ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 9 and 63

[FR#]

RIN

Approval of State Programs and Delegation of Federal Authorities

AGENCY: Environmental Protection Agency (EPA)

ACTION: Proposed amendments.

SUMMARY: We, the Environmental Protection Agency (EPA), are proposing to change the Agency's current procedures for delegating to State, Local, Territorial, and Tribal governments (i.e., "States") the authority to implement and enforce Federal air toxics emission standards and other requirements. Specifically, these regulatory amendments revise procedures and criteria for approving State rules, programs, or other requirements that would substitute for Federal emission standards or other requirements for hazardous air pollutants (HAP) established under section 112 of the Clean Air Act (CAA or the Act). Section 112(l) of the Act authorizes us to approve State programs when a State's alternative requirements are 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 States can choose, increase the flexibility States have to demonstrate equivalency for their alternative requirements, and provide options that will expedite the approval process. In addition, policy guidance in today's notice clarifies what States must or can do to obtain delegated authority under subpart E, including how they can demonstrate equivalency for alternatives to Federal requirements.

This effort responds 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 State agencies, regulated industries, and the Federal government without sacrificing the emission reduction and enforcement goals of the Act. These amendments reduce the potential for redundant or conflicting regulations for industry while they accommodate a wider variety of State program needs.

This rulemaking addresses requirements that apply to States, 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.

DATES:

ADDRESSES:

Comments

Public Hearing

Docket

FOR FURTHER INFORMATION CONTACT: Mr. Tom Driscoll at (919) 541-5135, Integrated Implementation Group, Information Transfer and Program Integration Division (MD-12), U.S. EPA, Research Triangle Park, North Carolina 27711, or at "driscoll.tom@epamail.epa.gov".

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

I. Summary of preamble *[Executive summary to be added]*

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

A. Reasons for revisiting section 112(l) regulations

Before the 1990 Clean Air Act Amendments, many State and local (S/L) air pollution control agencies developed their own programs for the control of air toxics (i.e., hazardous air pollutants (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 emission 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.[1] 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 emission

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[1] The Federal emission standards established under section 112 authority are codified in 40 CFR parts 61 and 63. These standards are referred to as National Emission Standards for Hazardous Air Pollutants (NESHAP).

standards in terms of the emission 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 provided provisions in section 112(l) that allow us to recognize S/L, Territorial, or Tribal 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, emission limitations, and compliance and enforcement measures) and allow them to substitute for part 63 National Emission Standards for Hazardous Air Pollutants (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 governments the authority to implement and enforce part 63 NESHAP exactly as we promulgate them, that is, without any changes.

Thus, a S/L agency 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), however, submission of any rules or programs by S/L agencies for approval and delegation is voluntary. If S/L agencies do not obtain approval or delegation, we have primary authority and responsibility to implement and 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 agencies 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, we believe that Congress's intention in section 112(l) is to integrate these programs with the Federal air toxics program as it was revised in 1990. (S/L agencies may also have volatile organic compound (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 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 emission 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 agencies 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 part 63, subpart E, provide regulatory "guidance" regarding approval of S/L, Territorial, and Tribal 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 emission standards or other requirements.

The current subpart E provides several different processes (that we also refer to as options) that a S/L agency may pursue to obtain delegation or program approval. A S/L agency 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 agencies raised

concerns to us through the State and Territorial Air Pollution Program Administrators (STAPPA) and the Association of Local Air Pollution Control Officials (ALAPCO) about the practical workability of these regulations. Since August of 1995 we have been engaged in discussions with S/L agency 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 permit 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.[2] 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 emission reduction and enforceability goals of the Clean Air Act. Through this effort, we hope to provide additional flexibility to S/L agencies in how they accept delegation for the section 112

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[2] Note that we are not proposing to revise any of the subpart E provisions that deal with delegations or approvals of requirements established under section 112(r) of the Act.

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 agencies 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 agencies 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 minimize the likelihood of dual regulation of stationary sources.[3]

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 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

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[3] Minimizing the likelihood of "dual regulation" was also an explicit goal in promulgating the existing subpart E regulations.

enforceability of the otherwise applicable Federal requirements.

Equivalency demonstrations that S/L agencies 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.[4] However, this does not mean that S/L agencies must demonstrate "line-by-line" equivalency with the section 112 requirements.

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

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 agency chooses to pursue among the options that allow alternative requirements to be substituted for Federal requirements. By "test" we mean the criteria that we would use to determine

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[4] *Affected source* is a defined term in section 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 emission standard or requirement.

whether S/L requirements are as stringent as ours in terms of the effect they would have on achieving the required emission 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 agencies, interstate associations, State-wide 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 "State or local agencies" (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 emission standards 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 emission standards (and other substantive section 112 requirements), and they establish the processes by which you may implement regulations that, while not identical to our emission standards, achieve the same or better results.

IV. Who else is affected by this rulemaking?

[Note to the reader: This section will be filled in later]

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

In August of 1995, representatives from STAPPA and ALAPCO, the associations of S/L agency 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 emission reductions are too burdensome. During the succeeding two years, we held numerous discussions with representatives of STAPPA and ALAPCO to better understand their views and to work together to develop options for addressing their concerns while still assuring that the requirements of the Clean Air Act are met. After developing some approaches for responding to STAPPA and ALAPCO's concerns, we involved a wider group of stakeholders, e.g., from industry and from 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, D.C. on [INSERT DATE], with stakeholders in Los Angeles, California on December 5 and 6, 1996, and with stakeholders in Washington, D.C. on February 26, 1997 and July 9 and 10, 1997.

VI. 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, we expect you to demonstrate that each of your rules, standards, or requirements (as appropriate) that is applied to an affected source is no less stringent than the otherwise applicable Federal rule, emission standard, or requirement.

The four ways to obtain delegation are:

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 how we promulgated them, as well as delegation of authority for unchanged rules and standards that we will issue in the future. These provisions are addressed in section 63.91 and in various guidance memoranda or

documents.

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, section 63.92. Each adjustment taken individually must be unequivocally no less stringent than the corresponding requirement in our standard. If your rule meets the criteria listed in section 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 not unequivocally no less stringent. Taken as a whole, the adjustments must achieve results 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 section 63.93.

4. Program Approval -- Delegation to implement some or all Federal emission standards through development of terms and conditions in 40 CFR part 70 operating permits, rather than through approval of your substantive rules. First, through an "upfront" 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 part 70 permitting process you may change requirements in the Federal emission standards, provided that the results of each change are equivalent to (i.e., 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 section 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 section 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, section 63.91 requires you to demonstrate to us that your program has adequate legal authority and resources to implement and enforce your rule or program upon approval and to assure compliance by all sources within your jurisdiction with each applicable section 112 rule. In addition, you must provide an expeditious implementation schedule and a plan that assures

expeditious compliance by all sources subject to the rule or program, and you must provide us with a copy 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, part 70 program approval is sufficient to demonstrate that you have satisfied subpart E's general approval criteria in section 63.91, at least for sources permitted under your part 70 program.

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

1. Section 63.91 "straight" delegation

Under the *"straight" delegation option* in section 63.91, you may implement 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 section 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 public notice and comment. This mechanism can be similar to the process established under EPA's 1983 "Good Practice Manual for NSPS and NESHAP".

Alternatively, you could choose to submit separate section 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 30 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. Section 63.92 rule adjustment

Under the *rule adjustment option* in section 63.92, we can approve one (or more) of your rules that is structurally very similar to, and is at least as stringent as, the Federal rule for which you want to substitute your rule(s). Under this option, you must show us that each adjustment to the Federal rule results in emission 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 emission rate or subjecting additional emission 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 notice and 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. Section 63.93 substitution of authorities

Under section 63.93, *substitution of authorities* (which is commonly referred to as the *rule substitution option*), we can approve one (or more) of your rules that is structurally different from the Federal rule for which you want 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

section 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 emission 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 section 63.90.) Any rules or other requirements that you submit under this section must be enforceable under your State law.

