

NEDA
CARP
CLEAN AIR REGULATORY PROJECT

National Environmental Development Association • 555 Thirteenth Street, NW, Washington DC 20004 • (202) 637-8900

May 28, 2002

John Morrall
Office of Information and Regulatory Affairs
Office of Management and Budget
New Executive Office Building, Rm 10235
7725 17th Street, NW
Washington, DC 20503

Re: Draft Report to Congress on the Costs and Benefits of Federal Regulations, 67 Fed. Reg. 15014 (Mar. 28, 2002)

Dear Mr. Morrall:

The National Environmental Development Association's Clean *Air* Regulatory Project ("NEDA/CARP") appreciates the opportunity to comment on OIRA's **Draft** Report to Congress and the opportunity to respond to OIRA's solicitation of comments on government's use of guidance documents. 67 Fed. Reg. 15014, 15034. NEDA/CARP is a coalition of manufacturing companies from the major economic sectors¹ that works on Clean Air Act regulatory issues affecting regulated entities across the board.

As one of the **Petitioners** in the *Appalachian Power* case, 208 F.3d 1015 (D.C. Cir. 2000), cited in this Federal Register notice, NEDA/CARP is extremely concerned **about** EPA's use of interpretative guidance to set out nationally applicable Clean *Air* Act law. We have observed a growing trend on EPA's part to **issue** guidance in lieu of conducting rulemakings on issues of national significance. We **will** describe in the following discussion three examples that **we** submit should be scrutinized by OIRA **because of their national applicability**. It is our belief that these actions go well beyond a determination or guidance to a single regulated source **and** that they are intended by EPA to have the effect of rules.

The attachments discuss each of the following three EPA interpretations in greater detail. The first action is not-yet-issued EPA guidance on "compliance

¹ NEDA/CARP's members are Alcoa, Boeing, DaimlerChrysler, Eli Lilly, ExxonMobil, General Electric, Koch Industries, Mack, Occidental Petroleum, Phillips, and Procter & Gamble.



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DATE: May 28, 2002

FROM: Leslie Ritts

TIME: 4:57 PM

TOTAL NO. OF PAGES, INCLUDING COVER: 39

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certifications” for purposes of complying with **Clean Air Act Part 70 annual** and semiannual operating permits requirements. The second is a 1995 EPA guidance document to **EPA Regions** known as the “Once In, Always **In**” policy that prohibits sources **from** undertaking activities to remove themselves from **the** scope of certain onerous regulations. **The** third action is a **Region V** EPA determination published by EPA’s Office of Enforcement and Compliance as part of a “Notice of Applicability” in the Federal Register that creates out of **whole** cloth a “circumvention policy” applicable to sources **subject** to **National** Emissions Standards **for** Hazardous Air Pollutants.

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<u>Compliance Certification Guidance</u>	
Regulating Agency	Environmental Protection Agency
Citation Authority	Not available. Currently in draft Clean Air Act, 42 U.S.C. § 7413 ("federal enforcement," §§ 7661b, 7661c (operating permit applications and contents); 40 CFR Part 64 (compliance assurance monitoring), Part 70 (operating permits)
Description of Problem	D.C. Circuit and Part 64 EPA rules say "compliance certification" procedures and content shall be prescribed by rule.
Proposed Solution	Assure that EPA treat the content and procedures for compliance certifications as a rulemaking, not as interpretative guidance.
Estimate of Economic Impacts	Potentially extraordinary, given effect of compliance certification requirements on regulated community and state/local air permitting authorities.

Discussion – The part 64 Compliance Assurance Monitoring (CAM) regulation **was** remanded by the D.C. Circuit to EPA for further rulemaking on the issue of compliance certifications and their content. *NRDC v. EPA*, F.3d (D.C. Cir. 1999). A regulated emissions source that is required to obtain a "Part 70 Clean Air Act operating permit must certify that it is in compliance with the **Clean Air Act** at the time it **submits** an application under the state/local/federal **Part 70** or **Part 71** Operating Pexmic Program, and it also must certify compliance with the applicable provisions in its permit **on** a semi-annual basis thereafter. The content of the compliance certification and what is necessary for the responsible *official* at the company to undertake in order to be able to certify compliance with the Clean Air Act is **ambiguous under current law**. EPA published a "direct final rule" on compliance certifications in 2000, **which was inadvertently** codified, even though the direct final rule **was** later withdrawn because **EPA** received adverse comment from NEDA/CARP and other **industry groups**. 66 Fed. Reg. 12872, 12916 (Mar. 1, 2001). EPA **has** not yet finalized that rulemaking, although nearly half of the **sources** in the US. have operating permits and **all** sources have had to certify compliance at the time of **permit** application.

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At issue in the rulemaking is whether a source can certify it is in "continuous compliance" if the source's compliance monitoring is based on "intermittent" measurements (e.g., daily, hourly, or monthly instrumental readings, mass balances, or other indirect measurements), instead of direct and "continuous" emissions monitoring. (NEDA/CARP maintains that a source should be able to certify "continuous compliance," even if it uses periodic monitoring rather than continuous direct emissions monitoring, so long as the source is not aware of any other basis that a violation exists of an applicable permit or other Clean Air Act requirement.)

There are at least four reasons that EPA's intended guidance on compliance certifications can only be properly issued as a rule. First, both the Agency and a federal Court of Appeals says it should be a rule. Second, the cost of "continuous monitoring," when applicable monitoring technology even exists for a particular pollutant, has been demonstrated by EPA in its own analysis to be very significant. EPA agrees, for instance, in the CAM rule that other monitoring methods are equally capable of producing adequate assurance of compliance. (See 40 CFR Part 64, 62 Fed. Reg. 54900, Oct. 22, 1997.) Third, corporations should not be required to say they are in "intermittent" compliance. Such a statement may inappropriately suggest that a company is "out of compliance" some portion of the time when in fact all of the required monitoring data indicates there has been ongoing compliance. There is a grave potential for such inaccurate statements to adversely impact a company's relations with the community. Fourth, EPA's Office of Enforcement and Assurance prepared a document several years ago hinting that because of the vast variety of ways in which sources (and regulators) required compliance certifications be made, the issue was ripe for Clean Air Act enforcement. (See Attachment A: B. Buckheit, "Results of CAA Title V Annual Compliance Certification Study and Formation of CAA Title V Self-Certification Advisory Group," October 6, 1999.)

Requested Action - OMB should carefully monitor EPA's progress to finalize the "compliance certification" rule it proposed on March 1, 2001. It also should demand that any guidance or interpretation prepared by EPA or its regional offices on compliance certifications be scrutinized to assure that it is not in actuality rulemaking activity being undertaken without notice and comment and public participation.

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<u>"Once In, Always In" Policy</u>	
Regulating Agency	Environmental Protection Agency
Creation	www.epa.gov/ttn/caaa/t3/memoranda/pteguid.wpd
Authority	Clean Air Act, 42 U.S.C. § 112(d), 40 CFR Part 63 (National Emission Standards for Hazardous Air Pollutants and NESHAPs General Provisions)
Description of Problem	A 1995 EPA Policy Issued by EPA's Office of Air Quality Planning and Standards states that a source must become an area source before the compliance date for a NESHAPs or it will always be a regulated NESHAPs source, despite process changes, pollution prevention, removal of the process, or other actions which in fact make that source an "area" or unregulated source, under the rule and the Clean Air Act.
Proposed Solution	Require that EPA complete rulemaking in the context of the revision to the NESHAPs "General Provisions" reversing the interpretation which has the effect of a rule.
Estimate of Economic Impacts	The cost of complying with inapplicable Clean Air Act rules include monitoring, reporting and recordkeeping costs which can be an enormous drag on national productivity.

Discussion - In 1995, EPA issued an interpretation entitled "Potential to Emit for MACT Standards - Guidance on Timing Issues" (May 16, 1995) (Attachment B). This policy, also called the "Once In, Always In" Policy, prevents any source that is a "major source" at the time of the compliance date of a Section 112(d) Clean Air Act NESHAPs (also known as a "MACT" Standard) from making changes at the facility that will enable it to become an unregulated or "area" source. A "major source" is a facility with the "potential to emit" 10 tons of any single hazardous air pollutant or 25 tons per year of a mixture of HAPs.

