## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Parts 51 and 52

**[AD–FRL–5455–7]**

**RIN 2060–AE11**

## Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR)

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The EPA is proposing to revise regulations for both the approval and promulgation of implementation plans and the requirements for preparation, adoption, and submittal of implementation plans governing the NSR programs mandated by parts C and D of title I of the Clean Air Act (Act). These proposed changes are largely drawn from the discussions and recommendations of the Clean Air Act Advisory Committee's (CAAAC) Subcommittee on NSR Reform. The proposed changes are intended to reduce costs and regulatory burdens for permit applicants, while still ensuring that emissions from new or modifying major stationary sources of air pollution will not interfere with efforts to attain and maintain the nation's air quality standards and goals.

**DATES:** *Comments.* All public comments must be received on or before October 21, 1996.

*Public Hearing.* A public hearing is scheduled for 8:30 a.m. to 4:30 p.m. in Research Triangle Park, North Carolina September 23, 1996. The hearing may be canceled if no requests to speak have been received 15 days prior to the scheduled hearing date.

**ADDRESSES:** *Comments.* Comments on this proposal should be mailed (in duplicate if possible) to: U.S. EPA, Air Docket Section, Air Docket A–90–37; 401 M Street SW., Washington, DC 20460.

*Docket.* Supporting information for this proposal is contained in Docket No. A–90–37. This docket is available for public review and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday at the EPA's Air Docket Section, 401 M Street SW., Washington, DC; Room M–1500. A reasonable fee may be charged for copying.

*Public Hearing.* A document announcing the specific location of the public hearing will be published in the Federal Register.

**FOR FURTHER INFORMATION CONTACT:** Dennis Crumpler, Information Transfer and Program Integration Division, MD–12, Office of Air Quality Planning and Standards (OAQPS), U.S. EPA, Research Triangle Park, North Carolina 27711, (919) 541–0871. Persons wishing to make oral presentations at the public hearing, or seeking further information, should contact Pam J. Smith at (919) 541–5319.

**SUPPLEMENTARY INFORMATION:** The following outline reflects the contents of this action:

## I. Overview of This Proposal

### *A. Introduction*

The EPA is proposing substantial changes to the major NSR program, a preconstruction permitting program required by the Clean Air Act (Act) that regulates the construction and modification of major stationary sources of air pollution. This proposal represents the first comprehensive overhaul of the program in 15 years. The proposed revisions are largely drawn from the recommendations and deliberations of the CAAAC's NSR Reform Subcommittee, a panel of industry representatives, State and local air pollution control officials, environmentalists and other experts.

This proposal also contains certain revisions to the NSR regulations for State Implementation Plans (SIP) based on requirements established by the 1990 Amendments. These revisions are proposed here in order to clarify certain requirements of the 1990 Amendments. The adoption of the proposed changes will resolve a number of the underlying issues that have impeded full adoption of the nonattainment NSR programs by some States and caused uncertainties in the permitting process thereby delaying some projects. Other revisions, based on the CAAAC that are deregulatory in nature have also been included.

If adopted, the proposed reforms will significantly reduce the number and types of activities at sources that would otherwise be subject to major NSR under the existing NSR program regulations, including the new and revised requirements imposed by the 1990 Amendments. At the same time, the proposed changes are intended to provide States with greater flexibility to customize their own regulations implementing the NSR program, address concerns raised about the permitting of sources near protected National Parks and other wilderness areas (Federal Class I areas), promote the use of innovative technologies and pollution prevention, and, in general, streamline the overall NSR permitting process.

The key elements of this proposal designed to relieve regulatory burden are:

- Deregulation of changes at ''clean'' emissions units and ''clean'' facilities and of pollution control and pollution prevention projects—Existing sources that have clean emissions units or are undertaking projects to clean up air pollution should not be targeted for major NSR.
- Promotion of voluntary plant-wide limits—Rather than face complicated, piecemeal applicability decisions every time a change at a plant is contemplated, plant managers may prefer to work within an emissions cap or emissions budget, an annual emissions limit that allows managers to make almost any change anytime as long as the plant's emissions do not exceed the cap. Today's action proposes to create this option in EPA's regulations.
- Applicability criteria to reflect real emissions increases—This proposal would extend the range of years sources can use to establish their historical emissions and would allow sources to calculate emissions increases using projected future actual emissions rather than maximum potential to emit (PTE). This will especially benefit cyclical industries which during economic downturns are currently penalized for making modernizing changes that are vital to their recovery, even when the changes lower emissions rates.
- Encouragement of pollution prevention and innovative control technologies—these proposed changes would ensure that pollution prevention qualifies for the pollution control project exclusion and revamp the under-used innovative control technology waiver to simplify the process and eliminate penalties for good faith failures.
- Enhanced Public Awareness—Increased public disclosure of source impacts on Class I areas, establishment of national database of major permit applications, and improvements to EPA's pollution control technology bulletin board to increase opportunities for informed citizen participation in key permitting decisions.
- Revised requirements for control technology determinations—These proposed changes would allow States to adopt their own methodologies for reviewing and determining BACT so long as control technology evaluations include reasoned consideration of the most stringent control technology. Other proposed changes clarify the extent of a source's duty to search out new technology and shorten the technology review process by providing presumptive cut-offs.
- Better coordination of permit reviews for sources potentially affecting air quality in Federal Class I areas—These proposed changes clarify the role of the FLM, the State permitting authority and the applicant with regard to the NSR permitting process. The steps in considering of Class I area issues are clarified and would be initiated earlier in the permit review process than in current regulations. De minimis levels for determining whether Class I increment analyses must be performed would be established. The changes should reduce delays and disputes associated with permitting near Federal Class I areas.
- Increased State flexibility—Instead of one-size-fits-all solutions to applicability and other issues, States will be allowed for the first time to choose applicability and implementation approaches from a menu of alternatives.
- The EPA is taking comment on the range of preliminary construction activities that might be allowed to proceed prior to the issuance of an NSR permit in cases of modifications at existing facilities.
- More offset credits available to nonattainment area sources—Proposed changes will ease restrictions on use of emissions reductions credits resulting from source shutdowns and curtailments.
- New definition to ensure that the definition of ''stationary source'' included stationary internal combustion engines, but excludes newly-defined ''nonroad engines'' and ''nonroad vehicles.''

Proposed deregulatory changes that are authorized by the 1990 Amendments include:

- Exclusion of HAP from PSD requirements.
- Requirements on ozone-depleting substances (ODS)—Relaxes PSD requirements on the substitution of ODS with lower potency.

Revisions in this document that are being proposed based on requirements mandated by the 1990 Amendments are:

- Revised major source thresholds and emissions offset ratios for sources of volatile organic compounds (VOC), nitrogen oxides ($NO_X$), particulate matter with diameter of 10 microns or less (PM–10) and CO according to severity of a nonattainment area's ambient air quality problem.
- Special requirements for determining major modifications of VOC and $NO_X$ sources in serious and severe ozone nonattainment areas.
- Requirements for the submittal of control technology information into the EPA's RACT/BACT/LAER Clearinghouse.

This proposal also includes proposed ''housekeeping'' revisions to the NSR regulations at § 51.165(a) (NSR in nonattainment areas) for control

technology review, complete application criteria, and public participation, which are consistent with similar provisions under the PSD regulations at §§ 51.166 and 52.21. Further, consistent with proposed reform-related revisions to public participation provisions, the EPA is also proposing provisions that clarify permit applicants' and the public's opportunities for judicial review in State court regarding PSD or nonattainment permit actions.

Finally, the EPA is proposing clarification of source definition criteria as they relate to military installations during ''national security emergencies''.

*B. Background*

The NSR program legislated by Congress in parts C and D of title I of the Act is a preconstruction review and permitting program applicable to new or modified major stationary sources of air pollutants regulated under the Act.[1]

In areas not meeting health-based NAAQS and in ozone transport regions (OTR), the program is implemented under the requirements of part D of title I of the Act for ''nonattainment'' NSR. In areas meeting NAAQS (''attainment'' areas) or for which there is insufficient information to determine whether they meet the NAAQS (''unclassifiable'' areas), the NSR requirements for the prevention of significant deterioration of air quality under part C of title I of the Act apply. These regulations are contained in 40 CFR 51.165, 51.166, 52.21, 52.24 and part 51 appendix S.

The NSR provisions of the Act are a combination of air quality planning and air pollution control technology program requirements for new and modified stationary sources of air pollution. In brief, section 109 of the Act requires the EPA to promulgate primary NAAQS to protect public health and secondary NAAQS to protect public welfare. Once these standards have been set, States must develop, adopt, and submit to the EPA for approval a SIP which contain emission limitations and other control measures to attain and maintain the NAAQS and to meet the other requirements of section 110(a) of the Act.

Each SIP is required to contain a preconstruction review program for the construction and modification of any stationary source of air pollution to assure that the NAAQS are achieved and maintained; to protect areas of clean air; to protect AQRV (including visibility) in national parks and other natural areas of special concern; to assure appropriate emission controls are applied; to maximize opportunities for economic development consistent with the preservation of clean air resources; and to ensure that any decision to increase air pollution is made only after full public consideration of all the consequences of such a decision. See, *e.g.*, sections 101(b)(1), 110(a)(2)(C), 160, and 173 of the Act.

On November 15, 1990, Congress enacted numerous changes to title I of the Act, including changes involving the NSR provisions under parts C and D for major new sources and major modifications locating in attainment and unclassifiable areas, nonattainment areas, and ozone transport regions. Most of these changes are described in the ''General Preamble for Implementation of Title I of the Clean Air Act Amendments of 1990'' (General Preamble; see 57 FR 13498, April 16, 1992). The EPA has not yet revised its NSR regulations to reflect the statutory changes resulting from the 1990 Amendments.