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

(1) State rules or other requirements enforceable under State law that would substitute for a section 112 rule; or

(2) In the case of alternative work practice standards, specific part 70 permit terms and conditions for the source or set of sources in the source category for which you are requesting approval under this section. The permit terms and conditions must address control requirements as well as compliance and enforcement measures, and they would substitute for the permit terms and conditions imposed by the otherwise applicable section 112 rule for that source or set of sources.

Under section 63.93, you must make a detailed demonstration that your rule (or other authorities) would achieve equal or

greater emission reductions (or other measure of 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 do 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 would be federally enforceable and it would replace the otherwise applicable Federal rule in your jurisdiction for the affected sources.

The approval criteria in section 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 section 63.90;

(2) Levels of control and compliance and enforcement measures that would achieve emission 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 authorities specified in section 63.93(b)(4) that are not repeated here.

To obtain approval under section 63.93, you must demonstrate that you have satisfied the approval criteria in section 63.93(b) in addition to the approval criteria in section 63.91(b). As we mentioned earlier, you may usually demonstrate that you have satisfied section 63.91(b) by demonstrating that you have an approved part 70 operating permit program. In addition, once you have demonstrated that you have satisfied the section 63.91(b) criteria under a section 63.93 approval action, you generally would not have to repeat the section 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).[5] Another example of a situation in which you may need to resubmit section 63.91(b) approval elements is when you submit for

[5] This general statement about when you must or need not resubmit the section 63.91(b) component of your program for reapproval applies also to the other options under subpart E and it is not affected by this rulemaking.

approval an alternative compliance and enforcement strategy that involves a more resource-intensive inspection program than the one previously approved.

In guidance memoranda we issued on June 26, 1995 and November 26, 1996 [INSERT FULL CITES], we explained our interpretation of the "holistic" approval criteria in section 63.93(b)(2). In the June 26 memo we stated that, based on the language in section 63.93(b)(2) (paraphrased above), we believe that "section 112(l) allows for approval of State compliance measures that differ from the Federal rule provided that the State can demonstrate that its compliance requirements result in equivalent or better overall emission reductions." This means, for example, that your rule (or permit terms) could contain alternative recordkeeping or reporting requirements which, when taken together, would accomplish the same objectives as the requirements in the Federal rule in terms of their ability to assure compliance. In the November 26 memo we further clarified that under a section 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 memo regarding the record retention period be granted "when evaluating any alternative compliance measures, including recordkeeping and reporting requirements, provided that the section 112(l) Federal enforceability is not diminished in this process."

4. Section 63.94 program approval

Under the current *program approval option* in section 63.94, we may approve your program so that you can substitute alternative requirements for one, some, or all section 112 emission standards through the part 70 permitting process. Currently, this option is available only for sources that will be permitted under part 70.

For approval to implement and enforce your program in place of the otherwise applicable Federal section 112 emission 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 emission 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 part 70 permit you issue for these sources is at least as stringent as those that would have resulted from the otherwise applicable Federal emission standards;

(3) Finally, you must commit to expressing the 40 CFR part 70 operating permit 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 permit 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 can 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 "upfront" approval. Our approval of alternative requirements for specific sources would take place during the part 70 permit issuance process. Thus, beyond the "upfront" approval of your commitments and other legal authorities, under this option we do not do rulemaking to approve your alternative, source-specific requirements.

This mechanism, including the "form" of the standard approval criterion in section 63.94(b)(2)(D), was intended to provide us with an opportunity for expedited review of your alternative requirements in the form of part 70 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 section 63.93. The part 70 permit issuance process includes opportunities for public and EPA review, and EPA veto, 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 emission standards that are identified in the "upfront" program approval. These emission standards may have been established under sections 112(d), 112(f), 112(h), 112(m), 112(n), 112(k) or 112(c)(6).

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 section 63.94 program approval, starting on the date of permit issuance).[6] After the approval date, our promulgated standard is no longer applicable or enforceable for the sources in your jurisdiction that otherwise would be subject to it.

Although you become the primary implementation and enforcement authority when you accept delegation for a section 112 emission 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 emission standard, including any "alternative" requirements arising from your rule or program. This authority is spelled out in section 112(l)(7) and sections 63.90 and 63.96. Nothing in these amendments changes our interpretation of section 112(l)(7) or how it is implemented through subpart E.

E. Purpose of upfront 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

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[6] Under subpart E, paragraph 63.91(a)(6), the date of approval is the date of publication in the Federal Register.

delegation/approval criteria contained in section 63.91(b). In addition, under the current rule, to obtain delegation/approval under a particular option in section 63.92, section 63.93, section 63.94, or section 63.95, you must demonstrate that you have satisfied the additional approval criteria specified in the relevant section.

The rulemaking that we do under each subpart E delegation option to codify our finding that you have satisfied the upfront approval criteria serves several critical functions under section 112(l). First, the process of approving the upfront portion of your program assures that you have met the delegation criteria in section 112(l)(5) (as codified in section 63.91(b)), that is, that you have demonstrated adequate authority and resources, an expeditious implementation schedule, and 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 part 70 program approval, you need not resubmit information demonstrating that you meet the section 63.91(b) criteria. As we explain later, we believe that part 70 program approval often is sufficient to demonstrate that you have met the section 63.91(b) criteria.)

Second, our section 112(l) approval of your program (which is based on your demonstration that you have met the section 63.91(b) criteria and the additional process-specific criteria in

other sections) 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' part 70 permits). The upfront 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 upfront approval step provides for an orderly way of identifying which authorities have been delegated to you in relation to specific Federal emission 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 emission 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' part 70 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 would be delegated to you without changes, with changes under other subpart E approval processes, or not at all.

If, in the future, you would like to expand the coverage of your approved program to include additional Federal requirements, you must repeat the upfront 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 section 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 part 70. Previously, in the subpart E promulgation preamble (see 58 FR 62271-2), 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 section 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 section 63.91(b) criteria by demonstrating part 70 program approval (for the sources for which you are accepting delegation that are covered by your part 70 program). In the promulgation preamble we did not make clear that, under the existing subpart E regulations, part 70 program approval could be considered sufficient to demonstrate that you have satisfied the section 63.91(b) criteria for delegation requests other than straight delegations. Therefore, we are clarifying in today's notice that for all the delegation options under subpart E, part 70 program approval may be sufficient to demonstrate that you have satisfied the section 63.91(b) component of the approval criteria for part 70 sources. In your upfront subpart E submittals under any of the options, you may merely have to provide appropriate documentation or citations to demonstrate that you have an approved part 70 program (for the sources for which you are accepting delegation and that are covered by your part 70 program) in order to demonstrate that you have satisfied

the 63.91(b) approval criteria.

F. EPA can withdraw approval if a State 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, emission 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 part 70 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 a timetable for sources to come into compliance with the applicable Federal requirements and you would revise their part 70 operating permits to reflect the new requirements.

VII. What concerns have States raised regarding the current subpart E delegation options and what actions has EPA taken to address these concerns?

