March 11, 1991

MEMORANDUM

SUBJECT: New Source Review (NSR) Program Transitional Guidance

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

TO: Addressees

The Clean Air Act Amendments of 1990 (1990 Amendments) make numerous changes to the NSR requirements of the prevention of significant deterioration (PSD) and nonattainment area programs. The 1990 Amendments create new and expanded nonattainment areas, extend PSD coverage to current Class I area boundaries, and mandate a PSD exemption for certain hazardous air pollutants. The Environmental Protection Agency (EPA) intends to propose by September of this year a regulatory package that will implement these and other changes to the NSR provisions. Final adoption of these revised regulations is projected for August 1992. In the interim period between passage of the 1990 Amendments and adoption of the Agency's final regulations, EPA expects that numerous issues regarding the 1990 Amendments will arise. This memorandum sets forth the Agency's position on the most important of these transitional issues involving the NSR program.

The Regional Offices should send this guidance document to their States. Questions from States and applicants concerning specific issues and cases should be directed to the appropriate EPA Regional Office. If you have any general questions, please contact Mr. Michael Sewell of the New Source Review Section at FTS 629-0873 or (919) 541-0873.

Attachment

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Regions I, IV, and VI
Director, Air and Waste Management Division, Region II
Director, Air Management Division, Regions III and IX
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**New Source Review (NSR) Transitional Guidance**

Toxics and National Emissions Standards for Hazardous Air Pollutants (NESHAPS) Issues

1. Section 112 Hazardous Air Pollutants are No Longer Considered Regulated Pollutants Under Prevention of Significant Deterioration (PSD), but NESHAPS Still Apply

Under the 1977 Amendments to the Clean Air Act (Act) and regulations issued thereunder, the PSD requirements of the Act apply to all "major" new sources and "major" modifications, i.e., those exceeding certain annual tonnage thresholds [see 40 CFR 52.21(b)(1)(i) and (b)(2)(i)]. Typically, new sources and modifications become subject to PSD because they exceed the specified tonnage threshold for a criteria pollutant, i.e., a pollutant for which a national ambient air quality standard (NAAQS) has been established under section 109 of the Act. Once a new source or modification is subject to PSD, the PSD requirements apply to every pollutant subject to regulation under the Act that is emitted in "significant" quantities (or, in the case of a major modification, for which there is a significant net emissions increase) [see 40 CFR 52.21(b)(23) and (i)(2)]. Under the 1977 Amendments, best available control technology (BACT) and other PSD requirements apply not only to emissions of criteria pollutants but also to emissions of pollutants regulated under other provisions of the Act, such as section 111 or 112. This regulatory structure was altered by the 1990 Amendments.

Title III of the 1990 Amendments added a new section 112(b)(6) that excludes the hazardous air pollutants listed in section 112(b)(1) of the revised Act (as well as any pollutants that may be added to the list) from the PSD (and other) requirements of Part C. Thus, because they are on the initial Title III hazardous air pollutants list, the following pollutants, which had been regulated under PSD because they were covered by the section 112 NESHAPS or section 111 new source performance standards (NSPS) program, are now exempt from Federal PSD applicability:

- arsenic
- asbestos
- benzene (including benzene from gasoline)
- beryllium
- hydrogen sulfide ($H_2S$)
- mercury
- radionuclides (including radon and polonium)
- vinyl chloride.

The Title III exemption applies to final Federal PSD permits (i.e., those issued in final form and for which administrative appeals, if any, under 40 CFR 124.19 have been exhausted) issued on or after the date of enactment of the 1990 Amendments (November 15, 1990). For Federal PSD permit applications now

under review by either an EPA Regional Office or a delegated State, PSD permit requirements do not apply to the pollutants exempted by Title III. For Federal PSD permits containing PSD requirements for the pollutants exempted by Title III issued on or after November 15, 1990, the permittee may request a revision (e.g., removal of a BACT limit for benzene) to their PSD permit to reflect the Title III exemption from Federal PSD applicability.

Note that pursuant to section 116 and the preservation clause in section 112(d)(7) of the amended Act, States with an approved PSD program may continue to regulate the Title III hazardous air pollutants now exempted from Federal PSD by section 112(b)(6) if the State PSD regulations provide an independent basis to do so. These State rules would remain in effect unless a State revised them to provide similar exemptions. Additionally, the Title III pollutants continue to be subject to any other applicable State and Federal rules; the exclusion is only for Part C rules.

