MEMORANDUM

SUBJECT: Relationship Between the Part 70 Operating Permit Program and Section 112(r)

FROM: John Seitz, Director
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Jim Makris, Director
Chemical Emergency Preparedness and Prevention Office (CEPPO)

TO: Addressees

Over the last few months, several Regions have asked us to clarify the relationship between the accidental release prevention requirements in section 112(r) and permitting requirements in Title V of the Clean Air Act (CAA). Many questions have arisen as a result of the review and approval process for State part 70 permit programs. Guidance was issued last April 13, 1993, explaining that requirements concerning accident prevention under section 112(r)(7), like other section 112 requirements, are applicable requirements under part 70 and must be implemented and enforced through an approved State operating permits program. This guidance was developed prior to the proposal of the risk management program rule under section 112(r)(7) which contains requirements that are broader than the criteria in the guidance. Accordingly, the final rule may require States to modify their initially approved permit programs to accommodate these requirements.

The goals of this memorandum are to clarify how the current part 70 permit program submittals from States should be reviewed for approval with respect to section 112(r), as well as discuss the relationship between the section 112(r) rulemaking(s) with the Title V program. Further resolution of specific issues will likely be needed as the final risk management program rule is finalized and guidance is developed, however, the main points are:

- The initial State permit program can be approved as long as it shows that the State has general statutory and regulatory authority to issue permits that ensure compliance with all applicable section 112 requirements, including section 112(r). The April 13 memorandum provides Regions and States guidance on the specific approval criteria for the initial evaluation and approval of State part 70 permit programs.

- The approval criteria in the April 13 memorandum preceded the section 112(r) rulemaking efforts, and consequently, may not be sufficient to ensure compliance with all "applicable requirements" established in the risk management program rule. While the proposed rule is a good indication of the section 112(r) activities that must be carried out through part 70 programs, the final risk management program rule will likely expand the scope of section 112(r) applicable requirements for sources. Accordingly, Regions are encouraged to inform their States that modifications to part 70 permit programs may be necessary to accommodate requirements in the final risk management program rule.

- The EPA will establish the minimum requirements needed to assure implementation and compliance with the accidental release prevention requirements in the final risk management program rule. This rule will also address how the applicable requirements for sources subject to both section 112(r) and part 70 should be integrated. State air programs will, in effect, assume the delegation for section 112(r) unless another State agency is designated by the Governor and receives delegation from EPA pursuant to section 112(l).

- Since CEPPO is responsible for the development of the section 112(r) requirements and is the most familiar with their content, we believe it is imperative that the Regions work closely with CEPPO, as well as OAQPS, to highlight areas in State part 70 programs that will likely be incompatible with the final section 112(r)(7) rulemaking. While initial review and approval of part 70 programs will be based on the April 13 criteria, CEPPO will, as part of the program review process, provide suggestions about how programs could be more flexible to reduce the burden on the State and Region to accommodate future section 112(r) requirements. We also want to work with Regional representatives on the State implementation details for the risk management program rule. Your feedback and input continues to be important and we

encourage it.

- States, as part of their part 70 programs, are only obligated to assure compliance with section 112(r) for sources subject to both part 70 and section 112(r). However, as there are many additional sources subject only to section 112(r), EPA needs to encourage the States to take delegation for section 112(r) for non-title V sources. Those sources not included in a delegated State program either through section 112(l) or in effect through part 70 permitting, will have to be regulated by the Regions. Regional administration of any portion of these requirements is not desirable since accident prevention cannot be adequately achieved without the involvement and leadership of the State, as well as local officials and the public.

Our staffs are ready to assist you as you work with the States to implement part 70 and the accidental release prevention requirements over the next several years. If you have any further questions on the part 70 program content with regard to section 112(r) requirements, please contact Michael Trutna at 919-541-5345 or Julie Andreson 919-541-5339. If you have any questions concerning the overall implementation of section 112 requirements, please call Karen Blanchard at 919-541-5647. Questions regarding the requirements of section 112(r) should be directed to Craig Matthiessen of CEPPO at 202-260-9781.

