UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105

December 13, 2005

**MEMORANDUM**

SUBJECT: Regional Comments on Draft OIAI Policy Revisions

FROM: Michael S. Bandrowski, Chief
Air Toxics, Radiation and Indoor Air Office
Region IX

TO: David Cozzie, Group Leader
Minerals and Inorganic Chemicals Group
Office of Air Quality Planning and Standards

Thank you for allowing the Regional Offices the opportunity to comment on the draft proposed changes to the General Provisions of 40 CFR Part 63, intended to replace EPA's Once-in-Always-In (OIAI) policy established in a May 16, 1995, memorandum entitled, "Potential to Emit for MACT standards – Guidance on Timing Issues," from John S. Seitz to the Regional Air Directors. A draft copy of the proposed changes, dated November 16, 2005, was received by Region IX on November 30, 2005, and we shared this copy with the Regional Offices. As sub-lead Region for air toxics, we have summarized and consolidated the feedback received from the Regional Offices, and are forwarding these Regional comments and concerns through this memo. Eight Regions provided comments. For your convenience, the original comments from each Regional Office are included as attachments to this memo.

Over the years, many questions and implementation issues have arisen that have initiated the reconsideration of the OIAI policy. The new revisions being planned by OAQPS would essentially negate the original policy, and this change would be codified in the 40 CFR Part 63 General Provisions. This change in policy would have major implications for implementation and enforcement of the maximum achievable control technology (MACT) standards. The Regional Offices, therefore, appreciate the opportunity to review and comment on HQ drafts before the revisions are proposed in the Federal Register for public comment. However, we are disappointed that OAQPS formulated revisions to the OIAI policy without seeking Regional input and was reluctant to share the draft policy with the Regional Offices. This trend of excluding the Regional Offices from involvement in rule and policy development efforts is disturbing. We are

requesting that OAQPS establish a means for Regional input during the development of future policies and rules.

With regard to the OIAI policy, all the Regional Offices that submitted comments acknowledged the need for a change from the 1995 guidance in limited circumstances. For example, if EPA finalizes the delisting of methyl ethyl ketone as a hazardous air pollutant (HAP), it would be logical for EPA to allow existing major sources of HAPs to reevaluate their PTE, excluding emissions of methyl ethyl ketone. Likewise, if a source eliminates, or significantly reduces their use of HAPs, then it would be reasonable for EPA to allow such a source to reevaluate MACT standard applicability. In addition, certain pollution prevention benefits may follow in circumstances where a source has an incentive to obtain actual reductions in emissions of HAPs equivalent to or greater than the level required by the MACT standard with less burden and cost. Overall, the Regions support the intent behind the draft proposed amendments to provide incentive to companies for engaging in emission-reducing activities. Several Regions also explicitly stated their support of revising the policy through a public rulemaking process and encouraging sources to explore different control technologies and pollution prevention options to reduce emissions and potential to emit (PTE). One Region was supportive of the change in policy as drafted. However, all other Regional Offices expressed varying degrees of concern about allowing any source to take synthetic minor limits at any time, for any reason. The concerns are described below, followed by suggestions for addressing these concerns while still encouraging existing MACT sources to take actions towards pollution prevention. Our comments are organized as follows:

CONCERNS
- Health and Emission Concerns
- Permitting and Compliance Concerns

ALTERNATIVE APPROACHES
GENERAL EDITS AND COMMENTS

## CONCERNS

### Health and Emissions Concerns

1. *Reversal of Position with Inadequate Justification*

The May 16, 1995, Seitz memo regarding potential to emit for MACT standards states:

> 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. (See page 9)

Elsewhere, the Seitz memo states:

> 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 of measures that happen to bring the source below major source levels. (See page 5)

While it is true that policy is not set in stone, and that policy decisions may be reversed, the preamble, as currently drafted, does not set forth an adequate rulemaking record to justify this drastic change in interpretation. In 1995, EPA believed that the OIAI policy follows "most naturally" from the language and structure of the statute, and that allowing facilities to backslide would undermine the maximum achievable emissions reductions mandated by Congress. Now, in 2005, EPA is claiming that "there is nothing in the statute which compels the conclusion that a source cannot attain area source status after the first compliance date of a MACT standard" (see page 15 of the draft proposed changes). In order to provide an adequate rulemaking record, the preamble should more clearly articulate why EPA no longer believes that the OIAI policy flows naturally from the statute.