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The policy removes the incentive for sources to reduce their emissions and become “area sources” (i.e., “nonmajor” sources) after **the** compliance date through a variety of means including product reformulation, energy **efficiency**, and pollution prevention options, or removal of the production process or equipment. The policy also **has** the effect of requiring sources to **maintain** cost-intensive record-keeping, monitoring, and other MACT rule requirements even though the source would not be **regulated** except for the fact that it was “major” at the time of the standards compliance date. **Such an** interpretation is not supported by the Clean **Air Act**. Moreover, the **guidance** is currently being enforced by state and local agencies and regional EPA offices as though it were a rule.

Recommendation - EPA’s “Once In” Policy **should be** withdrawn or revised. It also can be changed by rulemaking (which would have been more appropriate in the **first place**). The Agency **is on** its second round of revising the General **MACT** Provisions, codified at Part 63. **This** rulemaking provides an appropriate and efficient means for changing the **arbitrary** and counterproductive Agency interpretation. OIRA should scrutinize this rulemaking to **ensure** that this issue is addressed and **the nationally** applicable “Once In” guidance **is** reversed.

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**EPA Index of Applicability Decisions -
 Region V Determination for New Flver**

Regulating Agency	Environmental Protection Agency
Citation	OECA ADI Index Control Number M010017, 66 Fed. Reg. 57453
Authority	Clean Air Act, 42 U.S.C. §§ 7412(d), (g); 40 CFR Part 63 (National Emission Standards for Hazardous Air Pollutants and Modifications of Major Sources of Hazardous Air Pollutants)
Description of Problem	A 2000 Determination issued by EPA's Region V Office to Minnesota's Pollution Control Agency exemplifies a determination that has been given the national effect of a rule. In the action EPA's Region V's Enforcement lawyers ruled that a new manufacturing facility that had voluntarily limited its emissions by adopting a "synthetic minor" emissions cap in its state permit could not expand its operations two years later. EPA's Regional Counsel determined a permit modification could not be approved and to do so would be "illegal circumvention" of section 112(g) of the Clean Air Act. The determination, posted as nationally applicable final action, 66 Fed. Reg. 57453, has caused numerous air pollution agencies in Region V (IL, OH, IN, MN, WIS, MI) and elsewhere to refuse to allow sources to take synthetic minor emissions caps if they ever think they might expand operations. Such a policy is counterintuitive and illegal.
Proposed Solution	(1) Do not allow EPA to post internet guidance as nationally applicable guidance, (2) Require Regional EPA actions to be submitted to EPA Headquarters and OIRA for review, and (3) Require that EPA complete rulemaking in the context of the revision to the NESHAPs' General Provisions, reversing this interpretation which has the effect of a rule.
Estimate of Economic Impacts	The counterintuitive effect of the New Flver determination is preventing sources from voluntarily reducing hazardous air pollutants, with potentially large health, environmental, and economic ramifications.

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Discussion – EPA Region V's "New Flyer Determination" came to public attention because of OECA's bold move to publish the regional EPA interpretation, **along** with the NSR Determination for "Detroit Edison),² in the Federal Register. 66 Fed. Reg. 57453. See Attachment C. In a January 3, 2001 letter to the Minnesota Pollution Control Agency, Region V appears to conclude that a bus manufacturer that constructed a greenfield **facility** in 1998 as a *HAP* "synthetic minor" in order to avoid **making** a case-by-case MACT determination under Clean Air Act section 112(g) violated § 63.4(b) of the General MACT provisions. EPA finds in the determination that the company "may" have circumvented section 112(g), when it applied to MPCA within two years of construction of its new plant to **modify** its synthetic minor permit and add production capacity to build additional kneeling buses. The determination provides no factual basis for this allegation in **terms** of contracts, statements to the public or investors, or any of the other indicia of fraud discussed in EPA policy documents that concern circumvention of new source permitting.

There are at least two compelling reasons for OIRA to scrutinize the New Flyer determination apart from its particular substantive content. The first is to scrutinize the effect of EPA guidance that is "posted" on EPA's web page and in the Federal Register through a "Notice of Availability" that "crosses over from being mere technical assistance" to a particular facility and becomes "national guidance." The second is to prevent EPA's 10 regional offices from bypassing EPA headquarters and issuing nationally applicable guidance on its **own**.

For 25 years, EPA's Office of **Air** has provided guidance to permitting authorities and regulated entities that request technical assistance on specific factual issues. **The** "New Flyer" determination began **as** such technical guidance. Recently, EPA's Office of Enforcement and Compliance Assurance, **which** also periodically issues determinations, specifically under 40 CFR §§ 60.5, 61.5 (New Source Performance Standards and NESHAPs), decided to "post" such determinations in the Federal Register, thereby **giving** regulated entities "fair notice" of the determination (and coincidentally preventing possible legal defenses to **Clean** Air Act enforcement based on lack of "fair notice"). EPA published this "NOA" with a statement that the determinations had general applicability and were final agency actions for purposes of **judicial** review under the Clean Air Act. See, 66

¹ The Deaair Edison determination defines 24 criteria for determining if a change to existing equipment was exempt from new source permitting because it was "routine maintenance." See, F. Lyons, EPA Region V letter to H. Nickel, "Detroit Edison Applicability Determination Detailed Analysis" (May 15, 1999); also see, separate EPA notices published in the Federal Register on Dec. 12, 2000 (Notice of Availability, 65 Fed. Reg. 77623), and November 15, 2001 (66 Fed. Reg. 57453).

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Fed. Reg. 57453 (Nov. 15, 2001); as corrected, 67 Fed. Reg. 11295 (Jan. 10, 2002). NEDA/CARP and several other industry groups brought suit against EPA in the federal Court of Appeals for the District of Columbia alleging that the notice was illegal circumvention of the rulemaking procedures of the Clean Air Act and the Administrative Procedures Act. Utility Air Regulatory Group v. EPA, No. 02-1023 (D.C. Cir. 2002).

Not only is the determination objectionable for lack of procedural rulemaking. The determination's premise that "synthetic minors" are inherently illegal under Title III of the Clean Air Act if a source later wishes to expand operation is counterintuitive, and at least in the opinion of air program officials, bad public policy. The New Flyer Determination is inconsistent with other EPA guidance on synthetic HAP minors which it views elsewhere as a legitimate compliance method. In fact, EPA Headquarters officials at its Office of Air Quality and Planning and Standards say that they believe that the Region V EPA decision is incorrect and that there is no such provision in the rules codifying section 112(g) or in the General MACT Provisions (40 CFR Part 63, subpart A).

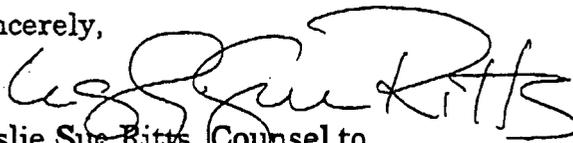
Recommendations - (1) Do not allow EPA to post regional, fact-specific technical guidance, issued in response to a single entity's specific request for guidance, as nationally applicable guidance; (2) Require Regional EPA actions to be submitted to EPA Headquarters and OIRA for review; and (3) Require that EPA complete rulemaking in the context of the revision to the NESHAPs "General Provisions" reversing this interpretation which has the effect of a rule.

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In closing, the transparency that OMB has brought to the development of regulations **in** this Administration **is** praiseworthy. **Far from** stirring controversy, the efforts by the Office of the President to involve **the public** at each stage of regulatory development **dispel** mystery about administrative **rulemaking and** provide a greater opportunity for the public to become involved **in** rule development. We also **are** encouraged by OMB's other policy innovations such **as** prompt letters to prioritize public policy issues in agencies in the Executive Branch.

If we can be of further assistance, or if we can provide other information, please do not hesitate to call me at 202-637-6573.

Sincerely,



Leslie Sue Ritts, Counsel to
NEDA/CARP

Cc: Honorable J. Graham, Administrator
Office of Management and **Budget**
Honorable J. Holmstead, **Assistant Administrator**
EPA Office of Air and Radiation
L. Friedman, Deputy General Counsel for Air
EPA Office of General **Counsel**

ATTACHMENT A

October 6, 1999

MEMORANDUM

SUBJECT: Results of CAA Title V Annual Compliance Certification Study
and Formation of CAA Title V Self-Certification Advisory Group

FROM: **Frederick F. Stiehl, Director /S/
Enforcement Planning, Targeting & Data Division**

**Bruce Buckheit, Director /S/
Air Enforcement Division**

TO: Regional Air Compliance Managers
Regional Enforcement Coordinators
Bill Becker, Executive Director, STAPPA/ALAPCO

OVERVIEW

The Office of Enforcement and Compliance Assurance has completed its analysis of a National Performance Measures Strategy study of Clean Air Act Title V annual compliance self-certifications. This memorandum contains an attachment that explains the findings of this study.