Finally, section 112(q) retains existing NESHAPS regulations by specifying that any standard under section 112 in effect prior to the date of enactment of the 1990 Amendments shall remain in force and effect after such date unless modified as provided in the amended section. Therefore, the requirements of 40 CFR 61.05 to 61.08, including preconstruction permitting requirements, for new and modified sources subject to existing NESHAPS regulations are still applicable.

In summary, the pollutants currently regulated under the Act as of March 1991 that are still subject to Federal PSD review and permitting requirements are:

- carbon monoxide
- nitrogen oxides
- sulfur dioxide
- particulate matter and PM-10
- ozone (volatile organic compounds)
- lead (elemental)
- fluorides
- sulfuric acid mist
- total reduced sulfur compounds (including $H_2S$)
- CFC's 11, 12, 113, 114, 115
- halons 1211, 1301, 2402
- municipal waste combustor (MWC) acid gases, MWC metals and MWC organics.

2. Hazardous Air Pollutants that are Regulated as One Component of a More General Pollutant Under Other Provisions of the Clean Air Act are Still Regulated

Any hazardous air pollutants listed in section 112(b)(1) which are regulated as constituents of a more general pollutant listed under section 108 of the Act are still subject

to PSD as part of the more general pollutant, despite the exemption in Title III. For example, volatile organic compounds (VOC's) (a term which includes benzene, vinyl chloride, methanol, toluene, methyl ethyl ketone, and thousands of other compounds) are still regulated as VOC's (but not as individual pollutants such as benzene, etc.) under the PSD regulations because these pollutants are ozone precursors, not because they are air toxics. Also, particulates (including lead compounds and asbestos) are still regulated as particulates (both PM-10 and particulate matter) under the PSD regulations. Lead compounds are exempt from Federal PSD by Title III, but the elemental lead portion of lead compounds (as tested for in 40 CFR Part 60, Appendix A, Method 12) is still considered a criteria pollutant subject to the lead NAAQS and still regulated under PSD.

3. Toxic Effect of Unregulated Pollutants Still Considered in BACT Analysis

Based on the remand decision on June 3, 1986 by the EPA Administrator in North County Resource Recovery Associates (PSD Appeal No. 85-2), the impact on emissions of other pollutants, including unregulated pollutants, must be taken into account in determining BACT for a regulated pollutant. When evaluating control technologies and their associated emissions limits, combustion practices, and related permit terms and conditions in a BACT proposal, the applicant must consider the environmental impacts of all pollutants not regulated by PSD. Once a project is subject to BACT due to the emission of nonexempted pollutants, the BACT analysis should therefore consider all pollutants, including Title III hazardous air pollutants previously subject to PSD, in determining which control strategy is best.

PSD Class I Boundary Issues

1. PSD Applicability Coverage Changes as Class I Area Boundaries Change

Sections 162(a) and 164(a) of the amended Act specify that the boundaries of areas designated as Class I must now conform to all boundary changes at such parks and wilderness areas made since August 7, 1977 and any changes that may occur in the future. The EPA does not believe that Congress intended to create the turmoil which would occur if this redesignation required the modification of permits issued between August 7, 1977 and November 15, 1990, or the resubmission and reevaluation of complete permit applications submitted prior to enactment of the 1990 Amendments. Thus, for this reason, applications considered complete prior to November 15, 1990 should be processed as submitted without regard to the new Class I area boundaries. Exceptions to this general policy are in the areas of increment consumption and air quality related values (including visibility), as discussed below.

For an applicant who submitted a complete PSD application prior to November 15, 1990, if all other PSD requirements are met, a permit may be issued based on the Class I analysis as submitted in the application, unless the reviewing authority finds, on a case-by-case basis, that additional analysis is needed from the applicant to address suspected adverse impacts or increment consumption problems due to the expanded boundaries of the Class I areas. Any existing increment violations in the new boundaries of Class I areas must be remedied through a SIP revision pursuant to 40 CFR 51.166(a)(3).

The PSD applications not considered complete before November 15, 1990 must consider the impact of both existing sources and the new or modified source on the Class I areas as defined by the 1990 Amendments. Thus, the complete application must consider the impacts on the entire Class I area based upon the boundaries in existence on the date of submittal of a complete application; as before, if a Class I boundary changes before the permit is issued, the reviewing authority may find, on a case-by-case basis, that additional analysis is needed from the applicant to address suspected adverse impacts or increment consumption problems due to expanded Class I area boundaries.

