MEMORANDUM

SUBJECT: Guidance for Initial Implementation of Section 112(g)

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

TO: See below

The purpose of this memorandum is to provide guidance for initial implementation of section 112(g) of the Clean Air Act amendments. This guidance is needed because the Clean Air Act (the Act) requires section 112(g) to be implemented as soon as a State's title V program is approved, regardless of whether EPA has yet promulgated a final section 112(g) rule. Therefore this guidance addresses two critical time periods: (1) after approval of a State's title V program, but before the promulgation of the final section 112(g) rule, and (2) after promulgation of the final section 112(g) rule but before establishment of a State rule to implement the Federal rule.

While section 112(g) must be complied with during the transition period, the guidance provided in this memorandum does not address in detail the substance of what constitutes an acceptable case-by-case MACT determination. Rather, the guidance contained in this memo sets out the legal mechanisms that the EPA believes are available to States in order to make their case-by-case MACT determinations or offsets federally enforceable during the transition period. The guidance has undergone extensive review and comment by appropriate regional staff.

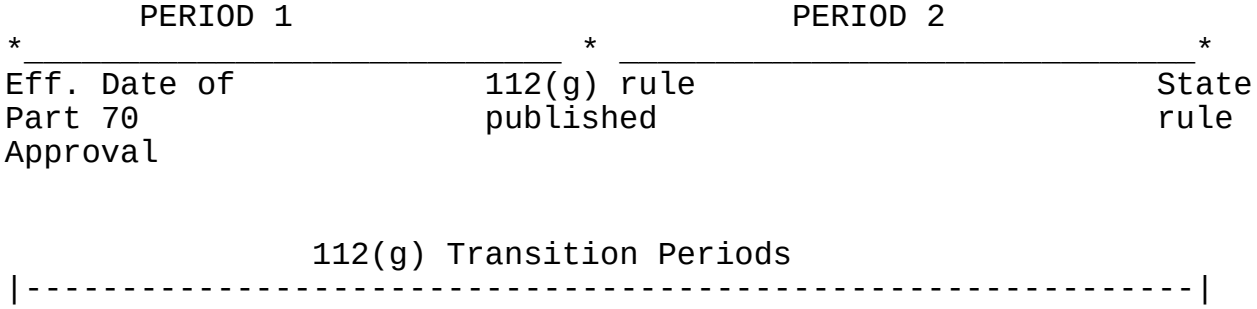
Background

In a recent working meeting to discuss issues relative to the implementation of Section 112 of the Act, it became clear that guidance was needed regarding the implementation of section 112(g). This guidance is important because many Regions are now processing Part 70 submittals, and because the rule implementing section 112(g) [hereinafter the "subpart B rule"] will not be promulgated until May 1995.

The general policy regarding the authority needed for title V program approval is described in my previous memorandum of April 13, 1993. As noted in the attachment to the April 13 memorandum, the Clean Air Act requires that State permitting authorities take responsibility for implementation of section 112(g) upon the effective date[1] of the program. The purpose of today's memorandum is to address several legal and policy issues that arise during the initial "transition period."

The transition period consists of two possible segments, as displayed in Figure 1. The first is the time period between the effective date of the Part 70 approval, which triggers the applicability of section 112(g), and the date of promulgation of the subpart B rule (the rule covering section 112(g)). The second is the time period between the date of promulgation of the subpart B rule and the completion of State rulemaking to implement section 112(g).

Figure 1



Mechanisms for Federal Enforceability During the Transition Periods

An important need for both transition periods is the State's ability to make use of existing regulatory mechanisms in their

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[1] As noted in the last paragraph of the April 13, 1993 memorandum, the "effective date" of a source category-limited interim program triggers section 112(g) requirements only for those sources covered by the interim program. However, interim approvals must expire in two years or less. Accordingly, the section 112(g) requirements for all remaining sources will be triggered no later than two years after the effective date of the interim part 70 program.