A. State issues with subpart E

On August 14, 1995, STAPPA/ALAPCO presented us with a list of issues and implementation difficulties that you associate with subpart E's requirements. (See docket item number ___ .) This list was compiled by S/L agency representatives based on their actual experiences with subpart E and on difficulties they anticipated experiencing with forthcoming submissions for approval. As we understand your concerns, some of your major issues are that subpart E requires 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 emission limits and compliance and enforcement measures are expressed. (For example, if a certain Federal emission standard requires an emission limit of 5 pounds per hour of a HAP from a particular piece of equipment, you would have to express an emission limit resulting from your programs' requirements in the same units, i.e., pounds per hour, and the actual limit would have to be 5 pounds per hour or less in order to be no less stringent than the Federal standard.)

We think your concerns arise from language in section 63.94

that requires separate equivalency demonstrations for emission limits, compliance and enforcement measures (monitoring, recordkeeping, and reporting (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 (in the form of part 70 permit terms and conditions) achieve the same or better results than our rules or programs; without it, we believed we would not have the resources to perform this analysis during our 45-day review period for each permit. Our understanding is that you believe these provisions limit your flexibility to substitute your requirements for the Federal requirements. You 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 your concerns with subpart E as it is currently structured pertains to the length of the approval process for a rule substitution under section 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." You expressed concern that the 180-day review period may cause delays for the regulated community, and you requested that we explore ways to expedite the approval process.

You also expressed concern that the program approval option in section 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 part 70 operating permits. You asked us to revise subpart E so that a mechanism is available to delegate changed Federal standards for both part 70 and non-part 70 sources.

You also asked us to clarify how you may substitute alternative work practice standards (WPS) for federally promulgated WPS under section 112(l). One of your 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.

You reiterated your concern about the potential for dual regulation if you are unable, for the reasons above, 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. Sources already may reduce the burden of dual regulation by choosing to "streamline" overlapping requirements in their part 70 permits.

B. What actions has EPA taken to address States' 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 that we feel we can accommodate.

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

Even before this rulemaking action, we took several steps to address your more minor concerns (that could be addressed rapidly). 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 affected the following changes:

(1) It deleted a duplicative requirement in section 63.93 that sources report the results of all required monitoring or testing at least every six months under an approved S/L rule or program. This requirement was duplicative of reporting requirements already included in individual NESHAP standards and the part 70 permit program regulations.

(2) It established a 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 of 1995 we issued two policy memoranda to clarify the flexibility that we believe already exists under section 63.93 for making equivalency determinations between S/L and Federal rules. (See docket items numbered ___.) These memoranda clarified our interpretation of the "holistic" approval criteria in section 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 emission reductions. Provided you can demonstrate that the emission limitations and MRR of your rule, when taken as a whole, result in equivalent or better overall emission reductions, and provided that your MRR 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.[7] These memos are discussed further in section VI.C.3. of this preamble.

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

Through today's 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

[7] 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.

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) based on "same emissions reductions achieved" 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 State program approval (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) A process for establishing alternative requirements on a source-specific basis (for a few sources in a category);

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

(8) Approval to substitute 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.

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) section 63.91 delegation of unchanged Federal standards;

(2) section 63.92 rule adjustment;

(3) section 63.93 authorities substitution;

and

(4) section 63.94 program substitution.

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

(1) section 63.91 delegation of unchanged Federal standards;

(2) section 63.92 rule adjustment;

(3) section 63.93 substitution of authorities;

(4) section 63.94 equivalency by permit; and

(5) section 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 today's regulatory amendments. The primary changes we are proposing are to replace the current program substitution process in section 63.94 with the new EBP process and to add the new SPA

process to section 63.97.[8] 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 that it may be used only for a small number of sources, 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 section 63.90

For section 63.90 we are proposing to add or modify a number of subpart E's definitions. We are proposing to revise the

[8] 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.

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 State rule that adjusts a section 112 rule	Approval of a State rule that adjusts a section 112 rule
63.93	Approval of State authorities that substitute for a section 112 rule	Approval of a State authorities that substitute for a section 112 rule
63.94	Approval of a State program that substitutes for section 112 emission standards	Approval of State permit terms and conditions that substitute for section 112 emission 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

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 are part of the

emission limitation portion of the level of control and 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.

Finally, we are proposing to add a new paragraph to section 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 section 63.91

In paragraph 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 placeholder to develop provisions to address what States must do to update their section 112(l)

approvals when we amend, repeal, or revise previously promulgated Federal section 112 requirements that affect sources.

3. Proposed changes to section 63.92

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

4. Proposed changes to section 63.93

Proposed changes to section 63.93 are discussed in detail in section VI. of the preamble. The significant change we are proposing is to delete paragraph 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 section 63.94

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

6. Proposed addition to section 63.97

Table 3 summarizes the flexibility offered under the new State program approval 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:

1. Our interpretations of existing regulations and

guidance (e.g., the holistic equivalency demonstration test);

2. Our expectations regarding your submittals under the equivalency demonstration process;

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
Upfront approval	• Upfront approval on State authorities, commitments, and eligible source categories -- 180 days with rulemaking	• Upfront approval on State authorities and eligible sources • No State rulemaking needed to establish commitments • Expedited upfront approval process - 90 days with rulemaking
Approval of alternative requirements	• That a part 70 permit be used to substitute State requirements for Federal requirements • EPA and public review and comment during the permit issuance process. Affirmative EPA approval not required -- 45 days	• That a part 70 permit be used to substitute State 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 section 112(d), (f), (h), (m), (n), (k), or (c)(6) emission standards	• Permit terms to be substituted for section 112(d), (f), or (h) emission 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
Upfront approval	• Upfront approval on State authorities, commitments, and eligible source categories -- 180 days with rulemaking (63.94)	• Upfront 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 part 70 permit, but only when sources are permitted under part 70 (63.94)	• Substitutions for area source requirements on a source category basis through State enforceable mechanisms other than rules or part 70 permits. Alternative requirements must be approved by rulemaking -- 180 days
Section 112 program applicability	• Substitutions for section 112(d), (f), (h), (m), (n), (k), or (c)(6) emission standards (63.94)	• Substitutions for section 112(d), (f), (h), (m), (n), (k), or (c)(6) requirements

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 State situations they are designed to address;

5. Functions of the upfront approval process in subpart E delegation options; and

6. Use of part 70 program approval to demonstrate that section 63.91(b) criteria have been met.

E. Policy guidance provided outside the preamble

Currently, we are developing guidance which would clarify in much greater detail than the guidance provided in this preamble what we are looking for from you when you submit alternative requirements for an equivalency demonstration. 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 work practice 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 advice from you about what other kinds of guidance would be most helpful to you.

F. Additional policy considerations

In the context of developing today's rulemaking, we considered ways to delegate our authority to approve certain alternatives to test methods and monitoring requirements required under part 63. We are continuing to evaluate which of our authorities may be delegated and the manner in which any such delegations could occur.

VIII. How do the revised delegation processes work?

A. Section 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 section 63.93. Because we believe that the approval criteria included in section 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 paragraphs 63.93(a) and (b), the previous discussion in section VI.C.3. is still relevant. In the following discussion we clarify and take comment on what types of authorities you may substitute for section 112 rules under section 63.93 and we explain our rationale for proposing to amend rule language that deals with this topic.

Under section 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 section 63.92. Section 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 paragraphs 63.93(a)(4)(i) and (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 part 70 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 section 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 paragraph 63.93(a)(4)(ii) (that deal with specific part 70 permit terms and conditions that would substitute for standards promulgated under section 112(h)) because we believe they are no longer necessary to approve alternative section 112(h) requirements that differ in form from the Federal standard. Specifically:

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

(2) section 63.94 as amended would require the same equivalency test as section 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 section 63.94's equivalency criteria

should not be a prerequisite for obtaining approval under section 63.93;

(3) section 63.94 as amended would require you to specify in your upfront 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[9]), but this requirement is not necessary for obtaining approval under section 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, section 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."

