July 10, 1998

MEMORANDUM

SUBJECT: Second Extension of January 25, 1995 Potential to Emit Transition Policy and Clarification of Interim Policy

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

Eric V. Schaeffer, Director
Office of Regulatory Enforcement (2241A)

TO: See Addressees

This memorandum further extends the Environmental Protection Agency's (EPA) January 25, 1995 transition policy for potential to emit (PTE) limits relative to maximum achievable control technology (MACT) standards issued under section 112 of the Clean Air Act and federal operating permits issued under Title V programs. It also clarifies how the EPA's interim policy on PTE, first discussed in a January 22, 1996 memorandum, works with the transition policy.

Background

Many Clean Air Act requirements apply only to "major" sources, that is, those sources whose actual or potential emissions of air pollution exceed threshold emissions levels specified in the Act. A source's total potential to emit is determined by a two step process. First, the source's potential emissions at maximum physical capacity are established. This figure is then reduced by any recognized, practically enforceable limits on the source's emissions, such as limits on rates of production, hours of operation, and type and amount of fuel burned or materials processed. The three primary programs where PTE is a significant factor are (1) the section 112 MACT program to control emissions of hazardous air pollutants (HAPs); (2) the Title V operating permits program; and (3) the New Source Review (NSR) programs in Part C of Title I (the prevention of significant deterioration (PSD) program) and Part D of Title I (the nonattainment NSR program). These programs each contain a definition of PTE. Due to several court decisions addressing the requirement in EPA's regulatory definition of PTE under these programs that any enforceable limits on potential emissions be federally enforceable, these regulations are currently under review, and the EPA is engaged in a rulemaking process to consider amendments to the current requirements. The EPA has reviewed information provided

through a stakeholder process and is preparing a proposed rule presenting several options related to practical and federal enforceability. Further information on options being considered is contained in January 1996 and November 1997 options papers (available on the Internet at http://www.epa.gov/ttn/oarpg/).

The Current Transition Policy

In a January 25, 1995 policy memorandum entitled "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)," issued before the court decisions regarding the definition of PTE and federal enforceability, the EPA announced a transition policy for Section 112 and Title V (available on the Internet at http://www.epa.gov/ttn/oarpg/t5pgm.html). This transition policy alleviated concerns that some sources may face gaps in the ability to acquire federally enforceable PTE limits because of delays in State adoption or EPA approval of programs or in their implementation. In order to ensure that such gaps would not create adverse consequences for States or for sources, the EPA provided that during a 2-year period extending from January 1995 to January 1997, for sources lacking federally enforceable limitations, State and local air regulators had the option of treating the following types of sources as non-major in their Title V programs and under section 112:

(1) sources that maintain adequate records to demonstrate that their actual emissions are less than 50 percent of the applicable major source threshold, and have continued to operate at less than 50 percent of the threshold since January 1994, and

(2) sources with actual emissions between 50-100 percent of the threshold, but which hold State-enforceable limits that are enforceable as a practical matter.

On August 27, 1996, the EPA announced an extension of the transition policy until July 31, 1998. See Memorandum entitled "Extension of January 25, 1995 Potential to Emit Transition Policy" (Aug. 27, 1996) (Internet site http://www.epa.gov/ttn/oarpg/t5pgm.html). This extension was originally based, in part, on the schedule for completing the rulemaking on the definition of PTE.

Second Extension of Transition Policy

The EPA does not expect that the PTE rulemaking which will address the PTE requirements in, among other rules, the MACT standard General Provisions (40 C.F.R. part 63, subpart A) and the Title V operating permits program, will be completed before July 1998. These rule amendments will affect federal enforceability requirements for PTE limits under these programs. Thus, there will continue to be uncertainty with respect to federally enforceable limits, and a basis for the January 25, 1995 transition policy will continue to be valid after July 31, 1998. The EPA is, therefore, extending the transition period for the MACT and Title V programs until December 31, 1999, or until the effective date of the final rule in the PTE rulemaking, whichever is sooner.

Interim Policy During Period Between D.C. Circuit Opinions and Final PTE Rule

A January 22, 1996 policy memorandum entitled "Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit" sets forth the EPA's interim policy on federal enforceability during the period prior to the effective date of a final PTE rule (available on the Internet at http://www.epa.gov//ttn/oarpg/t5pgm.html). Because there have been several inquiries into the application of the interim policy, the EPA encourages Regions, States and regulated sources to review that policy memorandum, as it still represents the EPA's position. A brief description is provided below.