Several critical issues have been identified as a result of this study:

I. Currently there is no comprehensive national method to identify if annual self-certifications have been submitted by facilities in a timely manner.

2. There is little standardization of self-certifications being received from facilities. Self-certifications vary from one page to 20 pages. Other than "Facility Name", there was not a single required data element which was filled in on every certification. Many facilities are being permitted by emission point as opposed to facility wide.

3. There is not a consistent enforcement response to facilities that have reported violations.
4. There **does** not appear to be a consistent method for tracking self-certification compliance data in the AIRS Facility Subsystem, or any other national data system.
5. **Regions and states** are developing a **variety** of methods for tracking annual self-certification data.

To address these issues, Dan Holic and Mark Antell will be co-chairing a Title V Annual Self-Certification Advisory Group. We are asking each interested Regional office to designate a representative to this Advisory Group by contacting Dan at 202-564-7117 by October 15, 1999. Consistent with agency commitments to involve STAPPA and ALAPCO members early in agency planning processes that may impact state and local programs, we are also soliciting participation by STAPPA/ALAPCO in the Advisory Group.

BACKGROUND

Sources which are permitted under Title V of the Clean Air Act are required to verify at least annually that they are operating within the constraints of their permit. Title V Permitted Sources are required to submit annual Certifications to the Permitting authority (State/Local) and the appropriate EPA Regional Office. We anticipate that, as primary enforcers under the Act, state and local air quality programs will review these certifications, investigate any reported deviations, and take appropriate action when sources report that they are out of compliance.

Currently, there is no system in place to aid state and local authorities in tracking these activities, or that would allow EPA to perform its oversight obligations with respect to this aspect of the Title V program. The only way EPA can receive Compliance Certification information is to query Regions, states, and/or locals for specific information. This process would likely be more time and resource intensive, both for the EPA and for the state and local authorities, than a standardized data stream. Although there is no requirement that Certification data be maintained electronically, two Regions and a number of states have begun to develop their own systems to track self-certification data, but currently the data are not consistently being tracked in any EPA national data system. Annual compliance certification data are not a component of the Federal Minimum Data Requirements, and AFS would require modifications in order to house complete compliance certification data.

Currently the Office of Regulatory Enforcement (ORE) is conducting a similar study to collect and analyze Title V permit application compliance certifications from state offices. Results of the ORE permit application study will be reported under separate cover.

OVERVIEW OF CAA SELF-CERTIFICATION STUDY

This past Fall eight Regions that received annual certifications responded to our August 25, 1998 memorandum (Attached) by compiling and submitting Clean Air Act (CAA) Title V annual self-certifications. We would like to thank each of the Regions that participated in this pilot. The goal of the study was to collect and analyze CAA Title V compliance self-certification

data, to use the data as a component of the National Performance Measures Strategy (to benchmark CAA compliance rates), and as an important source of targeting data.

Based upon our review, we believe that information contained in the annual self-certifications is critical to the CAA program and that national policy needs to be developed relating to the collection and tracking of this information. This lack of annual certification data is impeding the Office of Enforcement and Compliance Assurance's (OECA's) ability to adequately track Clean Air Act compliance rates, coordinate appropriate enforcement responses, and to effectively manage the Title V program.

ADVISORY GROUP CHARGE

The charge of the Advisory Group is to make recommendations and suggest priorities for EPA management for each of the issues listed below. These recommendations will be reviewed by management, and OECA will issue a draft strategy for the collection and maintenance of Title V self-certifications for Regional and state/local comment. We envision the Advisory Group holding several teleconference calls, one faceto-face meeting, and concluding its deliberations by April, 2000.

The Advisory Group should reach consensus on as many issues as possible, and for any items where no consensus is reached, list the available options with a recommendation by the Group.

1. Information Collection
 1. Define exactly what information shall be collected from facilities.
 1. Are facilities required to list all permit terms and conditions in the compliance certification, or only those which are in non-compliance?
 2. Are facilities required to list all permit deviations in the compliance certification, or just reference the semi-annual permit deviation monitoring report?
 3. Does the term "continuous or intermittent" refer to compliance status or method of data collection?
 4. What is needed relative to the monitoring in the semi-annual permit deviation/monitoring report?
 - A. Recommend whether or not a standard form shall be used for collecting information from facilities. If so, suggest a standard form and how it will relate to the Facility Identification Initiative (EII), and discuss how facilities will be numbered (e.g., what permit number will they put on the form, and do they currently know that number. Does the number allow EPA to integrate the certification data with AFS data?). Recommend nationally-consistent standards regarding what is reported, and if possible, identify any burden reduction that could be realized through streamlined and/or electronic reporting. Develop a draft timeline for when the information would be reported.
 1. Recommend how the information shall be received from facilities.
 1. Hard copy of forms.

2. Central receiving electronic format
3. Web based system electronic format
4. Other

1. Data Tracking

- A. Recommend **how** a national data stream can be established, and **suggest** a data system for housing the **data**, i.e., AFS, **GEMS**, other.
- B. Recommend how **existing Regional** efforts to collect and use self-certification data can be supported and coordinated nationally
- C. Define the data elements that should become a part of the minimum data requirements. Define the **data** elements that **may** be optional for tracking, i.e., data stream made available to house **data**, but **not** federally required.
- D. Define how self-reported compliance **data** shall be tracked relative to agency compliance determinations-- **particularly** when **inspections have not been** performed.

II Data Management of Violations

- A. Recommend **what database** flags will be raised if:
 1. **Certifications are not submitted** in a timely manner. What process can be used for automatically detecting **when self-certifications are** not reported?
 2. **Certifications are not complete**
 3. **Certifications report violations (e.g., should a facility reporting violations be defaulted to "noncompliant" status in AFS?)**.
 4. Other

This advisory group is not charged with the development of an **Enforcement Response Plan** for detected violations. The charge for this group is **to clarify the data management** issues of detected violations, as noted above.

Attachments (Title V Annual Self-Certification Study Results; August 25, 1998 National Performance Measures Strategy Pilot Memorandum)

cc: Michael Stahl
 Eric Schaeffer
 Luis Troche
 Rich Biondi
 GIL Wood, OAQPS
 Steve Hine, OAQPS
 Regional AFS Coordinators
 Regional/HQ Air Targeting Network

Attachment 1
Title V Annual Self-Certification Study Results

Goal

The **goal** of the **study** was to collect and **analyze CAA Title V** compliance self-certification data, and to use **the data as a component of the National Performance Measures Strategy** (co benchmark **CAA compliance rates**), and as an **important source of targeting** data.

Background

On **August 25, 1998** the **Office of Compliance and the Office of Regulatory Enforcement** sent a joint **memorandum requesting** Regional **Offices to submit** hard copies of all **Title V annual self-certifications** to the **Targeting and Evaluation Branch**. The last of the certifications were received in December. **Since then data from the certifications have been entered** into a Microsoft Access **Database for Analysis**. **Following are the findings** of this analysis.

Program Facts

211 Title **V permitted sources are required** to verify at least annually that they are operating within the constraints of **their permit. (40 CFR 70.6)**

3• Title V compliance self-certification is a major **CAA** requirement that is currently not being tracked **in EPA data systems**.

4• An **August 1997 Colorado study** found that **noncompliance rates would** change from **5% to 40%** by using self-certification data.

Preliminary Results

1• A total of **19,124 permits are expected to be granted. 545 annual** self-certifications were collected from **445 different facilities in 24 states, and put into a stand alone database for analysis**. (Some facilities have **submitted more than one certification** because they have been permitted for more than one year, so the facilities **most** current annual self

certification was **used** for this study.) **5,716 self-certifications will be due by January 2000.**

2. For this study, 8 Regions submitted annual self-certifications from 24 different states.

1. 17% (78) of the 445 sources that submitted annual self-certifications reported a violation.

2. 59 of the 78 sources that reported non-compliance in their self-certifications have an AFS designation of 'incompliance'. 21 of these 59 facilities had not been inspected in greater ..

than two years.

- 5. There is little standardization of self-certifications being received from facilities. Self-certifications vary from one page to 20 pages. Other than "Facility Name", there was not a single required data element which was filled in on every certification.
- 2. About 5% of the facilities submitting self-certifications that were forwarded to OECA have not been located in AFS. This may be due to name changes or other reasons. Some of these facilities may not be cracked in AFS.
- 7. Some states are issuing Title V permits to sources which are being tracked as minors in AFS.