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[9] 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 section 63.94, the "upfront approval" step in this process only covers your demonstration of resources and authorities under part 70/section 63.91(b) and your identification of sources that you will cover under this delegation process.

Second, section 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 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 section 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).[10] In our proposed scheme of amended delegation options, section 63.93's role 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 paragraph 63.93(a)(4) to read

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[10] Also, under section 63.93, each approval action covers both the generic section 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 section 63.93 unless you submit the enforceable conditions for that source category with your section 63.93 submittal.

"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 section 63.93 to "Approval of a State rule that substitutes for a section 112 rule."

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 section 63.93. This approach is discussed in section XI.C., "Using compliance evaluation studies in equivalency demonstrations."

B. Section 63.97 State program approval process

To address some of your concerns with the existing substitution options in subpart E, we developed the State program approval (SPA) process which, in today's rulemaking, we are proposing to add to section 63.97. Although section 63.97 succeeds section 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 part 70 permits. This would allow you to address area sources that are not covered by your part 70 programs. Finally, you asked us to eliminate the requirements for line-by-line equivalency demonstrations and the "form" of the Federal standard in section 63.94 as it is currently structured. This would give you more flexibility in how you can demonstrate that your requirements are as stringent as the Federal requirements.

The new SPA process addresses these concerns. Compared with the existing program approval process in section 63.94, the SPA process provides you with additional flexibility by eliminating the "form" of the standard and line-by-line equivalency requirements. Compared with the existing rule substitution process in section 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 emission standards. The SPA process would allow you to obtain approval upfront, 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 established under 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 section 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 to

determine equivalency, see section XI.)

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) emission 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 SPA process consists of two steps. In the first step, you submit to us and we approve your upfront program. The upfront 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 upfront 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 section 63.93, they must be enforceable as a matter of S/L law before you can submit them for approval. Also, as in section 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, we ensure that your approved alternative requirements are incorporated correctly into part 70 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. With the SPA process, you have an opportunity to streamline and speed the step two approval of your alternative requirements by obtaining

approval for some portion of your alternative requirements during your step one program approval.

Alternatively, you may submit your alternative requirements at a future date (or multiple future dates), after the upfront 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 upfront approval. Each time you submit your alternative requirements at a future date, we would repeat the approval process under step two. (It is not necessary to repeat the section 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 on pages 29297-8.) 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 upfront approval step for submittals that do not contain any alternative requirements, and for the full 180 day-period for the upfront 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 upfront program approval has been completed. One suggestion is to delay rulemaking on the upfront program approval until future rulemaking takes place for approval of the alternative requirements; although upfront 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 upfront 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 would like to know whether you think these proposed time periods are feasible, adequate, and acceptable for this purpose, especially given our mutual desire to expedite the approval process. We have carried over this approach to the EBP upfront 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 upfront portion of the SPA process to streamline the review process for your alternative requirements. The following discussion on upfront 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, doing so would make the review and approval of your requirements go more easily and quickly.

a. *Step one: Upfront approval*

i. *Upfront approval elements and criteria*

The upfront 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 section 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 emission standards or requirements. In addition, the SPA upfront 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 also obtain approval to implement and enforce alternative requirements that apply generically to more than one category of sources, and you can specify which enforceable mechanisms you will use to substitute alternative requirements for area sources. Our intent is that our one-time, upfront 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 section 63.94, you would submit certain elements of your program for upfront approval. The upfront program submittal under the SPA process must include, at a minimum, the following two elements:

(1) Section 63.91(b) demonstration.

A demonstration of how you have satisfied the criteria in section 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. Part 70 program approval may be sufficient to demonstrate that you have satisfied the section 63.91(b) criteria for sources covered by your part 70 program; and

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

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 paragraph 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.

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. 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 permit programs other than part 70 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 upfront approval step. This approval may require you to supplement your previous section 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 upfront 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 upfront 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 section 63.94 may be implemented for area sources, but only if you will be permitting those sources under your part 70 program. We understand that, in the near term, most part 70 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 part 70 programs to permit area sources.) We are proposing that, as part of the upfront 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-part 70 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 permitting programs that you may wish to use for this purpose and specific descriptions of how you would use these mechanisms.

An alternative approach that we considered, but rejected proposing for these rule amendments, was to allow you to use S/L enforceable mechanisms that were already EPA-approved and under which you had the authority to create federally enforceable terms and conditions. Under this alternative approach, you could incorporate approved, alternative requirements for area sources into your enforceable mechanism, such as a general permit, following the same process that is described for major sources under the new equivalency by permit process we developed for amended section 63.94. (We considered and rejected applying this same approach under the EBP option for the same reasons that we provide for SPA.) The mechanism for making the area source

requirements federally enforceable is the process of issuing the permit, not a Federal rulemaking on the specific alternative requirements.

We rejected this approach because we believe that any mechanism that would be acceptable to implement it and that could be approvable under section 112(l) would have to be able to satisfy the criteria we have previously established for approving federally enforceable permitting mechanisms into SIP, i.e., Federally Enforceable State Operating Permit (FESOP) programs, and it would have to include an opportunity for us to object to the permit for proper cause related to the substitution of the otherwise applicable Federal section 112 requirements with your alternative requirements. These fundamental approval criteria are analogous to many of the requirements for part 70 program approval.

For example, these mechanisms would have to provide adequate opportunity for EPA and public comment, adequate permit revision procedures (including opportunity for EPA and public comment), notification to EPA and the public that the draft permit contains alternative section 112(l) requirements, and an opportunity for EPA to object to the permit, in order to ensure that we have final decision making authority to determine that the alternative requirements are equivalent to the Federal section 112 requirements they would replace and that the alternative

requirements are correctly incorporated into the enforceable document for each source.

We believe that the same types of considerations that have applied to SIP approval of FESOP programs are applicable in the section 112(l) approval context, that is, in general, these same criteria should be applied for approving mechanisms that you could use for establishing federally enforceable area source requirements under authority of section 112(l). In addition, to obtain section 112(l) approval for the purpose of substituting your requirements for otherwise applicable Federal requirements, you would need to demonstrate authority to regulate any individual HAP for which you intend to establish federally enforceable requirements if these HAP are not VOC or PM, e.g., methylene chloride, (assuming you already have authority to regulate HAP indirectly as VOC or PM), and you would need to demonstrate that your program provides an opportunity to object to each permit before it may be issued.

We chose not to propose this approach because we believe that these criteria for obtaining EPA-approval exceed the criteria that could be met by any existing S/L enforceable mechanism for area sources, particularly the requirement to allow us to object to each permit before it is issued. From our discussions with you, we understand that you are not likely to want to pursue options that involve additional program approval

for newly established area source mechanisms. In our discussions, you indicated your preference for relying on your existing mechanisms to implement area source programs under the SPA process. We invite your comments on whether our conclusions in this regard are correct and, in general, if there are additional, practical and legally supportable ways of implementing area source programs that we did not consider in this notice and that you may wish to pursue.

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 agency 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, set of sources in the source category, and individual HAP, if any, for which you are requesting section 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 section 63.91(b) component of the upfront approval. We would

like your comments on whether we should establish any specific approval criteria for such programs through these amendments to subpart E.

