FACT SHEET

INTERPRETIVE NOTICE ON REQUIREMENTS UNDER SECTION 112(G) OF THE CLEAN AIR ACT---NEWLY CONSTRUCTED, RECONSTRUCTED, AND MODIFIED MAJOR SOURCES OF TOXIC AIR POLLUTANTS

TODAY'S ACTION...

- The Environmental Protection Agency (EPA) is issuing a notice that reinterprets the requirements for major sources under section 112(g) of the Clean Air Act Amendments of 1990.

WHAT IS SECTION 112(g)?

- Section 112(g) addresses air toxics emissions from newly constructed, reconstructed and modified sources of toxic air pollutants. Air toxics are those pollutants known or suspected to cause cancer or other severe health effects, such as birth defects or reproductive effects.

- EPA's 112(g) rule, which was proposed in April 1994, would require newly constructed, reconstructed or modified "major sources" to apply controls or take other steps if emission increases are above certain "de minimis" levels.

- Sources can avoid control requirements by achieving additional emission decreases (referred to as "offsets") so long as those pollutants being offset are "more hazardous." The proposed rule includes a pollutant ranking system to determine if offsets are "more hazardous."

HOW DOES THE 112(g) INTERPRETIVE NOTICE AFFECT CURRENT POLICY?

- In guidance that was issued to the EPA Regional Offices in June 1994, EPA stated that requirements pertaining to modification, construction and reconstruction of major sources under section 112(g) would be triggered in any State upon the effective date of a State's implementation of an EPA-approved Clean Air Act operating permit program (under the Act, States establish these programs to require sources to obtain permits that contain emissions limits).

- Today's interpretive notice outlines EPA's revised interpretation of 112(g) applicability prior to EPA's issuing the final 112(g) rule. The notice states that major source modifications, constructions, and reconstructions will not be subject to 112(g) requirements until the final rule is promulgated. Under the Act, implementation of section 112(g) is dependent on final EPA guidance, which has

not yet been promulgated.

WHEN WILL THE 112(g) RULE BE PROMULGATED?

- EPA expects to issue the 112(g) final rule in September 1995.

FOR MORE INFORMATION...

Anyone with a computer and a modem can download the notice from the Clean Air Board of EPA's electronic Technology Transfer Network bulletin board by calling (919) 541-5742. For further information about how to access the board, call (919) 541-5384. For further information about the interpretive notice or the proposed 112(g) regulation, contact Kathy Kaufman at (919) 541-0102.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[AD-FRL-]

Hazardous Air Pollutants: Provisions Governing Constructed, Reconstructed or Modified Major Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interpretive Notice

SUMMARY: This notice announces the EPA's revised interpretation of the Clean Air Act's (Act) requirements regarding the effective date of section 112(g) of the Act. The interpretation adopted here postpones the effective date of section 112(g) until after the EPA has promulgated a rule addressing that provision.

EFFECTIVE DATE: [Insert date of publication in the Federal Register].

FOR FURTHER INFORMATION CONTACT: Ms. Kathy Kaufman at (919) 541-0102, Information Transfer and Program Integration Division (MD-12), U. S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION:

I. SUMMARY OF EPA'S POLICY

The Administrator of the EPA is today announcing the EPA's interpretation of the Act requirements regarding the effective date of section 112(g) during the period prior to promulgation of a Federal rule addressing implementation of

that section. This notice effects changes from the view embodied in the preamble to the proposed rulemaking under section 112(g), Federal Register notices of proposed and final approvals of operating permits programs under title V of the Act, and in guidance issued by the EPA's Office of Air Quality Planning and Standards (OAQPS).