5. Regions track annual self-certifications by:

Region	Current System
1	Hard Copy
2	Hard Copy
3	AFS
4	Hard Copy
5	Lorus Notes Enforcement Tracking System (ETS)
6	Hard Copy (working toward AFS)
7	AFS
8	Hard Copy (working toward AFS)
9	Lorus Notes
10	AFS

- 7. Many states are developing their own tracking systems.

Summary

7. **Annual self-certifications provide a valuable source of compliance information that is not being tracked in any national database.**
8. **Analysis of certification data is hampered due to the lack of certification standardization.**
9. **Regional Offices and states are spending resources on developing their own tracking systems.**
10. **There does not appear to be consistent follow-up enforcement action on facilities that report deviations.**

Attachment 2
AUG 25, 1998 Memorandum

MEMORANDUM

SUBJECT: National Performance Measures Strategy Pilot to Measure CAA Compliance Rates and Enhance Enforcement Targeting

FROM: Elaine G. Stanley, Director /S/
Office of Compliance

Eric Schaeffer, Director /S/
Office of Regulatory Enforcement

TO: Regional Air Program Managers
Regional Enforcement Coordinators

The purpose of this memorandum is to describe to you an additional pilot for the National Performance Measures Strategy ("Strategy"), and ask for your cooperation in compiling and submitting the relevant information needed to complete this study. This pilot is in addition to those described in the memo entitled, "Status Report on Implementation of Performance Measures for EPA's Enforcement and Compliance Assurance Program", signed by Steve Herman on July 30, 1998.

This project, which will enable us to determine a compliance rate for sources self-reporting their compliance status under Title V of the Clean Air Act, will be conducted as a pilot under Set 1(b) "Noncompliance Rates for Self-reporting Populations" which is part of the "outcome" category of performance measures of the Strategy. Through this pilot, we will determine a compliance rate for Title V sources based on their self-reported data. We will then compare this information to inspection data of the same category of sources. Comparisons and resolution of discrepancies between inspection data and reported compliance status will enable us to produce more accurate compliance rates, as well as develop more efficient and focused targeting strategies for enforcement and compliance assurance activity for this segment of the regulated community. We can then produce a baseline from which to measure the outcomes of enforcement and compliance assurance activity on the compliance status for Title V sources over time.

Currently, the Office of Regulatory Enforcement (ORE) through a contractor, is collecting and analyzing Title V permit application compliance certifications from state offices. We are requesting that Regional air programs submit to the Office of Compliance (OC) subsequent Title V annual self-certifications which are currently in their possession. Since Title V sources are required to report this information directly to the Regional offices, this pilot does not involve any new information requests to regulated entities or state governments. OC is creating one database to score and analyze both the permit applications being collected by ORE and the annual

self-certification information. Both the permit application compliance certifications and the annual self-certifications will be compared and analyzed with current and future inspection data. If the results of this pilot study indicate that this information is valuable to our program, we will evaluate options for later merging this information into the AIRS Facility Subsystem.

Each Regional office should pouch mail copies of all Title V annual self-certifications to OC at this address: "Annual Self-Certification Pilot - Mail Code 2222-A" by October 23, 1998. If you would like more information about the collection of Title V applications please contact Luis Troche of ORE at 202-564-2008. For more information on the annual compliance self-certifications, please contact Dan Holic of OC at 202-564-7117. Thank you for your support and attention to this important matter.

- cc: Michael Stahl
- Frederick Stiehl
- Bruce Buckheit
- Bill Becker, Executive Director, STAPPA/ALAPCO
- Luis Troche
- Mark Antell
- Dan Holic

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ATTACHMENT €

Based on the results, the maternal NOAEL is 50 mg/kg body weight/day and the developmental NOAEL is 150 mg/kg body weight/day. This study did not reveal any teratogenic potential up to and including the highest dose level of 450 mg/kg body weight/day.

4. Subchronic toxicity—i. Rat inhalation. An orientation study for subacute inhalation toxicity was conducted with an aerosol of the test substance on the Wistar rat. 111.2 mg of the test substance air was tolerated without specific effects occurring with regard to all parameters determined.

ii. **Rat oral.** The test substance was administered in feed to 10 male and 10 female Wistar rats for 13 weeks at 0, 400, 2,000, and 10,000 ppm. Clinical chemistry, gross pathological and histological examination revealed no evidence of test article-related liver lesions up to and including 2,000 ppm. Increased plasma cholesterol values following 10,000 ppm indicate slightly impaired fat metabolism in the liver. This finding was not correlated histopathologically. There were no unusual findings among the clinical parameters measured at the end of the recovery period.

iii. **Dog.** In a subacute toxicity study group of two male and two female beagle dogs treated with the test substance, there was no difference exhibited between the control group and the treatment group either in the hematological parameters or in the clinical chemistry.

C. Other Information

1. The toxicity of green algae was conducted using OECD guideline method 201. The results show the *Selenastrum capricornutum* growth rate (72 h) EC₅₀ (effective concentration) = 16.06 mg/L. The 95% confidence limits: 7.95-32.45 mg/L. The effect threshold was 2.40 mg/L. The toxicity of bacteria was conducted using OECD guideline 209 with results of: EC₅₀ = 212 mg/L.

2. A Tier I seed germination, seedling emergence, and vegetative vigor phytotoxicity study was conducted.

The results from the analysis of the substance Tier I germination test for lettuce and radishes indicated that a significant difference did exist. No germination was present for the lettuce in treatment (100 ppm). Radish had a low germination of 26% for 100 ppm treatment, a detrimental effect greater than 25% compared to the control. The emergence test indicated a significant difference for lettuce in the substance at 113 ppm treatment, showing a detrimental effect greater than 25% compared to the control. Radish in the

emergence test indicated no significant difference between treatments. The vegetative vigor test indicated the dicot species lettuce and radish had no significant effects from the exposure to the test compound 113 ppm treatment level.

D. Aggregate Exposure

1. **Dietary exposure.** For the purpose of assessing the potential dietary exposure, the C.P. Hall Company considers that the compound could be present in all raw and processed agricultural commodities.

i. **Food.** Both constituents are neither permitted nor prohibited in food, animal feeding stuffs, medicines or cosmetics under European directives. The material is listed in the "comprehensive list" of pesticide product inert ingredients and categories in "List 3" (inerts of unknown toxicity). No concerns for risk associated with any potential exposure scenarios are reasonably foreseeable given the available data.

ii. **Drinking water.** The lack of observed toxicity would indicate that the presence of trace amounts of the compound in drinking water would pose no appreciable risk to humans. The test substance is relatively insoluble in water (0.17% in water at 25 °C) and is not expected to create any drinking water toxicity. The rate of hydrolysis and its degradation pattern in aqueous buffer solutions showed that the compound was hydrolyzed to negligible extent at pH 5, 7, and 9 at 25 °C within 30 days. The adsorption and desorption of the compound was determined in four soils. Based on the study the compound is of low or medium to low mobility in the soils used in this study. The direct photolysis of the compound showed that it was stable against direct photolysis at pH 5.0 during illumination at 25 °C for 30 days. The half-life was much greater than 30 days. A study was conducted to determine the rate of photolysis and degradation. During illumination on soil thin layer plates the material was degraded and mineralized. No specific photodegradation product with more than 4.2% of the applied radioactivity was found.

E. Cumulative Effects

Section 408(b)(2)(D)(v) of FFDCA requires that when considering whether to establish, modify, or revoke a tolerance, or tolerance exemption, the Agency consider "available information" concerning the cumulative effects of the chemicals residues. This compound has been used in European pesticides for a number of decades

without any signs of acute or chronic exposure toxicity.

F. Safety Determination

1. **U.S. population.** Since the material may be used in a European formulation of a pesticide and no toxicological effects have been shown, no risks are anticipated for the U.S. population.

2. **Infants and children.** Due to the extensive available toxicological data base and the expected low toxicity of this compound, C.P. Hall Company does not believe a safety factor analysis is necessary in assessing the risk of this compound.

G. International Tolerances

To C. P. Hall's knowledge no international tolerances exist for this compound.

[FR Doc. 01-28634 Filed 11-14-01; 8:45 am]
BILLING CODE 6560-60-9

ENVIRONMENTAL PROTECTION AGENCY

[FRL-7102-2]

Recent Posting of Agency Regulatory Interpretations Pertaining to Applicability and Monitoring for Standards of Performance for New Stationary Sources and National Emission Standards for Hazardous Air Pollutants to the Applicability Determination Index (ADI) Database System

AGENCY: Environmental Protection Agency (EPA).
ACTION: Notice of Availability.