In August 1992, amidst concerns expressed by regulated industries that the EPA's major NSR regulations were too complex and burdensome, the EPA began an effort to revise those regulations. This effort involved the solicitation of ideas and recommendations from the CAAAC, as well as public input.[2] The goal of the NSR Reform effort is to eliminate as much of the program complexity, administrative burden and resultant project delays as possible without sacrificing the current level of environmental protection and benefits derived from the program.

In today's action, the EPA is proposing changes to various aspects of the current NSR program based primarily on its consideration of recommendations provided through the NSR Reform effort, but also based on independent EPA initiatives to clarify the NSR program. The EPA further proposes to add certain new requirements established by the 1990 Amendments.

The reader should note that the proposed new and revised regulations in this document do not comprehensively address all the statutory revisions to the NSR program in the 1990 Amendments. Consequently, EPA's promulgation of any or all revisions in this proposal should not create the expectation that States and permit applicants may obtain program approvals or be issued permits, respectively, by solely following the NSR rules, as proposed or ultimately promulgated.

II. Applicability of the NSR Program

*A. Overview*

The issue of NSR applicability proved to be one of the most difficult and divisive issues for the CAAAC's NSR Reform Subcommittee. While the issue was considered by a subgroup of the Subcommittee for several months and debated by the full Subcommittee during several sessions, consensus proved elusive. As a result, no formal recommendations were proffered to the CAAAC or the EPA on this issue. Still the discussions provided the EPA with a better understanding of the concerns of all sides and revealed a few areas of potential agreement. There were common elements in many of the competing proposals circulated by members of the Subcommittee. Thus, while there was no CAAAC resolution of the issues, today's proposed applicability changes build upon the Subcommittee's deliberations.

This preamble discusses the following proposed changes to NSR applicability: (1) A new exclusion from major NSR for existing emissions units and facilities that are subject to BACT or LAER, equivalent minor NSR control requirements, or comparable ''clean'' emissions control technology (see section II.C); (2) a new baseline for determining if a physical or operational change will result in a significant net emissions increase and thereby trigger major NSR, allowing sources to use any 12 consecutive months in the past 10 years to establish the unit's pre-change emissions level (see section II.D); (3) a pollution control project exclusion, patterned after the exclusion recently adopted by EPA for utilities but covering all source categories and pollution prevention projects (see section II.E); (4) a new provision allowing States to base applicability on a PAL (see section II.F); and (5) extension of a version of the ''actual-to-future-actual'' test, currently only available for utilities, to all source categories (see section II.G). Finally, the EPA is proposing for comment an applicability approach which the EPA agreed to consider and take final action

[1] Section 112(g) of the Act provides for preconstruction review of HAP. Section 112(b)(6) of the Act specifies that the ''part C'' PSD program shall not apply to HAP listed under section 112. The EPA has published guidance on NSR implementation issues presented by these provisions. See 57 FR 18074–18075 (April 28, 1992).

[2] The meetings of the CAAAC and its NSR Reform Subcommittee are announced in the Federal Register and open to the public. The last meeting of the NSR Subcommittee was in July 1994. A preliminary draft of this rulemaking was discussed at that meeting and made available for public comments. A copy is in the Docket for this rulemaking. See 59 FR 35119 (July 8, 1994).

on in accordance with the settlement of a lawsuit with the CMA and other industry petitioners (see section II.H).

In the past, EPA has essentially required States to follow a single applicability methodology. States could, of course, have a more stringent approach but most followed closely the EPA prototype. The EPA is proposing to break with this one-size-fits-all approach to applicability by proposing to adopt these changes as a menu of options from which a State may pick and choose in order to customize a specific approach for its individual needs. Thus, in its final action on this rulemaking, EPA will consider placing all or some of the applicability options presented today as permissible alternatives in its part 51 regulations containing minimum requirements for State NSR programs in nonattainment and attainment/unclassified areas. States will then be free to adopt any combination of these menu options into their own regulations and SIP to offer sources these alternatives. For instance, if EPA adopts in its final rulemaking both the ''Clean Unit'' exclusion and the PAL option, a State could retain its current federally-approved applicability approach without making changes, retain its existing approach and add a Clean Unit Test, or retain its existing approach and add both a Clean Unit Test and an option for PAL. The EPA also proposes to include these applicability approaches in the part 52 regulations governing Federal permitting programs. The EPA solicits comment on this approach and specifically solicits comments on what restrictions, if any, EPA should place on States in selecting applicability options.

*B. Background*

1. Current Provisions

The major NSR provisions of part C (PSD) and part D (nonattainment requirements) of title I of the Act apply to both the construction of new major sources and the modification of existing major sources. For new ''greenfield'' sources, ''applicability''—the determination of whether an activity is subject to the program or, stated differently, whether the program applies to particular circumstances—is a fairly straightforward determination. The Act, as implemented by the EPA's regulations, sets applicability thresholds for nonattainment areas (PTE above 100 tons per year (tpy) of any pollutant subject to regulation under the Act, or smaller amounts, depending on the nonattainment classification) and attainment areas (100 or 250 tpy, depending on the source type). A new source with a ''PTE'' in excess of the applicable threshold amount ''triggers'' or is subject to major NSR.[3]

The determination of what should be classified as a modification subject to major NSR presents more difficult issues. The modification provisions of the NSR programs in parts C and D are based on the broad definition of modification in section 111(a)(4) of the Act: the term ''modification'' means ''any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.'' That definition contemplates a two-step test for determining whether activities at an existing major facility constitute a major modification subject to major NSR requirements. In the first step, the permitting authority determines whether a physical or operational change will occur. If so, then the permitting authority proceeds in the second step to determine whether the physical or operational change will result in an emissions increase over baseline levels.

The reference to ''any physical change * * * or change in the method of operation'' in section 111(a)(4) of the Act could—read literally—encompass the most mundane activities at an industrial facility (even the repair or replacement of a single leaky pipe, or an insignificant change in the way that pipe is utilized). However, the EPA has recognized that Congress did not intend to make every activity at a source subject to major new source requirements under parts C and D. As a result, the EPA has adopted several exclusions from the ''physical or operational change'' component of the definition. For instance, the EPA has specifically recognized that routine maintenance, repair and replacement, and changes in hours of operation or in the production rate are not by themselves considered a physical change or change in the method of operation within the definition of major modification. See, *e.g.*, existing §§ 52.21(b)(2)(iii), 52.24(f)(5)(iii), 51.165(a)(1)(v)(C)(1), and 51.166(b)(2)(iii).

The EPA has likewise limited the reach of the second step of the statutory definition of modification by excluding all changes that do not result in an emissions increase above ''significance'' levels for the pollutant in question. See, *e.g.*, existing § 51.165(a)(1)(x). Taken together, these regulatory limitations restrict the application of the NSR program in parts C and D to only *''major modifications''* at existing major stationary sources. See, *e.g.*, existing § 51.165(a)(1)(v).

One key attribute of the NSR program in general is that sources typically ''net'' modifications out of review by coupling proposed emissions increases at the source with contemporaneous emissions reductions. The judicial decision in *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 400–403 (D.C. Cir. 1979), endorsed use of this ''plantwide bubble'' concept in the PSD program. The court reasoned that since the principal purpose of the PSD program was to prevent *deterioration* in air quality, a PSD permit was unnecessary so long as new construction at an existing plant did not increase overall emissions to the environment. Thus, under the EPA regulations promulgated in 1980 following *Alabama Power* (which are for the most part still in place today), source owners may modify or even completely replace or add emissions units without obtaining a PSD permit so long as ''actual emissions'' do not increase over baseline levels at the plant as a whole. In 1984, the EPA regulations expanding the use of the plantwide bubble to the nonattainment area NSR program under title I, part D of the Act were upheld in *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984).

Applicability of the part C and D NSR provisions must be determined in advance of construction and is pollutant-specific. In cases involving existing sources, this requires a pollutant-by-pollutant determination of the emissions change, if any, that will result from the physical or operational change. The EPA's 1980 regulations implementing the PSD and nonattainment NSR programs thus inquire whether the proposed change constitutes a ''major modification,'' *i.e.*, a *nonexcluded* physical change or change in the method of operation ''that

[3] The ''PTE'' is currently defined as the ''maximum capacity of a stationary source to emit a pollutant under its physical and operational design.'' Any physical or operational limitation on the capacity of the source to emit a pollutant, including a permit limitation, is treated as part of its design provided the limitation or its effect on emissions is federally enforceable (e.g., see existing §§ 51.165(a)(1)(iii) and 51.166(b)(4)).

In recent decisions, *National Mining Ass'n* v. *EPA*, 59 F.3d 1351 (D.C. Cir. 1995) and *Chemical Manufacturers Ass'n* v. *EPA*, No. 89–1514, slip op. (D.C. Cir. Sept. 15, 1995), the District of Columbia Circuit court addressed challenges related to EPA's requirement that a source which wishes to limit its PTE must obtain a federally enforceable limit. The EPA is currently reviewing its Federal enforceability requirements in light of these court decisions, and has not yet decided how it will address this issue. Once EPA has completed its review of the Federal enforceability requirements in all relevant programs including NSR, the Agency will make available in a Federal Register notice its response to the court decisions.

would result in a significant net emissions increase of any pollutant subject to regulation under the Act.'' See existing § 52.21(b)(2)(i). A ''net emissions increase'' is defined as the increase in ''actual emissions'' from the particular physical or operational change (taking into account the use of emissions control technology and restrictions on hours of operation or rates of production where such controls and restrictions are federally enforceable), together with other contemporaneous increases or decreases in actual emissions at the source. See footnote 3 and existing § 52.21(b)(3)(i).[4] In order to trigger major NSR, the net emissions increase must exceed specified ''significance'' levels when compared to a pre-modification ''baseline.''[5] See existing §§ 52.21(b)(2)(i) and 52.21(b)(23).

