time periods are feasible, adequate, and acceptable for this purpose, given that we are trying to balance our desire to expedite the approval process with our interest in allowing the public sufficient time to comment. We have carried over this approach to the EBP up-front approval process as well, and we are also requesting comments on the application of this approach in that context.

Based on our experience reviewing your alternative requirements under the existing subpart E, we strongly recommend that you take steps under the up-front portion of the SPA process to streamline the review process for your alternative requirements. The following discussion on up-front approval elements and criteria suggests how your submittal could contribute toward simplifying and streamlining the process. Alternatively, we recommend that you work with your EPA Regional Office in advance of any formal submittal under the SPA process to get early feedback on the approvability of your submittal elements. At its

discretion, your Regional Office may offer you a preliminary assessment of your submittal, and it can advise you on how your submittal may be improved, so that the formal approval process proceeds smoothly and expeditiously. Your Regional Office also may be willing to work with you to find mutually acceptable ways to shorten the review process. For example, you could discuss what you will include in your equivalency submittal package, the equivalency demonstration criteria you will follow, and the style and format of your supporting analyses and documentation, so that the Regional Office is likely to consider your step two submittal complete; or you could discuss ways to speed the administrative aspects of the approval process. While we have eliminated the requirement to express your alternative requirements in the form of the Federal standard, expressing them this way would make the review and approval of your requirements go more easily and quickly.

a. Step one: Up-front approval

i. Up-front approval elements and criteria

The up-front approval step serves several critical functions under the SPA process. As discussed earlier in this preamble: (1) it assures that you have met the delegation criteria in section 112(l)(5) and §63.91(b); (2) it provides the legal foundation by which section 112 requirements may be replaced by your alternative requirements

(whether they arise from an enforceable S/L rule or permit terms and conditions) such that your requirements become the federally enforceable requirements in lieu of the applicable Federal requirements; and (3) it provides for an orderly way of identifying which authorities have been delegated to you in relation to specific Federal emissions standards or requirements. In addition, the SPA up-front approval gives you the opportunity to implement alternative compliance and enforcement strategies (such as through the compliance evaluation study approach discussed in section XI.C. of the preamble). You also could obtain approval to implement and enforce alternative requirements that apply generically to more than one category of sources, and you could specify which enforceable mechanisms you will use to substitute alternative requirements for area sources. Our intent is that our one-time, up-front review and approval of these program elements will streamline the subsequent review of your (additional) alternative requirements for section 112 rules.

As a first step, as in the existing §63.94, you would submit certain elements of your program for up-front approval. The up-front program submittal under the SPA process must include, at a minimum, the following two elements:

(1) §63.91(b) demonstration

The first element is a demonstration of how you have satisfied the criteria in §63.91(b) that address the basic adequacy of your program to accept delegation to implement and enforce Federal section 112 requirements. These criteria ensure that you have adequate authorities and resources to implement and enforce the substituted provisions, including the authorities and resources to implement your area source program. Title V program approval may be sufficient to demonstrate that you have satisfied the §63.91(b) criteria for sources covered by your title V program; and

(2) Identification of source categories and/or Federal section 112 requirements.

The second element is an identification of the source categories and/or the Federal section 112 requirements for which you will accept delegation and for which you intend to substitute requirements at that time or in the future. (Note, however, that you cannot substitute requirements for a Federal requirement until it is promulgated.)

In addition, depending on the design and complexity of your program and what you want to achieve by substituting your program under the SPA process, you may submit for approval one or more of the following elements:

(3) Generic program requirements.

You may obtain approval in this step for generic alternative requirements that you intend to apply to one or

more source categories, e.g., if you have a different approach to implementing the startup, shutdown, and malfunction plan required in §63.6(e) of the part 63 General Provisions, or if you have a different approach generally from the Federal requirements for recordkeeping and reporting, preconstruction review, or any number of other "general provisions." In addition to general provisions, which are often administrative in nature, you could obtain generic approval for substantive control regulations (e.g., design, equipment, or performance standards) that apply to more than one source category and reduce emissions of HAP.

You could do a generic equivalency demonstration for these requirements at this early stage in the SPA process. This early demonstration of equivalency would help to expedite our review and approval of your subsequent submittals for promulgated Federal regulations, and it would allow the public to comment on the general applicability of these approaches.

(4) Enforceable mechanisms for area source requirements.

The next element is a description of the mechanism(s), that is enforceable as a matter of S/L law, that will be used to make your alternative requirements for area sources federally enforceable when they are approved during step two. In addition, you must include a demonstration that you have

adequate resources and authorities to implement and enforce these mechanisms (or the requirements they generate).

Under the SPA process you may use S/L enforceable mechanisms, such as S/L operating permits programs other than title V programs, to develop and submit for approval alternative requirements for area sources. A thorough discussion of this topic follows.

(5) Alternative compliance and enforcement strategies.

In addition, if you elect to implement protocols that establish alternative compliance and enforcement strategies (such as performing compliance evaluation studies, which are discussed in section XI.C., below), we must approve your proposal through rulemaking in the up-front approval step. This approval may require you to supplement your previous §63.91(b) demonstration if you need additional resources, authorities, or requirements to implement the alternative strategies.

The advantage of including information from elements (3) or (5) in your up-front submittal is that it would allow significant aspects of your equivalency demonstration for specific Federal section 112 requirements to be addressed and worked out generically and in advance of our and the public's review of your alternative requirements during the subsequent step two phase. Consequently, it can result in a decrease in the time it would otherwise take to review and approve your

regulations or permits for one or more source categories. In fact, we believe that the benefits from developing these up-front understandings may be significant, and we think this is one of the major advantages of pursuing the SPA option.

ii. Process for making area source requirements federally enforceable

One way that the SPA process is more flexible than the existing program substitution process in subpart E is that the SPA process may be implemented more readily for area sources. (The existing program substitution process in §63.94 may be implemented for area sources, but only if you will be permitting those sources under your title V program. We understand that, in the near term, most title V programs in the country will not cover the part 63 area sources that we deferred from permitting. Nothing in this discussion, however, is intended to deter you from using title V programs to permit area sources.) We are proposing that, as part of the up-front SPA approval process, you may submit a plan to implement your programs for area sources, in addition to your plan for major sources. In this plan you would identify the legally enforceable mechanism(s) that you would use to implement and enforce your area source requirements. These legally enforceable mechanisms may be either source category rules or general permits (or a similar type of approach) that are specific to a source category and are issued through a

non-title V S/L permitting (or similar) program. In either case, in step two we could approve these rules or permits, that are already enforceable as a matter of S/L law, in the same way that we can approve major source rules, that is, through notice and comment rulemaking in the Federal Register. Whether you regulate area sources through source category-wide rules, general permits, or another enforceable mechanism, these rules become federally enforceable upon approval of the specific alternative requirements in step two. We are requesting comment on types of S/L enforceable mechanisms other than rules and permitting programs that you may wish to use for this purpose and specific descriptions of how you would use these mechanisms.

We are also requesting comment on the types of criteria that an enforceable S/L mechanism must satisfy, if any, to be acceptable as a source of alternative requirements that may be approved under section 112(l). For example, we are requesting comment on whether, as a condition of obtaining approval for area source requirements submitted through a non-rule mechanism, the public within a S/L jurisdiction should have adequate notice and opportunity to submit written comment to the S/L during the process of developing the enforceable terms and conditions that would become the approved alternative requirements. Such programs obviously must have authority to cover the sources in the source

category, and individual HAP, if any, for which you are requesting §63.97 approval, and you must have authority and resources to implement and enforce the program's requirements. These criteria would be satisfied by the §63.91(b) component of the up-front approval. We would like your comments on whether we should establish any additional specific approval criteria for such programs through these amendments to subpart E.

For the revised regulation, we plan to review and approve general permits, rules, requirements, or permit templates developed under authority of your enforceable mechanism for area sources (or your title V authority for major or area sources). We intend that §63.97 substitutions of requirements be applied on a source category-wide basis, rather than to individual sources (except when you only have one source in a source category). Each general permit or other approved mechanism would take the place of a source category rule submitted for approval under this option. As we explain in section VIII.C., which describes the equivalency by permit process, we believe the use of permits for demonstrating alternative requirements must be limited to be implemented practicably, because of the burden associated with reviewing individual permits containing alternative section 112 requirements expressed in a form that is different from that in the underlying standard. Otherwise,

we believe this approach will overtax your ability to administer your programs and our ability to review your permits within the specified time limits. This, in turn, could delay the program approval process and adversely impact sources generally.

Therefore, except when you have only one source in a source category (or possibly in other limited circumstances described below), you must submit for review and approval general permits, rules, requirements, or permit templates for either major or area sources. You may submit more than one such mechanism for each source category (or class of sources in a source category, e.g., major sources) provided the collection of submittals ensures that all of the otherwise applicable Federal section 112 requirements in the emissions standard and all sources for that source category are addressed. We are taking comment on this approach.

Your program for area sources need not apply to sources subject to Federal standards for which you are not taking delegation under this approval option. These sources would be subject to Federal standards or your alternative requirements established under a different subpart E option. However, your area source program must assure compliance with all Federal section 112 emissions standards and requirements for which you accept delegation under the SPA process.

Furthermore, to reduce the burden associated with implementing an enforceable area source mechanism under subpart E, we are clarifying that you may specify as part of your up-front subpart E program approval that only the permit terms and conditions that are established to substitute for Federal section 112 requirements need to undergo public and EPA review and become federally enforceable through step 2 of the SPA process. We hope that this minimizes disruption to your existing programs by allowing you to maintain the rest of your program as is, or as S/L-enforceable only.

b. Step two: Approval of alternative section 112 requirements

After or during the up-front approval, in step two of the SPA process, you would submit to us the alternative requirements that you propose to substitute for Federal section 112 requirements, and we would approve or disapprove those requirements. We would review and (dis)approve your alternative requirements for each source category for which you wish to receive delegation to implement alternative requirements. If we disapprove your substitution request, you would proceed to implement the Federal rules.[6] For

[6] Under your approved up-front program, you would already have been delegated the authority to implement and enforce those Federal requirements.

part 63 NESHAP or other Federal requirements that are already promulgated at the time of your up-front submittal, step two may be combined with step one, or it may occur after step one, depending on the status of your existing rules or authorities. To be submitted for approval, your alternative requirements must be enforceable as a matter of S/L law; they may take the form of enforceable regulations, general permit terms or conditions, administrative orders, board orders, or other legally enforceable mechanisms in your jurisdiction. If the actual requirements originate from policies instead of regulations, they may only be submitted to us if they are included in an enforceable mechanism such as a permit.

Furthermore, the alternative requirements that you submit for a particular NESHAP or other Federal requirement must apply to the entire source category or subcategory. Under the SPA process, as under the §63.93 process for substitution of rules, we will only review and approve alternative requirements that do <u>not</u> require a source-specific evaluation to determine their equivalency. This means that, if you are using a permitting mechanism to make your requirements enforceable for a source category, you could only submit general permits. (Earlier we asked for comment on the feasibility and desirability of creating limited exceptions to this policy.)

After we have determined whether your alternative requirements are acceptable, the public would have 21 days to comment on your proposed alternative requirements and our evaluation of them through a notice and comment rulemaking published in the Federal Register. Then, after considering the public comments and your responses to them, we would act on your submittal by notifying you in writing as to whether we have approved or disapproved your request for substitution. We would also publish our findings in a final Federal Register notice. Because your alternative requirements do not become federally enforceable or replace the otherwise applicable Federal section 112 requirements until the final Federal Register notice is published, we strongly recommend that you begin your SPA approval process under step two in plenty of time to receive approval before the first substantive compliance date for the otherwise applicable Federal requirements. (By substantive compliance date we mean a date by which the source is required to comply with provisions to install and operate control equipment, make process changes, or take other physical steps that reduce emissions of HAP to the atmosphere.) For sources that need a long lead time to come into compliance with your requirements or the otherwise applicable NESHAP requirements, more than two years may be needed. We recommend that you develop suitable timelines for implementing the SPA process

steps with your EPA Regional Office at the time of up-front approval, or as early in the process as possible.

During the course of developing this proposed rulemaking, some of you suggested that a 45-day review period (similar to the 45-day review period for proposed title V operating permits) should be adequate for acting on alternative section 112 requirements under the SPA process. However, because of the potential complexity of equivalency demonstrations, the application of approved alternatives to all sources or groups of sources within the affected source category or subcategory within your jurisdiction, and the need to do a rulemaking to approve your source category-wide alternative requirements, we believe that 45 days is not adequate as the maximum allowable review period.

In developing the SPA process, we explored options under which we could approve your alternative requirements in step two without the need for additional Federal rulemaking, but the Act prohibits that. 42 U.S.C. §7697(d). See also, Administrative Procedures Act, 5 U.S.C. §§551, 553. Under the APA, Agency actions of general applicability and future effect designed to implement the law are considered rules and must undergo rulemaking. Approvals of your source category or subcategory applicable alternative requirements, which will be implemented and enforced in lieu of the Federal section 112 standards, fall within the above description of a

“rule.” Consequently, we must undergo a rulemaking to grant such an approval.

c. Incorporation of alternative requirements into title V permits

Following completion of step two of the SPA process, you would incorporate the new federally applicable requirements into title V permits for sources that are required to have such permits. This action is important for several reasons relating to section 112(l) substitutions of requirements. First, we and the public have an opportunity to ensure that the approved alternative section 112 requirements are implemented correctly via the permit issuance process. Second, the permit is a publicly available repository of the requirements that apply to an affected source. We, you, the affected source, and the public all have access to the same information about what is required from that source.

Although we and the public have an additional opportunity to review your alternative section 112 requirements during the permit issuance process, this is not an opportunity to "second guess" the approval of those requirements that took place during the step two review. The purpose of the review during the permit issuance process is to ensure that the terms and conditions of previously approved alternative requirements are incorporated properly into the permit.