2. *Increased HAP Emissions Resulting from Abandoning MACT Control Levels*

The Clean Air Act requires the maximum degree of reduction in emissions of HAPs from sources subject to the MACT standards. The reductions anticipated through the MACT program will not be achieved through the strategy described in the draft rule proposal. A key concern is that the draft proposal allows facilities to obtain synthetic minor permits after the MACT standard compliance date by taking potentially less protective requirements than the MACT standard would otherwise require them to install. The proposal, as written, would be detrimental to the environment and undermine the intent of the MACT program.

Many MACT standards require affected facilities to reduce their HAP levels at a control efficiency of 95% and higher. In many instances, the MACT requirements could lead to greater reductions when compared to sources accepting synthetic minor limits of 24 tons per year (tpy) for a combination of HAPs and 9 tpy for a single HAP. Clearly, the intent in promulgating MACT standards was to reduce emissions to the extent feasible, not just to the minor source level. However, under the current draft proposal, the reductions that were intended to be achieved through the MACT standards would be offset by synthetic minor limits that allow sources to emit HAPs at levels higher than those allowed by the MACT standard. The cost of the increased HAP emissions would be borne by the

communities surrounding the sources. On pages 15 and 16 of the draft preamble, EPA states:

> A concern has been raised that sources that are currently well below the major source threshold will increase emissions to a point just below the threshold. We believe these concerns are unfounded. While this may occur in some instances, it is more likely that sources will adopt PTE limitations at or near their current levels to avoid negative publicity and to maintain their appearance as responsible businesses.

This statement is unfounded and overly optimistic. Regional experience indicates that sources requesting synthetic minor limits to avoid a MACT standard typically request, and are frequently given, limits of at least 24 tpy for a combination of HAPs and 9 tpy for a single HAP. The Regional Offices anticipate that many sources would take limits less stringent than MACT requirements, if allowed. Thus, the cumulative impact of many "area" sources whose status is derived *after* the MACT compliance date could be significant. This change in policy would offset the intended environmental benefits of the MACT standards. Although the draft changes could serve to alleviate some possible inequity under the current OIAI policy, or encourage some sources to further reduce emissions to achieve area source status, EPA should look closely at this issue to determine whether the likely benefits would be greater than the potential environmental costs. This analysis should occur before the proposal is put forth for public comment. One Region suggested that EPA should not enact a policy allowing facilities to qualify out of the MACT standards until a strong area source toxics program is in place, or until state, local and tribal air quality agencies have programs that can provide an equivalent level of protection.

A related concern with regard to the draft changes as written is that a facility, by changing from a major source to an area source, and back again, could virtually avoid regulation and greatly complicate any enforcement against them. Take, for example, a facility that is covered by a MACT standard, and has three years from the date that the rule is promulgated to come into compliance. Three years go by, and just before the end of that time period, the facility announces its area source status. If an area source regulation exists, there may also be some equivalent waiting period before the facility is required to comply with the area source requirements. If the facility later announces that it is, after all, a major source, then it may again enter a grace period, possibly up to another 3 years, before it is subject to the MACT standard requirements. Thus, by continually going back and forth between major and area source status, a facility could be a major source for most of its operating life and never have to comply with the MACT standard requirements. The 1995 OIAI policy recognizes this and states, "The EPA believes 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." This type of problem must be addressed if the OIAI policy is changed.