SUMMARY: In accordance with the Administrative Procedure Act (5 U.S.C. 552(a)), and the Clean Air Act provisions for judicial review (42 U.S.C. 7607(b)), this notice announces interpretations of applicability and alternative monitoring decisions that have been made by the EPA under the New Source Performance Standards (NSPS), and the National Emission Standards for Hazardous Air Pollutants (NESHAP).

DATES: Comments on any of the documents posted on the ADI database system must be submitted on or before January 14, 2002.

ADDRESSES: Comments may be submitted to the attention of Maria Malave; Mail Code 2223A; Compliance Assessment and Media Programs Division, Office of Compliance, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460 or send via E-mail to mnlovc.mario@epa.gov.

FOR FURTHER INFORMATION CONTACT: An electronic copy of the complete document posted on the ADI database system is available on the Internet through the Applicability Determination Index (ADI) at: <http://es.epa.gov/oeca/eptdd/adi.html>. The document may be located by date, author, subpart, or subject search. For questions about the ADI or this notice, contact Maria Malave at EPA by phone at: (202) 564-7027, or by email at: malave.maria@epamail.epa.gov. For technical questions about the individual applicability determinations or monitoring decisions, refer to the contact person identified in the individual documents, or in the absence of a contact person, refer to the author of the document.

SUPPLEMENTARY INFORMATION:

Background

The NSPS (40 CFR part 601 and the NESHAP (40 CFR parts 61 and 63) provide that a source owner or operator may request a determination of whether certain actions constitute the commencement of construction, reconstruction, or modification. EPA's written responses to these inquiries are

broadly termed applicability determinations. See 40 CFR 60.5 and 61.06. The NSPS and NESHAP also allow sources to seek permission to use monitoring or recordkeeping which is different from the promulgated requirements. See 40 CFR 60.13(i), 61.14(g), 63.8(b)(1), 63.8(f), and 63.10(f). EPA's written response to these inquiries are broadly termed alternative monitoring. Further, EPA responds to written inquiries about the broad range of NSPS and NESHAP regulatory requirements as they pertain to a whole source category. These inquiries may pertain, for example, to the type of sources for which a regulation is applicable, or clarification of the applicable testing, monitoring, recordkeeping or reporting requirements.

EPA currently compiles EPA-issued NSPS and NESHAP regulatory interpretations pertaining to applicability determinations and alternative monitoring, and posts them on the Applicability Determination Index (ADI) on a quarterly basis. The ADI is an electronic index on the Internet with over one thousand EPA letters and memoranda pertaining to the

applicability, monitoring, recordkeeping, and reporting requirements of the NSPS and NESHAP. The letters and memoranda may be searched by date, office of issuance, subpart, citation, or by string word searches.

Today's notice comprises a summary of 24 of such documents added to the ADI on August 31, 2001. The subject, author, recipient, and date (header) of each letter and memoranda is listed in this notice, as well as a brief abstract of the letter or memoranda. Complete copies of these documents may be obtained from the ADI at: <http://es.epa.gov/oeca/eptdd/adi.html>.

Summary of Headers and Abstracts

The following table identifies the database control number for each document posted on the ADI database system on August 31, 2001, the applicable category; the subpart(s) of 40 CFR part 60, 61, or 63 (as applicable) covered by the document; and the title of the document which provides a brief description of the subject matter. We have also included a summary of each abstract identified with its control number after the table.

Control No.	Category	Subpart	Title
A010001	Asbestos	M	Single family house with asbestos containing floor tile.
A010002	Asbestos	M	State authority regarding single-family house with asbestos.
M010012	MACT	N	Applicability to process without chromic acid use.
M010013	MACT	S	Alternative monitoring for pulp & paper closed vent systems.
M010014	MACT	S, A	Alternative monitoring/inspection for closed vent systems.
M010015	MACT	T	Halogenated solvent cleaning alternative method of compliance.
M010016	MACT	S	Alternative monitoring for pulp & paper dosed vent systems.
M010017	MACT	O	Circumvention & case-by-case MACT determinations.
Z010003	NESHAP	H, I	Application of Subpart H to DOE owned, NRC licensed facility.
Z010004	NESHAP	H	Alternative method of determining compliance under Subpart H.
0100039	NSPS	Kb	Subpart Kb application to wastewater detoxification tanks.
0100040	NSPS	A, B, C	Alternative monitoring of HCl emissions-hospital incinerator.
0100052	NSPS	Db	Alternative monitoring for burning pulp mill stripper off gases.
0100041	NSPS	RR	Subpart RR testing/waiver exemption.
0100042	NSPS	GG	Subpart GG alternative monitoring plan.
0100043	NSPS	A, D	Shorter sampling time for initial performance testing.
0100044	NSPS	A	Modification issues for dense pack turbine project.
0100045	NSPS	Da	Approval of RATA schedule for Subpart Da boiler.
0100046	NSPS	GG	Approval of alternative monitoring plan under Subpart GG.
0100047	NSPS	WWW	Use of a natural attenuation factor.
0100048	NSPS	GG	Request for alternative monitoring under Subpart GG.
0100049	NSPS	A, Db	Commencement of construction.
0100050	NSPS	Dc, A	Request for alternative fuel usage recordkeeping plan.
0100051	NSPS	GG	Request for custom fuel monitoring schedule under Subpart GG.

Abstracts

Abstract for (A010001):

Q1. Does the asbestos NESHAP regulation apply to single family homes?

A1. The asbestos NESHAP program applies to facilities which include, institutional, commercial, public,

industrial, or residential structures, i.e., apartments, condominiums, cooperatives. A single family residence or a residential building having four or fewer dwelling units is not subject to the asbestos NESHAP requirements.

Q2. If asbestos containing floor tile and mastic were removed by a jackhammer, would the resulting friable asbestos waste material be subject to the asbestos NESHAP regulations?

A2. If a contractor removes greater than 160 square feet of asbestos

containing material (ACM) by using a jackhammer, the resulting waste material is subject to the asbestos NESHAP. However, in your situation, the asbestos NESHAP would not apply. The "All Other Asbestos Projects" citation from the COMAR may apply to your situation.

Q3. What is the definition of "hand pressure"?

A3. There is no definition for "hand pressure" in the asbestos NESHAP regulations. There is a reference to "hand pressure" under the definition for regulated asbestos containing material. In a July 1992 applicability determination, the Agency wrote that vinyl asbestos tile in good condition, if subject to certain forces, i.e., mechanical, weather or aging can be weakened to the point where it can become friable because it can be crumbled, pulverized or reduced to powder by hand pressure. Using the jackhammer on asbestos containing tile has a high probability for significant fiber release. The tile becomes regulated asbestos containing material and subject to the asbestos NESHAP because using a jackhammer grinds or abrades the normally non-friable material.

Abstract for (A0100020):

Q: Why would a State and not the EPA have jurisdiction over asbestos in the case of a single-family home?

A: Single-family homes are not considered "facilities" under the asbestos NESHAP, thus no Federal laws or regulations are implicated. In addition, the State in this case has an equivalent asbestos NESHAP program, to which EPA generally defers. Thus, the State takes the lead in implementing the asbestos NESHAP program in the State. The determination letter provides further guidance on technical issues.

Abstract for (M010012):

Q. A facility operates a tank to produce a protective conversion coating on magnesium parts using an anodic process but no chromic acid is added to the tank. Is the tank subject to the Chromium NESHAP?

A. No. Chromium anodizing is defined under Subpart N 40 CFR 63.341 as the electrolytic process by which an oxide layer is produced on the surface of a base metal for functional purposes using a chromic acid solution. Because the facility does not use a chromic acid solution in the tank, EPA has concluded that this process is not an anodizing process that is regulated by the Chromium NESHAP.

Abstract for (M010013):

Q. Can continuous monitoring of vacuum indication on the negative pressure sections for both the Low Volume High Concentration (LVHC) and

High Volume Low Concentration (HVLC) gas collection systems be used instead of conducting the 30-day inspections required by MACT for closed vent systems specified in 40 CFR 63.453(k)(2)?

A. Yes. EPA will approve an alternative monitoring method proposed to continuously monitor vacuum indication on the negative pressure sections for both the LVHC and HVLC collection systems with an additional requirement to perform a visual area survey once a quarter after loss of vacuum.