The EPA's existing regulations generally define baseline actual emissions as ''the average rate, in tpy, at which the unit actually emitted the pollutant during a 2-year period which precedes the particular date and which is representative of normal source operation'' (see, *e.g.*, existing § 52.21(b)(21)(ii)). The Administrator ''shall'' allow use of a different time period ''upon a determination that it is more representative of normal source operation.'' *Id.* The EPA has historically used the 2 years immediately preceding the proposed change to establish the baseline [see 45 FR 52676, 52705, 52718]. However, in some cases it has allowed use of an earlier period.

With respect to modifications at existing sources, a prediction of whether the physical or operational change will result in a significant net increase in the source's actual emissions following the modification is thus necessary. In part this involves a straightforward and readily predictable engineering judgment—how will the change affect the emissions factor or emissions rate of the emissions units that are to be changed. It also necessarily involves a prediction of utilization rates—how much of the source's full production capabilities as modified will be used per hour, and how many hours per year the source will be operated.

The current regulations provide that when an emissions unit (other than an electric utility steam generating unit) ''has not begun normal operations,'' actual emissions equal the PTE of the unit. See existing § 52.21(b)(21)(iv). The EPA has interpreted this provision as creating an initial presumption that because the changed unit ''has not begun normal operations'' following the change, it will operate at its full capacity year round, i.e., at its full emissions potential. This is referred to as the ''actual-to-potential'' test. The owner or operator is free to rebut the presumption that actual emissions will increase over pre-modification levels by agreeing to limit its PTE, through the use of federally enforceable restrictions, to pre-modification actual emissions levels (plus an amount that is less than ''significant''). See footnote 3. The effect of this methodology is to require the source to take minor NSR permit limits to ensure that actual emissions will not increase (by more than a prescribed ''significant'' amount, if any) above baseline levels following the physical or operational change.

2. Litigation Over the Actual-to-Potential Test

Industry has long been concerned that most physical or operational changes under EPA's rules will initially register as emissions increases under EPA's actual-to-potential test because most sources are operated at less than full capacity on an annual basis. As a result, a change at the source that does not affect instantaneous emissions rates shows up as a presumed emissions increase because the pre-modification actual utilization is less than the projected post-modification utilization, which is presumed to reflect full capacity at all times. Hence, often sources have accept federally enforceable limits on post-modification emissions or operations to avoid major NSR.[6] As a legal matter, some industry representatives argue that under current regulations the EPA cannot properly presume that every non-routine or otherwise nonexcluded change to an existing emissions unit cannot be the basis for finding that the unit ''has not begun normal operations.'' They contend that the fact that a unit is proposed to be ''changed'' should not necessarily mean that it has not yet ''begun normal operations'' following the change.

Two cases have addressed the EPA's application of the actual-to-potential test, and specifically, the interpretation of the phrase ''begun normal operations.'' In *Puerto Rican Cement Co.* v. *EPA*, 889 F.2d 292 (1st Cir. 1989), the court upheld the EPA's application of the actual-to-potential methodology in a case involving conversion of a cement plant from a wet process to a more efficient dry process. The court upheld the EPA's interpretation that the words ''emissions unit that has not begun normal operations'' include modified units as well as new units, citing a passage from the 1980 rulemaking preamble that, in the court's view, made it clear that the EPA intended to apply the actual-to-potential test to a ''new *or modified* unit.'' 889 F.2d at 298 (45 FR 52676, 52677) (emphasis added by court).

The court noted that its endorsement of EPA's use of the ''actual-to-potential'' approach for calculating an emission change in this case was simplified by the facts presented, and that under other circumstances, the decision could have been more difficult.

On a related issue, the court agreed with the EPA's position that the regulatory exclusion for certain increases in a source's production rate or hours of operation applies only when such an increase is unaccompanied by construction or modification activity. See *id.* at 916, n.11. The EPA is today proposing to make the existing exclusion explicitly clear on this point by inserting the phrase ''standing alone'' at the beginning of the exclusion. See proposed amendatory language for §§ 51.165(a)(1)(v)(C)(6), 51.166(b)(2)(iii)(F), 52.21(b)(2)(iii)(F) and 52.24(f).

The actual-to-potential test was also at the heart of a legal challenge brought by WEPCO, see *Wisconsin Electric Power Co.* v. *Reilly*, 893 F.2d 901 (7th Cir. 1990). The WEPCO proposed extensive, life-extension renovations for several older (35- to 50-year old) coal-fired electric utility boilers. The EPA sought to apply the ''actual-to-potential'' test reasoning that the modernizing changes, as confirmed by the WEPCO's own projections, would increase reliability

[4] In approximate terms, ''contemporaneous'' emissions increases or decreases are those which have occurred between the date 5 years preceding the proposed physical or operational change and the date that the increase from the change occurs [see, *e.g.*, existing section 52.21(b)(3)(ii)].

[5] Once a modification is determined to be major, the PSD requirements apply only to those specific pollutants for which there would be a significant net emissions increase. See, *e.g.*, existing sections 52.21(j)(3) (BACT) and 52.21(m)(1)(b) (air quality analysis).

[6] For example, consider an industrial coal-fired boiler, constructed in the late 1960s and therefore ''grandfathered'' from NSR, which originally had a PTE of 1000 tons per year of $SO_2$. Since the mid-1980s, this source has actually operated at 50 percent of its capacity and emitted only 500 tons per year due to economic conditions or because the boiler became less efficient as it aged, and hence less economic to operate at full capacity. If the boiler were to be modified through a non-routine physical change which did not affect the unit's hourly emissions rate, the owner or operator would need either to accept a cap on its post-modification emissions at 539 tons per year (i.e., a level less than a significant increase over its past actual emissions, where the significant increase level for $SO_2$ is 40 tons per year), or to obtain a major NSR permit if it desires to maintain the ability to operate at 100 percent of its rated capacity. The 500 ton ''cushion'' between actual and potential emissions that existed prior to the modification would no longer exist.

and decrease operating costs, thus likely leading to increased utilization and, hence, increased actual emissions. However, the Seventh Circuit disagreed with the EPA's interpretation. The court coined the phrase ''like-kind replacement'' to describe the type of renovations occurring at the WEPCO plant, where steam drums and other major components were replaced by new components of identical design and function. 893 F.2d at 917. The court said that where the renovations were like-kind replacements, the EPA could not reasonably interpret its regulations to say that such a unit was so different that it has not begun normal operations.

Following the remand in the WEPCO case, the EPA employed an ''actual-to-future-actual'' test for the WEPCO facility comparing WEPCO's emissions during the baseline period to estimated future-actual emissions drawn from utilization projections available in the record.

3. The WEPCO Rulemaking

In 1992, the EPA promulgated revisions to its applicability regulations creating special rules for physical and operational changes at electric utility steam generating units [see 57 FR 32314, July 21, 1992].[7] In this rule, prompted by the WEPCO litigation and commonly referred to as the ''WEPCO Rule,'' the EPA adopted an actual-to-future-actual methodology for all changes at electric utility steam generating units except the construction of a new electric generating unit or the replacement or reconstruction of an existing emissions unit. Under this methodology, a utility compares its actual annual emissions before the change with its projected annual emissions after the change to determine if a physical or operational change would result in a significant increase in emissions. To ensure that the projection is valid, the rule requires the source to track its emissions for the next 5 years. The EPA is today proposing to allow use of this methodology for all source categories as described in more detail in section II.G of this preamble.

The EPA also made changes to the baseline portion of the actual-to-future-actual methodology. The EPA retained the existing regulatory language, but adopted a presumption that utilities may use as baseline emissions the annual actual emissions from any 2 consecutive years within the prior 5 years. This presumption would be superseded by the proposed baseline changes for all source categories discussed in section II.D. of this preamble. In the WEPCO rule, the EPA also created a pollution control project exclusion for utilities. As discussed in section II.E. of this preamble, today's proposal would replace this pollution control project exclusion with a new pollution control project exclusion for all source categories.[8]

*C. The ''Clean Unit'' and ''Clean Facility'' Exclusion*

1. Introduction

The Applicability Subgroup of the CAAAC's NSR Reform Subcommittee considered many applicability options. While none of these proposals garnered the full Subcommittee's support, representatives of State and local regulators as well as environmental groups expressed general support for the idea that ''benign'' changes at existing emissions units should not be subject to the complicated NSR applicability rules related to determining a significant net emissions increase. There was also support for the proposition that the NSR applicability test should provide some deference to sources that have already undergone major NSR.

The EPA, after careful consideration of these discussions, believes that the best approach for a new exclusion is one that focuses on the existing emissions control of a unit, rather than the change being proposed. Almost all stakeholders identified the goal of ensuring that modified units apply state-of-the-art controls as being of paramount importance. Accordingly, where an emissions unit already meets this goal, environmental concerns associated with proposed changes are likely reduced. For example, it is the EPA's experience that in many cases where an existing well-controlled unit triggers major NSR, the permitting process does not necessarily result in improved controls. On the other hand, where the review is focused on units which have not recently been required to meet a control technology requirement, NSR can be expected to result in more effective controls and meaningful reductions in actual emissions.