For the reasons set forth in this notice, the EPA now interprets section 112(g) not to take effect before the EPA issues notice and comment guidance addressing implementation of that section. In the interim period before this guidance is promulgated, States may, as a matter of State law, implement a program for the review of section 112(g) modifications, constructions, or reconstructions. However, the section 112(g) requirement that major source modifications, constructions, or reconstructions meet the maximum achievable control technology (MACT) -- as determined on a case-by-case basis where no Federal standard for a source category has been set -- will not take effect as a matter of Federal law until the section 112(g) rule is promulgated.

II. DISCUSSION

A. Requirements of Section 112(g). Previous Policy Position.

After the effective date of a title V permit program in a State, section 112(g) prohibits any person from constructing or reconstructing a major source of hazardous air pollutants (HAP), or modifying a major HAP's source, without a determination from "the Administrator (or the State)" that MACT will be met. The determination must be on a case-by-case basis by "the Administrator (or the State)" if no MACT standard has been issued. Section 112(g)(1)(B) also provides that the Administrator "shall, after notice and opportunity for comment and not later than [May 15, 1992] publish guidance with respect to implementation of this subsection." The guidance must address the relative hazard of HAP in a manner "sufficient to facilitate the offset showing" allowed in the definition of "modification."

The EPA proposed a rule implementing section 112(g) on April 1, 1994 (59 FR 15504). The EPA currently anticipates promulgation of this rule during the summer of 1995. In anticipation of the fact that many title V permit programs would be approved before the section 112(g) rule was promulgated, the OAQPS issued a guidance memorandum on June 28, 1994[1] to assist States in their implementation of section 112(g) during this transition period. The guidance states that section 112(g) takes effect upon approval of a

[1] Guidance for the Initial Implementation of Section 112(g), Memorandum from John S. Seitz to EPA Regional Air Division Directors, June 28, 1994.

title V program in a State regardless of whether the EPA's rule has been promulgated. The guidance also offers suggestions for how States may implement section 112(g) during the transition period.

To date, the EPA has approved several title V programs, the first of which was for the State of Washington on November 9, 1994 (59 Fed. Reg. 55813). EPA also has proposed approval of numerous other programs. In each of these notices, the Agency has restated its position that the requirements of section 112(g) would take effect in these States upon approval of the title V program, and has described its understanding of how section 112(g) would be implemented in that State during the transition period.

B. Reconsideration Based on Concerns Raised.

States and the regulated community have voiced considerable concern with the impracticality of implementation of section 112(g) during the transition period.[2] These concerns have focused on the provisions for determining the applicability of section 112(g), and in particular on provisions addressing de minimis levels and offsets for modifications, as well as the definition of "major source" for constructions and reconstructions.

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[2]For State and regulated community comments submitted on the proposed section 112(g) rule, see Docket Number A-91-64 inserts IV-D-199, IV-D-213, IV-D-217, IV-D-219, IV-D-222, IV-D-229, IV-D-255, IV-D-295, IV-D-323, IV-D-333, IV-D-337, IV-D-PH217, IV-D-199, IV-D-213, IV-D-295, IV-D-PH221, and IV-D-PH222.

States and the regulated community have noted that the applicability of the section 112(g) modification provisions have the potential to vary significantly depending on how these issues are addressed in the final section 112(g) rule, that these provisions are among the most complex and controversial in the section 112(g) proposal, and that implementation of these provisions in the absence of a promulgated rule will present considerable uncertainty and legal and financial risk for States and emissions sources.

After careful consideration, the EPA concludes that these concerns are valid and, as a policy matter, justify re-examining and modifying the Agency's interpretation concerning the effective date of section 112(g). Moreover, the EPA believes it should announce its revised view now, before there is a significant expenditure of State, source, and Agency resources and before questions of source liability are raised. In light of this conclusion, the EPA has revisited its prior legal interpretation that section 112(g) must take effect upon approval of the title V program regardless of whether a rule has been promulgated. These practical difficulties confirm for the Agency the soundness of a reading that implementation of section 112(g) is to be delayed until a rule is promulgated.