3. Changes to previously approved alternative requirements

After we have approved your alternative requirements (rules or permit terms), if your alternative requirements then change in any way that would change the approved section 112 provisions, you must resubmit your rules or permits to us for reapproval in order for your new alternative requirements to become federally enforceable in place of the set of alternative requirements we previously approved. Subsequently, if relevant, you must open and revise any federally enforceable permits (or permit terms) that contain these alternative section 112 requirements to bring them up to date with your revised, approved alternative requirements. In other words, you must repeat step two and revise your title V permits whenever your underlying regulations, policies, or permits change so that your subpart E-approved rules and permits to correctly reflect your most current requirements for those affected sources. As a matter of Federal enforceability, until we approve your revised alternative requirements under step two, sources remain subject to the applicable alternative section 112 requirements that we approved previously. If your alternative requirements originate from source category rules, you must first submit those rules to us, as in step

two, to obtain our approval that the changed rules satisfy the equivalency demonstration criteria.

If your alternative requirements originate from policies that result in permit terms and conditions, rather than from enforceable rules, if you make any changes to those policies, or if you implement those policies differently from how they are expressed in the approved permit terms and conditions, you must submit the revised permit terms and conditions, as in step two, to obtain our approval that the changed permit terms satisfy the equivalency demonstration criteria.

4. Criteria for demonstrating equivalency of alternative requirements

Under proposed §63.97(d), each individual submittal for specific alternative requirements must:

(1) Identify the specific conditions that sources in the source category must comply with under your requirements, including which of these are alternative requirements that you want to implement and enforce in lieu of the otherwise applicable Federal requirements. You must submit copies of all S/L rules, regulations, permits, implementation plans, or other enforceable mechanisms that contain the entire set of requirements for which you are seeking approval, including any alternative requirements, or if these documents are readily available to us and the public, you may cite the

relevant portions of the documents or indicate where they are available;

(2) Identify how these conditions are the same as or different from the relevant Federal requirements through a side-by-side comparison of your requirements and ours. Your submittal must contain sufficient detail for us to be able to make a determination of equivalency between your alternative requirements and the Federal requirements;

(3) Provide detailed information that supports and justifies why you believe that your alternative requirements, taken as a whole, are no less stringent than the otherwise applicable Federal requirements, that is, how they meet the equivalency criteria specified in §63.93(b). For example, this equivalency demonstration must demonstrate how your requirements will achieve equivalent or greater emissions reductions compared to the Federal requirements for each affected source.

We would then evaluate the specific alternative requirements by using the equivalency "test" contained in §63.93(b). Section XI. of the preamble contains a complete discussion on how we would conduct an equivalency evaluation under the criteria of §63.93(b) to ensure that the alternative requirements are no less stringent, taken as a whole, than the otherwise applicable Federal requirements.

(In the future, we may supplement this discussion with additional guidance.)

C. §63.94 equivalency by permit approval process

1. Overview and purpose of an equivalency by permit process

Because of issues you raised about the current program substitution process in §63.94, we are proposing to revise §63.94 to create an equivalency by permit (EBP) approval process which does not include a requirement for you to submit your alternative requirements in the form of the Federal standard. The proposed EBP process would allow you to substitute, for a limited number of sources, alternative requirements and authorities that take the form of permit terms and conditions instead of source category regulations. Under this three-step process, you could seek approval to implement alternative section 112(d), section 112(h), or section 112(f) requirements that would be enforced in lieu of part 63 emissions standards by submitting permit terms and conditions that satisfy subpart E's equivalency demonstration criteria. Once approved, these permit terms and conditions would be included in a title V permit, through the appropriate title V permit issuance process, to replace the otherwise applicable Federal requirements. This process satisfies your request for a means of obtaining delegation for a few sources without having to go through rulemaking at

the S/L level to establish source category-specific regulations. It also allows you to substitute alternative requirements on a source-specific basis for area sources when those sources are permitted under title V.

The proposed EBP process accomplishes similar objectives to those that the current §63.94 is intended to accomplish; however, the EBP process provides flexibility beyond that now in §63.94 by allowing a "holistic" approach for determining equivalency between your alternative requirements and the Federal emissions standards. The proposed EBP process differs from the current process in §63.94 in that it does not require you to present your permit terms and conditions in the form of the Federal standard in order to demonstrate equivalency (although doing so may greatly reduce the time it takes to approve your alternative requirements). Rather, it relies on the same equivalency demonstration "test" that is currently in §63.93(b) for rule substitutions and that we are proposing for the §63.97 SPA process.

To balance this additional flexibility, we are proposing to add a process step (i.e., step two, in which we review your draft permit terms and conditions before they are included in proposed permits) and limit the scope of applicability of the EBP process (i.e., allow the EBP approach for 5 or fewer sources in a source category that is affected by a NESHAP for which you want to substitute

alternative requirements). These "checks and balances" would ensure that the results of EBP implementation are comparable to the results that would be achieved through the other subpart E processes in terms of the types of alternative requirements that could be approved, the opportunities for public and EPA review of alternative requirements, and the overall burden that would be associated with implementing this approach (for you, for us, and for regulated sources). In addition, the checks and balances would provide assurance that the proper emission reductions are achieved. These concepts are explained further in the remainder of this section of the preamble.

Essentially, the EBP process is appropriate when a source-specific analysis is necessary to determine the effect of the alternative requirements. In general, it is appropriate when you do not already have S/L standards that apply to source categories regulated by part 63 emissions standards. For example, EBP could be appropriate for SIP-approved rules that regulate HAP indirectly. Alternative requirements may also arise from health-based or technology-based rules that generate source-specific requirements based on a source's operations, location, construction or modification activities, etc. Because each of these situations requires a source-specific analysis, general permits would not be appropriate under the EBP process.

The EBP process is similar to (but not the same as) the title V permit streamlining process we developed for minimizing duplication among multiple applicable requirements that apply to the same emissions point at a source. (For guidance on permit streamlining, see our March 5, 1996 policy guidance document entitled "White Paper Number 2 for Improved Implementation of the Title V Operating Permits Program," commonly called White Paper 2, which can be found on our website at *http://www.epa.gov/ttn/oarpg/t5wp.html*.) Through title V permit streamlining, a source may elect to consolidate multiple applicable requirements into a single set of applicable requirements that assure compliance with each of the "subsumed" requirements to the same extent as would be achieved by having the source comply with each requirement independently. Through the EBP process, you (as the permitting authority) may have Federal section 112 requirements replaced with your approved alternative requirements that are no less stringent than the section 112 requirements that they replace. Sources subject to the title V operating permits programs must continue to meet the requirements of that program in addition to the requirements of subpart E.

The EBP process differs from the rule substitution and the SPA processes in that three steps are required under EBP

to obtain our approval for your alternative requirements. While all of the substitution options require Federal rulemaking action to approve your program elements (i.e., the §63.91(b) criteria and any other up-front approval elements) and a step where we review and (dis)approve your alternative requirements, the EBP process also requires a final step where we review and (dis)approve how those alternative requirements are incorporated into title V permit terms and conditions. In the other substitution options, your alternative requirements are approved by rulemaking and become federally enforceable after the second step. In the EBP process, after approval of the S/L alternative requirements, you must incorporate the approved permit terms and conditions into Title V permits.

The EBP and SPA processes also differ in that the scope of applicability for EBP is narrower than the scope for SPA. Under the SPA process you submit and we approve alternative requirements that apply to entire source categories; this approach may impact numerous sources in many source categories. In contrast, under the EBP process, you submit and we approve alternative requirements that apply to a small number of individual sources in a category. These sources may or may not comprise all the sources in that category in your jurisdiction. (If they do not comprise all your sources in that category, you must accept delegation for the

remainder of your sources in the category under a different subpart E delegation process.)

2. Steps in the proposed equivalency by permit process

a. Step one: Up-front approval

As a first step you would submit certain elements of your program for up-front approval (as in the existing §63.94 and the proposed SPA processes). The purpose of the up-front submittal is for you to demonstrate that you have satisfied the basic §63.91(b) criteria for obtaining delegation, demonstrate that you have an approved title V permit program to implement the EBP approach, and identify the sources in the source categories for which you wish to use the EBP approach. (You may identify sources for which part 63 emissions standards will be established in the future.)

In discussing the form that an EBP process could take, some of you have suggested that an up-front approval would be redundant when you already have an approved title V program. We disagree, at least in part. As we already discussed for the SPA process, the State-specific up-front approval for an EBP program serves critical functions under section 112(l) including ensuring that you meet the §63.91(b) criteria for delegation, providing a legal foundation for you to replace the otherwise applicable Federal NESHAP requirements in your permits with your alternative, federally enforceable requirements, and delineating the specific sources and

Federal emissions standards for which you have accepted delegation. Also, as in the SPA process, the up-front approval step allows us to verify that you have adequate resources and authorities to implement your alternative section 112 requirements through your approved implementation mechanism, which in this case is your title V permit program. As we have mentioned previously, title V program approval generally is sufficient to demonstrate that you have satisfied the §63.91(b) criteria for the sources covered by your title V program, but it is not sufficient to satisfy the other purposes of the up-front approval.

Section 63.94(b) of the proposed rule, which contains the criteria for up-front approval, differ from the approval criteria currently in §63.94(b) in that they no longer require you to make legally binding commitments to express your title V permit terms and conditions in the form of the Federal standard, in addition they no longer can be construed to require you to demonstrate equivalency in a line-by-line manner. The new second step in the EBP process, where we review and approve your alternative requirements, replaces the up-front commitments. In this step we have the opportunity to evaluate your alternative permit terms and conditions the same way we would evaluate your alternative rules under the rule substitution or SPA processes, so the

up-front, legally binding commitments are no longer necessary to implement this option.

We are proposing that you submit for approval under the EBP process an up-front package that, in addition to including a written request to use the EBP process:

(1) Identifies the existing or future Federal NESHAP standards to be replaced;

(2) Specifies the specific sources to be covered for each NESHAP standard (not to exceed five sources per source category) as well as the process you will use to accept delegation for the other sources in the source category in your jurisdiction; and

(3) Demonstrates that you have an EPA-approved title V program for the sources for which you wish to use the EBP process.

Because the up-front EBP submittal elements do not contain alternative requirements, we are proposing that we could take a maximum of 90 days to review (following a determination that the submittal is complete) and (dis)approve the program you submitted up-front, including the opportunity during this period for public comment during the rulemaking on your submittal. Through a proposed rulemaking notice in the Federal Register, we would inform the public of and request comments on your desire to use the EBP process for the source categories and sources that you

have identified. This notice would also inform the public that they may provide comments on specific equivalent alternative requirements during the comment period for individual draft permits. Assuming the public comments are favorable, as for all the subpart E processes, we would promulgate a rule amending part 63 to incorporate your program. Our proposed timeline for the 90 days is the same as for the simple up-front approval process in SPA.

If you submit alternative requirements (in the form of permit terms and conditions) at the same time you submit your up-front program, we could evaluate them on approximately the same 90-day timeline we use to approve your up-front program (though they do not have to undergo rulemaking), but we could not approve your alternative requirements until your up-front approval becomes effective (at the time of publication in the Federal Register). After your up-front approval has been completed, if you wish to implement the EBP process for individual sources or sources in source categories that are not already identified as part of your approved EBP program, you would need to repeat the up-front approval process to add those sources to your program. As part of your resubmittal for program approval, you would not have to repeat the portions of the demonstration that pertain to the §63.91(b) program approval criteria, provided that your former demonstration is still adequate to show that you have the

resources, authorities, and other program elements necessary to implement the EBP program for the additional sources. Finally, nothing precludes you from obtaining up-front approval simultaneously under more than one subpart E substitution process, e.g., SPA and EBP. We are eager to work with you to streamline the administrative aspects of obtaining subpart E approval to the maximum degree possible within the framework of these regulations.

If we disapprove your program approval request, the Federal emissions standards or requirements remain the applicable requirements for those sources. You would proceed to implement the Federal rules for those sources that are covered by your title V program.

b. Step two: Approval of alternative NESHAP requirements

After we approve your program you may proceed to implement step two, the development and submittal of the draft permit terms and the equivalency demonstrations themselves. In step two of the EBP process, we would review and approve your alternative requirements for each source for which you have received delegation under the EBP process. For Federal standards that are already promulgated at the time of your up-front submittal, step two may take place concurrently with step one, or it may occur after step one. The purpose of step two is for us to evaluate and approve the

actual draft permit terms and conditions that you are proposing to include in permits for these sources to replace the otherwise applicable Federal NESHAP requirements.

In step two of the EBP process, you would submit to us the specific draft permit terms and conditions that you propose to substitute for Federal section 112 requirements, and we would approve or disapprove those terms and conditions. If practical, we prefer that you submit just the terms and conditions that would substitute for the Federal section 112 requirements, thereby omitting any State-only requirements, and that this submittal take place well before you prepare the complete draft permits for the affected sources, so that the terms you include in the complete draft permits reflect the comments you receive from us on your alternative section 112 requirements. However, in some situations it may be appropriate for you to submit complete draft permits at this step, and it may speed the overall permit issuance process when time is of the essence. Your submittal must include the complete set of draft permit terms and conditions that substitute for the Federal NESHAP, an identification of which terms contain alternative requirements, and your supporting documentation for your equivalency demonstration. Additional information on the criteria you may use to demonstrate equivalency for alternative requirements is located in section VII.C.4. of

this preamble. After considering your submittal, we would notify you in writing (which may be done electronically) as to whether we have approved or disapproved your alternative requirements. We may approve your submittal on the condition that you make certain changes to the permit terms and conditions that we identify.

We are proposing that we could take up to 90 days after receiving a complete submittal to review and either approve or disapprove your permit terms and conditions. We are proposing that this review period take no more than 90 days because we are not required to do a rulemaking following our evaluation. However, we think 90 days is an appropriate amount of time to review your alternative requirements because this step is essentially the same as our review of your rules or issued permits under the rule substitution or SPA processes. Each individual permit under the EBP process is like a substituted rule. We are seeking comments on whether more or less time should be allowed for this approval step. Regardless, in any particular situation, we may not need to take the maximum amount of time allocated for our review when you provide complete, well-documented information and demonstrations in your submittal. For example, we may require less time to review and approve your alternative requirements when you submit your permit terms and conditions in the form of the Federal standard and/or your requirements

are no less stringent than the Federal NESHAP requirements on their face.