As a policy matter, we believe it is generally appropriate to limit our review and approval under section 63.97 to general permits developed under authority of your enforceable mechanism for area sources (or your part 70 authority for major or area sources). For the revised regulations, we intend that section 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 would take the place of a source category rule submitted for approval under this option. As we explain in section VIII.C. that describes the equivalency by permit process, 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, we believe the use of permits for demonstrating alternative requirements must be limited to be implemented practicably. Otherwise, we believe this approach will overtax your ability to administer your programs and our ability to review your permits. 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 for either major or area sources. You may submit more than one general permit for each source category (or class of sources in a source category, e.g., major sources) provided that the collection of general permits ensures that all of the otherwise applicable Federal section 112 requirements in the emission standard for that source category are addressed. We are taking comment on this approach.

We are also taking comment on whether you should be allowed to make arrangements with your EPA regional offices through your upfront SPA approval to submit for review and approval a small number of source-specific permits that contain alternative section 112 requirements. We believe that this additional flexibility would enhance the usefulness to you of this option, but we are concerned about the resource burden it may impose on regional offices that would be implementing this approach for individual sources in a category. How we address this topic in the final rule will depend on the comments we receive and our consideration of them.

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 emission 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 upfront 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 upfront 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.[11] For part 63 NESHAP or other Federal requirements that are already promulgated at the time of your upfront submittal, step two may be combined with step one in time, 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. Under the SPA process, as under the section 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 may only submit general permits. (Earlier we asked for comment on the

[11] Under your approved upfront program, you would already have been delegated the authority to implement and enforce those Federal requirements.

feasibility and desirability of creating limited exceptions to this policy.)

After we have determined whether your alternative requirements are acceptable to us, the public would have 30 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. We do not consider initial notifications of sources' applicability status under part 63 emission standards to be substantive requirements.) 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 upfront 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 part 70 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 within the affected source category 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. The Administrative Procedures Act (APA) prevents us from taking such an approach. 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 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 part 70 permits*

Following completion of step two of the SPA process, you would incorporate the new federally applicable requirements into part 70 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 change in any way that would change the approved section 112 provisions, and you want your new alternative requirements to become federally enforceable in place of the set of alternative requirements we previously approved, you must resubmit your rules or permits to us for reapproval. 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 part 70 permits whenever your underlying regulations, policies, or permits change if you want 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 to, 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 the proposed new section 63.97, once we have granted upfront approval for your program (or simultaneously with your upfront approval), we could approve your alternatives to specific Federal section 112 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 State 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 section 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 section 63.93(b). Section XI. of the preamble contains a complete discussion on how we would conduct an equivalency evaluation under the criteria of section 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. Section 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 section 63.94, we are proposing to revise section 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 emission 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 part 70 permit, through the appropriate part 70 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 part 70.

The proposed EBP process accomplishes similar objectives to those that the current section 63.94 is intended to accomplish; however, the EBP process provides flexibility beyond that now in section 63.94 by allowing a "holistic" approach for determining equivalency between your alternative requirements and the Federal emission standards. The proposed EBP process differs from the current process in section 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 speed the time it takes to approve your alternative requirements). Rather, it relies on the same equivalency demonstration "test" that is currently in section 63.93(b) for rule substitutions and that we are proposing for the section 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). 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 emission standards. For example, these "standards" could be 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 emission 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 Part 70 Operating Permits Program," commonly called White Paper 2.) 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 replace Federal section 112 requirements with your approved alternative requirements that are no less stringent than the section 112 requirements that they replace. Sources subject to the part 70 operating permit 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 upfront 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 part 70 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, your alternative requirements are approved in the second step in a non-rulemaking process and they become federally enforceable only when the permit issues in step three. Therefore, our review of your proposed part 70 permits that have gone through the EBP substitution process is more critical than it is in the other substitution options.

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: Upfront approval*

As a first step you would submit certain elements of your program for upfront approval (as in the existing section 63.94 and the proposed SPA processes). The purpose of the upfront submittal is for you to demonstrate that you have satisfied the basic section 63.91(b) criteria for obtaining delegation, demonstrate that you have an approved part 70 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 source categories for which part 63 emission standards will be established in the future.)

In discussing the form that an EBP process could take, some of you have suggested that an upfront approval would be redundant when you already have an approved part 70 program. We disagree, at least in part. As we already discussed for the SPA process, the State-specific upfront approval for an EBP program serves critical functions under section 112(l) including ensuring that you meet the section 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

upfront 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 part 70 permit program. As we have mentioned previously, part 70 program approval generally is sufficient to demonstrate that you have satisfied the section 63.91(b) criteria for the sources covered by your part 70 program, but it is not sufficient to satisfy the other purposes of the upfront approval.

Paragraph 63.94(b) of the proposed rule, the criteria for upfront approval, differ from the approval criteria currently in paragraph 63.94(b) in that they no longer require you to make legally binding commitments to express your part 70 permit terms and conditions in the form of the Federal standard and 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 upfront 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 upfront, legally binding commitments are no longer necessary to implement this option.

We are proposing that you submit for approval under the EBP process an upfront 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 part 70 program for the sources for which you wish to use the EBP process.

Because the upfront EBP submittal elements do not contain alternative requirements, we are proposing that we could take a maximum of 90 days to review and (dis)approve the program you submitted upfront (following a determination that the submittal is complete), 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 upfront approval process in SPA.

If you submit alternative requirements (in the form of permit terms and conditions) at the same time you submit your upfront program, we could evaluate them on approximately the same 90-day timeline we use to approve your upfront program (though they do not have to undergo rulemaking), but we could not approve your alternative requirements until your upfront approval becomes effective (at the time of publication in the Federal Register). After your upfront 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 upfront 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 section 63.91(b) or the part 70 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 upfront 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 emission 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 part 70 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 upfront 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 see, 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, 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. 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 submittals. 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 unambiguously no less stringent than the Federal NESHAP requirements.

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 part 70 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 part 70 is not adequate for this purpose. In addition, we are not required under part 70 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 part 70 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 part 70 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 part 70, you are required to provide an opportunity for a public hearing on the draft permit as well as a comment period of at least 30 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 part 70 program.[12] Your alternative requirements may not become federally enforceable when the permit issues

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[12] In addition to the part 70 requirement that you implement and enforce section 112 requirements for part 70 sources, under the EBP process, you receive delegated authority to implement and enforce specific section 112 requirements for the sources you identified in your upfront program approval, and you retain this delegated authority whether or not we approve your alternative requirements. In addition, 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.

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 part 70 permits*

After we have approved your draft permit terms and conditions as equivalent, you would incorporate them into proposed part 70 permits.[13] As required under part 70, 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 part 70, 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

[13] Regulations proposing [VERIFY] to amend part 70 [CITE DATE] require that the "establishment or revision of substitute section 112 standards, if accomplished solely through a part 70 revision process, established pursuant to a program approved by EPA for such purpose under section 112(l) of the Act" take place through the "significant permit revision" process. Currently, we intend to promulgate this requirement when we finalize the proposed revisions to part 70.

section 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 <u>the</u> 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 part 70. 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 work hours necessary for us to review part 70 permits containing alternative NESHAP requirements expressed in a form that is different from that in the underlying 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 part 70 operating permit programs, and it could over tax 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 have individual equivalent alternative requirements developed through terms and conditions in their permits. 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. 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 section 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 upfront 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 submittals at least one-and-a-half to two 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 one-and-a-half to two years is an appropriate amount of time to implement steps two and three of the EBP process for a typical part 70 permit issuance process: during the first three months we would approve or disapprove your alternative requirements. During the remainder of the time you would issue the part 70 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 submittals of alternative requirements that are not significantly different from the NESHAP requirements, a timeframe shorter than two 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 two 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 upfront approval, or as early in the process as possible. Before final permits are issued, sources are subject to all applicable NESHAP requirements.