Abstract for (M010014):

Q. Will EPA approve a proposal to inspect the closed-vent and closed collection systems once every calendar month, with at least 14 days elapsed time between inspections, instead of once every 30 days as specified in 40 CFR 63.453(k) and (l)?

A. Yes.

Abstract for (M010015):

Q. Will EPA approve an "alternative standard" in accordance with 40 CFR 63.464(d) for measuring compliance with 40 CFR Part 63, subpart T?

A. Yes. EPA will approve an alternative method of compliance that includes additional monitoring parameters.

Abstract for (M010016):

Q. Can amperage loading on the scrubber fan be used instead of gas scrubber vent gas inlet flow rate measurements to ensure compliance with the HAP removal requirements of 40 CFR 63.4457?

A. Yes. provided the appropriate monitoring values for the vent gas motor amperage established during the initial performance test are approved by the designated regulatory agency.

Abstract for (M010017):

Q. What is the time period that EPA considers when acting on an application for a new synthetic minor permit or a change to an existing synthetic minor permit for purposes of circumvention of 112(g)?

A: The EPA views any new construction, any proposal for new construction, or any relaxation of synthetic minor limits within 5 years of the initial permit as evidence of a potential phased construction for a source.

Abstract for (Z010003):

Q: Will a facility which is both owned by the Department of Energy (DOE) and licensed and regulated by the Nuclear Regulatory Commission (NRC) be subject to 40 CFR part 61, subpart H?

A: Yes. Subpart H applies to any facility which is owned or operated by the DOE.

Abstract for (Z010004):

Q: Are high-volume air samplers an acceptable alternative to continuous stack monitoring for demonstrating compliance with 40 CFR Part 61, subpart H?

A: Yes. The proposal meets the criteria specified in 40 CFR 61.93(b)(5). Abstract for (0100039):

Q. Is NSPS subpart Kb applicable to three existing 100,000 gallon wastewater detoxification tanks?

A. No. For reasons other than those submitted by the company, EPA agrees that NSPS subpart Kb does not apply to the tanks. See the letter below for EPA's discussion of all pertinent and specific information used in this determination. The letter also addresses and discusses why the reasons submitted by the company to try to support this decision were not used.

Abstract for (0100040):

Q1: Does the Federal hospital/medical/infectious waste incinerator (HMIWI) section 111(d)/129 plan, subpart HHH, allow the use of continuous emission monitoring systems (CEMS) for determining compliance with the HCl emissions limitation instead of the stipulated methods—monitoring sorbent flow rates and use of EPA Reference Test Method 26?

A1: Yes, 40 CFR 62.14452(l) allows use of CEMS to demonstrate compliance with the HCl emissions limitation, providing the HMIWI owner/operator: (1) Determines compliance using a 12-hour rolling average, calculated each hour as the average of the previous 12 operating hours (not including startup, shutdown, or malfunction); (2) determines the measured HCl concentrations on an adjusted basis, 7 percent oxygen, dry; and (3) operates the CEMS in accordance with applicable EPA performance specifications, quality assurance and quality control requirements under appendices B and F of 40 CFR part 60.

Q2: Because EPA has not promulgated performance specifications, quality assurance and quality control requirements for hydrogen chloride CEMS, can EPA now approve a request for use of CEMS to determine HCl emission rates and compliance with subpart HHH?

A2: Yes, providing the alternative HCl monitoring request includes or references acceptable performance specifications (PS), and quality assurance/quality control (QA/QC) requirements. EPA has determined that the proposed use of the Pennsylvania Department of Environmental Protection (PADEP) CEMS manual, Revision No. 6, January 1996 will provide acceptable PS and QA/QC requirements.

Abstract for (0100041):

Q: Will EPA grant a facility a testing waiver/extension for its reconstructed 3L coating line and associated thermal oxidizer where the facility would be required to test the same line to show compliance with other State and federal regulations within a "short" period of time?

A: No. EPA will not grant a testing waiver/extension because the eighteen months between the required subpart RR compliance test and the deadline date for the MPCA test is too long.

Abstract for (0100042):

Q1: Will monitoring of fuel nitrogen content be required if natural gas is the only fuel fired in each turbine?

A1: No.

Q2: Will daily monitoring of sulfur be required if only pipeline quality natural gas is fired?

A2: No. The monitoring schedule from U.S. EPA's national guidance for subpart GG, dated August 14, 1987, should be used for sulfur monitoring when natural gas is fired.

Abstract for (0100043):

Q: May the sampling time for Method 9 opacity testing while burning fuel oil in a boiler be reduced to one hour per boiler?

A: Yes. In this particular case, the shorter test sampling time may be reduced to one hour for Boilers 4 and 5 while burning fuel oil because the construction permit is so restrictive that 3 hours of initial performance testing would consume a significant portion of the annual operating time allowed for these boilers while burning fuel oil.

Abstract for (0100044):

Q: Does the installation of Dense Pack turbine blades constitute a modification?

A: Probably not. Although such a project would constitute a nonroutine physical change under PSD, it would not be a modification under PSD (as well as NSPS) if there were not an associated emissions increase as defined under the respective PSD and NSPS rules.

Abstract for (0100045):

Q: Will EPA allow a reduced frequency of Relative Accuracy Test Audits (RATAs) for an infrequently operated boiler?

A: Yes. In this particular case, the boiler is operated only 8 days per year as a peaking unit. EPA believes that it is reasonable to provide for some reduction in quality assurance testing for the continuous emissions monitors, as long as the boiler meets acid rain program requirements at 40 CFR Part 75, and operates as a peaker.

Abstract for (0100046):

Q: Will EPA relieve a facility that uses only pipeline quality natural gas of the nitrogen monitoring requirements?

A: Yes.

Q: May a facility use the sulfur monitoring requirements in sections 2.3.1.4 and 2.3.3.1 of Appendix D to Part 75 in lieu of 40 CFR 60.334(b) and 60.335(a)?

A: Yes.

Q: Is a nitrogen CEM a permissible alternative to the monitoring requirements at 40 CFR 60.334(a) and 60.335(c)(2)?

A: Yes.

Abstract for (0100047):

Q: May a landfill use a natural attenuation factor for fugitive landfill gas control for the purpose of State fee reports and emission inventories?

A: No. Natural attenuation was evaluated during the rulemaking process for 40 CFR part 60, subpart WWW. Analysis by the U.S. EPA determined that there was insufficient oxygen and residence time for aerobic biofiltration to be a significant removal pathway.

Abstract for (0100048):

Q1: Is nitrogen monitoring of either natural gas or landfill gas required?

A1: Nitrogen monitoring of landfill quality natural gas is not required. Nitrogen monitoring of landfill gas will be waived if EPA receives adequate information that the landfill gas in question contains very little fuel-bound nitrogen.

Q2: Will EPA permit a facility nor to perform sulfur monitoring when natural gas and landfill gas are used?

A2: No. However, this particular facility provided data on the sulfur content of each type of fuel. This data showed that the sulfur content was minimal. Therefore, the facility may begin at semi-annual testing.

Abstract for (0100049):

Q: Did Tenneco commence construction when it internally obligated funds for the purpose of modifying a boiler prior to June 19, 1984, thereby not triggering NSPS, subpart Db applicability?

A: No. For the purposes of subpart A, there was no contractual obligation to construct an affected facility.

Q: Does the installation of sampling ports in a boiler constitute commencement of construction?

A: No. The ports were installed to gather data for planning and design work, or other unrelated activities, which does not constitute commencement of construction, reconstruction, or modification.

Abstract for (0100050):

Q: Will EPA grant Tyson Foods an alternative fuel-usage recordkeeping plan under subpart Dc?

A: Yes. The specific recordkeeping requirements for the facility are included in Attachment A to the response letter.

Abstract for (0100051):

Q1: Will EPA approve the waiver of monitoring fuel bound nitrogen for facilities using only pipeline quality natural gas?

A1: Yes.

Q2: What should the sulfur monitoring schedule be for peaking-only units that use only natural gas and operate only during the summer months?

A2: These types of peaking units rest once per month during the initial ozone season (May-September). If this shows little variability, then sulfur monitoring should be conducted once per season thereafter.

Abstract for (0100052):

Q: A company intends to burn stripper off gases (SOGs) from pulping processes in a boiler subject to subpart Db, which would cause the facility to exceed the subpart Db NO_x emission limits. The company requests permission to use an alternative monitoring procedure for NO_x which will consist of correcting the continuous NO_x monitoring data by subtracting the NO_x contribution from burning SOGs. Is this acceptable?