Furthermore, we believe it is appropriate to require an EPA review period for your alternative requirements that takes place separately from and in advance of our opportunity under title V to review your proposed permits, and we believe this review period must be long enough to allow us adequate time to complete our evaluation. The 90-day period we are proposing for the EBP process is consistent with the amount of time we would have under the other subpart E substitution options to evaluate your alternative rules or permit terms (not including the time needed to do rulemaking), and we think that up to 90 days will be needed to complete our evaluation of your alternative requirements, which would be comparable to a rule substitution evaluation for each permit. Therefore, we think the 45-day review period provided for under title V is not adequate for this purpose. In addition, we are not required under title V to review your proposed permit before it can be issued, but under subpart E we must have an affirmative opportunity to approve or disapprove your alternative requirements for them to replace the otherwise applicable Federal requirements. The second step of the EBP process satisfies the need under section 112(l) for a mandatory requirement that we review and approve your alternative requirements.

After reviewing our comments on your draft permit terms and conditions, you would make adjustments as necessary and develop a complete draft permit for public review and comment under the title V regulations. Under these revisions to subpart E, in your notice of draft permit availability to the public, you must identify where the alternative requirements appear and specifically solicit comments on those requirements. In notifying the public, you must follow the public notification procedures of your approved title V program. The draft permit terms and conditions must also be accompanied by comprehensive supporting documentation that demonstrates how they satisfy the criteria for equivalency. We are calling this supporting documentation the "equivalency demonstration," and it must conform to the guidance for demonstrating equivalency that we have provided in section XI. of this preamble. Under title V, you are required to provide an opportunity for a public hearing on the draft permit as well as a comment period of at least 21 days.

When we approve your program's alternative requirements, those requirements may replace the corresponding Federal requirements and become the federally enforceable requirements applicable to the affected sources. Your alternative requirements would become federally enforceable at the time of permit issuance. If we disapprove your alternative requirements, you would proceed to implement the

Federal rules for sources covered by your title V program. To gain approval to implement the EBP process for a subset of sources in a category in your jurisdiction, you must accept delegation for the remainder of the sources in the category through another subpart E process, such as straight delegation. Your alternative requirements may not become federally enforceable when the permit issues unless and until we approve them during step two. We have added rule language to this effect to prevent alternative requirements from inadvertently becoming federally enforceable if, for some reason, you include them in your proposed permits without our explicit approval and if, for some reason, we fail to object to those permits.

c. Step three: Incorporation into title V permits

After we have approved your draft permit terms and conditions as equivalent, you would incorporate them into proposed title V permits using the appropriate permit modification process. As required under title V, you would send the proposed permits to us for our review and approval and we would have up to 45 days to object to the proposed permit. In accordance with title V, if we object in writing to the issuance of the proposed permit, you would be unable to issue the permit. However, if we have approved your alternative requirements in step two, and if we do not object to the proposed permit, when the permit is issued your

alternative requirements would become the federally applicable requirements in lieu of the Federal NESHAP standard(s). Under EBP, compliance with the set of §63.94 alternative requirements would be considered compliance with all of the applicable NESHAP requirements that are replaced by that set of alternative requirements.

This step is critical for several reasons. First, under the EBP process, the permit issuance process is the legal mechanism (that replaces notice and comment rulemaking) for making your alternative requirements federally enforceable in lieu of the otherwise applicable Federal section 112 requirements. Second, we and the public have an opportunity to ensure that the approved alternative section 112 requirements are implemented correctly via the permit issuance process. To enhance this opportunity, the notice of permit availability and the permit must flag that the permit contains alternative section 112 requirements, and the approved equivalency demonstration for that set of requirements must be attached to each draft, proposed, and final permit. Third, the permit is the publicly available repository that contains the alternative section 112 requirements that apply to an affected source. Our letter of approval to you in step two may not necessarily be readily accessible to the public and, although it contains approved alternative requirements, it does not contain the applicable

requirements for that source, as defined in title V. Through the permit document, we, you, the affected source, and the public all have access to the same information about what is required from that source.

Although we have an additional opportunity to review your alternative section 112 requirements during the permit issuance process, this should not be viewed as an opportunity to "second guess" the approval of those requirements that took place during the step two review. The purpose of our 45-day review with regard to the alternative section 112 requirements is to ensure that the previously approved permit terms and conditions are incorporated properly into the permit.

3. Program approval criteria

Because of the time necessary for us to review title V permits containing alternative NESHAP requirements expressed in a form that is different from that in the underlying Federal standard, we believe this process should be applied in a given jurisdiction only to relatively few sources. We believe that widespread use of the EBP process could hamper your ability to administer your title V operating permits programs, and it could overtax our resources for reviewing permits. This, in turn, could delay permit issuance for sources generally. Because of our concern about the potential burden associated with this process, we are

proposing to limit the number of sources that could use EBP. We are proposing that you may participate in the EBP process for five or fewer sources in your jurisdiction that are subject to a promulgated Federal NESHAP. For five or fewer sources within a source category, we should be able to review each individual equivalency demonstration within the proposed timeframe. As we mentioned previously, if you have more than five sources subject to a NESHAP for which you want to substitute alternative requirements, you should use a process other than EBP.

We recognize that our selection of five or fewer sources in a category is a subjective decision based on our assessment of the burden that will be associated with preparing and reviewing individual permits with equivalency demonstrations (which could be comparable to five rule substitutions). Therefore, we are seeking comment on our proposal to include in §63.94 a defined maximum number of sources in a category for which you could use the EBP process. We are also seeking comment on whether a number other than five would be acceptable; whether there should be a defined maximum number of sources in all categories taken together for which you could use the EBP process; or whether the maximum number for each category and/or the total number of sources for all categories should be a matter that is negotiated between you and the Regional Office during the up-

front approval. We would appreciate detailed justification for any responses that you provide to these questions.

In addition to having approved permit programs and a limited number of sources in a NESHAP-affected source category, two additional conditions need to be satisfied in order for you to submit equivalent alternative requirements in step two. First, a Federal NESHAP standard must have been promulgated. Equivalent alternatives cannot be developed without having a basis for comparison. (This is true for all the substitution options.) Second, your equivalent alternative requirements must be specific to the sources to which they will apply. In general, the EBP process is designed to address situations where you lack a rule or combination of rules the effect of which would be comparable to the NESHAP for which they would substitute. Should you have other rules or a combination of rules the effect of which would be comparable to the Federal NESHAP, you should investigate the use of alternative subpart E processes such as rule substitution or SPA, or permit streamlining as described in White Paper 2. Examples of S/L requirements that are suitable as the basis for developing permit terms and conditions under the EBP process are source-specific SIP requirements and ambient concentration limits derived from health-based rules.

In order to ensure that permits are issued in time to avoid potential dual regulation on NESHAP-affected sources, we strongly recommend that you give us your step two submittal at least 1-1/2 to 2 years in advance of the first substantive compliance date for a NESHAP. (By substantive compliance date we mean a date by which the source is required to comply with provisions to install and operate control equipment, make process changes, or take other physical steps that reduce emissions of HAP to the atmosphere.) We think that 1-1/2 to 2 years is an appropriate amount of time to implement steps two and three of the EBP process for a typical title V permit issuance process. During the first 3 months we would approve or disapprove your alternative requirements. During the remainder of the time you would issue the title V permit and sources would take steps as necessary to comply with the new applicable requirements. For sources affected by simple NESHAP standards (or with very simple permits), and for submittal of alternative requirements that are not significantly different from the NESHAP requirements, a timeframe shorter than 2 years may be adequate. For sources that need a long lead time to come into compliance with your requirements or the otherwise applicable NESHAP requirements, more than 2 years may be needed. We recommend that you develop suitable timelines for implementing the EBP process

steps with your EPA Regional Office at the time of up-front approval, or as early in the process as possible. Before final permits are issued under the EBP option, sources are subject to all applicable Federal NESHAP requirements.

4. Criteria for demonstrating equivalency for alternative requirements

Each submittal of permit terms and conditions for a source must:

(1) Identify the specific, practicably enforceable conditions with which the source must comply;

(2) Identify how these conditions are the same as or different from the relevant Federal requirements through a side-by-side comparison of your requirements and ours;

(3) Provide detailed information that supports and justifies your belief that your alternative requirements meet the equivalency "test" in §63.93(b). Your submittal must contain sufficient detail to allow us to make a determination of equivalency between your requirements and ours.

We would then evaluate the specific alternative requirements (i.e., permit terms and conditions) using the equivalency evaluation criteria in §63.93(b) and discussed in section XI. of this preamble and any guidance we develop to supplement the preamble. We believe that the compliance evaluation study approach to demonstrating equivalency for alternative compliance and enforcement measures described in

section X.C. is not appropriate for the EBP process, but we are taking comment on whether this approach could be implemented effectively under this process.

5. Changes to previously approved alternative requirements

After we have approved your alternative requirements (permit terms and conditions) in step two, if your alternative requirements change in any way that would change the approved section 112 provisions, you must resubmit your permit terms to us for reapproval in order for your new alternative requirements to become federally enforceable in place of the set of alternative requirements we previously approved. Subsequently, you must open and revise the title V permits that contain these alternative section 112 requirements using the appropriate permit modification process to bring them up to date with your revised, approved alternative requirements. In other words, you must repeat step two and revise your title V permits whenever your underlying regulations, policies, or permits change so that your subpart E-approved permit terms correctly reflect your most current requirements for those affected sources. As a matter of Federal enforceability, until we approve your revised alternative requirements under step two, sources

remain subject to the applicable alternative section 112 requirements that we approved previously. If your alternative requirements originate from policies that result in permit terms and conditions, rather than from enforceable rules, if you make any changes to those policies, or if you implement those policies differently from how they are expressed in the approved permit terms and conditions, you must submit the revised permit terms and conditions, as in step two, to obtain our approval that the changed permit terms satisfy the equivalency demonstration criteria.

6. How equivalency by permit compares with title V permit streamlining

Under the proposed EBP process, you would be able to use your title V permitting process to adjust and replace one or more applicable Federal NESHAP standards with your equivalent alternative requirements. This allows you, as the permitting authority, to substitute your alternative requirements for similar part 63 NESHAP requirements and make your alternative requirements federally enforceable. Substitution of requirements under EBP is similar, but not identical to "streamlining" under White Paper 2, however, as the following discussion makes clear.

While the process in White Paper 2 allows permitting authorities as well as sources to initiate streamlining, streamlining under White Paper 2 can only be implemented when

the permit applicant consents to its use (see White Paper 2, page 2). Under the EBP process, you would be allowed to initiate the substitution process, for example, by identifying in the permit application the individual NESHAP standards for which you want to substitute your alternative requirements, and you could do so without a source's consent. (You could not replace Federal requirements with your alternative requirements, however, until we approve your alternative requirements in writing during step two of the EBP process.)

The purpose of streamlining under White Paper 2 is to synthesize the conditions of multiple applicable requirements into a single new permit term (or set of terms) that will assure compliance with all of the requirements. Under White Paper 2, the applicable requirements that are not selected as the set of streamlined requirements remain in effect. Streamlining subsumes, rather than replaces, the nonstreamlined requirements. This means that a source subject to enforcement action for violation of a streamlined applicable requirement could potentially also be subject to enforcement action for violation of one or more subsumed applicable requirements.

Under the EBP process, however, your equivalent alternative set of applicable requirements replaces the NESHAP requirements. This means that once the equivalent

alternative requirements are included in an approved federally enforceable operating permit, the replaced NESHAP requirements are no longer relevant for compliance and enforcement purposes.

In order to demonstrate the adequacy of proposed streamlined requirements under White Paper 2, a source must demonstrate that the most stringent of multiple applicable emissions limitations for a specific regulated air pollutant (or class of pollutants) on a particular emissions unit (or collection of units) has been selected. The MRR requirements associated with the most stringent emissions limitation are presumed appropriate for use with that streamlined emissions limit, unless reliance on that MRR would diminish the ability to assure compliance with the streamlined requirements. Under EBP, you must demonstrate that your alternative emissions limitation is as at least as stringent as the otherwise applicable Federal emissions limitation for a specific HAP (or class of HAP) for a particular affected source. Your alternative MRR requirements may be approved if they meet the "holistic" equivalency test for subpart E equivalency determinations.

Under White Paper 2, there is no limit on how many and which applicable requirements can be streamlined. Under White Paper 2, streamlining is not limited to the requirements arising from any particular program; all

applicable requirements are eligible for streamlining. In contrast, under subpart E's EBP process, replacement is limited only to Federal NESHAP standards by equivalent alternative requirements -- only the Federal NESHAP standards are replaced, not subsumed, by the equivalent alternative requirements established through the EBP process. Note that after getting approval for equivalent alternative requirements for section 112(l) purposes, nothing prevents further streamlining of these requirements with other applicable requirements under the process and criteria provided in White Paper 2. However, when you seek to replace a Federal section 112 standard during the title V permit issuance process under §63.94, streamlining must take place by meeting both the criteria of §63.94 and, except where contradictory, the criteria of White Paper 2 (see White Paper 2, page 18).

Under White Paper 2, applicable requirements that are not selected as the most stringent, i.e. those that are "unused," during the streamlining process must be mentioned in the source's title V operating permit under the permit shield section, if your program offers a shield, or in the statement of basis section. This approach ensures that all applicable requirements are accounted for in a single document, including those subsumed by streamlining, and that the public and enforcement agencies are able to assess

compliance with subsumed requirements quickly. We are not requiring a similar approach for the EBP process. Rather, we believe it would be adequate if the equivalency demonstration simply accompanies draft and final permits. If the alternative requirements correctly replace the Federal NESHAP requirements in the permit, there would be no need to assess compliance with the replaced standards.

VIII. How do the revised delegation processes compare?

This section discusses similarities and differences among the rule substitution process, the SPA process, and the EBP process as we are proposing them in this rulemaking. The discussion compares these options in terms of what they require, which steps are most critical, and where and how they provide flexibility for you to obtain approval. Differences exist among the three processes in terms of the section 112 programs or sources that they cover, the requirements for up-front program approval, and the requirements and procedures for approval of your alternative requirements (including what form your alternative requirements must take before you can submit them to us). The three processes are similar in terms of the "test" that you must meet to demonstrate the equivalency of alternative requirements and in terms of when we and the public have an opportunity to comment on your submittal. All of these

factors may affect your selection of delegation options under subpart E.