NSR Nonattainment Issues

1. NSR Construction Permit Requirements in Nonattainment Areas

In many States, the existing approved Part D permit program by its terms covers all designated nonattainment areas in the State, so a Part D permit program will automatically apply to the new and expanded nonattainment areas which are established under provisions of Title I of the 1990 Amendments. Thus, until new rules are adopted for these new or expanded nonattainment areas, States should apply the requirements of their existing approved Part D permit program. However, in other States, a Part D program may be limited to specified areas and does not apply to new or expanded areas. In these areas, States must implement a transitional permitting program until their existing Part D programs are revised to meet the requirements of the 1990 Amendments and expanded to cover all nonattainment areas in the State. Otherwise, both the goals of Part D and Congress' intent in creating new or expanded nonattainment areas will be frustrated.

The EPA regulations already provide for these new or expanded designated nonattainment areas because the Emission Offset Interpretative Ruling (40 CFR Part 51, Appendix S) governs permits to construct between the date of designation and the date an approved Part D plan is made applicable to the new nonattainment area [see 40 CFR 52.24(k)]. Until a State's new Part D plan is approved by EPA, if a State wishes to issue a permit for a major stationary source or major modification in a new or expanded designated nonattainment area, the State should comply with the requirements of Appendix S. Among other things, Appendix S requires a major source seeking to locate in a nonattainment area to (1) meet the lowest achievable emission rate for such source, (2) provide offsets from existing sources in the area, and (3) show that the offsets will provide a positive net air quality benefit (see 40 CFR Part 51, Appendix S, section IV.A). The EPA believes that in order to carry out the intent of Appendix S, offsets should be required for sources in all categories and in all instances should be calculated on a tons per year basis (see 40 CFR Part 51, Appendix S, section IV.C).

Of course, neither Appendix S nor the existing NSR rules incorporate the NSR changes mandated by Title I of the 1990 Amendments such as lower source applicability thresholds, increased emissions offset ratios, new definitions of major stationary source, and (for ozone nonattainment areas) requirements for nitrogen oxides (NOx) control and NOx emissions offsets. However, the 1990 Amendments require States to submit to EPA new NSR permit program rules for ozone nonattainment areas by November 15, 1992; for PM-10 nonattainment areas by June 30, 1992; and for most carbon monoxide (CO) nonattainment areas no later than 3 years from the date of the nonattainment designation. The EPA interprets this as an expression of congressional intent not to mandate that States adhere to the more stringent Title I NSR requirements in nonattainment areas during the time provided for State implementation plan (SIP) development. Thus, for NSR permitting purposes in nonattainment areas, the new NSR requirements in Title I are not in effect until the States, as required by the Act, adopt NSR permit program rules to

implement the Title I provisions. In addition, EPA encourages any State having adequate authority for early implementation of the NSR changes to do so as soon as possible.

If States fail to submit to EPA the new NSR permit program rules for nonattainment areas by the deadlines in the amended Act, EPA intends to impose in these nonattainment areas a Federal implementation plan (FIP) embodying such requirements. Currently, EPA intends to propose revised NSR regulations at 40 CFR Part 52 that would implement the new Title I NSR requirements under a FIP in a State if that State's revised NSR rules to implement Title I are not submitted in approvable form to EPA and made effective within the State by the deadlines established by the 1990 Amendments.

The area designation in effect on the date of permit issuance by the reviewing agency determines which regulations (Part C or Part D) apply to that permit. In other words, the PSD permit regulations apply to pollutants for which the area is designated as attainment or unclassifiable, and the NSR nonattainment permit regulations apply to pollutants for which the area is designated nonattainment [see 40 CFR 51.166(i)(3) and (5); and 40 CFR 52.21(i)(3) and (5)]. Under these regulations, a PSD permit for a pollutant cannot be issued in an area that is designated nonattainment for that pollutant. For the situation where a source receives a PSD or other permit prior to the date the area is designated as nonattainment, the permit remains in effect as long as the source commences construction within 18 months after the date of nonattainment designation of the area, does not discontinue construction for more than 18 months, and completes construction within a reasonable time [see 40 CFR 52.24(g) and (k)]. Although the PSD regulations provide for extension of these deadlines, no extension would be appropriate where the area has been designated as nonattainment following permit issuance. Accordingly, if any of these construction provisions are not met, the PSD permit or other permit will not be extended, and the source (if subject to the nonattainment provisions) must obtain a nonattainment permit prior to commencing (or continuing) construction.

The 1990 Amendments create some new and expanded nonattainment areas by operation of law. Other nonattainment area changes are expected as the States and EPA complete the designation process prescribed in amended section 107(d). Because of these provisions, the dates areas switch from attainment to nonattainment for NSR purposes vary by pollutant. However, except for the two instances where the Amendments create changes by operation of law, the new designations and expanded boundaries will not be effective for NSR purposes until EPA promulgates the changes. The promulgations will be announced in the Federal Register.