Similarly, where an entire facility already meets the goal of the application of state-of-the-art controls and has undergone an air quality impact analysis of its emissions, environmental concerns associated with proposed changes are likely reduced if the changes remain consistent with requirements imposed by the original analysis. Thus, EPA is also proposing a ''clean'' facility exclusion that allows a major stationary source to make changes at its facility consistent with PSD or NSR permits that have been recently issued.

2. Description of the Clean Unit Proposal

Based on these factors, the EPA is today proposing a simplified applicability test for changes to existing emissions units that already are well-controlled considering the extent a current BACT/LAER review for a particular unit would result in lower emissions. In general, this new ''clean unit'' exclusion will allow States to exclude from major NSR, proposed changes to existing emissions units that have installed major BACT or LAER within the last 10 years or which otherwise qualify as a ''clean unit.'' Under this exclusion, sources can make any change to a qualifying unit so long as the change will not increase the unit's emissions rate (measured in terms of the unit's maximum hourly emissions, the NSPS test found at 40 CFR 60.14). Specifically, changes which do not increase the unit's hourly potential emissions would not be considered a physical or operational change and thus would not trigger major NSR.[9] See proposed

[7] The regulations define ''electric utility steam generating units'' as any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts (MW) of electrical output to any utility power distribution system for sale. See *e.g.*, existing section 51.166(b)(30).

[8] In the WEPCO Rule, the EPA also created special new source performance standard (NSPS) treatment for certain repowering projects and provided limited NSR exemptions for temporary and permanent Clean Coal Technology projects, and for certain ''very clean'' units. See *e.g.*, existing section 51.166(b)(2)(iii) (*i*), (*j*) and (*k*)]. All of these changes implemented special provisions in the 1990 Amendments. In the rule, the EPA also amended its NSPS regulations (40 CFR part 60) to allow a utility to use as its pre-change baseline its highest hourly emissions rate achieved during the 5 years prior to the proposed physical or operational change. The changes implementing the NSPS baseline change are neither discussed nor affected by today's rulemaking proposal.

[9] Under today's proposal, for units that are permitted to change feedstocks frequently, such as pharmaceutical manufacturing and certain chemical batch processes, the maximum hourly emissions rate test would be applied on a per feedstock basis to determine if an emission increase will occur. For example, a unit which has state-of-the-art volatile organic compounds (VOC) control technology and uses toluene and other organic solvents as feedstocks, the hourly maximum emission rate of toluene before and after the proposed physical or operational change would be assessed as if toluene alone was to be fully utilized by the unit before and after the proposed change. The other feedstocks would also be individually assessed. A change in feedstock would not trigger NSR if the control technology designed to control emissions resulting from the feedstock and the unit was previously permitted to use the feedstock. The EPA encourages suggestions in developing rules or guidance on other approaches for determining emissions

Continued

§§ 51.165(a)(1)(v)(C)(*10*), 51.166(b)(2)(iii)(L), 52.21(b)(2)(iii)(L), and 52.24(f).

The proposed ''clean unit'' exclusion would both simplify the applicability test for qualifying units and increase source flexibility. It would also reward sources that in the recent past have applied controls to their emissions units that were equal or comparable to BACT or LAER.

Ideally, the change in hourly potential emissions would be assessed immediately before and after the change to determine if an emissions increase did indeed occur. However, this may not be practical in many instances because information necessary to establish the hourly potential emissions rate may require considerable time to develop or collect. Therefore, under the proposed provision, the pre-change hourly potential emission rate may be established or verified at any time up to 6 months prior to the proposed activity or project. The EPA solicits comment on alternative periods for establishing the pre-change hourly emissions rate, particularly periods which might allow the use of routine compliance emissions tests to determine the emissions rate (e.g., annual). Also, under the proposed provision, where the unit is subject to a federally enforceable limitation (on operations or emissions) which limits the unit's hourly potential emissions to less than the maximum physically-achievable hourly rate, the unit's lower allowable rate must be used in determining if an emissions increase will occur at the unit.

3. What Constitutes a ''Clean Unit''?

For this exclusion to function, it is necessary to distinguish a well-controlled unit from a poorly controlled one. In other words, what criteria distinguish a unit eligible for this exclusion from one which is not? Criteria which allow a broad range of units to qualify could largely transform the existing applicability system into one based solely on assessing a unit's potential emissions, with the possibility of a dramatic increase in a unit's actual annual emissions without undergoing NSR.

The EPA proposes to require that in order to qualify as a ''clean unit'' an emissions unit must have a federally enforceable emissions limit that ''is comparable'' to the BACT or LAER requirements for that type of unit, whichever would otherwise be applicable to the proposed change. See proposed §§ 51.165(a)(1)(v)(C) (*10*) through (*13*), 51.166(b)(2)(iii)(L), 52.21(b)(2)(iii)(L), and 52.24(f). The EPA envisions that three types of limits would qualify: (1) BACT or LAER limits set within the last 10 years for the particular unit; (2) a limit set within the last 10 years for the particular unit by a State technology review program determined by EPA to be comparable to the Federal BACT or LAER programs; and (3) a limit found on a case-by-case basis—after notice and opportunity for public comment—to be comparable to the current BACT or LAER limits that would otherwise be imposed on the source after weighing the cost and benefits of additional or modified controls, including retrofit cost and benefits.

a. *Units with BACT or LAER Limits.* One starting point for determining whether a unit is well-controlled is the level of control required to satisfy BACT (in attainment/unclassified areas) or LAER (in nonattainment areas). For units which have recently undergone these reviews, re-evaluation of the technology shortly after the source is constructed or modified to determine if the technology is still ''state-of-the-art'' would likely result in very little or no incremental improvement in emissions control. Moreover, units that are recently permitted are far less likely to have physically deteriorated and more likely to be running near permitted capacity, reducing the risk that changes to the unit will result in increased utilization and increased actual emissions.

Therefore, the EPA is proposing that the new exclusion may presumptively apply to any unit which received a BACT or LAER limit in a currently applicable major NSR permit within 10 years of the proposed change under consideration. See proposed §§ 51.165(a)(1)(v)(C)(*11*)(*i*), 51.166(b)(2)(iii)(L)(*2*)(*i*), 52.21(b)(2)(iii)(L)(*2*)(*i*), and 52.24(f). In other words, for the first 10 years following issuance of a PSD or nonattainment NSR permit, units subject to BACT or LAER set in that permit are eligible for the clean unit exclusion. At least some members of the Subcommittee expressed concern that the 10-year period is too long given the improvement in control technology that can occur in some source categories. For this reason, EPA solicits comment on using a shorter period such as 5 years as the length of the Clean Unit presumption derived from a NSR permit.

During consideration of the Clean Unit Exclusion, several participants suggested that units subject to maximum achievable control technology (MACT) or reasonably available control technology (RACT) should also automatically qualify as clean units. A recently required MACT emissions limit, while not necessarily equal to BACT or LAER, is likely to result in significant emissions controls such that a BACT or LAER review would not necessarily result in significant additional emissions reductions. However, the EPA is also concerned that a MACT limit could be significantly less effective in limiting VOC emissions than BACT or LAER in many circumstances. A MACT emission limit may adequately control a toxic VOC but could result in emission increases of pollutants subject to NSR. For example, an incinerator installed to reduce a toxic VOC will increase nitrogen oxides ($NO_X$) emissions emitted to the atmosphere.

The EPA also has concerns with using Federal RACT limits to presumptively qualify a unit as a clean unit since RACT emission limits can be less stringent than LAER and BACT. Further, in some instances RACT is based on the attainment needs of the area and not a specific control technology standard. While EPA solicits comment on presumptively applying the clean unit exclusion test to units with Federal MACT or RACT limits, the EPA is not inclined to do so across the board. Rather, the EPA believes that MACT or RACT limits should be found to qualify for the Clean Unit exclusion using the case-by-case option described in section II.C.3.c.

*b. State Technology Programs Comparable to BACT or LAER.*There are many emissions units at stationary sources that were permitted according to a State's minor NSR permitting program. While these units were not subject to a major source BACT or LAER limit per se, they may have installed controls that would have satisfied major source BACT or LAER requirements at the time the permit was issued. For instance, several jurisdictions have control technology reviews as part of a State, local or tribal minor NSR program which requires new or modifying sources to meet emissions levels comparable to major source control technology requirements (BACT or LAER). For this reason, the EPA is proposing that permitting authorities may submit minor NSR control technology requirements for certification by the EPA that the minor NSR program requires control technology that would satisfy the requirements for the clean unit exclusion. See proposed §§ 51.165(a)(1)(v)(C)(*11*)(*ii*), 51.166(b)(2)(iii)(L)(*2*)(*ii*),

increases for processes with rapidly changing and mixed feedstocks.

52.21(b)(2)(iii)(L)(*2*)(*ii*), and 52.24(f). Once determined by EPA to be comparable, all units subject to emissions limitation established under the jurisdiction's minor NSR program would be eligible for the clean unit exclusion for the first 10 years following issuance of the permit. This could also apply to permits that have been issued previously under minor NSR technology requirements that are later determined to be comparable to major source BACT or LAER requirements. In such a case, the clean unit exclusion would apply to the unit covered by the minor NSR permit, and it would take effect once EPA makes the certification of comparability (i.e., the clean unit test would apply only to modifications taking place after the EPA certification of comparability). The clean unit test could apply to the qualifying unit for up to 10 years after issuance of the minor source permit. The EPA also solicits comment on whether a shorter period, such as 5 years, would be more appropriate.