4. <u>Criteria for demonstrating equivalency for alternative requirements</u>

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 section 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 section 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 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, and you want your new alternative requirements to become federally enforceable in place of the set of alternative requirements we previously approved, you must resubmit your permit terms to us for reapproval. Subsequently, you must open and revise the part 70 permits that contain these alternative section 112 requirements[14] to bring them up to date with your revised, approved alternative requirements. In other words, you must repeat step two and revise your part 70 permits whenever your underlying regulations, policies, or permits change if you want your subpart E-approved permit terms 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 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

[14] Using the "significant permit revision" process. See footnote 12.

criteria.

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

Under the proposed EBP process, you would be able to use your part 70 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 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 part 70 permit issuance process under section

63.94, streamlining must take place by meeting both the criteria of section 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 part 70 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.

IX. 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 today's 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 upfront 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 submittals. 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 requirements established under sections 112(d), 112(f), and 112(h). (Section 63.93 may also be used to substitute your alternative requirements for Federal section 112(r) requirements.) We are proposing that the SPA process cover additional Federal requirements established 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 the

SPA process to implement and enforce alternative section 112(r) requirements that address section 112's Risk Management Program.

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. (Currently, as we are proposing to amend section 63.94, there is no limit on the number of source categories for which you could use the EBP process. We are taking comment on whether the total number of sources for all source categories should be limited.)

B. What is required for upfront approval?

All three processes require an upfront approval to ensure, at a minimum, that you have satisfied the section 63.91(b) program approval criteria. The upfront 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 upfront 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 part 70 sources by demonstrating part 70 program approval):

(1) for the SPA and EBP processes you obtain upfront approval for current and future Federal standards or requirements for which you intend to substitute alternative requirements. In your upfront 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 upfront 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 section 63.91(b) program approval criteria demonstration.

(2) for the SPA process you obtain upfront 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 upfront 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 upfront approval to implement a protocol that establishes an alternative compliance strategy in place of MRR requirements for one or more part 63 emission standards, i.e., the compliance evaluation study approach outlined later in the preamble in section XI.C. The proposed upfront approval criteria for the EBP process (see revised section 63.94(b)) are simpler and more streamlined than the existing approval criteria in section 63.94(b) and the proposed new approval criteria for SPA in section 63.97(b). We believe that, for two reasons, it is no longer necessary for you to provide a legally binding commitment in the EBP process that, after the upfront approval, you will include in part 70 permits conditions that are in the form of the Federal standard and that demonstrate equivalency on a line-by-line basis. The first reason is that we have designed the EBP process to address

situations where you have just a few sources with special needs. For just a few sources we believe it is reasonable for us to review your alternative NESHAP provisions in the form of draft permit terms and conditions that are not in the form of the Federal standard. Also, as we have clarified elsewhere in the preamble, we intend to apply a "holistic" equivalency test for equivalency determinations under the EBP process. Second, we have added step two to the EBP process in which we and the public can review and (dis)approve your alternative requirements before they are incorporated into proposed permits. In order for us to evaluate the equivalency of your alternative requirements and to make a finding of equivalency, you must provide information during this step that satisfies our general requirements for equivalency demonstrations and determinations. Because we are able to object to your alternative requirements (or, specifically, your draft permit terms and conditions) during this step, we believe it is sufficient for us to specify the equivalency test in the rule (as we did in section 63.93(b)) without requiring you to commit to this test in order to obtain upfront approval.

In the same vein, the proposed upfront approval criteria for the SPA process (see proposed section 63.97(b)) are more 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 section 63.97, you may obtain approval for your alternative requirements in less time than it would otherwise take.

We are clarifying in today's notice that, in general, all S/L agencies that have received interim or final part 70 program approval have satisfied the section 63.91(b) approval criteria for part 70 sources. This clarification establishes that, for *all* the delegation options under subpart E, if you have received part 70 program approval, you need not necessarily repeat the section 63.91(b) demonstration of adequate resources and authorities in your upfront submittal, at least for part 70 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 XI.C., you may have to update your section 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 upfront approval, provided the Federal section 112 requirements are promulgated and you are able to submit your alternative requirements at the time of upfront approval. You can think of this as combining step two with step one in time, 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 part 70 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 affirmative opportunity to 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. The EBP process also allows you to initiate the process of replacing otherwise applicable Federal section 112 requirements with your alternative requirements 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. 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 (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 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. <u>When do EPA and the public have an opportunity to comment on State submittals?</u>

For all subpart E delegation processes, we and the public are provided an opportunity to comment during the upfront approval step as well as during the subsequent steps to approve

alternative requirements and ensure that they are accurately reflected in part 70 operating permits. For the upfront approval step, which always involves rulemaking in the Federal Register, the public comment period must last for a minimum of 30 days. The 30-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 section 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 upfront 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 upfront 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 part 70, the public would have 30 days to review and comment on the complete draft part 70 permits after we have approved or disapproved your alternative permit terms and conditions. Also under part 70, 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 is to ensure that the permit terms and conditions accurately reflect the substance of any approved alternative requirements.

X. How should a State 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 today's 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 emission 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. Section 63.93 substitution of rules or authorities

The rule substitution option in section 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 upfront 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. Section 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 makes sense to use the EBP process. An advantage of the EBP process is that you may submit alternative requirements in the form of part 70 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. Section 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 requirements 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 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 upfront 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 upfront 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.

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

[Note to the reader: This section may not reflect the discussions currently underway with the California Air Resources Board and California districts]

A. Introduction

Before we can approve your alternative requirements in place of a part 63 emission 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 upfront program elements.

In order to evaluate your submittal in a timely way, we would expect you to incorporate 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 emission limit (and its associated requirements such as test methods, averaging times, and work practice standards), the compliance and enforcement measures (MRR), and associated requirements established in the part 63 General Provisions. The details of the submittal would then be organized according to these elements. Your submittal must be based on your S/L rules or authorities that are enforceable as a matter of S/L law, and not simply on nonbinding policies that you may have established to run your program. Fundamentally, you must demonstrate that your alternative requirements will achieve the same (or better) emission 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 NESHAP must not be diminished.

The expectations, guidelines, and requirements discussed in this section would apply to the rule substitution, State program approval, 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.[15] We believe that the burden of demonstration is on you to show us that your alternative requirements adequately achieve the emission reduction and enforceability results of the Federal standards and that this burden 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 B., below, addresses our thinking regarding equivalency demonstrations that involve alternative compliance and enforcement measures (including a discussion on how compliance evaluation studies may be used to establish alternative compliance and enforcement measures). This discussion is followed by a more comprehensive description of the equivalency demonstration process under subpart E. Finally, we address specific issues associated with demonstrating equivalency for work practice standards and General Provisions.

B. Equivalency of alternative emission limitations 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

[15] The criteria for evaluating the equivalency of your submittal would be the same under each process option.

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 excellent documentation by sources of what air emissions (and operation, maintenance, and corrective activities) have occurred since an inspector was last present at those sources.[16] While we

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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

recognize the admirable job you often have done to provide a field presence, and we intend to continue to rely on you to provide that function in cooperation with our inspection efforts, 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.

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 section 63.93, and that we intend to amend section 63.94 and other delegation provisions of a similar nature, such as the SPA process, 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 section 63.93(b).

On a practical level, given the continuing need to do more with fewer resources, S/L and Federal enforcement offices may find that they have fewer inspectors in the field and/or fewer travel dollars to deploy the inspectors they do have. The development of new NESHAP standards that affect tens of thousands of sources nationwide will put an even greater strain on S/L and

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inspection; and

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

Federal inspection forces. Given an increasing source population and smaller inspection resources, inspectors may not be able to inspect with the frequency possible in previous years; therefore, we anticipate we will need to continue to rely on improved MRR and source self-certifications to ensure compliance when inspectors are not present on site.