Attachment

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ATTACHMENT

This attachment represents a consensus policy developed by OAQPS and CEPPO, in consultation with the Office of General Counsel (OGC), regarding the relationship between the Title V and section 112(r) requirements. The following information provides some background and specific responses to frequently asked questions concerning the interface between the section 112(r) requirements and part 70 operating permits program.

Current Review of State Operating Permit Program Submissions

Broad criteria for evaluating the section 112 portion of a part 70 program submittal were provided in the April 13, 1993, memorandum entitled "Title V Program Approval Criteria for Section 112 Activities." The memorandum generally states that, in order to obtain a full part 70 program approval from EPA, a submittal is to contain authority and/or commitments sufficient to assure that permits contain and assure compliance with all applicable CAA requirements, including any from section 112(r). Where general statutory authority to issue permits implementing section 112(r) is present, but the Attorney General is unable to certify explicit regulatory authority at the time of permit program submittal, the Governor may instead submit commitments to adopt and implement additional regulations, as needed, to issue permits that implement all applicable requirements. State submittals that contain general statements of section 112 legal authority without any specific reference to section 112(r) should be approvable unless State legislation or other aspects of the submittal prohibit or restrict the implementation and enforcement of section 112(r) applicable requirements.

The April 13, 1993, memorandum also defined specific approval criteria for the State permit program submittal. For section 112(r) States must have adequate legal authority sufficient to: (1) determine whether a part 70 source is obligated to register and submit a risk management plan (RMP); (2) secure verification from part 70 sources that any required submittal was prepared and submitted to appropriate authorities (permit authority, EPA, and/or another State authority); (3) obtain annual certifications from these sources as to whether their risk management plans are being properly implemented; and (4) include the obligation to submit such a plan in accordance with a compliance schedule in the part 70 permit for any sources failing to make its required plan submittal.

These approval criteria were developed prior to the proposal of the risk management program rule under section 112(r)(7). Please note that we do not believe these criteria are sufficient to assure that the section 112(r) regulations will be implemented

and enforced after the current rulemaking efforts are completed. The proposed rule expands upon the current notion of "applicable requirements" for sources subject to both the accident prevention and permitting requirements. Accordingly, in order for States to be able to assure compliance with the applicable requirements and retain an approved part 70 program, changes to some State programs may be necessary.

Where section 112(r) issues have been identified, and revisions to the initial State programs are expected, Regions are strongly encouraged to include a discussion of the section 112(r) rulemaking in any public notice for the approval of that program. Draft language has been developed to assist Regions with this portion of the Federal Register notice.

Ongoing Section 112(r) Rulemakings

As mentioned above, ongoing rulemaking efforts coordinated by CEPPO will serve as a mechanism to define the scope of section 112(r) requirements for all sources, including those sources also subject to the title V. For sources subject to title V, the risk management program rule will address how the "applicable requirements" of section 112(r) must be integrated into a part 70 program. Presently this is a major issue and a number of options are being considered. The Agency plans to outline these options in the ongoing rulemaking process.

While the outcome of the final rulemaking will not be known for sometime, one approach being considered for the integration of these provisions is to require that a risk management plan (RMP) be submitted as part of the source's permit application, thus providing much of the information needed for the State to determine that the source is complying with section 112(r) requirements. The RMP would be examined for completeness along with the other information contained in the source's application. Permit applications that are submitted prior to the due date for submission of the risk management plan would need to contain information regarding how the source is complying with the section 112(r) requirements and a compliance schedule demonstrating how the source intends to come into full compliance and submit the RMP. The part 70 permit must then list the section 112(r) applicable requirements (this would not mean incorporation of the RMP into the permit itself) as permit conditions because section 112(r)(7)(E) of the CAA indicates that standards established under section 112(r) are to be treated as section 112(d) standards. A comparison of the content of the RMP with actual activities at the facility could be incorporated into normal inspection activities at permitted sources. Such comparisons fall into the realm of assuring compliance with section 112(r) applicable requirements. Modifications to the RMP

could be addressed through mechanisms in the proposed risk management program rule that would not require part 70 permit modifications. This type of an integrated approach for the implementation of section 112(r) attempts to minimize the burdens on the State and the permitted source.