A. What section 112 programs or sources are covered by each process?

You may use the rule substitution and EBP processes to substitute your alternative requirements for Federal rules and requirements established under sections 112(d), 112(f), and 112(h). (§63.93 may also be used to substitute your alternative requirements for Federal section 112(r) requirements.) We are also proposing that the SPA process cover additional Federal requirements established under other section 112 provisions, but only after we have promulgated regulations implementing those programs. You may not seek approval under the SPA process to implement and enforce alternative section 112(r) requirements that address section 112's Risk Management Plan (RMP).

You may use the rule substitution and SPA processes to substitute your alternative requirements for any number of Federal requirements that apply to an unlimited number of sources in a source category. You may use the EBP process to substitute your alternative requirements for five or fewer sources in a source category regulated by a NESHAP. We are seeking comment on whether the total number of sources for all source categories should be limited. (Currently, as we are proposing to amend §63.94, we are not proposing to limit

on the number of source categories for which you could use the EBP process.)

B. What is required for up-front approval?

All three processes require an up-front approval to ensure, at a minimum, that you have satisfied the §63.91(b) program approval criteria. The up-front approval takes the form of an EPA rulemaking, through notice and comment in the Federal Register. It can take 90 to 180 days for us to complete this process from the date that we receive a complete request for approval, depending on whether we are approving alternative requirements at the same time.

The rule substitution process requires the least in terms of an up-front approval, the EBP process requires somewhat more, and the SPA process may require even more (depending on the nature of your program). In addition to the §63.91(b) criteria (which, in general, may be satisfied for title V sources by demonstrating title V program approval):

(1) For the SPA and EBP processes you obtain up-front approval for current and future Federal standards or requirements for which you intend to substitute alternative requirements. In your up-front submittal (in step one) you would identify the Federal requirements and the source categories they regulate. (For EBP you would need to identify individual sources.)

Because the rule substitution process collapses the up-front approval and the approval of alternative NESHAP requirements into the same step, the identification of particular NESHAP for which you will be substituting requirements takes place at the time the rule substitution request is approved during that step. It is not possible under the rule substitution process to obtain advance approval to substitute requirements for NESHAP that are not yet promulgated; however, it is possible to obtain future approval for additional alternative NESHAP requirements without having to repeat the §63.91(b) program approval criteria demonstration.

(2) For the SPA process you obtain up-front approval to implement area source requirements using an enforceable area source mechanism such as a general permit issued under a S/L-enforceable permitting program. Under both SPA and the rule substitution process, you may obtain delegation to implement alternative area source requirements through approved alternative requirements that cover categories of area sources.

(3) For the SPA process, which covers programs of broad applicability under section 112, you may obtain up-front approval for generically applicable alternative requirements such as "general provisions" or equipment leak standards.

Generically applicable requirements apply to more than one source category for which you will be obtaining delegation.

(4) For the SPA process you must obtain up-front approval to implement a protocol that establishes an alternative compliance strategy in place of MRR requirements for one or more part 63 emissions standards, i.e., the compliance evaluation study approach outlined later in the preamble in section X.C. The proposed up-front approval criteria for the EBP process (see revised §63.94(b)) are simpler and more streamlined than the existing approval criteria in §63.94(b) and the proposed new approval criteria for SPA in §63.97(b).

In the same vein, the proposed up-front approval criteria for the SPA process (see proposed §63.97(b)) are potentially more extensive than the existing approval criteria in sections 63.94(b) and 63.93(b). This is because we may approve your use of area source mechanisms, approve generic alternative requirements, or approve protocols for establishing alternative compliance and enforcement strategies. Depending on which program elements you get approved during this step, we believe it may be possible to expedite the subsequent rulemaking to approve your alternative requirements. Thus, in exchange for the effort involved in seeking program approval under §63.97, you may

obtain approval for your alternative requirements in less time than it would otherwise take.

We are clarifying in this notice that, in general, all S/L's that have received interim or final title V program approval have satisfied the §63.91(b) approval criteria for title V sources. This clarification establishes that, for all the delegation options under subpart E, if you have received title V program approval, you need not necessarily repeat the §63.91(b) demonstration of adequate resources and authorities in your up-front submittal, at least for title V sources. If you are implementing a program or rule for area sources, however, you would have to demonstrate that you have met the

Section 63.91(b) criteria for those source categories and program mechanisms. Also, for example, if you seek to obtain approval to implement the compliance evaluation study approach discussed in section X.C., you may have to update your §63.91(b) approval.

C. What is required to demonstrate that alternative requirements are equivalent?

All three approval processes rely on the same "test" for determining whether your alternative requirements are no less stringent than the Federal requirements, and they rely on the same protocol for preparing equivalency demonstrations. Each submittal of alternative requirements must be accompanied by

an equivalency demonstration package that provides the technical justification and supporting information we need to evaluate your requirements. Very briefly, the test for equivalency is whether, taken as a whole, the levels of control and compliance and enforcement measures in your alternative requirements achieve equivalent or better emissions reductions compared with the otherwise applicable Federal requirements at each affected source, and compliance dates must be no later than those for the Federal requirements. The next section of the preamble, which is entitled "How will EPA determine equivalency for S/L alternative NESHAP requirements?," explains how we would apply this test.

D. What is required for EPA approval of alternative requirements?

For the rule substitution process we approve your alternative requirements by doing rulemaking in step one. For the SPA process, we approve your alternative requirements by doing rulemaking in step two. The rulemaking step is the critical step in these processes in terms of making your alternative requirements federally enforceable to replace the NESHAP requirements. In the EBP processes we approve your alternative requirements in step two by notice to you in writing. Rulemaking is not required for step two approval of your alternative requirements. (For SPA and EBP, approval of

alternative requirements can take place at the same time as the up-front approval, provided the Federal section 112 requirements are promulgated and you are able to submit your alternative requirements at the time of up-front approval. You can think of this as simultaneously combining step two with step one, as generally happens under the rule substitution process.)

The SPA and EBP processes differ in terms of which step is the critical step. Step two is the critical step in the SPA process because this is when your alternative requirements become federally enforceable to replace the section 112 requirements. For EBP, which is implemented only through title V permitting programs, your alternative requirements become federally enforceable and replace the NESHAP requirements in step three, when the permits are issued. This is why it is critical for us to have an opportunity to affirm or object to each permit in the EBP process.

When your alternative requirements become federally enforceable through issued permits, the requirements may only be incorporated into permits and considered federally enforceable if they have already been approved by us. This eliminates the possibility that alternative NESHAP requirements could become federally enforceable by "default" if we fail to object to a permit during our review period.

The purpose of the permit review step from a section 112(l) approval perspective is to ensure that the permit accurately incorporates the approved alternative requirements.

The EBP process allows your alternative requirements to replace the otherwise applicable Federal section 112 requirements so that the Federal requirements are no longer relevant for compliance and enforcement purposes. This goes beyond White Paper Number 2's streamlining guidance, which requires unused streamlined requirements to be subsumed, rather than replaced, in the permit.

For both the rule substitution and the SPA processes, your alternative requirements must be submitted in a form that is enforceable as a matter of S/L law and that applies to an entire source category or subcategory unless you use the partial approval option. For SPA these authorities may consist of rules or general permit terms and conditions. We will not do source-specific reviews of alternative requirements under these processes even with partial approvals (except under rare circumstances, e.g., you only have one source in a category). For the EBP process, your alternative requirements must be submitted in the form of source-specific permit terms and conditions. We will only do source-specific reviews of alternative requirements under this process. An advantage of the EBP process is that you need not undertake a source category rulemaking or general

permitting process at the S/L level before submitting alternative requirements for approval.

When the basis for your alternative requirements is S/L policies, as opposed to enforceable regulations or rules, you may only submit such alternative requirements when they are incorporated into enforceable rules or permits (or other enforceable mechanisms). If and when you revise your policies in a way that would change any alternative section 112 requirements that we have already approved, you must revise and resubmit your requirements for another approval that allows us and the public to ensure that the subpart E equivalency criteria are still satisfied for those requirements.

E. When do EPA and the public have an opportunity to comment on S/L submittal?

For all subpart E delegation processes, we and the public are provided an opportunity to comment during the up-front approval step as well as during the subsequent steps to approve alternative requirements and ensure that they are accurately reflected in title V operating permits. For the up-front approval step, which always involves rulemaking in the Federal Register, the public comment period must last for a minimum of 21 days. The 21-day minimum public comment period is also required for any other rulemaking activities. This includes the approval of substituted rules and

authorities (i.e., alternative requirements) under the rule substitution process in §63.93. Our review period, including the consideration of public comments and publication in the Federal Register, may not exceed 90 days for any approval that does not involve rulemaking on alternative requirements, and 180 days for any approval step that does involve rulemaking on alternative requirements.

For the SPA process, the opportunity for us and the public to review and comment on your alternative requirements may take place with the up-front approval, or it may happen during the subsequent step. The timing of this review depends on the status of your program and regulations, on our promulgated rules, and on when you submit your alternative requirements. Because this activity requires Federal Register rulemaking, we are proposing that our review period for this step can take up to 180 days.

For the EBP process, the opportunity for us to review and comment on your alternative requirements may take place roughly at the same time as the up-front approval, or it may happen during the subsequent step. (However, we cannot approve your alternative requirements until we approve your request for delegation under the EBP process.) Again, the timing of this review depends on the status of your program, on our promulgated rules, and on when you submit your permit terms and conditions. Because this activity does not require

Federal Register rulemaking, we are proposing that our review period for this step can take up to 90 days. Under title V, the public would have 30 days to review and comment on the complete draft title V permits after we have approved or disapproved your alternative permit terms and conditions. Also under title V, you must provide a 45-day period for us to review and object to each proposed permit before it is issued (and for us to review and object to each permit revision that amends, repeals, or revises previously approved section 112 requirements). The purpose of our and the public's review of each permit during the 45-day period is to ensure that the permit terms and conditions accurately reflect the substance of any approved alternative requirements.

IX. How should a S/L decide which delegation process(es) to use?

This section discusses how the similarities and differences among the rule substitution process, the SPA process, and the EBP process (as we are proposing them in this rulemaking) may affect your selection of delegation options under subpart E. By expanding the number of delegation processes available under subpart E and by increasing their ease of use, we hope to provide you with as much flexibility as we can in accepting delegation for Federal section 112 requirements. Your selection of

delegation processes will depend on the structure of your program including the nature of your industries, the needs of your legislature, and the maturity of your program with regard to air toxics (or related) regulations. To choose the most appropriate processes, we invite you to consider what each option is designed to address and the tradeoffs among the options.

All the processes offer the same flexibility by allowing approval of alternative MRR requirements. Furthermore, if your rule contains a stricter emissions standard compared with the Federal standard, we can accept a less stringent package of MRR requirements. Such flexibility allows you to submit MRR requirements that differ from the Federal MRR requirements.

A. §63.93 substitution of rules or authorities

The rule substitution option in §63.93 addresses situations where you have a few source categories for which you want to substitute alternative source category rules or other enforceable authorities for major and/or area sources. The alternative requirements that you submit to us for approval must already be enforceable under your S/L law in the form of regulations or comparable enforceable requirements (such as permit terms). This program may impact numerous sources in a source category or across the source categories for which you substitute rules.

The rule substitution option offers several advantages. First, it allows your alternative requirements to become federally enforceable and replace the otherwise applicable Federal requirements upon our approval of your rules. Second, it involves somewhat less up-front effort to substitute alternative requirements than the EBP or SPA options (potentially significantly less compared with SPA). Third, it can be applied to an unlimited number of sources or source categories including area sources. A disadvantage of the rule substitution option is that it may entail a longer total review and approval process for each rule compared to step two of the SPA process. This is because we review each of your rules on an individual basis. Thus, this option could be administratively more burdensome to us and to you in developing and reviewing multiple rules. Nevertheless, you may decide that substituting your own S/L requirements (e.g. toxic, VOC, or PM rules) on a rule-by-rule basis both provides the best approach for reducing dual regulation and achieving the required emissions reductions most efficiently.

B. §63.94 equivalency by permit

In other situations, where you have only a few sources for which you want to substitute alternative requirements (or a few sources in each of a few source categories) and you do not already have source category rules that regulate these sources, it may make sense to use the EBP process. An

advantage of the EBP process is that you may submit alternative requirements in the form of title V permit terms and conditions; this allows you to bypass the sometimes lengthy process of developing source category rules, which may not be an efficient use of your resources for just a few sources. Disadvantages of the EBP process are that it may be used only for five or fewer sources in a category and only when a source-specific analysis is required to do an equivalency demonstration; also, general permits are not allowed under this option.

C. §63.97 State program approval

If you decide to substitute alternative source category rules (or enforceable authorities or general permit terms) for a large number of Federal section 112 rules, then the SPA process may be appropriate for you. This situation might arise if you decide to develop an entire air toxics program, or if you already have a mature air toxics program, with many regulations affecting source categories regulated by Federal section 112 standards. (This delegation process may impact numerous sources in a source category or across the source categories for which you substitute rules.) The SPA process is appropriate in these situations because it can eliminate the redundant review of generic requirements that apply to multiple source categories each time we review your

alternative requirements for a new source category; thus, it has the potential to shorten the review period for the specific alternative requirements because some aspects of the approval would have been worked out in advance.

Another advantage provided by the SPA process is that it allows you to substitute your area source requirements for Federal area source requirements using source category rules or other enforceable mechanisms such as Federally Enforceable State Operating Permit (FESOP) general permits. Also, like the rule substitution process, the SPA process allows your alternative requirements to become federally enforceable and replace the otherwise applicable Federal requirements upon our approval of your rules or permits. A disadvantage of the SPA process is that it may entail a more complex submittal and review process for the up-front approval during step one compared with the EBP and rule substitution processes. We believe this level of effort will be administratively efficient, however, for developing and submitting multiple rules. Finally, the SPA program covers section 112 requirements that we may develop in the future under other sections besides sections 112(d), (112(f), and 112(h), and it allows you to develop protocols to establish alternative compliance and enforcement strategies.

At the time you submit your program for up-front approval, your alternative requirements do not yet need to be

developed or enforceable; however, when you submit your alternative requirements to us for approval in step two, they must already be enforceable under your S/L law in the form of regulations, general permit terms, or requirements in another enforceable mechanism.