The EPA also solicits comment on the appropriate standards for EPA to use in determining whether a permitting authority's minor NSR program control technology requirements are comparable to the BACT and LAER requirements. The EPA envisions that as a minimum a ''pre-certified'' minor NSR program comply with 40 CFR 51.160 through 164.[10]

*c. Qualification of Units on a Case-By-Case Basis.* In many cases an emissions unit not subject to major NSR is constructed or retrofitted with a control technology or strategy comparable to the best controls applied in practice. This may occur when a source minimizes emissions in order to ''net'' a unit out of major NSR or applies controls to comply with other provisions of the Act. For this reason, the EPA's proposed regulations would allow a source having a limit on an emissions unit determined to be comparable to BACT or LAER for the particular unit considering cost and benefits of additional or modified controls, including retrofit cost and benefits to qualify for the ''clean unit'' exclusion on a case-by-case basis. Specifically, an existing unit which has not undergone a BACT or LAER determination or comparable State technology requirement can also qualify as a ''clean unit'' if, in the informed judgment of the permitting agency, a current BACT or LAER determination for the unit would not be expected to result in any lower level of emissions from the unit for the pollutant in question. The costs, benefits and technical consideration associated with the retrofit application of additional controls to the particular unit may be considered by the permitting agency in the evaluation. Since this in effect may require the permitting authority to engage in a technology review that is similar to BACT or LAER review in order to qualify a unit for this exclusion, the EPA is asking for comment on other approaches for qualifying units.

Once a permitting authority makes this determination through a process involving notice and opportunity for public comment, the unit would be eligible for the clean unit exclusion for the next 5 years. As with the other types of proposed clean unit exclusions, EPA requests public comments on the proposed exclusion eligibility period. See proposed §§ 51.165(a)(1)(v)(C)(*11*)(*iii*), 51.166(b)(2)(iii)(L)(*2*)(*iii*), 52.21(b)(2)(iii)(L)(*2*)(*iii*), and 52.24(f).

The EPA solicits comments on several other alternative bases upon which a permitting authority could take to make the determination that a unit has a comparable BACT or LAER emissions limitation. The first would be based on an average of BACT or LAER for equivalent or similar sources over a recent period of time (e.g., most recent 3 years). The second would be based on the unit's control level being within some percentage (e.g., 5 or 10 percent) of the most recent, or average of the most recent, BACT or LAER levels for equivalent or similar sources. The EPA solicits comment on these approaches and on the general issues concerning whether and how EPA should impose a specific methodology for determining that a specific emissions limit is ''comparable'' to the BACT or LAER limit that would result from a major source review.

For all of the above tests, the EPA realizes that there are many source and emission unit categories for which BACT or LAER determinations do not exist, let alone recent determinations. For these sources, the EPA proposes that their level of control be gauged against the control level associated with BACT or LAER for emission units with similar emission stream characteristics. Since this in effect requires the permitting authority to engage in a BACT or LAER review in order to qualify a unit for this exclusion, the EPA is asking for comment on other approaches for qualifying units.

States are encouraged to use the permitting process required by title V of the Act as the vehicle for determining and recording which units at a title V source can qualify for this exclusion.[11] The permitting authority could use the title V permit issuance, revision or renewal process as the mechanism for making the case-by-case determination (so long as the opportunity for public comment is provided). For convenience, one, many or all units at a source could be reviewed and subjected to public notice and comment concurrently with the issuance or renewal of a title V operating permit. For units eligible for the ''clean unit'' exclusion due to a prior NSR BACT or LAER determination, or a determination under a program found comparable by EPA, the title V permit offers the opportunity to clearly set forth the status of the unit under the clean unit exclusion. Qualifying clean units and the pollutant for which the determination was made should be clearly identified and listed in the title V permit as ''clean units'' for NSR purposes.

Under this proposal, a unit that does not initially qualify for the clean unit exclusion could install controls meeting the criteria the EPA establishes for well-controlled units and thereby qualify to use the exclusion. The controls or pollution reduction strategy that are the basis for the clean unit determination must be in place and federally enforceable at the time the source relies on an exclusion under this provision. So long as these federally enforceable conditions are met, the source is free to make any change at the permitted unit including those which could affect a unit's efficiency, capacity, availability, longevity and utilization. However, changes which would compromise the original emissions unit's BACT or LAER control level or air quality impact (e.g., modified stack parameters which would cause or contribute to violation of any applicable ambient standard, replacement of the unit with a different type or size of unit, or reconstruction of the unit) would not be allowed. Also,

[10] In a separate rulemaking EPA has proposed revising the public review and comment requirements at 40 CFR 51.161 to give States more flexibility in processing minor source permits for projects that are determined to be ''less environmentally significant.'' Certain minor source actions, e.g., netting, that in effect shield a source from major source permitting requirements would not qualify for less environmentally significant status. See 60 FR 45529, 45549 (August 31, 1995).

[11] While rules implementing title V address how the unit's major NSR permit and BACT or LAER limit are incorporated into the title V permit, it is not clear that the status of a unit as a NSR clean unit would be included in the title V permit as an applicable requirement. Whether the status of a unit as a NSR clean unit presumption is an applicable requirement in the title V permit will likely depend upon how the clean unit test is adopted by the permitting authority (e.g., adopted as a SIP requirement). The EPA solicits comment on the best approach for implementing and coordinating the review and designation of clean units with the title V permit process.

for units excluded from major NSR under this proposed revision, the physical or operational change must still comply with all otherwise applicable Act and SIP requirements including any federally enforceable limits on emissions or operations and minor NSR requirements.

Finally, the determination that a unit is ''clean'' or ''well-controlled'' under this proposal is an applicability test and is independent from the case-by-case determination of BACT or LAER for sources subject to major NSR. While control technology which qualifies a unit as ''clean'' may be ''comparable'' to BACT or LAER for a particular unit considering its unique circumstances, it is not necessarily equal to BACT or LAER for that unit when considered as part of a new major facility or major modification, and in no way establishes a presumptive BACT or LAER for that unit, source type or category. Further, a 5- or 10-year presumption that a unit is ''clean'' does not in any way ''freeze'' BACT or LAER determinations in permitting actions. The Act requires that BACT and LAER be current determinations for sources subject to major NSR and the clean unit designation does not override this determination.

4. Description of the Clean Facility Proposal

Similar to the clean unit exclusion, EPA is proposing an exclusion for changes at clean facilities. This ''clean facility'' exclusion will allow States to exclude from major NSR, proposed changes to an existing major stationary source that has undergone major NSR for the entire source within the last 10 years. See proposed §§ 51.165(a)(1)(v)(C)(*11*), 51.166(b)(2)(iii)(M), 52.21(b)(2)(iii)(M), and 52.24(f). Under this exclusion, a major source can make any change as long as the source would still be in compliance with its major NSR permit. The EPA envisions this to allow any changes that do not include adding new units or allowing emissions trades that were not evaluated for air quality impacts in the major NSR permit. The exclusion would, however, allow a source to replace or reconstruct existing units so long as they continue to meet the emissions limitations established in the permit. Thus, such replacement or reconstruction would not result in a different type of emissions unit than envisioned and covered by the major NSR permit and its requirements. The addition of new emissions units would not be allowed under the proposal because such changes would not be consistent with the existing NSR permit. However, all other changes consistent with the terms of the major NSR permit would not be considered a ''physical or operational change'' for the purposes of major NSR applicability. Similarly, emissions trades may not be permissible where a different air quality impact would result since the PSD or NSR permit might limit such differing impacts.

As proposed, a clean major stationary source is one that underwent NSR within the last 10 years. The EPA requests comment on this approach and specifically on whether this proposed approach should not allow units or facilities to be replaced or reconstructed.

*D. Revision to the Netting Baseline*

This preamble describes and solicits comment on a new method for determining an existing source's baseline emissions for purposes of determining whether a physical or operational change will cause an increase in emissions and trigger NSR.

1. Introduction

As discussed, in order to determine whether a physical or operational change will result in an increase in emissions, it is necessary to compare a source's emissions before the change (its baseline emissions) with its emissions after the change. The EPA's existing regulations generally define baseline actual emissions as ''the average rate, in tpy, at which the unit actually emitted the pollutant during a 2-year period which precedes the particular date and which is representative of normal source operation.'' See, *e.g.*, existing § 52.21(b)(21)(ii). The Administrator ''shall'' allow use of a different time period ''upon a determination that it is more representative of normal source operation.'' Id. Prior to the WEPCO rule, EPA historically used the 2 years immediately preceding the proposed change to establish the baseline. (See 57 FR 32323.) However, in the WEPCO rule, EPA adopted a ''presumption'' that utility sources could use any 2-year period out of the preceding 5 years.

During the CAAAC Subcommittee deliberations, there was considerable interest in the issue of the proper baseline. For instance in the automobile industry, where low utilization rates have persisted at some plants for several years, EPA's baseline presumptions have the effect of leaving plant managers with the choice of surrendering capacity (that would not be considered representative of normal operations under the current NSR rules) or taking the time and expense to secure a major NSR permit for even small, non-excluded changes to a portion of the plant.

Provisions in the existing regulations which, at the discretion of the permitting authority, allow the use a different, ''more representative,'' period have not alleviated the problem in the view of many Subcommittee members. As with other aspects of current netting rules, establishing representative baseline periods other than the 2-year period preceding the proposed change can be complex and time-consuming, and often involves disputed judgment calls.

Several industry applicability proposals included changing to a netting baseline that allows sources to use the highest year or 12 consecutive months out of the previous 10 years. Generally, the participating State air pollution management officials favored this increase in flexibility. Some of the environmental group representatives also recognized that the existing baseline approach has the impact of taking away ''used and useful'' capacity and that a longer baseline period would be appropriate. On the other hand, some participants were concerned that the test for determining a net emissions increase take into account not only annual emissions levels but short-term levels as well. The proposal outlined below addresses these concerns.