C. Analysis of Statutory Requirements for Modifications.

On its face, the section 112(g) requirement for case-by-case MACT determination for new major sources, reconstructed sources, and modifications to existing major sources appears to be triggered upon the title V program effective date. However, the Act also calls for guidance "with respect to the implementation of" section 112(g) to be issued "after notice and opportunity for comment and not later than" May 15, 1992. Section 112(g)(1)(B). Section 112(g)(1)(A) provides further that a greater-than-de minimis increase "shall not be considered a modification" if it is offset by an equal or greater decrease in a more hazardous pollutant, "pursuant to guidance issued by the Administrator under subparagraph (B)." The guidance must specifically "facilitate the offset showing" and "include an identification, to the extent practicable, of the relative hazard to human health resulting from emissions" of HAP.

Section 112(g) is analogous in certain important respects to statutory provisions at issue in the recent D.C. Circuit decision concerning inspection and maintenance (I/M) programs under the Act. Natural Resources Defense Council v. EPA, 22 F.3d 1125 (D.C. Cir. 1994). Section 182(c)(3) of the Act requires States to establish programs for "enhanced" vehicle inspection and maintenance programs. The statute further requires that these programs must be in compliance with regulatory "guidance" published by the Administrator,

and must be effective by Nov. 15, 1992. In NRDC v. EPA, the Court held that, because the EPA was late in issuing the guidance called for in the statute, without which it was impossible as a practical matter for States to create their own programs, the statutory requirement for States to have an effective program should be delayed.

The section 112(g) modification provisions bear two important similarities to the statutory provisions at issue in NRDC v. EPA. First, the EPA was obligated to issue guidance on section 112(g) for the States well before they were expected to begin implementing section 112(g) on the effective date of title V programs. Second, that guidance is intended to be binding. This is because the guidance forms an essential link between the statutory directives triggered on the effective date of permit program approval and the ability to actually implement these directives.

Regarding offsets, section 112(g)(1)(A) provides that offsets are to be determined "pursuant to guidance issued by the Administrator . . ." It follows that the absence of guidance precludes the issuance of valid offset determinations by a reviewing agency. Moreover, the absence of guidance makes it impossible for the owner or operator of the source to submit a "showing" provided for by the last sentence "that such increase has been offset under the preceding sentence," that is, pursuant to the

Administrator's guidance (emphasis added). While a State permitting authority could decide to impose offsetting provisions that are more stringent than those in the EPA guidance, the EPA believes that Congress intended the EPA guidance as integral to the implementation of this provision.

The concept of de minimis values is likewise integral to the definition of "modification" in section 112(a)(5). This is because a "modification" is defined in section 112(a)(5) as a "physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant . . . by more than a de minimis amount . . .." Until de minimis values are established in the section 112(g) rule, the definition of "modification" remains incomplete, lacking the lower boundary that the statute contemplates will be established through a notice and comment process. The statute, recognizing that establishment of de minimis values would require the application of scientific expertise and judgment, called for the EPA to set these values based on a notice and comment process. It would be contrary to the intent of the Act to require the section 112(g) program for review of modifications to go forward when the issue of what constitutes a "modification" cannot be resolved with the degree of certainty envisioned by the statute.

It thus appears that certain crucial elements in the section 112(g) program for dealing with modifications are missing until the EPA promulgates guidance. Under these circumstances, it is consistent with the statute, and with applicable precedent, to conclude that the obligation of States to establish the required program for review of modifications hinges on promulgation of the requisite "guidance" -- which is in fact, as the statute makes clear, a binding rule -- governing both offsets and de minimis values.

D. Analysis of Statutory Requirements for Major Source Construction and Reconstruction

The guidance required to be published under section 112(g)(1)(B) addressing implementation of "subsection" 112(g) must extend not only to modifications under section 112(g)(2)(A), but also to major source constructions and reconstructions addressed in section 112(g)(2)((B). This general directive aside, the statutory linkage between the section 112(g) guidance and implementation is not as detailed for constructions and reconstructions as it is for modification requirements. Notwithstanding this, the EPA believes that even with regard to constructions and reconstructions, guidance is necessary to resolve issues critical to the scope of applicability of these provisions,

and that delaying the effectiveness of these provisions therefore represents a permissible reading of the Act.