X. How will EPA determine equivalency for S/L alternative NESHAP requirements?

A. Introduction

Before we can approve your alternative requirements in place of a part 63 emissions standard, you must submit to us detailed information that demonstrates how your alternative requirements compare with the otherwise applicable Federal standard. This applies whether your alternative requirements take the form of a S/L regulation, the terms and conditions of specific permits, or any other format. This section addresses what information you must submit and how we would decide whether to approve that submittal. It also pertains to the information that you could submit for approval under the SPA process as part of the optional up-front program elements.

In order to evaluate your submittal in a timely way, we would expect you to develop and submit a side-by-side comparison of your requirements and the Federal rule. This comparison would cover specific elements pertaining to the applicability of the standard to subject sources, the

emissions limit (and its associated requirements such as test methods, averaging times, and work practice standards), which constitutes the level of control, the compliance and enforcement measures (MRR), and associated requirements established in the part 63 General Provisions. (We intend to provide examples of such submittal in forthcoming guidance). The details of the submittal would then be organized according to these elements. Your submittal could be based on S/L policies that are not necessarily enforceable as a matter of S/L law, so long as they are then made federally enforceable through the 112(l) approval process. Fundamentally, you must demonstrate that your alternative requirements will achieve the same (or more) emissions reductions of the same pollutants from the same sources that will be regulated by the Federal standard and that they will achieve the reductions no later than the Federal standard. Also, our ability to enforce the alternative requirements to the section 112 standard must not be diminished.

The expectations, guidelines, and requirements discussed in this section would apply to the rule substitution, SPA, and equivalency by permit approval processes we are proposing for revised subpart E. The complexity of any particular submittal would depend, however, on the process option you select, the complexity of the regulations that are being compared, and the degree to which your requirements differ

from the Federal requirements. (However, the criteria for evaluating the equivalency of your submittal would be the same under each process option.) You must demonstrate to us that your alternative requirements adequately achieve the emissions reduction and enforceability results of the Federal standards and this burden typically is proportional to how much your requirements deviate from the Federal requirements for which they would substitute.

The remainder of this section is organized as follows. Section X.B., below, addresses our thinking regarding equivalency demonstrations that involve alternative levels of control and compliance and enforcement measures (including a discussion on how compliance evaluation studies may be used to establish alternative compliance and enforcement measures in section X.C.). This discussion is followed by a more comprehensive description of the equivalency demonstration process under subpart E in section X.D. Finally, in section X.E. we address specific issues associated with demonstrating equivalency for work practice standards and General Provisions.

B. Equivalency of alternative levels of control and compliance and enforcement measures

You told us that you believe the equivalency test in subpart E should be flexible enough to accommodate approaches other than a line-by-line equivalency of compliance and

enforcement measures (that is, MRR requirements) between your rules and the Federal rules. In your view, line-by-line equivalency would preclude approving S/L approaches to compliance assurance and enforcement that rely on fewer MRR responsibilities for sources and greater inspection frequencies by permitting authorities (or other elements, e.g., operator training) in your programs. You believe these approaches can produce equivalent results compared with the otherwise applicable Federal MRR requirements.

Your views highlight differences in philosophy and approach regarding compliance assurance and enforcement between our respective programs. While we believe that vigorous inspection programs are vital to environmental protection programs, we do not believe that they replace completely the need for adequate documentation by sources of what air emissions (and operation, maintenance, and corrective activities) have occurred since an inspector was last present at those sources.[7] While we recognize that

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[7] The MRR requirements in part 63 NESHAP serve the following purposes:

(a) To ensure that process operators are provided information sufficient for them to know whether the process is operating in compliance with applicable requirements;

(b) To provide a source of information for plant managers, corporate managers, and corporate environmental compliance personnel to be able to review and ascertain whether facility operations are in compliance with applicable requirements;

(c) To provide sufficient information for State or Local program and Federal inspectors to ascertain the degree of facility compliance at times other than the period of an onsite

having a field presence is an effective way to assure compliance, we continue to find compelling reasons to limit how NESHAP MRR may be modified through the section 112(l) equivalency process to reduce the NESHAP MRR schemes. We believe that using a frequent inspection program can substitute for some but not all compliance and enforcement measures. We are seeking comment on the use of a frequent inspection program as a substitute for some compliance and enforcement measures.

Earlier, in section VI.C.3. of this preamble, we clarified that we believe that flexibility to approve alternative compliance and enforcement approaches is already available in §63.93, and that we intend to write sections 63.94 and 63.97 in a similar way to comport with the language in §63.93(b). Therefore, we are not proposing changes to the "test" in §63.93(b), but we are proposing rule revisions to other subpart E sections to achieve the flexibility afforded by §63.93(b).

On a practical level, given the continuing need to do more with fewer resources, S/L air pollution control enforcement offices may find that they have fewer inspectors

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inspection; and

(d) To provide sufficient evidence to document the compliance status of a facility for law enforcement purposes.

in the field and/or fewer travel dollars to deploy the inspectors they do have. The development of new section 112 standards that affect tens of thousands of sources nationwide will put an even greater strain on S/L and Federal inspection forces. You should be aware that once you agree to substitute more frequent inspections for some MRR, you must continue that higher frequency of inspections to ensure that your equivalency determination remains valid.

Furthermore, traditionally we have relied on you to be the first authority to address violations. In doing so, you may take a year or more to identify and address a violation. If you are unable to achieve a satisfactory resolution, we may be called upon to assist you with a Federal enforcement action. In some cases we may overfile as part of our Federal oversight responsibility. If we are to conduct our oversight duties, we must have sufficient evidence to review. Years after a violation has occurred, it is likely that the most reliable source of information will be a source’s monitoring records that clearly demonstrate violations.

Because we may not initiate a Federal enforcement action for several years after alleged violations have occurred, we require that sources' records be retained for at least five years, the statutory maximum generally allowed for Federal actions pursuant to 28 U.S.C. Section 2462. (This is consistent with requirements for all major and area sources

who must obtain operating permits under title V of the Act). In determining if the alleged violations are one-time violations or are part of a continuing pattern of violations, we and the courts must have records spanning a significant period of time to assess the history of violations at a source. Thus, the five-year record retention requirement that applies under the title V operating permits program and the part 63 emissions standards is critical to our enforcement efforts, and we will not modify this requirement through the section 112(l) approval process.

The current standard for approvability for substituted rules under subpart E §63.93(b)(2) is that the levels of control and MRR must "result in emissions reductions from each affected source...that are no less stringent than would result from the otherwise applicable Federal rule." What this means as a practical matter is that if the emissions limitation in your submittal is more stringent than the emissions limitation in the Federal NESHAP standard, then the MRR in your submittal can be slightly less stringent than the MRR in the Federal rule. We cannot approve gross deficiencies in compliance and enforcement measures, however. Similarly, if the emissions limitation in your rule is identical to that in the Federal rule or it is different but equal in stringency, your MRR package can be different from the NESHAP MRR, but it must, in total, be no less stringent

than the NESHAP's compliance and enforcement provisions. This means that some provisions in your MRR package can be less stringent than the NESHAP if they are balanced by something in your MRR package that is more stringent or more protective. For example, your monitoring could be more stringent and your reporting frequency less stringent, so long as the end result is equivalency.

We explained this approach in our November 26, 1996 memorandum on this topic. This memo clarified that we will evaluate your submittal taken as a whole, that is, we will consider the stringency of the level of control and the stringency of the compliance and enforcement measures together. We must review the components individually, but we will evaluate the sum of all the parts to determine if your submittal is no less stringent than the Federal NESHAP. Note that we are not proposing that less stringent emissions standards may be balanced by more stringent MRR. Thus, we believe you already have flexibility under the existing language of §63.93 to adjust the compliance and enforcement measures in a manner that will allow for "less stringent" MRR, if it is balanced by a more stringent level of control.

As promulgated in 1993, the equivalency language in §63.94 (program substitution) specifies that, taken individually, your level of control must be no less stringent than the Federal NESHAP, and your compliance and enforcement

provisions must be no less stringent than the Federal NESHAP. In addition, §63.94 as promulgated requires you to put your requirements in the form of the Federal standard. This language does not allow the same flexibility as the language in §63.93. It does not allow the same flexibility to balance less stringent MRR provisions against a more stringent level of control, and it does not allow the same flexibility within the MRR component to balance MRR provisions against each other. For example, you could not submit monitoring that is more stringent and reporting that is less stringent, or some other combination of adjustments, so that the end result is equivalency with the Federal MRR provisions.

In response to your requests for greater flexibility in the subpart E equivalency process overall, we are proposing in this rulemaking to create §63.97, the new SPA process, to mirror the equivalency approach in §63.93. We are also proposing to extend the §63.93 approach to the equivalency by permit process in amended §63.94.

Additionally, under these new provisions we would allow you to substitute other types of compliance assurance and enforcement measures to balance less stringent MRR measures in your substitution packages when it is unclear whether your initial submittal is equivalent to the Federal rule. For example, you may choose to include a guarantee of high levels of compliance to be determined by annual audits or rule

effectiveness studies, the exact nature of which you would need to negotiate with us (see the discussion on compliance evaluation studies in section X.C., below). Or, for example, you may offer to put all compliance reports from affected sources on an electronic bulletin board available free to the public in return for less frequent reporting.

You and other affected parties should be aware of the difficulty of comparing a more stringent level of control with less stringent MRR or, where levels of control are equal, of comparing more and less stringent MRR and/or entirely different enhancements to the compliance assurance package as mentioned above. Deciding how much flexibility we can allow on MRR provisions is not an exact science. We do not now have a "common currency" or "rate of exchange" that is generally applicable to all standards. Therefore, we are not prepared at this time to define precisely how increases in stringency may be traded for some other kind of decreases in stringency. Where we are not convinced that your package is equivalent, you may need to offer additional improvements in your program or enhanced documentation to assist us in reaching the conclusion that your rule or program is equivalent. For more detailed discussion of these issues, please see section X.D.3. below.

We seek comment on all aspects of this discussion. Because the determination of equivalency is not an exact

science, we are seeking comment on how to make these criteria more precise.

C. Using compliance evaluation studies in equivalency demonstrations

In conjunction with stakeholders from California, we have developed a proposed approach for using compliance evaluation studies in subpart E rule substitutions to establish equivalency for MRR provisions. We believe this approach can be implemented within the context of the existing regulations for the rule substitution process under §63.93 (on a rule-by-rule basis) and for the proposed SPA process. We intend to provide formal guidance in the near future to implement this approach fully. The following discussion summarizes only the highlights of the proposed approach.

Upon promulgation of a 40 CFR part 63 Federal standard, you would evaluate the level of control, WPS, and MRR in the Federal standard and prepare a submittal with your alternative requirements that you believe are adequate, as a package, to demonstrate equivalency with the Federal requirements and to allow Federal enforcement actions on sources that would otherwise be subject to the Federal standard. If differences exist between the Federal standard

MRR requirements and your alternative MRR and it is unclear whether your requirements are equivalent to the Federal requirements, you may offer to add to your package a commitment to perform compliance evaluation studies. This commitment would allow you to demonstrate that your requirements satisfy the approval criteria of §63.93(b). We would then take public comment on your rule substitution package through formal notice in the Federal Register and either approve or deny the rule substitution request that includes an approved plan for performing the compliance evaluation studies. If approved, we would require that you perform compliance evaluation studies as frequently as every year or two in perpetuity.

The compliance evaluation study for any source category in a part 63 NESHAP standard would consist of compliance assessments that would take place before and after we approve your program. In the pre-approval assessment, you would demonstrate to us that your existing MRR requirements, either alone or in conjunction with appropriate amendments, are achieving, or are likely to achieve, a high degree of compliance with the NESHAP requirements to apply controls and achieve the NESHAP-specified emissions reductions. In the post-approval assessment, you would demonstrate the rate of compliance for the source category (based on compliance with your approved alternative requirements), the cause of

noncompliance, if any, and you would explain whether the noncompliance is related to your alternative MRR provisions. This compliance rate information would be evaluated to determine, to the degree possible, if implementing the part 63 NESHAP MRR compliance provisions that were not included in your alternative rule would be likely to result in an improved compliance rate. The details for both phases of the compliance evaluation study would be worked out with us in advance of their implementation and, if acceptable, they would be approved, after public comment, in the Federal Register as part of your rule substitution package.

Any approval of a package that includes the compliance evaluation study approach would be conditioned on (1) you actually performing your commitments related to the compliance evaluation study, (2) a finding through the post-approval compliance assessment of no significant noncompliance, and (3) a finding through the post-approval compliance assessment that your MRR provisions did not contribute significantly to the noncompliance rate that is determined. If any of these conditions are not satisfied, and adjustments to your program and regulations do not correct these deficiencies, we may disapprove your program in accordance with withdrawal provisions in §63.96. We seek comment on this discussion and the use of compliance evaluation studies in equivalency demonstrations.

D. Proposed process for determining equivalency under subpart E

Because of the complexities involved in determining whether your alternative requirements are no less stringent, on the whole, compared with Federal section 112 requirements, we are requiring that you provide detailed demonstrations in your submissions when your requirements are different from those in the otherwise applicable Federal rules.

You must provide in your submittal a side-by-side comparison of your alternative requirements and the Federal requirements for which they would substitute. Your submittal must contain all the detail we need to determine equivalency. If you will be using more than one rule to obtain equivalency for a particular Federal rule, then you must attach each of your rules to your submittal and you must indicate the relevant requirements of each rule in the side-by-side comparison. You must also include all other documents containing requirements that are part of your equivalency demonstration, such as any relevant portions of your approved SIP. (If you are certain that these documents are readily available to your EPA Regional Office and the public, it may be sufficient to merely cite the relevant portions of the documents or say where they are available, e.g., give an Internet address.) You must submit all the information that is necessary to demonstrate whether your alternative

requirements achieve the emissions reductions called for in the Federal standard.

Even if your rules or policies specify that your alternative requirements must be as stringent as the Federal section 112 requirements, you must still perform the complete equivalency demonstration as described in this section for each individual Federal requirement for which you wish to substitute requirements. Each of the following elements must be addressed in the equivalency demonstration.

1. Applicability

Your alternative standard, regulation, or permit terms and conditions must cover all of the affected sources covered by the Federal NESHAP standard. Your standard must not contain any exemptions that do not also appear in the Federal rule. For example, you may currently have rules that exempt particular affected sources, such as those emitting particular pollutants, those performing a particular type of operation (e.g., research and development), or those that are below a size cutoff specified in the Federal rule. We cannot consider a rule containing such exemptions to be equivalent (unless the Federal rule provides for the same or broader exemptions). Similarly, we cannot consider a rule to be equivalent if it does not control each of the HAP controlled by the Federal standard to the same degree that the Federal standard requires.