Implementation of Section 112(r)

The Congress intended a Federal-State partnership in implementing all of section 112, including section 112(r). Legislative history indicates that State "accident prevention capabilities will be a high priority of the air toxics program." See, e.g., S. Rep. No. 228, 101st Cong., 1st sess., at 193. The implementation envisioned by Congress for accident prevention also focused on coordination and sharing of accident prevention information between various State/local agencies within the same State. The partnership for implementation of section 112(r) contemplated Federal standards, guidance, model plans, and research, and State and local integration of hazard assessments and facility plans into community-based planning for emergency events. See, e.g., S. Rep. No. 228, 101st Cong., 1st sess., at 225.

To facilitate the coordination of State air and emergency management programs, EPA encourages each State to evaluate how the implementation of section 112(r) can be most effectively accomplished. While implementation of section 112(r) for title V sources is accomplished through an approved part 70 program, for non-title V sources, it is accomplished through a section 112(l) delegation. See 58 FR 62202 (November 26, 1993). States are not obligated to request delegation; however, delegation of section 112(r) requirements can be promoted through the use of implementation agreements and section 105 grants. In addition, the State permitting authority with part 70 program approval may want to develop an agreement with another State agency capable of reviewing the RMP and communicating back to them information related to compliance.

Some States have indicated they believe that the section 112(r) requirements duplicate already existing Federal, State and local requirements such as OSHA's Chemical Process Safety Management Standard and the facility notification and community emergency planning requirements under the Emergency Planning and Community Right-to-Know Act (EPCRA). However, the focus of the section 112(r) requirements is to encourage industry to begin a serious evaluation of their current chemical management procedures, determine what type of off-site impact the chemicals they manage have if accidentally released, establish or improve

their accident prevention procedures, and failing these efforts, to minimize the impacts of an accident through the development of a facility specific emergency response plan. Even though the accident prevention requirements are an integral part of the Clean Air Act, the regulations developed under section 112(r) will build upon, but not duplicate, OSHA's Chemical Process Safety Management standards. Further, the information provided in the RMP supplements the information available to the community and public under EPCRA.

The proposed risk management program rulemaking requires facilities to provide a copy of the RMP to the Chemical Safety and Hazards Investigation Board, the implementing agency, the State Emergency Response Commission (SERC) and the Local Emergency Planning Committee (LEPC). As you are aware, the SERCs and LEPCs are typically non-regulatory entities established by States as a requirement of EPCRA. The SERC is made up generally of representatives from various State agencies. The LEPCs formed under EPCRA are responsible for the development of the emergency response plans for communities, in addition to other functions. The Agency believes that the implementing agency for the accidental release prevention requirements should be a member of the SERC to promote coordination with community emergency planning activities already underway through the LEPCs. Some States may wish to have the SERC serve as the implementing agency provided they can meet the approval criteria of section 112(l) and will coordinate the information with State/local air programs. Additionally, the LEPCs may find certain portions of the RMP from the facility necessary for further development and refinement of their community emergency response plan.

We also recognize that States have concerns about resources, expertise and possible liability associated with an accidental release prevention requirements. The final risk management program rulemaking will reasonably address these implementation concerns. The Agency plans to develop guidance and training, and provide assistance to States to help build expertise and to illustrate how effective rules for accidental release prevention can be developed and implemented without significant additional burden. As part of the rulemaking process, EPA is considering the use of model RMPs and guidance to help sources comply with the accidental release prevention requirements. These approaches could also help to reduce the burden on State programs. In terms of resources, Regions should consider encouraging States to pursue any possible grants that may be available for section 112(r). In addition, the cost to States for implementing section 112(r) within part 70 permits must be offset from part 70 permit fee revenue. In those States where an agency outside the air program becomes responsible for assuring compliance with and enforcing section 112(r) the State must demonstrate how the

accidental release prevention requirements will be funded prior to section 112(r) rule approval by EPA pursuant to section 112(l).