In the April 1, 1994 proposal, the EPA solicited comment on two alternative interpretations of the phrase "construct a major source." See 59 FR 15517. One interpretation would treat new major-emitting equipment at existing major source plant sites as "modifications," while the other interpretation would treat such additions as "constructions." Under the "modification" alternative, such equipment could be offset by a decrease elsewhere at the plant site. Under the "construction" alternative, such equipment would be required to install new source technology and offsets would not be available.

Similarly, the April 1, 1994 proposal contained two alternative definitions of major source "reconstruction." The alternative definitions are similar in that, for each, the replacement of components, where the cost of the replacement components is greater than 50 percent of the capital cost of "constructing a major source," would trigger reconstruction requirements. The alternatives differ in that one alternative treats the entire plant site as the basis for comparison, while the other alternative treats a major-emitting "emission unit" as the basis for comparison.

The ambiguities surrounding the term "construction" have potentially significant impacts on the nature and scope

of the Federal program, particularly in a transition period during which the modification provisions of section 112(g) are delayed. While there are likely to be few constructions of "greenfield" facilities emitting major amounts of HAPs prior to promulgation of the section 112(g) rule, there will be a far greater number of additions of major-emitting units at existing major source plant sites. Until the issue of whether these additions constitute a "construction" is clarified through rulemaking, there will be uncertainty as to how these additions must be treated as a matter of Federal law. For similar reasons, the scope of the section 112(g) requirements for "reconstructions" will continue to be in doubt until the section 112(g) rule is promulgated.

These implementation difficulties demonstrate that, as is the case for the section 112(g) modification provisions, rulemaking is needed to provide the degree of certainty EPA believes was intended by Congress regarding the applicability of the provisions for major source construction and reconstruction. For this reason, EPA believes it would be unreasonable to require the implementation of the section 112(g) provisions relating to construction and reconstruction prior to completion of the rulemaking.

E. Additional Clarifications

The EPA's interpretation, announced today, regarding the timing for implementation of section 112(g), applies to every title V program that has been or will be approved prior to promulgation of a Federal rule implementing section 112(g). The interpretation concerns the effective date of a Federal requirement set forth in the Act. In this sense, this interpretation need not be addressed in individual title V approvals. The EPA has indicated in a number of title V approval actions that the State would use its existing SIP-approved preconstruction review program to implement section 112(g) during the transition period. However, there have been no approvals of State programs designed specifically to implement section 112(g). Therefore, there is no need to revisit any EPA rulemaking action in order to implement today's notice.

This interpretation should not require significant changes to any title V program submittal. Each State program reviewed by EPA to date has included a general commitment to implement section 112(g), in accordance with the EPA regulations and/or guidance, upon approval of their title V program. However, those commitments were fashioned broadly enough to accommodate today's announced interpretation, and so no program revisions should be necessary for those States.

The EPA is aware of concerns that States may need additional time following the promulgation of the section 112(g) rule before they can begin implementing section 112(g). The EPA believes the statute may be read to allow for an additional period of delay so that States may adopt conforming rules if it would otherwise be impossible for States to implement the program. However, the EPA has not determined whether additional time will in fact be needed. If it is decided that additional time should be provided before the provisions of section 112(g) become effective, the EPA will so provide in the final section 112(g) rulemaking.

Finally, certain States have already promulgated regulations designed to implement section 112(g). The EPA wishes to emphasize that nothing in this notice is intended to preclude or discourage States from implementing a program similar to section 112(g) as a matter of State law prior to promulgation by the EPA of the section 112(g) guidance.

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Date Administrator

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