In addition, as we explained in the original subpart E proposal preamble at 58 FR 29303, "except as expressly allowed in the otherwise applicable Federal emissions standard, any forms of averaging across facilities, source categories, or geographical areas, or any forms of trading across pollutants, will be disallowed for a demonstration of stringency . . . ." Any State rule must be demonstrated to be no less stringent than an otherwise applicable Federal rule for any affected source subject to the Federal rule rather than, on average, across sources. This does not mean that a State's submittal must necessarily include a separate demonstration of stringency for each individual affected source within a State. Rather, a State must demonstrate that its rule could reasonably be expected to be no less stringent for any affected source within the State, reflecting knowledge of the number, sizes, and operating characteristics of that kind of source within the State subject to the relevant State rule. A worst case analysis may reasonably suffice in some such demonstrations."

2. Level of Control

Your emissions limitation cannot be considered equivalent unless it results in emissions reductions equal to or greater than the emissions reductions required by the Federal NESHAP standard for each affected source. This is a fundamental point, and it is the basis for many of the

requirements outlined in this section. The documentation associated with your submittal must clearly demonstrate equivalency. Emissions must be equivalent to the NESHAP emissions at all production levels and all modes of operation.

Test methods and averaging times are integral parts of the emissions limit equivalency determination. We cannot make decisions on the equivalency of your level of control without considering the test method(s) and averaging time(s) associated with both the NESHAP and your rules. In addition, the term "emissions limit" as it is used here includes either a numerical emissions limitation or a work practice standard.

The subpart E rule allows for flexibility on those elements where you can reasonably show that the outcome of your rule will be emissions reductions that are equal to or greater than the emissions reductions required by the Federal emissions standard. Subpart E does not allow for an outcome where there would not clearly be equivalent emissions reductions. The following criteria follow from this point:

a. Form of the standard and burden of demonstration. The form of your rule (or permit terms and conditions) does not have to mirror the form of the Federal standard. However, because it is difficult to compare rules that have different formats, your emissions reductions need to be quantified in a way comparable to the Federal standard, and

must be equivalent or better. In addition, as we mentioned earlier, the detail you provide in your demonstration should fully account for the ways in which, and the degree to which, your requirements differ from the Federal requirements.

b. Scope of applicability demonstration. Your standard must show equivalency on an affected source-by-affected source basis. This means that you need not demonstrate that your standard equivalently covers all the emissions points in the NESHAP affected source the same way that the Federal NESHAP covers them (unless the NESHAP defines an affected source as an individual emission point), but that the emissions reductions that would be achieved from each affected source is equivalent to the emissions reductions that would have been achieved by the otherwise applicable part 63 emissions standard.

c. Scope of pollutants covered. We may approve an alternative rule which covers classes of pollutants, rather than individual pollutants (e.g., VOC vs. specific HAP), but only if you can demonstrate that your rule's effect is to control each of the HAP in the Federal standard to the same degree as the Federal standard requires.

d. Control efficiency. The control efficiency at which your standard requires the pollution control equipment to operate must be as stringent as the analogous control efficiency required by the Federal standard.

e. Performance test methods. Your alternative requirements must state how compliance is to be determined and the appropriate test method to be used. (The section 112(l) approval of your performance test method is valid only for the explicit purpose for which it is intended). The performance test method required by your rule must ensure that the control equipment or other control strategy performs well enough to achieve the same emissions reductions required by the Federal rule. The performance test method in your alternative requirements would be evaluated and approved holistically as part of a package that includes your emissions limit, averaging time, applicability criteria, and work practice standards.

f. Averaging times. Your rule must explicitly contain the averaging time associated with each emissions limit (e.g., instantaneous, 3-hour average, daily, monthly, or longer). The averaging times in your rule must be sufficient to assure the emissions reductions that your rule requires, and they must be sufficient to assure compliance with the limitations required in the otherwise applicable Federal requirements.

Your alternative requirements must state explicitly those records that sources are required to keep to assess compliance with the associated time frame for the requirements. You must require records that are commensurate

with the applicable regulatory requirements and they must be available for inspection upon request.

g. Work practice standards. If your rule incorporates work practice requirements which are different from those required by the Federal rule, then you must show that your work practice requirements result in emissions reductions that are equivalent to the Federal requirements in cases where the work practice requirements are related to emissions reductions. In cases where the work practice standards are related to compliance and enforcement measures (MRR), your compliance and enforcement requirements, including these work practices, must be equivalent to the Federal compliance and enforcement measures as a whole or equivalent to the Federal regulation as a whole. (See the additional discussion on work practice standards in section X.E. below.)

h. Compliance dates. Your rule or permit terms must specify compliance dates for your alternative requirements. The compliance dates must be sufficiently expeditious to ensure that each affected source is in compliance no later than would be required by the otherwise applicable Federal rule.

3. Compliance and Enforcement Measures

You will need to submit a detailed description of the compliance and enforcement measures (MRR) required by your

rule as part of the side-by-side comparison of your rule and the Federal rule for which it would substitute. We have already stated that the level of control in your rule must be at least as stringent as the level of control in the Federal rule. In addition, in order for equivalency to be granted, the level of control and MRR of your rule, taken together as a whole, must be equivalent to the level of control and MRR of the Federal rule, taken together as a whole. This means that equivalency can be granted under two possible scenarios:

a. If your level of control is equal to the Federal emissions limit, then the sum of your MRR requirements must be as stringent as the sum of the Federal MRR requirements.

This means that you must require MRR that, on the whole, is equivalent to the requirements in the Federal rule. If your requirements are different from the Federal requirements, but are still considered close to equivalency with the Federal requirements, and it is difficult to demonstrate equivalency definitively, then you may pursue alternative compliance and enforcement strategies through the compliance evaluation study approach discussed above.

b. If your level of control is more stringent than the Federal level of control, then the sum of your MRR requirements can be less stringent than the sum of the Federal MRR requirements, so long as your rules and requirements, seen as a whole, are equivalent to the Federal

MACT standard's combination of emission limits, MRR, and other requirements.

This means that your rule as a whole must be equivalent to the Federal rule.

For either scenario a. or b., we believe there are limits to the differences in MRR that we would accept in an equivalency demonstration. We believe that your alternative requirements must, at a minimum, meet one or both of the following tests:

i. S/L MRR requirements are no less stringent than Federal MRR; or

ii. S/L MRR requirements assure compliance with the level of control or work practice standards to the same degree as the Federal requirements.

In order to satisfy either of the tests above when you might not otherwise be able to demonstrate equivalency, there may be additional measures of assurance that could, in sum, bring your MRR requirements up to equivalency. For example, we could consider accepting requirements for additional training for operators, a program of frequent inspections, a requirement of public or electronic posting of compliance reports, a State audit program, systems to alert operators to exceedances (lockout systems which shut down operations if you begin operating out of compliance could substitute for some MRR), or other similar measures.

We believe that MRR is a critical component of any standard. MRR helps to reduce pollution by alerting the operator to abnormal conditions, so that corrective action can be quickly taken to reduce pollution. Additionally, MRR helps to ensure that there is a record of compliance, or non-compliance, which the enforcement agency can use. This record of data which would lead to enforcement provides an incentive for sources to stay sufficiently below the level of mandated emissions so as to avoid enforcement, thus further reducing pollution.

It is possible that a S/L with a less stringent emissions limitation could in actual practice achieve greater cleanup than the Federal MACT because of the vigor of their enforcement program. While that might be a good result for the environment, what matters more for the purposes of the comparison required by section 112(l) is that the standards, seen as a whole, are equivalent. However, we will not accept S/L emission limits that are less stringent.

The language in section 112(l)(5)(A) of the Act, which discusses the basis for approval or disapproval, says that the Administrator shall disapprove a S/L program if the authorities are not adequate to assure compliance. We interpret this section to mean that even if some lesser degree of MRR than the MACT's MRR is in a S/L rule, which must be balanced by a more stringent emissions requirement in

order for the standard as a whole to be seen as equivalent, at no point can the S/L MRR package be inadequate to assure compliance by all sources within the S/L's jurisdiction with each applicable standard. In essence, this phrase in the Act is establishing a bottom line below which no MRR submittal is approvable.

Some of you have objected to the general inability to characterize tradeoffs in such a balancing of emissions limits and MRR. However, the same is true of trading off increased inspections, extensive compliance assistance and inspector training for less MRR, as California has proposed. How do we assess these tradeoffs? There is no exact answer. We must exercise judgment by weighing all the facts, and use wisdom and common sense to make as fair an assessment as possible.

With that in mind, we may still consider an extensive inspection program as complementing and assisting with operator conducted monitoring. However, it should be understood that we expect that all S/L's will have an inspection program as an integral part of the resources devoted to implementing the program. An inspection program should be truly superior in order to justify a reduction in MRR. For example, we would ask you to show us an inspection checklist that you will use for each inspection; also, inspections should be frequent, such as twice yearly.

However, an accurate record of compliance activity when the inspector is not present, with good MRR, is the best measure of ongoing compliance.

Finally, we also believe there are some "bottom line" conditions that are absolutely necessary to satisfy any of these tests, and that substitute rule (or set of requirements) must contain these conditions. Some of these conditions are:

a. We cannot approve your alternative rules if they allow you to exercise "Director's discretion" to change any approved requirements once we have granted equivalency and completed the subpart E approval process. (However, you may be able to develop source-specific alternative requirements through other mechanisms such as obtaining delegated authority under the part 63 General Provisions (see discussion in section X.D.4. below) for some of our discretionary provisions or streamlining a source's permit conditions following the guidance in White Paper 2.)

b. Major sources must retain records for at least 5 years.

c. Your submittal must sufficiently document and support any requirements that are different from Federal NESHAP requirements.

4. <u>General Provisions</u>

Your submittal must address all of the relevant General Provisions in part 63, subpart A and demonstrate that your rule or set of other requirements contains the same or equivalent provisions. In order to ensure that the review process is workable and timely, it is essential that your submittal address each requirement in the General Provisions and discuss any differences between a proposed alternative and the General Provisions. Mere references to other S\L rules or other requirements or to the fact that such matters are handled in sources' permits are not sufficient to demonstrate equivalency (although demonstrations may be made through permit terms and conditions). For example, saying that the General Provisions' intent is satisfied by "State rule 452," is incomplete without an explanation of the relevant features of rule 452 that address the individual General Provisions requirements, and submission of a copy of rule 452 as part of your section 112(l) submittal. Similarly, an assumption that the permit writer will automatically include quality control requirements for monitors, for example, is not acceptable. The requirements must be in the form of a S/L rule or enforceable permit terms and conditions.

Furthermore, alternative requirements based on policies or other mechanisms that are not regulations or rules formally adopted under S/L law are only approvable so long as

you understand that they become federally enforceable when we approve them under 112(l).

Section X.F. below contains a more comprehensive discussion of how we would determine equivalency between S/L requirements and the General Provisions to part 63.

5. Relationship to other Clean Air Act requirements

Section 63.91(f) establishes that any S/L alternative approved under section 112(l) of the Act must not override the requirements of any other applicable program or rule under the Act or under S/L law. For example, a source subject to a section 112 NESHAP standard may also be subject to controls for criteria pollutants such as best available control technology (BACT), reasonably available control technology (RACT), or fifteen percent VOC reduction under a SIP, or be subject to other S/L-level rules. We expect that S/L's will submit, for approval as alternatives to section 112 standards, rules which were established to comply with some of these VOC or other criteria pollutant reduction requirements. Nothing in this rule should be construed as allowing sources to avoid any of those otherwise applicable requirements. In fact, we expect that the section 112(l) process, by allowing S/L's to substitute already-established requirements for section 112 rules, might help S/L's and sources avoid having to implement requirements that are duplicative across Federal and S/L programs.

E. Equivalency of alternative work practice standards

Under section 112(h) of the Act, if it is not technologically or economically feasible to establish a numerical emissions limitation when setting an emissions standard under sections 112(d) (maximum achievable control technology standards) or 112(f) (residual risk standards), we have authority to establish design, equipment, work practice, or operational standards, or combinations of these, so long as they are consistent with the provisions of sections 112(d) and (f). In addition, we are required to establish requirements that will ensure the proper operation and maintenance of any design or equipment element we establish in a WPS, the general term that applies to section 112(h) standards.

One of the issues you brought to our attention is that the equivalency demonstration requirements for alternative WPS in subpart E are not clear. You asked us to clarify how you may substitute alternative WPSs for federally promulgated WPS under section 112(l). The following discussion responds to this request by explaining our interpretation of what is required under the Act to substitute alternative requirements for Federal WPS and what flexibility exists under subpart E to implement this interpretation.

For the purpose of equivalency demonstrations under section 112(l), we consider work practice standards as part

of the level of control in some cases and as part of the compliance and enforcement provisions in other cases. For example, the equipment leak provisions in several NESHAP, requiring sources to monitor valves, connectors, and other equipment, are considered WPS that reduce HAP emissions. Another example of a WPS that reduces emissions is the requirement in the Halogenated Solvent Degreaser NESHAP to store used rags, that are contaminated with HAP solvent, in barrels with tight fitting lids. These examples contrast with administrative-type WPS which a source performs to measure and/or document its emissions reductions, process operations and maintenance, etc. for the purposes of determining compliance and establishing a record for enforcement actions. This latter type of activity falls into the category of compliance and enforcement measures, or MRR. An example of a WPS that would be considered a compliance and enforcement measure is the Wood Furniture Manufacturing NESHAP requirement to develop a work practice implementation plan.

One of your concerns about WPS equivalency demonstrations relates to the distinction between "quantifiable WPS" and "nonquantifiable WPS." Quantifiable WPS are those WPS for which the expected emissions reductions can reasonably be measured, e.g., for leak detection and repair requirements. (Quantifiable WPS may relate directly

to an emissions limitation or have specific performance requirements that are measurable or quantifiable such as a capture efficiency.) Nonquantifiable WPS are those for which it is impossible to measure the expected emissions reductions (or establish specific performance requirements that are measurable or quantifiable), e.g., a requirement to place solvent soaked rags in covered containers, or a requirement to develop and implement an operation and maintenance (O&M) plan.