A: No. Since the combustion of SOGs in the boiler is not exempt from NSPS subpart Db, the proposed alternative monitoring procedure is not acceptable. However, EPA's SOA/QPS has agreed to initiate rulemaking to amend the subpart Db regulation to allow the establishment of an alternative NO_x standard for pulp mills, similar to the provision in 40 CFR 60.44b(f) for chemical manufacturing plants and petroleum refineries which combust byproduct/waste.

Dated: November 6, 2001.

Michael M. Stahl,

Director, Office of Compliance.

[FR Doc. 01-28632 Filed 11-14-01; 8:45 am]

BILLING CODE 5560-50-P

ENVIRONMENTAL PROTECTION AGENCY

[FRL-7104-3]

Preparation of Third U.S. Climate Action Report

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; request for public comments.

SUMMARY: In June 1992, the United States signed, and later ratified in

Category: MACT
EPA Office: Region 5
Date: 01/03/2001
Title: Circumvention & Case-by-Case MACT Determinations
Recipient: Ainars Silas
Author: Robert Miller
Comments:

Subparts: Part 63,B Major Source Control Tech. Determinations (Secs. 112(g) and 112(j))

References: 63.4(b)
63.40
63.41
63.42
63.43
63.44

Abstract:

Q: What is the time period that **EPA** considers when acting on **an** application for a new synthetic **minor permit** or a **change** to an existing synthetic minor **permit** for purposes of circumvention of 112 (g)?

A: The **EPA** views **any new** construction, **any** proposal for **new** construction, or any relaxation of synthetic minor limits **within 5 years** of the initial permit as evidence of a **potential** phased construction for **a** source.

Letter:

January 3,2001
(AR-18J)

Ainars 2. Silas, Supervisor
North/South Major Facilities
Air Quality Division
Minnesota **Pollution** Control Agency
520 Lafayette Road
St. Paul, **Minnesota** 55155

Dear Mr. Silas:

12/3/2001

The purpose of this letter is to give the U. S. Environmental Protection Agency's (EPA) recommendation on whether Section 112(g) of the Clean Air Act applies to a proposed modification for New Flyer USA in St. Cloud, Minnesota. We received a letter from your office, along with other correspondence, relating to an application from New Flyer USA requesting approval to modify its existing manufacturing lines and increase its emissions of hazardous air pollutants (HAPs).

According to this correspondence, it is the Minnesota Pollution Control Agency's (MPCA) position that the proposed increase would subject New Flyer USA to 112(g) and the requirements for a case-by-case maximum achievable control technology (MACT) determination under 40 C.F.R. Secs. 63.40 to 63.44. This application also raises concerns of possible intentional circumvention of the applicable requirements under 112(g).

Section 112(g) calls for a permitting agency to determine MACT emission limitations on a case-by-case basis for the construction, reconstruction, or modification of any major source of HAPs, where a MACT standard has not yet been promulgated. To avoid the requirement to apply a MACT to new construction, the owner or operator of a source may limit the source's potential emissions below the major source thresholds for HAPs through a federally-enforceable mechanism, such as in a synthetic minor construction permit. The major source thresholds for HAPs are 10 tons per year for any single HAP and 25 tons per year of any combination of HAPs. Sources that wish to avoid being subject to the MACT requirements and choose to limit their HAP emissions in this way must do so before beginning construction of the new major source or major modification. In acting upon an application for a new synthetic minor permit or a change to an existing synthetic minor permit, the permitting authority must consider the

Circumvention is prohibited by 40 C.F.R. Sec. 63.4(b), which states:

No owner or operator subject to the provisions of this part shall build, erect, install, or use any article, machine, equipment, or process to conceal an emission that would otherwise constitute noncompliance with a relevant standard. Such concealment includes, but is not limited to-- (1) The use of diluents to achieve compliance with a relevant standard based on the concentration of a pollutant in the effluent discharged to the atmosphere; (2) The use of gaseous diluents to achieve compliance with a relevant standard for visible emissions; and (3) The fragmentation of an operation such that the operation avoids regulation by a relevant standard. (Emphasis added)

In determining whether circumvention has occurred under 112(g), EPA considers factors similar to those it would use in determining whether circumvention has occurred in New Source Review (NSR) construction permitting. For instance, we consider the length of time between a single source's applications for synthetic minor permits to avoid NSR applicability, and the functional relationships among projects constructed under different synthetic minor permits. EPA looks closely at applications to relax synthetic minor limitations less than a year after operation of the new construction or modification begins. If a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation on the capacity of the source, such as relaxation of a synthetic minor emissions cap, then the applicable NSR requirements apply to the source or modification as though construction had not yet commenced on the source or modification. Similarly, for the purposes of reviewing possible cases of circumvention of 112(g) review, EPA reviews synthetic minor permits issued to a single source within a period of up to 5 years. In cases in which we determine that the source intended to circumvent the Section 112 requirements, EPA will consider the initial project and any subsequent projects together to determine whether construction, reconstruction or modification of a major source has occurred.

12/3/2001

New Flyer USA originally submitted an application requesting synthetic minor limits for its proposed new source on July 9, 1998. New Flyer USA sought in its application authority to construct and operate two separate manufacturing lines. MPCA issued a permit October 27, 1998, which allowed the source to take limits of 9.0 tons per year for any single HAP and 24.0 tons per year for any combination of HAPs to avoid classification of the facility as a major source under Section 112 of the Act. New Flyer constructed the facility at a "greenfield site" as defined under 40 C.F.R. Sec. 63.41, and the construction occurred after June 29, 1998, which is the effective date for Section 112(g)(2) (B) in Minnesota.

New Flyer USA submitted a new application to the MPCA on July 24, 2000, requesting a relaxation of the limitations in its initial 112(g) permit, thereby allowing additional emissions of 9.9 tons per year for any single HAP and 24.9 tons per year for any combination of HAPs at its existing manufacturing lines. Thus, it requested a relaxation of the existing requirements limiting the source to a synthetic minor. The permit application also requested modifications to the existing lines so that they can be used to construct a new type of bus, but it did not request approval to construct any new manufacturing lines at the facility. The EPA views any new construction, any proposal for new construction, or any relaxation of synthetic minor limits within 5 years of the initial permit as evidence of a potential phased construction for a source. Based on our positions and the facts stated above, EPA agrees with MPCA's determination that a case-by-case MACT emission limitation determination would be re

If you have any questions regarding this letter, please contact Shaheerah Fateen, Environmental Engineer, at (312) 353-4779.

Sincerely yours,

/s/

Robert B. Miller, Chief
Permits and Grants Section

12/3/2001

ATTACHMENT C

May 16, 1995

MEMORANDUM

SUBJECT: Potential to ~~emit~~ for MACT Standards – Guidance on Timing Issues

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

TO: Linda Murphy, Region I
Conrad Simon, Region II
Thomas Maslany, Region III
Winston Smith, Region IV
David Kee, Region V
Stanley Meiberg, Region VI
William Spratlin, Region VII
Patricia Hull, Region VIII
David Howekamp, Region IX
Jim McCormick, Region X

Section 112 of the Clean Air **Act** distinguishes between major sources and area sources of hazardous air pollutants. Although maximum achievable control technology (MACT) **is** required for all major sources of hazardous air pollutants, lesser controls or no controls may be required of area sources in **a particular** industry. In addition, whether a facility is **a** major or area source of hazardous air pollutants may affect the applicability of other **CAA** requirements-- **such as when** or whether the facility **is** required to obtain a Title V operating permit.

The purpose of this memo **is** to clarify when a major source of hazardous air pollutants can become an area source – by obtaining federally enforceable limits on its potential to emit – rather than comply with major source requirements. Timing questions are important to address now because several MACT standards have been promulgated and because an increasing number of sources are nearing deadlines for submitting Title V operating permit applications. The **EPA** recently provided guidance on how facilities can obtain federally enforceable limits on their potential to emit

hazardous and criteria air pollutants in a January 25, 1995, memo from me to you.

May-28-02 11:35 FROM: HOUAN & HARTSON 13

STATUTORY AND REGULATORY BACKGROUND

Section 112 of the **Act** defines a "major source" as "any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit considering controls, in the aggregate, 10 tons per year or more of any hazardous air pollutant or 25 tons per year or more of any combination of hazardous air pollutants..." The term "potential to emit" is defined in the section 112 general provisions (**40 CFR Part 63.2**) as "the maximum capacity of a stationary source to emit a pollutant under its physical or operational design," considering controls and limitations that are federally enforceable. This definition is consistent with definitions in regulations for the new source review and Title V permit programs.

