MEMORANDUM

SUBJECT: Use of the Site-Specific Risk Assessment Policy and Guidance for Hazardous Waste Combustion Facilities

FROM: Marianne Lamont Horinko
Assistant Administrator

TO: Regional Administrators
Regions 1 - 10

The purpose of this memorandum is to reiterate the appropriate use of the hazardous waste combustion site-specific risk assessment (SSRA) policy and technical guidance and the Resource Conservation and Recovery Act (RCRA) omnibus authority, as it relates to SSRAs.[1] We are also requesting that you review certain documents to determine if they contain misleading or incorrect information concerning the SSRA policy and technical guidance.

On February 28, 2002, the Administrator received a petition for rulemaking from the Cement Kiln Recycling Coalition (CKRC) regarding hazardous waste combustion SSRAs. In the petition, CKRC asserts that EPA has required and is continuing to require SSRAs in violation of the notice and comment rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§551, *et seq*. CKRC also requests that we repeal the SSRA policy and guidance and promulgate them under the APA if we continue to believe that SSRAs are necessary. We are evaluating this petition. In the meantime, we believe that it is important to reiterate the appropriate use of the SSRA policy and technical guidance and the RCRA omnibus authority, as it relates to SSRAs. Specifically, the SSRA policy and technical guidance convey information and recommendations; as with all guidance documents, they are not regulations or requirements

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[1] Section 3005(c)(3) of RCRA, commonly referred to as the "omnibus authority" or "omnibus provision", provides that RCRA permits "shall contain such terms and conditions as the Administrator (or the State) determines necessary to protect human health and the environment."

and should not be used in a way that suggests they are binding.

In addition, we are requesting that you determine whether any regional memoranda, policy and guidance documents, including internal documents, as well as any correspondence, Memoranda of Agreement, and Grant Workplans with your states contain misleading or incorrect information regarding how the SSRA policy and technical guidance should or should not be applied to hazardous waste combustion facilities. If such misleading or incorrect information is found, we are also requesting that you take immediate measures to clarify or correct the information in consultation with our office or your Office of Regional Counsel. In the meantime, this memorandum clarifies that the SSRA policy and technical guidance are not binding on EPA, states, or the regulated community, regardless of any language in any earlier EPA documents that might be read to imply a binding effect.

Background

The Agency articulated the original version of the SSRA policy in the draft and final *Strategy for Hazardous Waste Minimization and Combustion* (commonly referred to as the Combustion Strategy).[2] EPA stated that "risk assessments should be completed prior to making final permit determinations." *Strategy for Hazardous Waste Minimization and Combustion* (Nov. 1994) at 23. On September 30, 1999, we revised and updated our national technical standards for incinerators, cement kilns and light-weight aggregate kilns in the Phase I National Emission Standards for Hazardous Air Pollutants (NESHAP) final rulemaking (see 64 FR 52828). Recognizing that these combustors were now required to comply with more stringent technical standards than previously, we also articulated a revision to our SSRA policy in the preamble to the Phase I NESHAP (see 64 FR 52839 - 52843). Specifically, we stated the following:

> We are recommending that for hazardous waste combustors subject to the Phase I final MACT standards, permitting authorities should evaluate the need for a SSRA on a case-by-case basis. SSRAs are not anticipated to be necessary for every facility, but should be conducted for facilities where there is some reason to believe that operation in accordance with the MACT standards alone may not be protective of human health and the environment. If a SSRA does demonstrate that operation in accordance with the MACT standards may not be protective of human health and the environment, permitting authorities may require additional conditions as necessary. See 64 FR 52841.

In addition to the SSRA policy, we have also published technical guidance to assist regulators and facilities should a risk assessment be determined to be necessary.

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[2] *Draft Strategy for Combustion of Hazardous Waste*, May 1993. *Draft Strategy for Waste Minimization and Combustion*, May 1994. *Strategy for Hazardous Waste Minimization and Combustion*, November 1994 (EPA530-R-94-044).

What is the recommended use of the SSRA policy?

SSRAs are not a regulatory requirement. SSRAs only should be required at individual facilities where there is some reason to believe that operation in accordance with the applicable technical standards alone may not be protective of human health and the environment, and the permitting authority has documented the basis for concluding that an SSRA was necessary for a given facility.[3] Neither the Combustion Strategy, in which we introduced the original SSRA policy, nor the Phase I NESHAP, in which we articulated our revision to the policy, conferred any new authorities or requirements regarding SSRAs. Thus, the policy itself cannot be used as a basis to require a risk assessment.