It is your belief that WPS should be separated into quantifiable and non-quantifiable emissions as a way of differentiating between those WPS that are tied to emissions standard and those WPS that are tied to compliance and enforcement measures. Although we agree that we should clearly differentiate between WPS tied to emissions reductions and those tied to compliance and enforcement measures, we do not agree that only quantifiable WPS are tied to emission standards. As indicated above, some WPS that are nonquantifiable are also tied to emissions reductions. We believe that differentiating between WPS on the basis of whether or not it is tied to emissions reductions is sufficient.

For all WPS that are identified as tied to the level of control or emissions reductions component of an emissions standard, we believe that any equivalency demonstration for

WPS must address WPS in essentially the same manner as level of control, that is, based on a "no less stringent" test in terms of emissions reductions achieved. This interpretation is supported by section 112(h)(3), which allows alternative WPS to be established on a source-specific basis if an owner or operator can demonstrate to our satisfaction that "an alternative means of emissions limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved" under the Federal WPS for which the alternative is being proposed.

Any alternative WPS requirements that you submit must meet the "no less stringent" test and/or must match the effect of the corresponding Federal WPS in terms of the results they are intended to achieve. In other words, our interpretation of the "no less stringent" test for determining equivalency is whether your WPS achieve, in our best engineering judgement, the same emissions reductions as the Federal WPS, and we would make this determination based on an evaluation of whether your WPS meet the same objectives or intent as the Federal WPS. In addition, any alternative WPS that you propose for approval must be enforceable as a practical matter. We believe that no changes to subpart E are needed to implement this interpretation.

For WPS that are part of the emissions limitation component of the Federal standard, the alternative requirements you propose to implement in lieu of a part 63 emissions standard must address every WPS in that Federal standard. This means that each Federal WPS must have an equivalent counterpart in your requirements, or for the WPS for which you do not propose alternative requirements, you must implement the Federal WPS for that source or source category. Once equivalency for the emissions limitation component of that standard is established, including the complete WPS component, we may evaluate the equivalency of your entire submittal, including the MRR component, according to the "holistic" equivalency test described above in subsection D. of this section of the preamble. For WPS that are identified as part of the compliance and enforcement measures, there is more flexibility on how equivalency may be demonstrated. For more discussion on demonstrating equivalency of compliance and enforcement measures, see the discussion in section X.B. above.

One approach to expediting your subpart E approval and to simplifying implementation of section 112 requirements in your jurisdiction is to develop generic alternative WPS rules that are similar in function to the General Provisions WPS requirements in subpart A of part 63. These would apply to all (or many) source categories for which you seek to

substitute alternative requirements. Because part 63 emissions standards generally have been promulgated without information supporting the derivation of their WPS and the associated expected emissions reductions, this information is not often available as a basis for equivalency demonstrations under subpart E. Therefore, we are proposing as a matter of implementation guidance that, when this information is absent, best engineering judgement be used to establish the expected results from or intent of the WPS for which you seek equivalency. To assist us in making these judgements, we expect you to provide whatever information is needed and in a sufficient level of detail to make an effective comparison. We request comment on whether additional guidance is needed to implement this approach and, if so, the form that such guidance should take.

In the original subpart E proposal preamble (see 58 FR 29306), we indicated that alternative design, equipment, work practice, or operational standards established under section 112(h) must be expressed in the same form of the Federal standard under the §63.94 program approval option or they could not be approved (except for the provisions of §63.93(a)(4)(ii)). In situations where a Federal standard does not contain a numerical emissions limit, and instead specifies some sort of equipment, work practice, or operational requirements, it is less clear what it means to

express a level of control in the same form as the Federal standard. Effectively, this means that, depending on the form of the Federal standard, it might not be possible to express some S/L requirements in the same form, in which case the Federal requirements would remain the applicable requirements.

We believe that the existing language in §63.93(b)(2), which contains the holistic equivalency test we are proposing to apply to equivalency demonstrations under sections 63.93, 63.94, and 63.97, is sufficiently flexible for us to approve alternative WPS requirements as we have described. We also believe this language gives you sufficient flexibility to substitute reasonable alternatives to the Federal WPS and that providing specific guidance and examples for demonstrating equivalency would be more beneficial than adding regulatory language. We are seeking comments, however, on whether the language in §63.93(b)(2) is too restrictive in this regard, what specific text changes might be warranted, and how such text changes would clarify the rule or make it more workable. We intend to develop guidance to better define these equivalency criteria and the information we would need from you to evaluate your equivalency demonstrations for WPS.

F. Equivalency of alternative General Provisions

The purpose of this discussion is to clarify how you should demonstrate equivalency for the part 63 General Provisions contained in 40 CFR part 63, subpart A.[8] In this rulemaking we neither propose to change any rule language in subpart A, nor to take comment on the General Provisions themselves. Rather, we are taking comments on our guidelines for demonstrating equivalency for the General Provisions as we present them in this preamble.

In addition, we intend to issue guidance that more fully explains the guidelines discussed below and our intended application of them in reviewing individual submittal. This guidance should be helpful to you in developing submittal that adequately address our equivalency criteria and demonstration guidelines. We view the development of these guidance materials as an ongoing process that will reflect the evolution of our policy as we resolve questions and issues that arise in future submittal.

The body of the guidance will be a table that categorizes each individual requirement in the General Provisions according to a simple classification scheme that is introduced below.

1. Function and importance of the General Provisions

[8] The General Provisions were promulgated on March 16, 1994 (59 FR 12408).

The General Provisions for part 63 NESHAP contain the common administrative and technical framework for all emissions standards established under section 112. Rather than reproducing common elements in each standard, we have used the General Provisions to present these common requirements in one place, subpart A of part 63. The General Provisions contain requirements that pertain to the administrative and the compliance-related aspects of implementing NESHAP. For example, the General Provisions include administrative procedures and criteria for determining the applicability of standards, responding to other requests for determinations, granting extensions of compliance, and approving sources' requests to use alternative means of compliance from that specified in an individual standard. Compliance-related provisions spell out the responsibilities of sources to comply with the relevant emissions standards and other requirements. These provisions include compliance dates, operation and maintenance requirements, methods for determining compliance with standards, procedures for emissions (performance) testing and MRR requirements.

The General Provisions apply presumptively to every subpart of part 63, unless specifically overridden in an individual subpart. Part 63 subparts typically include tables that make explicit which General Provisions

requirements have been overridden or replaced for that standard.

The General Provisions approach eliminates redundancy in administrative and compliance-related requirements that are common to all section 112 standards, and it ensures that a baseline level of consistency will be maintained among individual NESHAP. Because the General Provisions are a cornerstone to every section 112 emissions standard, every S/L submittal under subpart E must address how your alternative requirements compare in effect to the General Provisions.

2. Demonstration of equivalency between S/L rules or programs and the General Provisions

Some of you are concerned that any equivalency demonstration would require a line-by-line showing that your requirements are equivalent to the General Provisions. Instead, you have argued that you should be able to demonstrate generally that a combination of your rules and policies accomplishes the intent of the General Provisions and that this general showing should be sufficient for an equivalency demonstration.

We believe that a general showing of intent is not sufficient to demonstrate equivalency under section 112(l) for the General Provisions. The General Provisions are an integral part of each part 63 NESHAP, and we consider them to

be just as important as the requirements in a source category-specific NESHAP when we evaluate an equivalency demonstration. However, at the same time, we think a line-by-line equivalency demonstration is not necessary for every General Provisions requirement. Rather, we think the General Provisions can be classified into distinguishable categories of requirements that would require different criteria to evaluate their equivalency. The level of rigor associated with an equivalency demonstration for a particular General Provisions requirement would depend on which category it is in. We have outlined this process in the following paragraphs and in an associated guidance document.

3. General Provisions categories simplify equivalency determinations

The individual requirements in the General Provisions can be classified into one of three categories:

(1) substantive requirements,

(2) quality assurance/quality control requirements, and

(3) administrative requirements.

"Substantive requirements" is the most restrictive category and consists of those requirements that are based on statutory requirements or on key (fundamental) EPA policies. An example of a statutory requirement is the requirement for new sources to comply with promulgated standards on the promulgation date, or upon startup if the startup date is

later than the promulgation date. The 5-year record retention requirement for major sources is a cornerstone of our compliance assurance and enforcement program. We would be unlikely to approve alternatives to any of the requirements in this class. However, under some circumstances we may approve an alternative requirement, but we would require a detailed showing based on case-specific factors to demonstrate that the alternative requirement is justified. The test for this category is "equivalence" -- the alternative requirement must be as stringent as Federal requirement on a one-to-one basis.

In the second class of requirements, called "quality assurance/quality control requirements," we would judge whether the requirement in the General Provisions is related to an important policy and/or guidance that is required of every standard. In this case, your regulatory language could differ, but a requirement that achieves the same intent must be included in all substituted rules. In our judgement, requirements that fall into the category of "quality assurance/quality control" directly impact the level of control and our ability to determine compliance. For example, the General Provisions require sources to develop detailed startup, shutdown, and malfunction (SSM) plans for operating and maintaining sources during periods of SSM. The essential standard is that sources, including their process

and air pollution control equipment, must be operated and maintained in a manner consistent with good air pollution control practices for minimizing emissions to the levels required by the standards. However, there are many acceptable ways to implement the general requirements to develop SSM plans and programs of corrective action. Therefore, for the "quality assurance/quality control" category, your alternative requirements need not be identical to the corresponding General Provisions. For us to find that your alternative requirements are no less stringent, we would require that they satisfy the intent and the enforceability of the requirements as written in the Federal rules. Like "substantive requirements," for "quality assurance/quality control" requirements you must have equivalent provisions in the rules or other requirements you submit to us for approval.

An example of another situation where we could be flexible in granting equivalency for requirements in the second category is the preconstruction review requirements found in §63.5. Section 63.5 implements the requirement in section 112(i)(1) of the Act that we (or a delegated agency) review sources' plans for major construction or reconstruction activities to determine that new and reconstructed major sources can comply with promulgated NESHAP when they start up. We are sensitive to the fact that

you already have preconstruction review programs and that section 112 sources may be required to undergo preconstruction review for other purposes such as major or minor new source review. We believe we can find your existing programs to be as stringent as the requirements of §63.5 provided they achieve similar results as §63.5 would achieve. For affected sources, this also would eliminate the burden of having to go through two similar preconstruction review processes.

We consider the final category, "administrative requirements," to be the most flexible in terms of your opportunities to make adjustments in your rules or programs. "Administrative requirements" relate primarily to program management. For example, §63.10(a) allows sources to streamline their reporting requirements by requesting adjustments to their reporting schedules. Because this provision is not essential to implementing NESHAP, and because the particular form its process requirements take is not essential to implementing the intent of the provision as a whole, you have discretion to eliminate it altogether or to substitute an alternative process that meets the same intent. In either case, the resulting package must be as stringent or more stringent than the Federal requirements. While some "administrative requirements" may be necessary to implement the Federal NESHAP the way we think they should be

implemented, in general for this category of General Provisions, you have considerable flexibility to alter the form of the requirements.

The following table provides some additional examples of how we categorize various General Provisions requirements according to the classification scheme we just described. In the table, "substantive requirements" are indicated by an "A," "quality assurance/quality control requirements" are indicated by a "B," and "administrative requirements" are indicated by a "C" under the column labeled "Equivalency Determination." A complete classification scheme for all the General Provisions requirements will be provided in the guidance document referenced above.

4. How would the equivalency demonstration process be implemented for the General Provisions?

Each of your submittals that contain alternative requirements must contain an equivalency demonstration for the pertinent General Provisions (unless your rules or permit terms implement the part 63 General Provisions unchanged). In order to ensure that the review process is workable and timely, it is essential that your submittal specifically address each requirement in the General Provisions and discuss any differences between a proposed alternative and the General Provisions.

To demonstrate equivalency for "substantive requirements," you would need to demonstrate that they are equivalent (i.e., as stringent as the corresponding Federal requirement) on a one-to-one basis. For example, the requirement within a standard to do a compliance demonstration (e.g., a performance test) is a fixed requirement that you would need to reflect in your section 112(l) submittal. However, within the limits of the associated requirements classified as either "quality assurance/quality control" or "administrative," we would have discretion in determining overall equivalency, and we may be able to determine equivalency holistically, by considering more than one requirement at a time.

EXAMPLES OF GUIDANCE:
GENERAL PROVISIONS EQUIVALENCY CRITERIA

Part 63 General Provisions Reference	Summary of Section(s)	Equivalency Determin-ation	Comments
63.1(a)(6)	How to obtain source category list or schedule.	C	Not related to statutory requirement or fundamental policy. Purely informational.
63.1(a)(7)	Subpart D contains procedures for obtaining an extension of compliance with a relevant standard through an early reduction of emissions of HAP pursuant to section 112(i)(5) of the Act. Refers to subpart D for extension of compliance through an early reduction program pursuant to Section 112(i)(5).	C	Informational. Cross references other parts of the CFR.
63.1(a)(12)	Time periods or deadlines may be changed if owner or operator and administrator agree, according to procedures in notification requirements (63.9(i)).	C	Section provided for convenience. Not essential to an alternative program.
63.1(b)(3)	Stationary source emitting HAP, but not subject to this part, shall keep a record of applicability determination on site for 5 years, or until the source changes its operations.	B	Fundamental EPA policy. Needed for enforcement purposes. Flexibility in form of applicability records possible.

Part 63 General Provisions Reference	Summary of Section(s)	Equivalency Determin-ation	Comments
63.4(a)(1) Prohibited Activities	Affected source should not operate in violation of provisions of this part unless granted an extension of compliance.	A	Key statutory requirements.
63.5(b)(3)	Source must obtain written approval prior to constructing a new or reconstructing an existing major source after promulgation has occurred, even if the S/L does not have an approved permit program.	A	Approval prior to construction is a key statutory requirement.
63.5(d)(4)	Allows the Administrator to request additional information after submittal of application.	B	Program must allow Administrator opportunity to request clarifications/more information.
63.5(e) Approval of Construction or Reconstruction Procedures	Lists procedures for approval of construction or reconstruction process if Administrator determines it will not violate part 63 standards.	B	Form of program may vary.
63.6(b)(1) Compliance Dates	If initial startup occurs before effective date of part 63 standard, source must comply by effective date of the standard.	A	Alternative compliance dates must be no later than the compliance dates in the NESHAP.