With regard to State concerns on liability, the statute is clear on the issue of liability associated with the accidental release prevention program. Section 112(r)(1) states that "Nothing in [section 112(r)] shall be interpreted, construed, implied, or applied to create any liability or basis for compensation for bodily injury or any other injury or property damages to any person which may result from accidental release of such substances." Thus, States implementing section 112(r) would not incur a greater liability for injuries or damages than they would have otherwise.

Specific Questions Related to Part 70
Program Approval and Section 112(r)

1. **If a source is covered under title V permitting requirements and section 112(r) provisions, what specific activities does a source need to perform (as it relates to section 112(r) provisions) to obtain an operating permit? How do these activities relate to the term "applicable requirements"?**

A source subject to section 112(r) and part 70, must provide any information in the permit application necessary to enable the implementing agency to determine compliance, as well as agree to conditions in the permit that assure its compliance with all applicable section 112(r) requirements. Current part 70 guidance indicates the source must agree to permit conditions that assure: (1) development and submittal of any required risk management plan (RMP) to the appropriate authority; and (2) annual certification by the responsible official as to whether the RMP is being properly implemented. Sources are also required to submit compliance schedules when compliance with all section 112(r) requirements has not been achieved prior to permit issuance.

The proposed risk management program rule would expand upon these requirements. Although the final rule may differ somewhat on specifics and on what the part 70 permit must contain, the source will generally be required to comply with the following "applicable requirements":

- Developing a risk management program consisting of the following elements:
  - conducting an off-site consequence analysis,
  - developing a five year accident history,
  - reviewing and documenting the plant's chemicals, processes, and equipment,
  - conducting a process hazards analysis to identify hazards,
  - developing standard operating procedures,
  - training and documenting training of employees,
  - establishing preventative maintenance procedures,
  - developing procedures for management of change,
  - developing procedures for initial start-up and start-up after modifications,
  - investigating and documenting accidents,
  - conducting periodic safety audits, and
  - developing an on-site emergency response program;
- Developing and submitting a risk management plan (RMP) to the designated entities;

- Updating the RMP as required by rule, inspection, or change in process;

- Submitting annual compliance certifications (as required by part 70).

The CAA indicates that the regulations established under section 112(r) are to be treated and enforced as a MACT standard established under section 112(d). Section 112(r)(7)(E) states that "After the effective date of any regulations or requirement imposed under this subsection, it shall be unlawful for any person to operate any stationary source subject to such regulation or requirement in violation of such regulation or requirement. Each regulation or requirement under this subsection shall for the purposes of sections 113, 114, 116, 120, 304, and 307 and other enforcement provisions of this Act, be treated as a standard in effect under subsection (d)." Consequently, States should consider the regulations developed under section 112(r) as they would emission standards established under section 112(d).

2. What is a State with an approved part 70 program required to do to implement section 112(r) requirements as they pertain to an operating permit?

A State must carry out section 112(r) to the extent required to assure compliance with the applicable requirements for part 70 sources. In order to obtain the initial part 70 approval, a State must have the legal authority to assure compliance with all applicable requirements. The April 13, 1993, guidance indicated that a State would need, at a minimum, the legal authority sufficient to: (1) determine whether a part 70 source is obligated to register and submit a risk management plan (RMP); (2) secure verification from part 70 sources that any required submittal was prepared and submitted to appropriate authorities (permit authority, EPA, and/or another State authority); (3) obtain annual certifications from these sources as to whether their risk management plans are being properly implemented; and (4) include the obligation to submit such a plan in accordance with a compliance schedule in the part 70 permit for any source failing to make its required plan submittal. The final risk management program rule will expand the notion of "applicable requirements" for sources and will also address how these requirements will be implemented by the State through the part 70 permit program. For further information please refer to the *Ongoing Section 112(r) Rulemakings* discussion where two possible approaches are outlined.