Congress create new PM-10 nonattainment areas through designations that became effective upon enactment of the 1990 Amendments on November 15, 1990[see section 107(d)(4)(B)]. Specifically, Congress designated Group I areas and areas where violations of the PM-10 NAAQS had occurred prior to January 1, 1989 as nonattainment. The EPA published a list of these PM-10 areas in a Federal Register notice (see 55 FR

45799,October 31, 1990; see also 52 FR 29383, August 7, 1987). The EPA plans to publish a notice in the Federal Register listing these areas as nonattainment in the near future, but they are already considered nonattainment areas as of November 15, 1990.

Similarly, the 1990 Amendments expand by operation of law some CO and ozone nonattainment areas. However, these changes did not become effective with passage but rather on December 30, 1990. The specifics are as follows:

> Section 107(d)(4)(A)(iv) of the amended Act provides that, with the exception explained below, ozone and CO nonattainment areas located within metropolitan statistical areas (MSA) and consolidated metropolitan statistical areas (CMSA) which are classified as serious, severe, or extreme for ozone or as serious for CO are automatically expanded to include the entire MSA or CMSA. This expansion became effective by operation of law 45 days after enactment unless the Governor submitted a notice by this deadline of the State's intent to seek a modification of the expanded boundaries pursuant to the procedures set forth in section 107(d)(4)(A)(v). So if a State did not provide this notice, the nonattainment boundaries of all serious, severe, and extreme ozone nonattainment areas in the State and all serious CO areas in the State expanded to include the entire MSA or CMSA on December 30, 1990. If a State did provide timely notice, the Administrator has up to 14 months from enactment to resolve the State's challenge. Until EPA promulgates a resolution of the State's challenge, the old boundaries remain in effect.

Except for these two cases where new or expanded boundaries have been created by operation of law, nonattainment area changes will not be considered effective until the changes are promulgated by the EPA. As to most new areas or expansions of previously-designated nonattainment areas, this will occur 240 days after enactment [see section 107(d)(4)(A)(i) and (ii)]. Newly-created ozone and CO nonattainment areas will be considered part of a designated nonattainment area for NSR purposes at the time of promulgation.

2. Status of Construction Bans

Pursuant to section 110(n)(3), an existing construction ban that was imposed due to the absence of approved Part D NSR rules remains in effect until a revised NSR SIP is approved. Existing construction bans imposed due to disapproval of primary sulfur dioxide NAAQS attainment plans also remain in effect. A Federal Register notice will be published soon announcing the status of construction bans in general and also lifting

specific bans where appropriate. Should a construction ban be lifted in any area designated as nonattainment, and the area lacks an approved Part D NSR rule, the State should meet the requirements of 40 CFR Part 51, Appendix S, in issuing permits to major new sources or major modifications prior to the adoption of NSR rules meeting the requirements of the 1990 Amendments.

3. Federal Implementation Plans Remain in Effect

The NSR permitting program in an existing FIP remains in effect until a SIP is approved or a revised FIP is adopted.

4. Use of Previously-Approved Growth Allowances is Prohibited

Section 173(b) invalidates growth allowances in existing SIP's in areas that received a SIP call prior to enactment of the 1990 Amendments, or that receive one thereafter. For NSR permits issued on or after November 15, 1990, previously-approved growth allowances cannot be used in these areas. Construction permits cannot be issued in SIP-call areas under existing EPA-approved Part D programs to the extent that such permits rely on previously-approved growth allowances. Case-by-case emission offsets must be obtained for any such permits, and other existing Part D requirements must be met.

5. Existing NSR Permitting Rules Continue to Apply in the Northeast Ozone Transport Region (NOTR)

The 1990 Amendments establish a single ozone transport region comprised of the States of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island, Vermont, and the CMSA that includes the District of Columbia and part of the State of Virginia. For this transport region, including all attainment areas within its boundaries, new section 184(b)(2) specifies that any stationary source that emits or has the potential to emit at least 50 tons per year of VOC's shall be considered a major stationary source and subject to the requirements which would be applicable to major stationary sources if the area were classified as a moderate ozone nonattainment area. For NSR purposes, the requirements of section 184(b)(2) are not in effect in a State until the State submits a new or revised SIP that includes the requirements (or EPA imposes a FIP implementing those requirements). A State in the NOTR has until November 15, 1992 to submit to EPA the new or revised NSR rules addressing the new requirements.