We are seeking comments on ways to streamline the review process for alternative General Provisions requirements while ensuring that we will receive sufficient information to conduct a review that results in the approval of appropriate alternative General Provisions.

XI. How will the section 112(r) accidental release program provisions of subpart E change and how will these changes affect the delegation of the RMP provisions?

We are proposing revisions to sections 63.90 and 63.95 to reflect the final rules that have been promulgated to implement the accidental release program required by section 112(r). When subpart E was promulgated in 1993, the section 112(r) rules were not yet final. The section 112(r) rules were subsequently promulgated on January 31, 1994 (list of regulated substances) (59 FR 4478) and June 20, 1996 (risk management programs or RMP) (61 FR 31668) in 40 CFR part 68. These rules require the development and implementation of a risk management program by sources that store or contain onsite more than a threshold quantity of a hazardous substance listed in §68.130. This list is not the same as the section 112(b) hazardous air pollutant list.

Part 68 also requires that a RMP be submitted to a central location in a method and format to be specified by us. With help from representatives of industry, State and local governments, environmental groups, and academia, we are developing a system

for electronic submission of RMPs to reduce paperwork burdens and facilitate data management. Under this system, facilities covered by the Risk Management Program rule would submit their RMPs to us and we would then distribute the RMPs to the entities that are designated by section 112(r)(7)(B)(iii) to also receive them--S/Ls and the Chemical Safety and Hazard Investigation Board (established under section 112(r)(6) of the Act). Further, we would also make the RMPs available to the public under section 114(c) of the Act, as provided by section 112(r)(7)(B)(iii).

We are proposing to revise sections 63.90 and 63.95 to make the requirements for delegation consistent with the final part 68 rules and our plan for an electronic submission system for RMPs. Specifically, we are proposing to add to §63.90 a statement that the authorities in the RMP provisions of part 68, subpart G, will not be delegated to you. The system of electronic submission of RMPs is feasible only if all RMPs include the data elements prescribed by subpart G and are submitted in the same format.

You could still require submission of additional information under your own program, and could include those additional information requirements in the program you submit to us for approval under part 63. We will consider your request to include S/L information requirements in our electronic RMP submission program for use by covered

facilities in that S/L's jurisdiction. Our approval of your program through a subpart E delegation process would make those additional requirements federally enforceable. However, inclusion of additional S/L requirements potentially raises technical and legal issues that we would need to address in deciding to what extent we could accommodate such requests. In any event, any of your information requirements included in our electronic submission program would be in addition to the standard data required under part 68 subpart G.

With respect to listing chemicals for coverage by the RMP program, we are proposing to add §63.90(c)(1)(ii) to clarify that the authority to amend the list of chemicals and the related thresholds will not be delegated to you as part of a section 112(l) delegation. You may still adopt a risk management program more stringent than ours that lists additional chemicals or sets lower thresholds for regulated substances which we could approve if submitted as part of the S/L delegation request. If, however, a S/L subsequently changes its list of chemicals or the related thresholds after we have approved their program, the changes would have to be submitted to us before they could become part of the program that we have approved and made federally enforceable.

We are also proposing to revise §63.95 to make it consistent with the requirements of the final RMP rule. The

revisions would eliminate the requirements for your programs to register or receive RMPs from covered facilities and to make RMPs available to the public consistent with the provisions of section 114 of the Act. Registration information has been made part of the RMP prescribed by subpart G, the authorities of which, as noted above, we are not delegating to you. You could require additional registration information, but you may not change the registration information that subpart G requires. You could also require that covered facilities in your jurisdiction send a copy of their RMPs to the S/L, as well as to us, but you could not relieve covered facilities from the obligation in subpart G to send their RMPs to us. You may also provide public access to RMPs consistent with the provisions of Act section 114, but since we will be providing such public access, you need not duplicate that function in order to obtain approval of your program. You will continue to be required to review RMPs and provide technical assistance to sources.

We are also proposing to eliminate the requirements for coordination mechanisms with the Chemical Safety and Hazard Investigation Board, state emergency response commissions, local emergency planning committees, and air permitting authorities. Although we encourage S/Ls that take delegation to coordinate with these groups, we do not believe that it

should be a requirement for gaining delegation or for having an equivalency demonstration approved. Part 68 already lists the responsibilities of air permitting agencies in relation to part 68; coordination between the permitting agency and the delegated agency will follow naturally from those provisions. We are also proposing to delete the reference to a "core program" in §63.95(c) because the elements referenced as the core program have been deleted.

The proposed §63.95 continues to say that you may request delegation for a full or partial program. Full delegation means you take over the entire section 112(r) program for all covered sources in your jurisdiction. Partial delegation means you take the entire section 112(r) program for title V permitted sources only, or the entire program for some discrete universe of sources covered by the section 112(r) rule. In other words, under partial delegation, you may request implementation authority for a defined universe of sources, but may not take less than the entire section 112(r) program for that defined universe.

XII. Administrative requirements for this rulemaking

A. Public Hearing

A public hearing will be held, if requested, to discuss the proposed standards in accordance with the Administrative Procedures Act. Persons wishing to make oral presentations on the proposed standards should contact EPA (see ADDRESSES).

To provide an opportunity for all who may wish to speak, oral presentations will be limited to 15 minutes each. Any member of the public may file a written statement on or before [Insert date 60 days after publication in the FEDERAL REGISTER]. Written statements should be addressed to the Air and Radiation Docket and Information Center (see ADDRESSES), and refer to docket number A-97-29. A verbatim transcript of the hearing and written statements will be placed in the docket and be available for public inspection and copying, or be mailed upon request, at the Air and Radiation Docket and Information Center (see ADDRESSES).

B. Docket

The docket for this regulatory action is docket number A-97-29. The docket is an organized and complete file of all the information considered by the EPA in the development of this rulemaking. The docket is a dynamic file, because material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the proposed and promulgated standards and their preambles, the contents of the docket will serve as the record in case of judicial review [See section 307(d)(7)(A) of the Act.]

C. Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), the EPA must determine whether the regulatory action is "significant" and therefore subject to review by the Office of Management and Budget (OMB) on the basis of the requirements of the Executive Order in addition to its normal review requirements. The Executive 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 proposed rule will not have an annual effect on the economy of $100 million or more, and therefore is not considered economically significant, EPA has determined that this rule is a "significant regulatory

action" because it contains novel policy issues. This action was submitted to OMB for review as required by Executive Order 12866. Any written comments from OMB to the EPA and any written EPA response to any of those comments will be included in the docket listed at the beginning of this notice under ADDRESSES. In addition, consistent with Executive Order 12866, the EPA consulted extensively with S/L's, the parties that will most directly be affected by this proposal. Moreover, the Agency has also sought involvement from industry and public interest groups as described herein.

D. Enhancing the Intergovernmental Partnership Under Executive Order 12875

Under Executive Order 12875, EPA may not issue a regulation that is not required by statute and that creates a mandate upon a State, local or tribal government, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by those governments, or EPA consults with those governments. If EPA complies by consulting, Executive Order 12875 requires EPA to provide to the Office of Management and Budget a description of the extent of EPA's prior consultation with representatives of affected State, local and tribal governments, the nature of their concerns, copies of any written communications from the governments, and a statement supporting the need to issue the

regulation. In addition, Executive Order 12875 requires EPA to develop an effective process permitting elected officials and other representatives of State, local, and tribal governments "to provide meaningful and timely input in the development of regulatory proposals containing significant unfunded mandates."

Today's rule does not create a mandate on State, local, or tribal governments. The rule does not impose any enforceable duties on these entities. Specifically, they are not required to purchase control systems to meet the requirements of this rule. Also, in developing this rule, EPA consulted with States to enable them to provide meaningful and timely input in the development of this rule. Accordingly, the requirements of section 1(a) of Executive Order 12875 do not apply to this rule.

E. Consultation and Coordination with Indian Tribal Governments Under Executive Order 13084

Under Executive Order 13084, EPA may not issue a regulation that is not required by statute, that significantly or uniquely affects the communities of Indian tribal governments, and that imposes substantial direct compliance costs on those communities, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by the tribal governments, or EPA consults with those governments. If EPA complies by

consulting, Executive Order 13084 requires EPA to provide to the Office of Management and Budget, in a separately identified section of the preamble to the rule, a description of the extent of EPA's prior consultation with representatives of affected tribal governments, a summary of the nature of their concerns, and a statement supporting the need to issue the regulation. In addition, Executive Order 13084 requires EPA to develop an effective process permitting elected officials and other representatives of Indian tribal governments "to provide meaningful and timely input in the development of regulatory policies on matters that significantly or uniquely affect their communities."

Today's rule does not significantly or uniquely affect the communities of Indian tribal governments. Because this rule implements a voluntary program, it imposes no direct compliance costs on these communities. Accordingly, the requirements of section 3(b) of Executive Order 13084 do not apply to this rule.

F. Paperwork Reduction Act

EPA has submitted to OMB requirements for collecting information associated with the proposed standards (those included in 40 CFR part 63, subpart E) for approval under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq. EPA has prepared an Information Collection Request (ICR) (ICR No. 1643.03), and you may get a copy from

Sandy Farmer by mail at OPPE Regulatory Information Division, U.S. Environmental Protection Agency (2137), 401 M Street, S.W., Washington, DC 20460, by email at farmer.sandy@epa.gov, or by calling (202)260-2740. A copy may also be downloaded off the Internet at http://www.epa.gov/icr.

This information is needed and used by EPA to determine if the State, local or Tribal government submitting an application has met the criteria established in the 40 CFR Part 63, Subpart E amended rule. This information is necessary for the Administrator to determine the acceptability of approving the affected entity's rules or programs in lieu of the Federal rules or programs. The collection of information is authorized under 42 U.S.C. 7401-7671q.

The total 3-year burden of the collection is estimated at 1,468,989 hours. The estimated average annual burden is 489,663 hours, 3,856 hours per respondent, and 104 hours per response. EPA has estimated that 127 State/local agencies will request delegation of 35 MACT standards each using the various delegation options. In addition, the 127 agencies will use the accidental release prevention program on a one-time only basis during the first 2 years of the collection. The cost burden of this response is limited to the labor costs of agency personnel to comply with the notification, reporting, and recordkeeping elements of the proposed rule.

These costs are estimated at $45.8 million for the 3-year collection period and $15.3 million on average for each year of the collection period. There are no capital, startup or operation costs associated with the proposed rule.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, disclose, or provide information to or for a Federal Agency. This includes the time needed to review instructions, process and maintain information, and disclose and provide information; to adjust the existing ways to comply with any previously applicable instructions and requirements; to train personnel to respond to a collection of information; to search existing data sources; to complete and review the collection of information; and to transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a current OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggesting methods for minimizing respondent burden, including through the use of automated collection techniques, to the Director, OPPE Regulatory Information Division, U.S.

Environmental Protection Agency (2137), 401 M Street, Washington, DC 20460, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street NW, Washington, DC 20503, marked "Attention: Desk Office for EPA." Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after [Insert date of publication in the FEDERAL REGISTER], a comment to OMB is best assured of having its full effect if OMB receives it by [Insert date 30 days after publication in the FEDERAL REGISTER]. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

G. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (Public Law 96-354, September 19, 1980), whenever an agency publishes a rule of general applicability for which notice of proposed rulemaking is required, it must, except under certain circumstances, prepare a Regulatory Flexibility Analysis that describes the impact of the rule on small entities (i.e., small businesses, organizations, and governmental jurisdictions). That analysis is not necessary if the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities.

EPA believes that there will be little or no impact on small entities as a result of the promulgation of this proposed rule. State and Local governments are the only entities affected by this action and EPA expects that most or all of the governments which would have the authority to accept partial or complete delegation under section 112(l) of the Act are those whose populations exceed 50,000 persons and are, thus, not considered “small.” Accordingly, because few or none of the affected entities are expected to be small entities, and because the regulatory impacts will be insignificant, pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

H. 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 objects 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 significantly or uniquely affect small governments, including Tribal governments, EPA 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.

This rule contains no Federal mandates (under the regulatory provisions of Title II of the UMRA) for S/L governments or the private sector. Because the proposed rule, if promulgated, is estimated to result in the

expenditure by S/L governments of significantly less than $100 million in any one year, EPA has not prepared a budgetary impact statement or specifically addressed the selection of the least costly, most effective, or least burdensome alternative. Because small governments will not be significantly or uniquely affected by this rule, EPA is not required to develop a plan with regard to small governments. Moreover, this action proposes amendments to a rule that is voluntary for S/L governments, so it does not impose any mandates on those entities. Therefore, the requirements of the Unfunded Mandates Act do not apply to this section. Nonetheless, the EPA has encouraged significant involvement by State and local governments, as detailed throughout this preamble.

I. Protection of Children from Environmental Health Risks and Safety Risks Under Executive Order 13045

Executive Order 13045 applies to any rule that EPA determines (1) economically significant as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially

effective and reasonable alternatives considered by the Agency.

This proposed rule is not subject to Executive Order 13045, entitled Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), because it is not an economically significant regulatory action as defined by Executive Order 12866.

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), Pub L. No. 104-113, § 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards.

The proposed rule does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

The section 112(l) rule is merely a procedural screen through which substantive air toxics standards are delegated

and is not susceptible to the use of VCS. If any of the Federal air toxics standards delegated through section 112(l) have VCS, then the section 112(l) rule will assure that the comparable S/L standard has equivalent requirements. The section 112(l) rule itself, however, is not a vehicle for the application of VCS.

XIII. Statutory Authority

The statutory authority for this proposal is provided by sections 101, 112, 114, 116, and 301 of the Act as amended (42 U.S.C. 7401, 7412, 7414, 7416, and 7601). This rulemaking is also subject to section 307(d) of the Act (42 U.S.C. 7407(d)).

List of Subjects in 40 CFR Part 63

Air pollution control, Environmental protection, Hazardous substances, Intergovernmental Relations, Reporting and recordkeeping requirements.

_____
Dated:

_____
Carol M. Browner,
Administrator

6560-50-P