2. Description of Proposed Netting Baseline

The EPA is today proposing to extend the time period for determining baseline in the definition of actual emissions to 10 years for all source categories and to allow sources to base their actual emissions on the highest consecutive 12 months during this 10-year period. See proposed §§ 51.165(a)(1)(xii)(b), 51.166(b)(21)(ii) and 52.21(b)(21)(ii). As described below, in nonattainment areas and ozone transport regions, the EPA proposes that the 12-month period begin on or after November 15, 1990 to be consistent with the area's emissions inventory and attainment plan requirements. See proposed § 51.165 (a)(1)(xii)(B). In addition, this proposal would replace the any 2-years-in-5 baseline established as a presumption for utilities in the WEPCO rulemaking and would be available for all source categories, subject to the restrictions discussed below. See, *e.g.*, existing § 51.166(b)(21)(v).

The EPA's intent is to allow sources to determine applicability based on their highest level of utilization and not necessarily their highest emissions rate. The emissions rate of units at issue may be subject to any number of current Federal or State restrictions (e.g., RACT,

MACT, BACT, LAER, NSPS, national emission standard for HAP (NESHAP)) as well as voluntary limits (e.g., reductions used for netting, offsets, Emission Reduction Credits creation) and these limits may have been imposed since the time the source achieved its highest emissions level. Therefore, these limits must be included in establishing the baseline emissions. For this reason, the EPA is today proposing that sources calculate the baseline by using their current emissions factor in combination with the utilization level from the 12-month time period selected. This safeguard insures that no significant loss of environmental protection will result from the proposed change.

Under the proposed provision, EPA also would limit the new baseline in nonattainment areas and ozone transport regions to no sooner than the enactment date of the 1990 Amendments, November 15, 1990. The 1990 Amendments included a number of changes in how emissions are to be inventoried and tracked, particularly in nonattainment areas and ozone transport regions. The changes strengthen reasonable further progress tracking requirements, offset limitations and RACT requirements for nonattainment areas and establish enhanced emissions inventory requirements for all areas. The EPA believes that allowing baselines prior to the 1990 Amendments may complicate and impede State and local efforts to track and reduce emissions from a 1990 emissions baseline which in many cases may be lower than pre-1990 emission levels. Therefore, the EPA is proposing to limit use of an expanded baseline in nonattainment areas and ozone transport regions to a period of time no earlier than November 15, 1990 and no greater than 10 years, whichever is more restrictive. This means that sources in nonattainment areas would not be able to utilize a 10-year look back until November 15, 2000.

In attainment/unclassifiable areas, use of pre-1990 emission baselines would also pre-date general emission inventory and reporting requirements of the 1990 Amendments which are expected to improve recordkeeping and inventory maintenance by State and local agencies. Unlike nonattainment areas and ozone transport regions, however, these inventory and data requirements are not directly linked to the PSD requirements. Therefore, the EPA sees no clear reason why the use of a 10 year look back should be limited to after November 15, 1990 in attainment/unclassifiable areas. However, EPA solicits comment on this issue for both attainment/unclassifiable areas and nonattainment areas.

It is the EPA's experience that many sources keep accurate records on emissions or operations for only 3 to 5 years, unless expressly required to do so for a longer period. A number of State and local permitting authorities have similar experiences. Thus, the EPA has reservations concerning the use of 10-year, and longer, baselines and solicits comment on whether a shorter (e.g., 5-year) period would be more appropriate. In addition, if the EPA adopts a 10-year look back period, the EPA also proposes that such period be available only when adequate emissions and/or capacity utilization data are available for the baseline calculation. The EPA solicits comment on the need to condition the use of such periods upon the accuracy and completeness of available data, and the need to establish specific criteria, through guidance or otherwise, for accuracy, completeness and recordkeeping when using older data.

As noted, the EPA's existing regulations provide that the source may seek to use another time period outside the 2 preceding years upon a finding by the permitting authority that this other period is ''more representative'' of normal source operations. See existing §§ 51.165(a)(1)(xii)(B), 51.166(b)(21)(ii), 52.21(b)(21)(ii), and 52.24(f)(13)(ii). This provision has been a source of confusion and uneven implementation. The EPA therefore proposes to eliminate this provision. In other words, if the EPA were to adopt a 10-year look back, a source may simply choose the highest consecutive 12-month period of utilization within the 10 years prior to a proposed physical or operational change (but not before November 15, 1990 in ozone transport regions and nonattainment areas). Neither the permitting authority nor the EPA will retain any discretion to allow a time period outside this extended range.

The EPA also solicits comment on how this proposed extension of the emissions baseline for netting may interact with the statutory requirements in section 182 (c) and (e) of the Act applicable in serious, severe and extreme ozone nonattainment areas. Section 182(c) (6), (7) and (8) of the Act provides special rules for modifications at major sources in serious and severe ozone nonattainment areas including an aggregation of all net increases in emissions from a source over 5 consecutive calendar years. Section 182(e)(2) of the Act governs applicability of NSR to modifications in extreme ozone nonattainment areas requiring any change that results in any increase in emissions from a discrete operation or unit to be subject to major NSR. While the determination of the emissions baseline is somewhat independent of the actual netting calculation, clearly the proposed new baseline can affect netting transactions and may be in tension with the design and intent of these statutory provisions.

This proposal does not extend the current 5-year contemporaneous period for considering increases and decreases for netting. See, *e.g.*, existing §§ 51.165(a)(1)(vi)(B), 51.166(b)(3)(ii), 52.21(b)(3)(ii), and 52.24(f)(6)(ii). While this proposal would allow a 10-year look back from the activity under review to determine baseline emissions, any contemporaneous increases and decreases must occur within the 5-year window to be applicable for netting. The EPA solicits comment on the effect of the differing look back and contemporaneous periods and any reasons why these periods should be consistent, over either 5 or 10 years.

3. Protection of Short-term Increments and NAAQS

In discussions of a longer baseline, environmental group representatives linked any change from the existing baseline with the adoption of safeguards for short-term NAAQS and PSD increments.[12] These representatives suggested that the current netting analysis be changed to require a source to go through major NSR when there is a net increase in short-term (e.g., hourly, daily, weekly or monthly, depending on the emission tracking capability of the source) emissions when past actual emissions are represented by the highest short-term emissions in the previous year. This step could provide assurances that peak emissions, which could cause violations of short-term NAAQS, would not be allowed to increase without major NSR. Some applicability subgroup members argued that the short-term test should be an air quality screening test rather than an NSR applicability trigger.

The EPA carefully considered the possibility of adding a short-term ''increase'' test to the netting calculation; however, ultimately decided against this in the proposal for two reasons. First, the EPA is concerned that a test that relies on a source's highest short-term actual emissions would be too easy to circumvent. For a short time, sources can run at maximum capacity so that the baseline short-term emissions would likely be nothing less than the source's maximum potential emissions.

[12] The PSD increments are explained in section IV.B.1.

Moreover, the EPA is not sure that limiting the source to its highest past short-term emissions level will necessarily provide any additional protection to NAAQS, increments or Class I AQRV. The current regulations already restrict the creditability of some decreases in emissions where the overall netting transaction could jeopardize air quality. In particular, a provision in the definition of ''net emissions increase'' allows credit for a reduction only to the extent that it has approximately the same qualitative significance for public health and welfare as the increase from the proposed change. See, existing §§ 51.165(a)(1)(vi)(E)(*4*), 51.166(b)(3)(vi)(*c*), 52.21(b)(3)(vi)(*c*), and 52.24(f)(6)(v)(*d*). In a June 28, 1989, rulemaking (54 FR 27286) EPA clarified that aspect of the regulations to require that, despite the absence of a significant net increase in emissions, an applicant proposing to net out of review must demonstrate that the proposed netting transaction will not cause or contribute to an air quality violation before the emissions reduction may be credited.

To ensure that the change to a netting baseline based on the highest 12 consecutive months out of the last 120 consecutive months does not adversely impact short- (or long-) term ambient standards, the EPA is proposing to clarify the regulations by requiring that, to be creditable for netting purposes, an emissions reduction must be sufficient to prevent the proposed increase from causing or contributing to a violation of any NAAQS or PSD increment and must not have an adverse impact on AQRV (including visibility) of Class I areas.[13] See proposed §§ 51.165(a)(1)(vi)(E)(*4*), 51.166(b)(3)(vi)(C), 52.21(b)(3)(vi)(C) and 52.24(f). As discussed above, this requirement is inherent in the EPA's current regulations and, therefore, should already be part of any netting analysis.

*E. Pollution Control Project Exclusion*

The 1990 Amendments are stimulating a vast number of sources in the country to undertake pollution control and pollution prevention projects during the next few years. As a result, most stakeholders urged EPA to clarify the applicability of major NSR requirements to pollution control and pollution prevention projects. The EPA has previously adopted a limited exclusion for pollution control project undertaken by utilities as part of the 1992 WEPCO rulemaking. See 57 FR 32314. Based on the stakeholder deliberations, EPA issued policy guidance which covered all other source categories and which excluded qualifying pollution control projects from major NSR.[14] Today, EPA proposes to replace both the WEPCO exclusion and the policy guidance with a single comprehensive regulatory exclusion for all types of pollution control projects (including add-on controls, switches to less-polluting fuels, and pollution prevention projects). The proposed exclusion is designed to minimize procedural delays while still ensuring appropriate environmental protection (i.e., that a project be allowed not cause or contribute to a violation of a NAAQS or PSD increment and not adversely impact on the AQRV of Class I areas).