State air programs to establish federally enforceable section 112(g) limits or offsets. There are several interim mechanisms which can be used to establish case-by-case MACT or make offset determinations:

(1) Approval of State preconstruction permit programs to establish section 112(g) limits. If a State has the authority to write HAP limits pursuant to its existing State preconstruction permit program, then, solely for the purposes of section 112(g), and for a limited time, the EPA can recognize these limits as federally enforceable. As noted in the April 13, 1993, memorandum, implementation of section 112(g) is a title V requirement that becomes effective upon EPA's approval of a State's title V program. The EPA believes that the linkage of these two programs permits EPA to approve State procedures necessary to implement section 112(g) during the transition period as part of EPA's approval of a State's title V program. Consequently, the EPA believes that approval of a State's preconstruction program for section 112(g) purposes can occur as part of the EPA's rulemaking on a State's Part 70 permit program.

Boilerplate language included in Part 70 approval notices can make clear that EPA's approval of a Part 70 program also serves to allow a State to rely on an existing State preconstruction permit program for section 112(g) purposes. Boilerplate language to this effect has been made available to the Regions.

The EPA currently anticipates being able to approve these State preconstruction programs for the transition period whether or not they include all of the procedural requirements generally deemed necessary for federal enforceability. The normal benchmark for federal enforceability is the criteria established in 40 CRF 51.160 through 51.166 regarding requirements that a State or local program must meet in order to be approved as part of a SIP and recognized as federally enforceable. The proposed section 112(g) rule would establish a similar set of requirements for section 112(g) reviews. The EPA believes that the limited departure from this policy is appropriate because of the urgency created by the timelines for implementation of section 112(g).

Accordingly, the EPA expects that any approval of existing preconstruction permit programs for the purpose of implementing section 112(g) during the transition period would be limited by a sunset provision, such that each State

would be required after a specified time period to adopt a program for implementation of section 112(g) that is consistent with the final Subpart B rule. The EPA believes that this sunset period should be no longer than necessary for the State to adopt regulations following promulgation of the Subpart B rule. As a general matter the EPA expects that States will adopt a specific section 112(g) rule no later than 12 months after promulgation of EPA's section 112(g) rule. Consequently, the EPA intends the States' authority to use existing preconstruction permit programs for implementation of section 112(g) to end 12 months after promulgation of EPA's section 112(g) rule.

(2) Use of Section 112(l) Authority. Section 112(l) provides authority for the EPA to allow a State to use its own preconstruction permit program to establish control technology requirements for HAPs or approve offsets during the transition period. Where a State has the authority to write HAP limits in its existing State preconstruction permits, section 112(l) could be used as authority to make those limits federally enforceable for HAPs. In the same way as described above for option 1, the EPA expects that the length of time that section 112(l) authority could be used for purposes of implementing section 112(g) during the transition period would be limited by a sunset provision of 12 months. Section 112(l) thus provides an alternative pathway, in addition to Part 70, for EPA to allow a State to use its own preconstruction permit program to implement section 112(g) for a limited time.

(3) Use of Part 70 permit conditions. Sources proposing changes that would be subject to section 112(g) could be issued a Part 70 permit which would include all requirements applicable under the Act, including the section 112(g) requirements. For example, most States are requiring some of the Part 70 permit applications within 6 months of program approval, in order to meet the requirement to issue one-third of the Part 70 permits within 1 year after approval. For such Part 70 applications, it may be feasible in some cases to "piggy-back" the section 112(g) preconstruction review onto the Part 70 process. [Note: the EPA is also taking comment in the section 112(g) proposal on whether section 112(g) requires the creation of a short-lived, single-purpose "specialty" operating permit.]

Finally, it should be noted that, since section 112(g) prohibits modifications from occurring unless case-by-case MACT is met or offsets are provided, one means of "implementing" section 112(g) during the transition period is to simply prohibit

section 112(g) modifications beginning on the effective date of the title V program. EPA does not encourage this approach as a desirable means for implementing section 112(g); nonetheless, this approach is acceptable for purposes of obtaining approval of the title V program. Such an approach may be necessary where the State does not have a federally enforceable mechanism to establish case-by-case MACT or provide offsets at the time of title V program approval, or where such a mechanism exists, but is not available in every situation where a modification may occur. EPA expects that the majority of states will provide some mechanism for approving modifications or offsets during the transition period.

Transition Period 1--Before the Final Section 112(g) Rule is Published

The EPA anticipates that the first transition period, the time period between the effective date of a part 70 program and the subpart B promulgation, will be relatively short, possibly less than 6 months. In any given State, the number of modifications for which applications will be received and issued during this period will probably be few in number. There are, however, a number of issues to consider when such situations do arise:

-- what kind of case-by-case determination would be acceptable to ensure that MACT "will be met"?