SCOPE OF TODAY'S GUIDANCE

EPA has received a number of requests for clarification concerning when facilities may limit their potential to emit to avoid applicability of major source requirements of promulgated MACT standards. **Most of** these issues are not explicitly addressed by the section 112 general provisions nor by MACT standards themselves. Therefore, **EPA** is providing this guidance for MACT standards based on the Agency's interpretation of the relevant statutory language.

Today's guidance addresses three issues:

By what date must a facility limit its potential to emit if it wishes to avoid major source requirements of a MACT standard?

Is a facility that is required to comply with a MACT standard permanently subject to that standard?

In the case of facilities with two or more sources in different source categories: If such a facility is a major source for purposes of one MACT standard, is the facility necessarily a major source for purposes of subsequently promulgated MACT standards?

EPA plans to follow this guidance memorandum with rulemaking actions to address these **issues**. The Agency intends to include provisions on potential to emit timing in future MACT rules and amendments to the section 112 general provisions. The **EPA** believes that **the** structure of section 112 strongly suggests certain outer limits for when a source may avoid a standard through a limit on its potential to emit. However, **EPA** also believes the statute may be flexible enough to allow the Agency

to reach different results through rulemaking. In forthcoming rulemaking, **EPA** will be considering alternative approaches that could garner additional environmental benefits and provide additional flexibility to small sources.

TIMING FOR OBTAINING POTENTIAL TO EMIT RESTRICTIONS: GUIDANCE FOR PROMULGATED STANDARDS

Existing sources

Today's guidance clarifies that facilities may switch to area source status at any time until the "first compliance date" of the standard. The "first compliance date" is defined as the first date a source must comply **with** an emission limitation or other substantive regulatory requirement (i.e., leak detection and repair programs, work practice measures, housekeeping measures, etc..., but not a notice requirement) in the applicable MACT standard. By that date, to avoid being in violation, a major source must either comply with the standard, or obtain and comply with federally enforceable limits ensuring that actual and potential emissions are below major source thresholds.

The **Act** does not directly address a deadline for a source to avoid requirements applicable to major sources through a reduction of potential to emit. However, a result that is consistent with the language and structure of the Act is that sources should not be allowed to avoid compliance with a standard **after** the compliance date, even through a reduction in potential to emit. In the absence of a rulemaking record supporting a different result, **EPA** believes that once a source is required to install controls or take other measures to comply with a MACT standard, it should not be able to substitute different controls or measures that happen to bring the source **below** major source levels.

Moreover, while some standards have multiple, staggered compliance dates, these requirements are intended to function in an integrated manner to meet the statutory goals for that source category. For such a standard, the relevant date for purposes of this policy is the first substantive compliance date. While the **Act** may permit exceptions to these general rules, any such exceptions will need to be developed through rulemaking.

Some have read the Act to require an even earlier deadline, namely, the date of standard promulgation. EPA believes this result is not as strongly compelled by the statute. It is reasonable to presume that Congress intended a source to have some opportunity to avoid a standard by becoming an area source once it **has** been identified as subject in a promulgated standard.

The compliance date deadline approach would give small emitters (i.e. facilities with actual emissions below the major threshold) time to limit their potential emissions rather than comply with major source requirements. Under this approach, a facility will have the same amount of time to comply whether it chooses to meet the standard or limit its potential to emit.

This compliance date approach for existing sources is also reasonable because it recognizes the circumstances that exist regarding MACT standards issued to date. States are in the process of developing additional mechanisms that can provide federally enforceable limits to sources. In addition, EPA rules have not previously specified when facilities may switch from major to area-source status to avoid MACT applicability. It would be inequitable to hold sources to a promulgation date deadline absent clear advance notice to sources of the full significance of that date. Although the Act gives EPA discretion to designate a deadline earlier than the first compliance date, this is most appropriately done through rulemaking in a manner that gives adequate notice to the regulated community. By contrast, any source should presume that the compliance date is the final date to establish its status as an area source, at least for purposes of that standard.

For clarity, the Agency wishes to note that as long as a facility does not qualify for treatment as an area source, the facility must comply with any applicable major source requirement under the Clean Air Act. Facilities in need to comply with additional limits to qualify as area sources will need to plan ahead to obtain the limits before compliance deadlines for major source requirements. Facilities should consult with State and local air agencies concerning the timing of any necessary submittal.

New sources

Section 112 requires new sources to comply with a MACT standard upon startup or no later than the promulgation date of the standard, whichever is later. As a legal matter, to avoid being in violation, a "potential" major source must either comply with MACT or obtain and comply with federally enforceable limits by this statutory deadline.

Therefore, the Agency advises that any new facility that would be a major source in the absence of federally enforceable limits must obtain and comply with such limits no later than the promulgation date of the standard or the date of startup of the source, whichever is later. For the same reasons articulated below with regard to existing sources, a new source that is major at the time of promulgation or startup will remain major for purposes of that standard.

Once In, Always In Interpretation

EPA is today clarifying that facilities that are major sources for HAPs on the "first compliance date" are required to comply permanently with the MACT standard to ensure that maximum achievable reductions in toxic emissions are achieved and maintained.

EPA believes that this once in, always in policy follows most naturally from the language and structure of the statute. In many cases, application of MACT will reduce a major emitter's emissions to levels substantially below the major thresholds. Without a once in, always in policy, these facilities could "backslide" from MACT control levels by obtaining potential-to-emit limits, escaping applicability of the MACT standard, and increasing emissions to the major-source threshold (10/25 tons per year). Thus, the maximum achievable emissions reductions that Congress mandated for major sources would not be achieved. A once in, always in policy ensures that MACT emissions reductions are permanent, and that the health and environmental protection provided by MACT standards is not undermined.

Example: A facility has potential emissions of 100 tons/year. After compliance with the applicable MACT standard, which requires a 99 percent emissions reduction, the facility's total potential emissions would be 1 ton/year. Under today's guidance, that facility could not subsequently operate with emissions exceeding the maximum achievable control technology emission level. The facility could not escape continued applicability of the MACT standard by obtaining "area source" status through limitations on emissions up to the 10/25 ton per year major source thresholds.

Additionally, the Act requires all major sources to obtain a Part 70 operating permit. Section 501(2) provides that any source that is major under section 112 will also be major under title V. It follows that a source that is major for purposes of any MACT standard will be subject to title V as a major source. As clarification, most MACT standards explicitly require operating permits for major sources. However, this principle applies regardless of whether it is specified in the particular standard. Therefore, a source required to comply with MACT requirements applicable to major sources will also be required to obtain a Part 70 permit for that MACT requirement.

APPLICABILITY OF MULTIPLE MACT STANDARDS TO A SINGLE FACILITY

A facility that is subject to a MACT standard is not necessarily a major source for future MACT standards. For example, if after compliance with a MACT standard, a source's potential to emit is less than the 10/25 tons per year applicability level, the EPA will consider the facility an area source for purposes of a subsequent standard.

EXAMPLE: A facility has degreasing operations which emit 30 tons per year of HAP. The same facility also has the potential to emit 5 tons/year of HAP from the coating of miscellaneous metal parts. After complying with the Halogenated

Solvent Cleaning **MACT**, the maximum potential emissions from degreasing operations is 3 tons per year. The total federally enforceable potential emissions from this facility would now be 8 tons per year which meets the definition for an "area source." Therefore, this facility **would** not be **subject** to the major source requirements of the future miscellaneous metal parts MACT standard.

It should be noted that EPA has authority to require additional reductions in toxic emissions from sources that avoid **MACT** requirements through reductions in potential to emit. Section 112(f), the residual risk program, requires **EPA** to evaluate the risk and to promulgate additional standards for each category or subcategory of major sources, and allows **EPA** discretion to do the same for area sources, where there is not an ample margin of safety to protect public health within 8 years after promulgation of the MACT standard. The **EPA** will consider whether residual risk standards are appropriate for sources complying with MACT standards or potential to emit limits.

In addition, **EPA** is committed to implementation of the urban area source program as required in Section 112(c)(3) of the **CAA**. This program requires EPA to issue air toxics standards for area sources representing 90 percent of the area source emissions of the 30 hazardous air pollutants that present the greatest threat to public health in the largest number of urban areas. Together, the Residual Risk Standards and the Urban Area Source Standards ensure protection of public health beyond that achieved by implementation of the MACT standards for major sources.