3. *Residual Risk*

Section 112(f) of the Clean Air Act requires that EPA examine risks remaining after implementation of the MACT standards. It is unclear from the preamble of this draft rulemaking how EPA envisions this draft rulemaking will affect or interact with the residual risk efforts currently underway at EPA. If there is a likelihood that this proposal will increase residual risks, EPA should examine whether sources that will be obtaining synthetic minor limits under this rulemaking may later need to take additional measures under the residual risk rules. This interface should be discussed in the preamble.

**Permitting and Compliance Concerns**

1. *Delayed Compliance*

The draft rule proposal does not address how to treat a facility seeking synthetic minor status after failing to comply with the MACT standard requirements by the initial compliance date. Any violations should be resolved before allowing a permit revision to facilitate area source status. If this issue is not addressed in the rule, then facilities may choose to delay compliance if they believe they can achieve area source status after the compliance date without any consequences.

2. *Violation of a Synthetic Minor Limit*

The draft rule proposal does not address how a source should be treated if it accepts synthetic minor limits to get out of a MACT standard and later violates those limits. Under the current General Provisions and most, if not all, MACT standards, an area source that subsequently increases its actual or potential emissions of HAPs to at or above the major source threshold would thereafter be subject to the MACT standard. EPA should clarify whether a source that violates its synthetic minor limits would be expected to comply with the MACT thereafter, by when compliance must be achieved, and how the source should be treated during such situations.

3. *Process for Removing MACT Requirements from Existing Title V Permits*

The Clean Air 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. Therefore, sources that are currently considered major for the purposes of a MACT standard are required to have a title V permit that contains applicable MACT requirements. The draft rule does not address the permitting process that a source must go through in order to have MACT requirements removed from its title V permit once it takes synthetic minor limits. EPA should clarify minimum requirements that are expected to be met by sources, including the type of permitting action required (i.e. Administrative, Minor, or Significant). Also, if a source is still subject to title V after taking synthetic minor limits (i.e. the source is required to obtain a title V permit for reasons other than MACT applicability), the preamble should recommend or require that the source have its synthetic minor limits added to the permit at the same time. The

preamble should address the mechanism for adding synthetic minor limits to title V permits, as well, where appropriate.

4. *Mechanism for Obtaining Synthetic Minor Limits*

It is unclear what mechanism is envisioned and viable for sources to obtain the synthetic minor limits. The draft preamble, on page 18, states:

> Most, if not all, permitting authorities have created and instituted enforceable permitting mechanisms such as federally enforceable state operating permits or conditional major operating permits, in lieu of title V permits, that allow sources to limit their potential to emit HAP emissions so as to avoid having to comply with major source requirements of one type or another.

In reality, few states have federally enforceable state operating permits programs, and we are not aware of many other mechanisms for adding such synthetic minor limits. The preamble should provide more detail regarding the mechanisms available for implementing such limits, and should also discuss whether title V permits (particularly for sources on tribal lands) may be used as the sole mechanism to limit PTE.

5. *Enforceability of Synthetic Minor Limits*

There are several concerns regarding the enforceability of these synthetic minor limits. First, EPA should not endorse the use of PTE limits enforceable by states only to avoid applicability of federal rules, such as the MACT standards. Second, there are concerns about the lack of clear-cut requirements regarding practicable enforceability and fear that significant time and energy will be spent debating the enforceability of synthetic minor limits with permitting authorities. Third, significant resources will need to be expended defending the enforceability of these limits in responding to title V public petitions in instances where a source is required to obtain a title V permit revision to incorporate the synthetic minor limits. Finally, the draft proposed rule does not provide clear guidelines regarding appropriate monitoring for these synthetic minor limits. Many of the environmental benefits that are achieved by the comprehensive monitoring and reporting requirements of the MACT standards will be lost in the process. The preamble should state what type of monitoring is acceptable for demonstrating compliance with synthetic minor limits, for instance, by requiring the same level of compliance assurance as is required by title V. One Region suggested adding a clear definition in the regulatory text for "practicably enforceable permit limits" that specifies sufficient monitoring, recordkeeping, reporting, and actual PTE limits.