3. **Has any specific language been developed for a State's part 70 legislation/rule to ensure that the State will meet section**

112(r) requirements?

State submittals that contain general statements of section 112 statutory authority without direct reference to section 112(r) are approvable unless the State has a particular legislative problem which specifically prohibits the implementation of the applicable section 112(r) requirements. Accordingly, no model language to implement section 112(r) has been developed nor does there appear to be an urgent need to do so.

In terms of regulatory language, the language in the part 70 regulations, as currently written, does not appear to be particularly restrictive. However, if the State regulatory language incorporates language from the preamble to part 70 which may restrict or prohibit the future implementation of section 112(r), this will probably result in revisions to the State program upon promulgation of the risk management program rule. Thus, the broader and more flexible the legislative and regulatory language, the less likely that States will have to revise any portion of their programs upon final section 112(r) rulemaking.

4. **Is a State required to describe how it implement's section 112(r) when it submits its part 70 program to EPA for approval?**

The criteria for part 70 program approval involve the State's ability to assure that sources comply with all applicable requirements. A State must describe generally how this compliance will be accomplished. Since many of the section 112 rulemakings have not been finalized, this would not amount to a detailed description of implementation activities at this time. However, as the structure of the accidental release prevention requirements are defined in future rulemakings, additional details may be required through IA's, section 112(l) delegation requests, and other implementation mechanisms. This should not impact the permit programs if the State has broad legislative and regulatory requirements for part 70.

5. **Should EPA require/ask a State to cover non-title V sources (but to which section 112(r) provisions apply) when the State submits its title V program?**

The EPA cannot require a State to cover non-Title V sources when a State submits its part 70 program. However, States should be encouraged to assume the responsibility of implementing section 112(r) for all sources. Regions should utilize all available mechanisms including State implementation plans and any available grant funds to support State implementation for the non-Title V sources. If a State chooses not to implement the

section 112(r) requirements for non-Title V sources, the Region then becomes the implementing agency for those sources.

The State cannot opt to cover non-Title V sources inside its Federal Title V program even it if wishes because of the language in section 112(r)(7)(F). This provision effectively bars the State from expanding its Federal part 70 sources population to cover sources only subject to section 112(r). A State, however, may choose a different permit mechanism to implement the requirements of section 112(r)(7) for non-Title V sources. Such State permits would not be part 70 permits or part of a State's approved Title V program but should not be discouraged.

Legislative history indicates, however, that accident prevention capabilities are to be a high priority of an air toxic program. Congress contemplated a Federal-State partnership that would result in the implementation and enforcement of section 112(r). This partnership was described in the legislative history to include Federal standards, guidance, model plans, and research and State and local integration of hazards assessments and facility plans into community based planning for emergency events. Thus, section 112(r) is to serve as a mechanism for ensuring that accident prevention information is available for integration into local community planning for emergency events in addition to being an integral part of a State air program with direct ties to the air toxic and permitting programs.

6. **What are EPA's options if a State does not wish to implement the accidental release prevention requirements for Title V sources (merely wants to reference the requirement in the permit)?**

In order to have an approvable part 70 program, a State must be able to implement and enforce through the permit all applicable requirements for part 70 sources. The EPA will explore available options to ensure that during the part 70 program approval process section 112(r) implementation is not restricted or prohibited. Further, rulemaking(s) under section 112(r) will clarify how the accident prevention requirements can be reasonably integrated into Title V. In addition, if the initial State permit program submittal in some fashion currently restricts the implementation of section 112(r) for part 70 sources, States should be informed during the approval process that upon final promulgation of the risk management program rule, it is likely they will be required to amend their programs to accommodate implementation and enforcement of section 112(r) applicable requirements.