Where the permitting authority concludes that a risk assessment is necessary for a particular combustor, the need should be substantiated in each case. The factual and technical basis for any decisions to conduct a risk assessment should be included in the administrative record for the facility. See 40 CFR §§ 124.7, 124.8, 124.9, and 124.18. In addition, the appropriate citation of authority for a site-specific risk assessment is the RCRA omnibus authority and its associated regulations, e.g., 40 CFR §270.10(k), since it is these provisions, and not the SSRA policy or other EPA guidance, that can provide the authority to require SSRAs (or information needed to conduct an SSRA) in individual cases. If the facility, or any other party, files comments on a draft permit decision objecting to the permitting authority's conclusions regarding the need for a risk assessment, the authority must respond fully to the comments. If the permitting authority concludes that a risk assessment is necessary despite the comments, the response should be based on the factual, technical, and legal factors relevant to the combustor being permitted, not on the SSRA policy or other guidance.

What is the recommended use of the SSRA technical guidance?

As stated above, technical guidance has been made available to assist regulators and facilities should a risk assessment be determined necessary for a specific combustion unit. Similar to the SSRA policy, this technical guidance is not mandatory; it does not impose any legally binding requirements. Rather, it contains our current thinking concerning what emissions data may be appropriate for performing a risk assessment and how a risk assessment might be conducted. The purpose of the guidance is to ensure that the Agency's current best information on these issues is widely disseminated so that individual permit writers and facilities are not forced to "reinvent the wheel" in each case. Risk assessors may choose to follow the recommendations in the guidance or not, as appropriate for the combustion device in question and similar factors. Regardless of whether the technical guidance recommendations are used and because of the site-specific nature of this type of risk assessment, where the permitting authority

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[3]Of course, the facility is free to perform a risk assessment, or to request that the permitting authority perform a risk assessment, if the facility views such an assessment as beneficial for addressing communication or other concerns associated with permitting determinations, and the permitting authority may choose to participate at its discretion.

determines that such an assessment is necessary, we recommend that the permit writer and facility representatives meet prior to any analysis to discuss risk methodology and data input needs. Such a meeting allows both the permitting authority and facility the opportunity to raise questions and objections concerning the appropriateness of different methodologies, assumptions, and default values, and their application to the hazardous waste combustor. We recommend that risk assessors document the rationale for the final selected methodology in a risk assessment protocol or plan or in the final risk report. As with the decision to require a risk assessment, the permitting authority should fully respond to any comments filed on a draft permit decision objecting to the risk assessment methodology, and the response should be based on relevant factual and technical factors, not on the fact that the technical guidance recommends the methodology at issue.

What type of documentation should be provided for SSRAs?

When developing a facility's RCRA permit, the permitting authority must include in the administrative record all documents supporting any permit decisions (see 40 CFR §124.9). With respect to SSRAs, this means that the permitting authority should include the basis or justification for any decisions that an SSRA was necessary for a given facility. If the permitting authority determines that additional risk-based conditions are necessary in the facility's RCRA permit to protect human health and the environment, based on the risk assessment and pursuant to the omnibus authority, this decision likewise must be documented, along with any supporting information, in the facility's administrative record. Supporting documentation may include the risk assessment protocol or plan and the risk assessment report as appropriate. The permitting authority should identify the specific risk concern and discuss how the additional control will alleviate this concern. It is not appropriate to simply cite the SSRA policy or any other related combustion risk assessment guidance documents as the basis of the decision, although the permitting authority may rely, where appropriate, on risk information and conclusions developed during the Phase I NESHAP rulemaking supporting the current version of the policy (see, e.g., 64 FR 52839 - 52843). In total, the information provided in the administrative record must articulate the technical basis for the additional risk-based permit conditions. By placing this information in the administrative record, it allows both the public and the facility the opportunity to review the risk analysis and to raise questions and objections concerning the appropriateness of the analysis and any resulting permit conditions during the public notice and comment period on the draft permit decision. As required in 40 CFR §124.18, any comments and responses to those comments must also be placed in the administrative record.[4]

Proper application of Agency policy and guidance is an essential element for the

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[4]This memorandum focuses on the formal notice-and-comment aspect of the permitting process. However, in less formal communications (e.g., meetings with facility personnel, public meetings), the permitting authority should likewise treat the SSRA and other guidance documents as non-binding guidance and should be receptive to any arguments or views received according to their merits.

continued success of the RCRA program. Agency policy and guidance must not be used in a manner that implies mandatory requirements as opposed to Agency recommendations. We hope that the information provided in this memorandum is helpful to you when considering the need for an SSRA and the possible application of the combustion risk assessment guidance. Should you have any questions regarding the above information or need assistance determining the appropriate scope for your regional document review, please contact Rosemary Workman or Sasha Gerhard of my staff at (703) 308-8725 and (703) 605-0632, respectively. Questions related specifically to either the human health or ecological risk methodology guidance documents should be directed to Karen Pollard also of my staff. Karen may be reached at (703) 308-3948.

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