-- what HAP de minimis values would be acceptable during this period?

-- what is a State's criteria for decisionmaking if an applicant proposes offsets in lieu of MACT?

-- is it acceptable for a State to not allow for offsets during this period?

-- if applications are processed during this time period which turn out to be inconsistent with the subpart B rule when it is later promulgated, must these applications be revisited?

The Regions should allow States considerable flexibility during this relatively short time period. However the States are still required to do a control technology determination consistent with case-by-case MACT unless offsets are approved. The proposed subpart B rule should be considered guidance for States as they make decisions regarding program implementation.

De Minimis. The EPA recommends that States use the de minimis values in the proposed subpart B rule as guidance during

the period prior to promulgation of the final rule. States wishing to use lower values may do so. The EPA does not believe that interim de minimis values or de minimis values substantially greater than those in the proposed rule would be appropriate.

Offsets. The EPA recognizes that without the relative hazard ranking system contained in the final subpart B rule, it may be difficult for many States to ensure that any proposed offset will produce an equal or greater decrease that would be deemed "more hazardous." On the other hand, the EPA believes that in some cases offsets can provide a greater environmental benefit than the imposition of MACT. The proposed regulation can be used by States as interim guidance on the relative hazards of HAPs which States may use if they so choose. The Regions should not, however, dispute a State's judgement in approving such offsets during Transition Period 1 unless there are compelling reasons to believe that the approved offset is unacceptable from a hazard standpoint. Similarly, a State is free to impose more stringent offsetting conditions (such as greater offset ratios, more restrictive creditability rules, or a requirement for a risk assessment) during the transition period.

In most States, the Part 70 program submittals contain broad statements of legal authority that would permit a State to grant a source's request for an offset to comply with section 112(g). However, the EPA is aware of one State rule that would not allow offsets, and which would impose "state-of-the-art" control technology requirements for constructed or modified emission units, even if those emission units would be exempt from MACT under section 112(g) by virtue of having provided offsets. Such a prohibition on use of offsets in place of control technology requirements is acceptable only if the requirement for application of technology is based on an independent State regulation, and not on the authority of section 112(g). If a State is relying on section 112(g) as grounds for prohibiting use of offsets and uniformly requiring application of controls, the State's program would not satisfy the requirements of section 112(g).

Need for Revisiting Approvals Based Upon Final Rule. Given that facilities subject to section 112(g) will eventually be required to comply with MACT standards under sections 112(d) or 112(h), the EPA recommends that applicability determinations and other approvals (i.e. case-by-case MACT determinations) during this interim period not be revisited. Accordingly, if the State issues a final, federally enforceable preconstruction permit before the final section 112(g) rule is promulgated, the EPA recommends relying on that permit rather than requiring the permit to be reopened as a result of the final rule, so long as the permit reflects compliance with the requirements of section 112(g).

Transition Period 2--After the Final Section 112(g) Rule is Published

It is possible in some cases that the "interim" procedures, approved by virtue of the Part 70 mechanism discussed above, may satisfy the procedural requirements of the final subpart B rule, and that the State could thereby continue to rely on the State preconstruction permit process to meet section 112(g) requirements after the subpart B rule is promulgated. In other cases, States may need to undertake rulemaking to ensure consistency with the final rule. Where such rulemaking is deemed necessary, the EPA believes that the specific steps in the adoption process, consistent with the limited duration of the interim procedures approved for the transition period, should be agreed upon in an implementation agreement or memorandum of understanding between the EPA and the State.

The EPA believes that there are number of steps that can be taken to facilitate this process even before the final rule is promulgated. For example, States may want to develop draft "model rule" language that incorporates broad references to the requirements of subpart B into their existing rules. A State's development of such draft language, including workshops with interested parties on how the language could be structured, may speed the process of adopting any needed State rule later. While such draft language should probably avoid details [for example, it may not be desirable to include the exact de minimis table from the proposed regulation], it could, for example, include draft references to subpart B rule passages that would be suitable for a final State rule [for example, a reference to the de minimis table in section 63.44 of subpart B].

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