6. *Notification of Area Source Status*

The new section 63.1(c)(6) should require notification to EPA when a major source becomes an area source.

## ALTERNATIVE APPROACHES

Based on the concerns outlined above coupled with the desire to provide incentives for sources to engage in pollution prevention activities, the Regions are offering the following suggestions for potential alternative approaches for this rulemaking. We believe it is important to consider these alternatives, and other viable approaches, in order to continue achieving the intended maximum emissions reductions of HAPs, while still providing incentive for sources to implement pollution prevention practices. We recommend that EPA request public comment on these alternative approaches.

*1. Finalize Pollution Prevention Rulemaking*

The preamble of the draft rule mentions the proposed pollution prevention rule amendments (68 FR 26249, May 15, 2003), which were intended to provide regulatory relief to facilities that use pollution prevention to achieve and maintain HAP emission reductions equivalent to, or better than, the MACT level of control required under the NESHAP. EPA proposed two options in the proposed pollution prevention rule amendments. First, if a facility completely eliminates all HAP emissions from all of its emissions sources regulated by the MACT standard, then it could request to be no longer subject to that MACT standard. Second, if a facility that is subject to a MACT standard uses pollution prevention to reduce its HAP levels to less than the emission levels required by the MACT standard, then that facility could request alternative compliance requirements that would amount to some regulatory relief. To provide the desired regulatory relief sought by the current draft proposal, EPA should consider finalizing the proposed pollution prevention rule amendments in lieu of, or in addition to, the strategy described in the draft proposed amendments to the General Provisions of 40 CFR Part 63.

2. *Examine Appropriateness of Synthetic Minor Limits Standard-by-Standard*

There may be certain MACT standards where it would be appropriate and beneficial to allow a source to take synthetic minor limits and to thus comply with MACT requirements via pollution prevention activities rather than by employing prescriptive control technologies -- for instance, source categories that lend themselves to replacing HAP-containing materials with non-HAP materials. However, there are many source categories for which this approach does not provide environmental benefits, such as those categories for which the MACT standard requires the installation of controls to minimize emissions of HAP byproducts. A more justifiable and environmentally protective approach would be to examine and modify MACT standards on a case-by-case basis.

3. *Restrict Instances in which a Source May Take a Synthetic Minor Limit*

Another alternate approach would be to proceed with a general rule, such as the one proposed, but to limit instances in which a source could take synthetic minor limits after the compliance deadline of the MACT standard. Suggested allowable instances include sources that eliminate or reduce the use of HAP materials, maintain a level of control

equivalent to the MACT level of control, or are subject to categories where area source MACT requirements have been promulgated.

4. *Case-by-Case Determinations by the Administrator*

Another alternate approach could be to revise the 1995 guidance or the General Provisions of 40 CFR Part 63 to allow sources the opportunity to petition the Administrator to request synthetic minor limits after the compliance deadline of the MACT.

5. *Alternative Compliance Options under the MACT*

Another recommendation is to consider revising the MACT standards to allow sources to take synthetic minor limits after the compliance deadline, but to continue to require some monitoring and recordkeeping pursuant to the MACT standard. In other words, allow sources to take a synthetic minor limit as an alternate compliance option while maintaining compliance assurance.

## GENERAL EDITS AND COMMENTS

### New area sources

Unlike the OIAI policy, the draft proposal does not distinguish between new and existing sources. The preamble should clarify that 40 CFR 63.6(b)(7) requires a new or reconstructed area source that becomes major to comply with the relevant standard upon startup.

### Specific MACT standards

1. *Degreasers*

One Region mentioned that sources subject to the Halogenated Solvent MACT standard (Subpart T) have previously requested to take limits on PTE after the compliance date to be deferred from title V permit requirements. On March 23, 2000, William Harnett issued a clarifying memo to the OIAI policy that explains that these degreasers may not take restrictions on PTE after the compliance date to be deferred from title V. Language should be added to the preamble about the halogenated solvent rule to make it clear that these sources may now take PTE limits to avoid title V.