While this proposal was modeled after the WEPCO exclusion, it contains several significant changes reflecting the fact that the WEPCO exclusion was limited to a single source category and covered only a small, finite set of pollution control projects specific to utility units. In contrast to the WEPCO exclusion, this proposal reflects the more complex task of addressing a vast array of pollution control and pollution prevention projects at a variety of sources facing numerous Federal, State and local environmental requirements. Specifically, this proposal:

- Provides a much broader definition of ''pollution control project'' than that adopted in the WEPCO rule and includes, unlike the WEPCO rule, pollution prevention projects;
- Deletes the requirement that add-on controls and fuel switches be subject to an ''environmentally beneficial'' test; instead only pollution prevention projects are subject to this additional safeguard;
- Incorporates the safeguard that no project, whether an add-on control, a fuel switch, or pollution prevention, can result in an increase in actual emissions that will cause or contribute to a violation of a NAAQS or PSD increment, and extends the policy to protection against adverse impacts of AQRV in a Class I areas.[15]

The EPA encourages commenters to address EPA's proposed decision to supersede the WEPCO pollution control project exclusion with a single exclusion applicable to all types of sources. Specifically, EPA invites comment on two alternative approaches: (1) In addition to today's proposed exclusion for all source categories, retain the WEPCO pollution control project exclusion for utilities only or (2) in lieu of the comprehensive exclusion proposed today, extend the WEPCO pollution control project exclusion to all source categories.

1. Background

In the WEPCO rulemaking, the EPA amended its PSD and nonattainment NSR regulations as they pertain to utilities by adding ''the addition, replacement or use of a pollution control project at an existing electric utility steam generating unit'' to the list of activities excluded from major NSR applicability. See, *e.g.*, existing § 51.166(b)(2)(iii)(*h*). Because the WEPCO rulemaking was directed only at the utility industry, the EPA limited the types of projects eligible for the exclusion to those types of controls typically associated with that industry, namely add-on controls and fuel switches to a less polluting fuel.[16]

The EPA built two safeguards into the exclusion in the WEPCO rulemaking. First, a project that meets the definition of pollution control project would nonetheless not qualify for the exclusion where the ''reviewing authority determines that [the proposed project] renders the unit less environmentally beneficial.'' See, *e.g.*, existing § 51.165(a)(1)(v)(C)(*8*). This provision is buttressed by a second safeguard that directs permitting authorities to evaluate the air quality impacts of a proposed pollution control project that the reviewing authority believes could result in a significant net increase in representative actual annual emissions of a criteria pollutant (id.; see also 57 FR 32322), since under no circumstances can a pollution control project cause or contribute to violation of a NAAQS, PSD increment, or visibility limitation.[17] See, *e.g.*, existing § 51.165(a)(1)(v)(C)(*8*)(*ii*); 57 FR 32322.

[13] The AQRV in Federal Class I areas are explained in section IV.

[14] July 1, 1994 memorandum from John Seitz, Director, OAQPS, ''Pollution Control Projects and New Source Review (NSR) Applicability''.

[15] The WEPCO rule refers specifically to ''visibility limitation'' rather than ''air quality related values.'' However, EPA clearly stated in the preamble to the final rule that permitting agencies have the authority to ''solicit the views of others in taking any other appropriate remedial steps deemed necessary to protect Class I areas * * *. EPA emphasizes that all environmental impacts, including those on Class I areas, can be considered * * *.'' *See* 57 FR 32322. Further, the statutory provisions in section 165(d) of the Act plainly are intended to protect against any adverse impact on AQRV in such Class I lands (including visibility). Based on this statutory provision, EPA believes that any air quality assessment for a pollution control project should consider impacts on visibility and any other relevant AQRV for any Class I areas that may be affected by the proposed project.

[16] The definition also includes certain clean coal technology demonstration projects. See, *e.g.*, existing section 51.166(b)(2)(iii)(*i*) and (*j*). Today's proposal would not affect these applicability rules for certain clean coal technology projects that were codified in the WEPCO rulemaking.

[17] The WEPCO rule adds that when evaluating impacts the permitting authority may use that part

Subsequent to issuance of the WEPCO rule, EPA's July 1, 1994, policy guidance provided a limited pollution control project exclusion for other source categories on a case-by-case basis. The July 1994 guidance will remain in effect until the EPA takes final action on today's proposal.

2. Description of Proposed Exclusion of Pollution Control Projects

The EPA proposes to adopt for all source categories a pollution control project exclusion from the definition of ''physical or operational change'' within the definition of major modification. See proposed §§ 51.165(a)(1)(v)(C)(*8*), 51.166(b)(2)(iii)(H), 52.21(b)(2)(iii)(H), and 52.24(f). This proposed exclusion will shield these projects from being considered ''major modifications'' and subject to major NSR. As proposed, the exclusion encompasses add-on controls, switches to less polluting fuels and pollution prevention projects and is subject to one overarching safeguard first applied in WEPCO: that the proposed pollution control project cannot result in an emissions increase that will cause or contribute to a violation of a NAAQS or PSD increment. See 57 FR 32322. As discussed, while the WEPCO rulemaking also extended this prohibition to ''visibility limitations,'' EPA is proposing instead to focus the protection on AQRV (including visibility) in Class I areas. In addition, for pollution prevention projects, the permitting authority must find that the project is environmentally beneficial before such projects may qualify as a pollution control project.

*a. Types of Projects Covered.* (1) Add-On Controls and Fuel Switches. In the WEPCO rulemaking, EPA found that both add-on emissions control projects and fuel switches to less polluting fuels could be considered to be pollution control projects. Today's proposal affirms that these types of projects are appropriate candidates for the exclusion, but also greatly expands the types of add-on controls covered to include other control projects. See proposed §§ 51.165(a)(1)(xxv), 51.166(b)(31), 52.21(b)(31), and 52.24(f). These types of projects include:

—The installation of conventional and advanced flue gas desulfurization and sorbent injection for sulfur dioxide ($SO_2$);

—-Electrostatic precipitators, baghouses, high-efficiency multiclones, and scrubbers for particulate or other pollutants;

—Flue gas recirculation, low-$NO_X$ burners, selective non-catalytic reduction and selective catalytic reduction for $NO_X$; and

—Regenerative thermal oxidizers, catalytic oxidizers, condensers, thermal incinerators, flares and carbon absorbers for VOC and HAP.

Projects undertaken to accommodate switching to a less-polluting fuel, such as natural gas when the source is burning coal, would also qualify for the proposed exclusion. In some instances, where the emissions unit's capability would otherwise be impaired as a result of the fuel switch, this may involve certain necessary changes to the pollution generating equipment (e.g., boiler) in order to maintain the normal operating capability of the unit at the time of the project.

The EPA has also concluded that substitutions of less potent ODS for more potent ODS is environmentally beneficial and is therefore proposing that such substitutions be considered a pollution control project for PSD purposes. See proposed §§ 51.166(b)(2)(iii)(N) and 40 CFR 52.21(b)(2)(iii)(N). This proposed exclusion is described further in section VI.B.2. of this preamble.

(2) Pollution Prevention Projects. The EPA's policy is to promote pollution prevention approaches and to remove regulatory barriers to sources seeking to develop and implement pollution prevention solutions to the extent allowed under the Act. For this reason, the EPA proposes today to include in the definition of pollution control projects switches to inherently less-polluting raw materials and processes and certain other types of ''pollution prevention'' projects.[18] For instance, under these proposed regulations, VOC users who switch to water-based or powder paint application systems as a strategy for meeting RACT or switch to a non-toxic VOC to comply with MACT requirements, could qualify for this exclusion.

Accordingly, under this proposal permitting authorities would be allowed to consider excluding from major NSR raw material substitutions, process changes and other pollution prevention strategies where the proposed changes are determined to be environmentally beneficial as discussed below. See proposed §§ 51.165(a)(1)(xxv)(A)(*6*), 51.166(b)(31)(i)(F), 52.21(b)(32)(i)(F), and 52.24(f).

*b. Safeguards.* (1) General Applicability. For the purpose of this proposed exclusion, a pollution control project is an activity or project at an existing emissions unit where the primary purpose of such activity or project is the reduction of air pollutants subject to regulation under the Act at the emissions unit. See proposed §§ 51.165(a)(1)(xxv), 51.166(b)(31), 52.21(b)(31), and 52.24(f). The proposed exclusion would not be applicable to air pollution controls and emissions associated with the construction of a proposed new emissions unit. Consistent with the WEPCO rule and EPA's existing policy guidance the replacement of an existing emissions unit with a newer or different one (albeit more efficient and less polluting) or the reconstruction of an existing emissions unit would not qualify as a pollution control project. Similarly, the fabrication, manufacture or production of pollution control/prevention equipment and inherently less-polluting fuels or raw materials would not qualify as pollution control projects (e.g., a physical or operational change for the purpose of producing reformulated gasoline at a refinery is not a pollution control project under the proposed exclusion).

A point was raised to EPA that new pollution control technologies are likely to be developed over time that will meet the same criteria that technologies named above have met. Consequently, a process would be useful whereby any such new technology qualifies as a ''pollution control project'' when a history of performance has been established. The EPA is therefore proposing that a new technology which meets the following criteria should be considered eligible for a pollution control project exclusion: (1) It has been installed for the purposes of a pollution control project as defined in the regulation; (2) it has been demonstrated in practice; (3) it has been determined by the permitting authority to be environmentally beneficial. See proposed §§ 51.165(a)(1)(xxv)(A)(*7*), 52.21(b)(32)(i)(G), 51.166(b)(31)(i)(G), and 52.24(f).