Section 112: In National Mining Association v. EPA, 59 F.3d 1362 (D.C. Cir. 1995), the D.C. Circuit questioned whether the federal enforceability requirement in the General Provisions to 40 C.F.R. part 63 was "necessary." The court remanded, but did not vacate, the definition of PTE in the General Provisions. Nonetheless, as noted above, since January 25, 1995, in a policy decision prior to the National Mining opinion, the EPA has followed the transition policy regarding what limits are necessary to render a source of hazardous air pollutants a "synthetic minor" source for purposes of section 112. As discussed above, today's memorandum extends the transition policy until December 31, 1999.

Title V: In Clean Air Implementation Project v. EPA, No. 96-1224 (D.C. Cir. June 28, 1996) (CAIP), the court vacated and remanded the requirement for federal enforceability for PTE limits under 40 C.F.R. part 70. The EPA has stated that the term "federally enforceable" in section 70.2 should now be read to mean "federally enforceable or legally and practicably enforceable by a State or local air pollution control agency" pending any additional rulemaking by the EPA.

As stated in the August 1996 memorandum, the EPA interprets the court order vacating the part 70 definition as not affecting any requirement for federal enforceability in existing State rules and programs. Pending the outcome of the current rulemaking effort, the EPA believes that States are not likely to pursue submittals for program revisions. Thus, despite the State program requirements for federal enforceability, there may be States wishing to continue to observe the transition policy -- the transition policy specifically allows States to follow it in determining Title V applicability. Therefore, as stated above, the EPA is extending the transition policy as it relates to Title V permitting until December 31, 1999.

New Source Review: In Chemical Manufacturers Association v. EPA, No. 89-1514 (D.C. Cir. Sept. 15, 1995) the court remanded and vacated the federal enforceability requirement in the federal NSR/PSD rules. The EPA reiterates that neither the January 25, 1995 transition policy, the opinion in National Mining nor the court order in CAIP impacts the NSR or PSD programs. A full discussion of the EPA's policy with respect to PTE issues related to the NSR and PSD programs is presented in the January 22, 1996 policy memorandum.

In brief, that memorandum states that the court's order in Chemical Manufacturers Association did not impact the individual state rules implementing these programs that have been incorporated into EPA-approved State Implementation Plans (SIPs). Thus, the order's practical impacts on NSR/PSD programs are not substantial for new construction -- federal enforceability is still required to create "synthetic minor" new and modified sources in most circumstances

pending completion of the PTE rulemaking. The precise impact of the vacatur on NSR/PSD applicability can be definitively determined only by reviewing the applicable SIP provisions.

Distribution/Further Information

We are asking Regional Offices to send this memorandum to States within their jurisdiction. Questions concerning specific issues and cases should be directed to the appropriate Regional Office. The Regional Office staff may contact John Walke of the Office of General Counsel at 202-260-9856; or Carol Holmes of the Office of Regulatory Enforcement at 202-564-8709. The document is also available on the Internet, at http:\\www.epa.gov\ttn\oarpg, under "OAR Policy and Guidance Information."

Addressees:
Director, Office of Ecosystem Protection, Region I
Director, Division of Environmental Planning and Protection, Region II
Director, Division of Air Quality, Region III
Director, Air, Pesticides, and Toxics Management Division, Region IV
Director, Air and Radiation Division, Region V
Director, Multimedia Planning and Permitting Division, Region VI
Director, Air, RCRA, and TSCA Division, Region VII
Assistant Regional Administrator, Office of Pollution Prevention, State, and Tribal Assistance, Region VIII
Director, Air and Toxics Division, Region IX
Director, Office of Air, Region X
Regional Counsels, Regions I-X
Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Enforcement Coordination Office, Region III
Director, Compliance Assurance and Enforcement Division, Region VI
Director, Enforcement Coordination Office, Region VII
Assistant Regional Administrator, Office of Enforcement, Compliance and Environmental Justice, Region VIII
Enforcement Coordinator, Office of Regional Enforcement Coordination, Region IX

cc: C. Holmes (2242A)
J. Ketcham-Colwill (6103)
J. Walke (2344)
L. Hutchinson (MD12)