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 exercise our oversight duties, we must have sufficient evidence to review. Years after a violation has occurred, it is likely that the information remembered or recorded by inspectors will not be as good as sources' 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 5 years, the statutory maximum generally allowed for Federal actions pursuant to 28 U.S.C. Section 2462. 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 to major and area sources under the title V operating permits program and the part 63 emission standards is critical to our enforcement efforts and we are reluctant to modify this requirement through the section 112(l) approval process.

The current standard for approvability for substituted rules under subpart E paragraph 63.93(b)(2) is that the emission limitations and MRR must "result in emission 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 emission limitation in your submittal is more stringent than the emission 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 emission 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 enunciated this approach in our November 26, 1996 memorandum on this topic. This memo clarified that we will evaluate your submittals taken as a whole, that is, we will consider the stringency of the emission limitations and the stringency of the *compliance and enforcement measures* together. We will 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. This means that your submittal could, for example, have emission standards that are more stringent than the Federal NESHAP and *compliance and enforcement measures* that are less stringent than the Federal NESHAP, so long as the sum of all these parts adds up to a rule (or other set of requirements) that is no less stringent than the Federal NESHAP. Note that we are <u>not</u> proposing that less stringent emission standards may be balanced by more stringent MRR. Thus, we believe you already have flexibility under the existing language of section 63.93 to adjust the *compliance and enforcement measures* in a manner that will allow for "less stringent" MRR, if it is balanced by more stringent emission limitations.

Currently, in section 63.94, the program substitution process, the equivalency language specifies that, taken individually, your emissions limitations 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, section 63.94 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 section 63.93. It does not allow the same flexibility to balance less stringent MRR provisions against more stringent emissions limitations, 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 promulgating subpart E in 1993, we considered the line-by-line equivalency test in section 63.94 appropriate because, under the program approval process, we would be evaluating a large number of alternative S/L requirements in the relatively short period that part 70 allows us to review the proposed permits. We believed it would be difficult for us to apply the more difficult analysis of determining equivalency between more stringent emissions limitations and less stringent MRR in such a short span of time.

Thus, section 63.94 simplified the complexity of analysis required for equivalency determinations.

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

Additionally, we are considering allowing you to substitute other types of compliance assurance and enforcement measures to balance less stringent MRR measures in your substitution packages when your initial submittal is not 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 XI.C., below); or you may offer to put all compliance reports from affected sources on an electronic bulletin board available free to the public. Because the development and approval of equivalent packages that include such approaches will necessarily be more complex than the more routine comparison of MRR and emissions limitation provisions with Federal NESHAP requirements, we do not anticipate that these

extraordinary approaches will be used to assure equivalency in very many instances. This is not to discourage you from implementing program enhancements such as doing rule effectiveness studies or putting compliance reports on electronic bulletin boards, even if your program can be demonstrated to be equivalent under normal circumstances. On the contrary, we encourage such enhancements and other improvements.

You and other affected parties should be aware of the difficulty of comparing more stringent emissions limitations with less stringent MRR or, where emissions limitations 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 in exchange for more stringent emissions limitations 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.

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 section 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 NESHAP, you would evaluate the emissions limitations, work practice standards, and MRR in the NESHAP 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 part 63 NESHAP. If significant differences exist between the part 63 NESHAP MRR requirements and your alternative MRR that are not resolved with us through technical evaluation and discussion, and where your alternative MRR provisions are roughly equivalent

to the comparable part 63 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 paragraph 63.93(b). We would 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.

The compliance evaluation study for any NESHAP source category 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 section 63.96's withdrawal provisions.

D. Proposed process for determining equivalency under subpart E

Because of the complexities involved in determining whether 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 or not your alternative requirements achieve the emission 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 NESHAP or section 112 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 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 (58 FR 29303), "except as expressly allowed in the otherwise applicable Federal emission 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. Emission Limitations

Your emission limitation cannot be considered equivalent unless it results in emission reductions equal to or greater than the emission 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 the same production level.

Test methods and averaging times are integral parts of the emission limit equivalency determination. We cannot make

decisions on the equivalency of your emission limitations without considering the test method(s) and averaging time(s) associated with both the NESHAP and your rules. In addition, the term "emission limit" as it is used here includes either a numerical emission limitation or a work practice standard (whether it is a "quantifiable" or "nonquantifiable" work practice standard as defined in paragraph E. of this section of the preamble).

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 emission reductions required by the Federal emission standard. Subpart E does not allow for an outcome where there would not clearly be equivalent emission 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 demonstration needs to be as comprehensive as possible. The more information the demonstration provides, the more likely it will be that we can complete our review in a timely manner. As we mentioned earlier, the scope of your demonstration should depend on the complexity of the regulations that are being compared and the degree to which your requirements differ from the Federal

requirements, among other factors.

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 emission points in the NESHAP affected source the same way that the Federal NESHAP covers them, 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 emission 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 controlled by 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.[17] 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 emission 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 emission limit, averaging time, applicability criteria, and work practice standards.

f. *Averaging times.* Your rule must explicitly contain the averaging time associated with each emission limit (e.g., instantaneous, three-hour average, daily, monthly, or longer). The averaging times in your rule must be sufficient to protect the emission 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.

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[17] The section 112(l) approval of your performance test method is valid only for the explicit purpose for which it is intended.

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. Your rule must include all of the basic elements of the Federal work practice standard, such as frequency of inspection, recordkeeping, etc. If the results of the Federal work practice standard can be quantified (in terms of its projected emission reductions), then the expected results of the work practice standard you wish to substitute for it must also be quantified and compared to the Federal requirements. If the results of the Federal work practice standard cannot be quantified, then you can substitute other nonquantifiable work practice standards if we can determine, in our best engineering judgement, that the same or better emissions reductions will occur. For this evaluation, the criteria for determining equivalency is whether your nonquantifiable work practice standards meet the same objectives or intent as the Federal requirements. (See the additional discussion on work practice standards in section XI.E. which follows.)

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 must 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 emission limit in your rule must be at least as stringent as the emission limit in the Federal rule. In addition, in order for equivalency to be granted, the emission limit and MRR of your rule, taken together as a whole, must be equivalent to the emission limit and MRR of the Federal rule, taken together as a whole, in terms of their ability to achieve the required emissions reductions. This means that equivalency can be granted under two possible scenarios:

a. If your emission limit is equal to the Federal emission 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, 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 emission limit is more stringent than the Federal emission limit, then the sum of your MRR requirements can be less stringent than the sum of the Federal MRR 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 meet one or more 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 emission limit or work practice standards to the same degree as the Federal requirements; or

iii. S/L MRR requirements result in emission reductions no less stringent than Federal requirements.

In order to satisfy any 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 posting of compliance reports, a state audit program,

systems to alert operators to exceedences, or other similar measures.

However, 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 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 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 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 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. (You also must submit a copy of rule 452 to your EPA Regional Office along with 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 not approvable (unless they are translated into enforceable permit terms and conditions that will be issued through an approved permit program). You must codify as a matter of S/L law your general policies before you can submit them for approval as a rule substitution under subpart E.

Your rules must codify the actual provisions that would be implemented if the submittal were approved, or they must create a process under which the actual provisions would be generated and become enforceable as a matter of S/L and Federal law.

5. Relationship to other Clean Air Act requirements

[The S/L alternatives must not interfere with any other applicable Clean Air Act requirements such as for RACT, 15% VOC reduction, etc.] *[Note to reader: We are developing the text and rationale for this paragraph.]*

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 emission limitation when setting an emission standard under sections 112(d) (maximum achievable control technology standards) or (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 work practice standard (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 WPS 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.