2. *Dry Cleaners*

One Region mentioned that the Dry Cleaning MACT standard (Subpart M) specifies two categories of area sources: large area sources and small area sources. Did the OIAI policy apply to large area sources? Will these sources be affected by the draft proposed changes? If so, how?

**Inconsistency with other programs**

On November 29, 2005, EPA published in the Federal Register the final phase 2 rule to implement the 8-hour ozone National Ambient Air Quality Standard. See 70 FR 71611. In this notice, EPA indicates that sources that were required to obtain title V permits because they were major under the now-revoked 1-hour ozone standard are still required to have a title V permit, even though they are no longer major under the 8-hour ozone standard. The policy indicated in the draft revisions to the General Provisions of 40 CFR Part 63 may be seen as inconsistent with the phase 2 implementation rule for the 8-hour ozone standard. EPA may want to address the two approaches in the preamble to this proposed rule change.

**Page 1**

1. *MACT Acronym*

The 1995 guidance is referred to as a memorandum entitled "Potential to Emit for Maximum Achievable Control Technology (MACT) Standards..." The term "Maximum Achievable Control Technology" is not actually spelled out in the subject of the guidance (it is only abbreviated). Since this is a title, in quotes, "Maximum Achievable Control Technology" should not be spelled out here.

2. *Confusing Sentences*

The last two sentences on page 1 are confusing and should be revised to read: "These amendments would replace a policy described in a May 16, 1995, EPA memorandum ('Potential to Emit...,' May 16, 1995, from John Seitz...to EPA Regional Air Division Directors). This memorandum ~~and~~ specify~~ies~~ how a major source may become an area source by limiting its potential to emit...HAP...to below the major source thresholds of 10..tpy...or 25 tpy...before the first major compliance deadline. If today's proposed action is finalized, a ~~A~~ source attaining..."

**Page 5**

*Regulated Entities*

The second to last sentence on page 5 reads "Categories and entities potentially regulated by this action include all major sources..." Given that some sources currently complying with MACT standards may actually be minor sources (i.e. they've reduced emissions to below the major source threshold at some point after becoming subject to the MACT), this sentence should be revised to read "...include all sources subject to MACT requirements for major sources."

**Page 13**

*Confusing Example*

The preamble gives an example at the bottom of page 13 of a source with post-MACT emissions above major source levels. According to the preamble, this source will not reduce emissions of one HAP that is not regulated by the MACT unless it is allowed to obtain synthetic minor limits to avoid MACT. This example is confusing. It is also unlikely that this is a common situation, and therefore should not be used as an example in the preamble to justify the rulemaking. Finally, the example raises the question of why the MACT standard is not being revised to require control of this one HAP or whether this HAP will be required to be controlled by another MACT standard with a future effective date.

**Page 14**

1. *Confusing Example*

The example given at the top of page 14 is fairly confusing on first read and should be clarified if possible.

2. *Clarification*

The second to last sentence on page 14 states: "A major source, therefore, could initially be subject to a MACT standard, apply MACT, and in doing so become an area source." The preamble is unclear as to whether it is addressing PTE or actual emissions. The sentence suggests that a source's actual emissions are enough to make it an area source; the preamble should make it clear that complying with a MACT standard alone is probably not sufficient to limit PTE, and that a source would most likely also need to take limits on production or hours of operation.

**Page 18**

*Practicable Enforceability*

On page 18, the preamble states, "These permitting mechanisms are practicably enforceable in that they provide for sufficient monitoring, recordkeeping, and reporting..." However, because we are not being prescriptive in exactly what mechanisms or permitting programs are to be used in limiting PTE, we should not make presumptions about the adequacy of monitoring, recordkeeping, and reporting. Instead we should state that "These permitting mechanisms may be practicably enforceable if they provide for sufficient monitoring..."

Attachments