Because section 112(h) WPS are established in lieu of the emission limitation component of section 112(d) and (f) standards, for the purpose of equivalency demonstrations under section 112(l), we consider them part of the *level of control* component of an emission standard. (The definition of *level of control* in section 63.90 already includes WPS.) In our view, section 112 WPS must be interpreted as an activity, or collection of activities, which a source performs to physically reduce emissions of pollutants to the atmosphere. This contrasts with administrative-type activities 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. MRR requirements of part 63 NESHAP are intended to assist in actually achieving the emissions reductions

intended by the emission limit or WPS requirements of the standards. This distinction is critical for understanding what we believe is the appropriate way to evaluate alternative WPS in an equivalency demonstration under subpart E.

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 emission 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), and which are not MRR requirements, 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.[18,19] The effectiveness of nonquantifiable WPS is therefore subjective.

The White Paper 2 implementation guidance for streamlining title V permits recognized this distinction by splitting WPS into those that are "directly" related to an emission limitation and those that are "not directly" related to an emission limitation.

Some typical examples of O&M plan requirements include, but are not limited to, good housekeeping measures and operating practices, inspector and/or operator training certifications.

Despite the difficulty of quantifying the emissions reductions from nonquantifiable WPS, we view both quantifiable and nonquantifiable WPS as *level of control* requirements because both are directly related to controlling emissions.

Because we believe that all WPS are tied to the *level of control* component of an emission standard, we believe that any equivalency demonstration for WPS must address WPS in essentially the same manner as emissions limitations, 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 emission 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.

For quantifiable Federal WPS, any alternative WPS requirements that you submit must also be quantifiable and must meet the "no less stringent" test. For nonquantifiable Federal WPS, the alternative WPS requirements that you submit need not be quantifiable, but they 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 of nonquantifiable WPS is

whether they 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 nonquantifiable 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.

Because WPS are part of the emissions limitation component of the Federal standard, the alternative requirements you propose to implement in lieu of a part 63 emission 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 (including any O&M requirements). Once equivalency for the emission 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. To expedite your subpart E approval and to simplify implementation of section 112 requirements in your jurisdiction, we encourage you to develop generic alternative WPS rules that

are similar in function to the General Provisions WPS requirements in part 63, subpart A. These would apply to all (or many) source categories for which you seek to substitute alternative requirements.

Because part 63 emission 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. For example, for quantifiable WPS, best engineering judgement should be used to quantify the expected emissions reductions that would be achieved from the Federal WPS and the proposed alternative S/L WPS so that we can make an equivalency comparison; for nonquantifiable WPS, best engineering judgement should be used to compare the Federal and S/L WPS in terms of their intent and expected effect in nonquantifiable or nonmeasurable terms. 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.

The interpretations just described differ from your views that nonquantifiable WPS should be considered *compliance and enforcement measures* rather than *level of control* requirements, that the appropriate test for their equivalency should be whether they are practicably enforceable and adequate to assure compliance, and that you should be able to eliminate a nonquantifiable WPS if you can demonstrate that it is not necessary. As we already mentioned, we disagree with these views. If WPS are *level of control* requirements, as we believe, then "practicably enforceable and adequate to assure compliance" is an inappropriate test to apply for their equivalency. Your alternative requirements must ensure compliance with each WPS individually; that is why WPS must be enforceable as a practical matter. Also, because we believe that WPS are *level of control* requirements that impact the quantity of pollutants entering the atmosphere (regardless of whether their effects can reasonably be quantified), it is not acceptable for you to eliminate any of these requirements.

The criteria for the test for equivalency for WPS comes from section 112(h) which requires the alternative standard to "achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such pollutant achieved under" section 112. We do agree with your view, however, that the criteria for evaluating equivalency for

nonquantifiable WPS are different from that for quantifiable WPS. We addressed this concern by clarifying that the criteria for evaluating the "stringency" of nonquantifiable WPS will be based on equivalent intent and effect. Also, any alternative WPS must be evaluated on its own merit as an equivalent (or better) requirement, independently from our evaluation of alternative MRR associated with the non-WPS emission limitation in the standard.

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 section 63.94 program approval option or they could not be approved (except for the provisions of section 63.93(a)(4)(ii)). In situations where a Federal standard does not contain a numerical emission limit, and instead specifics 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 section 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 section 63.93(b)(2) is too restrictive in this regard, what specific text changes might be warranted (in particular, whether we need to address explicitly equivalency determinations for nonquantifiable WPS), 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.[20] In this rulemaking we are not proposing to change any rule language in subpart A, nor are we taking comments on the General Provisions themselves.

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

Rather, we are taking comments on our guidelines for demonstrating equivalency for the General Provisions as we present them in this preamble and in a guidance document (which is included in the docket) entitled _____.

This guidance document more fully explains the guidelines discussed below and our intended application of them in reviewing individual submittals. This guidance should be helpful to you in developing submittals 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 submittals.

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

1. Function and importance of the General Provisions

The General Provisions for part 63 NESHAP contain the common administrative and technical framework for all emission 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, they 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 emission standards and other requirements. These provisions include compliance dates, operation and maintenance requirements, methods for determining compliance with standards, procedures for emission (performance) testing and MRR requirements.

The General Provisions apply presumptively to every part 63 emission standard, unless they are specifically overridden in an individual standard (in a separate part 63 subpart). Part 63 emission standards 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 emission 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 also statutorily-based and it is a cornerstone of our compliance assurance and enforcement program. Examples of key requirements that are necessary to implement section 112's emission standard provisions include performance testing, monitoring, reporting (including notifications), and recordkeeping requirements. 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 equivalency 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 Federal rule 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 emissions limitations 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. They also require sources to develop a program of corrective action for malfunctioning process and air pollution control equipment used to comply with relevant standards. 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 section 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 section 63.5 provided they are "substantially equivalent" to the section 63.5 provisions. "Substantially

equivalent" means *[Note to reader: We are still considering whether to use this concept and, if so, what the definition of the term should be]*. 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, section 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 are 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, 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

EXAMPLES OF GUIDANCE:
GENERAL PROVISIONS EQUIVALENCY CRITERIA

Part 63 General	Summary of Section(s)	Equivalency	Comments

63.1(a)(6)	How to obtain source	C	Not related to statutory

63.1(a)(7)	Subpart D contains	C	Informational. Cross

63.1(a)(12)	Time periods or deadlines	C	Section provided for

63.1(b)(3)	Stationary source emitting	B	Fundamental EPA policy.

63.4(a)(1)	Affected source should not	A	Key statutory requirements.

63.5(b)(3)	Source must obtain written	A	Approval prior to

63.5(d)(4)	Allows the Administrator to	B	Program must allow

63.5(e)	Lists procedures for	B	Form of program may vary.

63.6(b)(1)	If initial startup occurs	A	Alternative compliance dates

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 is 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 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 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. (You also must

submit a copy of rule 452 to your EPA Regional Office along with 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 not approvable (unless they are translated into enforceable permit terms and conditions that will be issued through an approved permit program). You must codify as a matter of S/L law your general policies before you can submit them for approval as a rule substitution under subpart E. Your rules must codify the actual provisions that would be implemented if the submittal were approved, or they must create a process under which the actual provisions would be generated and become enforceable as a matter of S/L and Federal law.

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.

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.

XII. Administrative requirements for this rulemaking

A. Coordination with Other Clean Air Act Requirements

B. E.O. 12291

C. Paperwork Reduction Act

D. Regulatory Flexibility Act -- SBREFRA

E. Unfunded Mandates

F. Review