The EPA solicits comment on extending the pollution control project

of any increase that exceeds an emissions level used for that source—if any—in the most recent air quality impact analysis in the area conducted for the purpose of title I.

[18] As defined in proposed sections, pollution prevention means any activity that through process changes, product reformulation or redesign, or substitution of less-polluting raw materials, eliminates or reduces the release of air pollutants and other pollutants to the environment (including fugitive emissions) prior to recycling, treatment, or disposal; it does not mean recycling (other than certain ''in-process recycling'' practices), energy recovery, treatment, or disposal [see Pollution Prevention Act of 1990, Pub. L. 101–508, section 6602(b) and section 6603(5) (A) and (B), 42 U.S.C. sections 13101(b) and 13102(5) (A) and (B); see also ''EPA Definition of 'Pollution Prevention,''' memorandum from F. Henry Habicht II, May 28, 1992].

exclusion to new qualifying technologies and the qualification criteria. Specifically, EPA requests comment on whether control technologies, other than those listed above and at §§ 51.165(a)(1)(xxv)(A)(*1*) through (*6*), 52.21(b)(32)(i) (A) through (E), and 51.166(b)(31)(i) (A) through (E) must be comparable in effectiveness to those listed technologies on a pollutant-specific basis in order to qualify for the exclusion contained under proposed §§ 51.165(a)(1)(xxv)(A)(*7*), 52.21(b)(32)(i)(G), 51.166(b)(31)(i)(G), and 52.24(f).

The EPA also solicits comment on whether applicability of the pollution control project exemption should be extended to ''cross media'' pollution control projects, and whether they should be required to meet the ''environmentally beneficial'' test.[19] To qualify for this exemption, as for all pollution control projects, a ''cross media'' pollution control project could not cause or contribute to a violation of any NAAQS or PSD increment or have an adverse impact on AQRV in a Class I area.

(2) The Cause or Contribute Test. A proposed pollution control project, or any physical or operational change, cannot result in an emissions increase that will cause or contribute to a violation of any NAAQS or PSD increment, or have an adverse impact on AQRV in a Class I area. See sections 110(a)(2)(C), 165, and 173 of the Act; see also 57 FR 32322–32323. To ensure that the proposed pollution control project exclusion does not have this proscribed impact, EPA is also proposing to adopt (with some changes) the air quality impacts safeguard currently in place for utility pollution control projects. See proposed §§ 51.165(a)(1)(v)(C)(*8*), § 51.166(b)(2)(iii)(H), § 52.21(b)(2)(iii)(H), and § 52.24(f).

It is possible that a pollution control project, while significantly reducing the emissions rate of a targeted pollutant, could still cause an increase in actual emissions of that or another pollutant at the source. This could occur either from the project causing collateral emissions (such as in the case of a VOC incinerator which causes $NO_X$ emissions) or through a utilization change (where a project reduces an emission rate but increased utilization stemming from the project results in increased emissions of the same or other air pollutants). In either case, the emissions increases could cause or contribute to a violation of any NAAQS or PSD increment, or have an adverse impact on AQRV.

Under the WEPCO rule, permitting authorities can require a source to model its impacts whenever (1) the permitting authority has reason to believe that the proposed project would result in a significant net increase in actual emissions of any criteria pollutant over levels used for that source in the most recent air quality impact analysis; and (2) the permitting authority has reason to believe that such an increase would cause or contribute to a violation of any NAAQS or PSD increment or visibility limitation. If this analysis indicates that the increase in emissions will cause or contribute to a violation of any NAAQS or PSD increment, or result in either visibility limitation or impairment, the pollution control exclusion does not apply. See 57 FR 32322.

The EPA believes that such safeguard needs to be included in this proposal as well. Thus, where a pollution control project will result in a significant increase in actual emissions and the increased level has not been previously analyzed for its air quality impact and raises the possibility of a NAAQS or increment or adverse impact on an AQRV, the permitting authority would require the source to provide an air quality analysis sufficient to demonstrate that the impact of the project would not cause or contribute to a violation of any NAAQS or PSD increment, or have an adverse impact on AQRV. The EPA would not necessarily require that the increase be modeled, but the source must provide sufficient data to satisfy the permitting authority that the new levels of emissions will not cause or contribute to a violation of any NAAQS or PSD increment, and will have an adverse impact the AQRV in nearby Class I areas.

Since a significant increase in a nonattainment pollutant would be considered to contribute to the existing nonattainment problem, in the case of nonattainment areas the State or the source would be required under this proposal to mitigate (e.g, through offsets or SIP measures) any significant increase in a nonattainment pollutant resulting from the pollution control project. De minimis collateral emissions increases (e.g., less than 40 tpy of VOC in a moderate ozone nonattainment area) would not trigger such mitigation requirements. However, a de minimis increase may be subject to a State's minor NSR requirements.

(3) Determination of Increase in Emissions. The EPA is today proposing to use a representative actual annual emissions approach to determining whether a pollution control project will result in increased emissions. See proposed §§ 51.165(a)(1)(v)(C)(*8*), 51.166(b)(2)(iii)(H), 52.21(b)(2)(iii)(H), and 52.24(f). This is the methodology developed in the WEPCO rule and is explained in detail in that rulemaking. See 57 FR 32323. The use of this approach is premised on the EPA's experience and expectation that in most circumstances pollution control projects will not affect how the source is operated so that the calculation of whether a pollution control project will result in an emissions increase can be made through the simple comparison of pre-change and post-change emissions rates. Of course, where the permitting authority expects source operations to change, this methodology allows the post-change emissions to be projected based on the new operating levels. In the case of a pollution control project that will not affect utilization but collaterally increases a non-targeted pollutant, this proposal requires that the actual increase (calculated using the new emissions rate and current utilization pattern) must be analyzed to determine its air quality impact.

Although the EPA is supportive of pollution prevention projects and strategies, special care must be taken in classifying a project as a pollution control project and in evaluating a project under a pollution control project exclusion. Virtually every modernization or upgrade project at an existing industrial facility which reduces inputs and lowers unit costs has the concurrent effect of lowering an emissions rate per unit of fuel, raw material or output. Nevertheless, it is clear that these major capital investments in industrial equipment are the very types of projects that Congress intended to address in the new source modification provisions. See *Wisconsin Electric Power Co.* v. *Reilly*, 893 F.2d 901, 907–10 (7th Cir. 1990) (rejecting contention that the utility life-extension project was not a physical or operational change); *Puerto Rican Cement Co., Inc.* v. *EPA*, 889 F.2d 292, 296–98 (1st Cir. 1989) (major NSR was found to be applicable to a modernization that decreased emissions per unit of output). Moreover, projects which significantly increase capacity, decrease production costs, or improve product marketability may dramatically increase source operations. In these situations, the

[19] A ''cross media'' pollution control project could be defined as either a control technology or application to comply with limitations established under other Federal environmental laws (e.g., Safe Drinking Water Act or Clean Water Act) that results in emissions to the atmosphere. For example, to comply with an effluent limitation established under the Clean Water Act, a source chooses to install a control device that removes the pollutant from the wastewater stream and discharges it into the atmosphere. This type of pollution control project could qualify for the exclusion provide it is environmentally beneficial.

environment may or may not see a reduction in overall source emissions due to the project.[20] Nevertheless, the EPA believes that these types of projects may have other desirable environmental effects by reducing energy and raw materials consumption and minimizing waste by-products. Consequently, the EPA solicits comment on how to address pollution prevention projects that can be reasonably expected to result in a significant increase in emissions resulting from increased utilization of the affected emissions unit(s) where notwithstanding such increase an overall positive environmental benefit is evident. Specifically, where emissions are expected to increase significantly as a result of a pollution prevention project, should these types of projects be allowed to take advantage of this pollution control project exclusion?

3. The Environmentally Beneficial Test

The WEPCO rule also provided that, to qualify for exclusion, a pollution control project cannot render the unit less environmentally beneficial. For the proposed list of pollution control projects and for fuel switches to a less-polluting fuel, EPA is satisfied that the overall impact on the environment of these projects is beneficial and that, consequently, such projects are desirable from an environmental perspective. These are the very types of pollution controls that have historically been applied to new and modified major and minor sources for the purpose of reducing emissions based on known and permissible environmental effects. Inherent in their historic use has been the basic understanding that from an overall environmental perspective the use of such controls is acceptable. The EPA has no reason at this time to doubt the validity of this presumption when such controls are applied to existing sources in a manner consistent with standard and reasonable practices.[21] Consequently, as part of the exclusion for pollution control projects, EPA's proposal would not require an overall environmental impact test for the listed pollution control projects. See proposed §§ 51.165(a)(1)(xxv)(A) (1) through (5), 51.166(b)(31)(i) (A) through (E), 52.21(b)(31)(i) (A) through (E), and 52.24(f).

However, the EPA proposes to retain the environmentally beneficial standard for pollution prevention projects. See proposed §§ 51.165(a)(1)(xxv)(A)(*6*), 51.166(b)(31)(i)(F), 52.21(b)(31)(i)(F), and 52.24(f). Unlike the list of pollution control projects described above for which the environmental impacts are known and EPA is satisfied that the projects will be environmentally acceptable, a project that may be acclaimed as a pollution prevention project may not be as well documented or substantiated as others and its effectiveness may depend on site-specific factors. Any project requesting a pollution prevention exclusion should be reviewed by the permitting authority to ensure that the project's overall impact on the environment is beneficial.[22] Once a particular kind of project has been demonstrated to be environmentally beneficial, the permitting authority could rely on this demonstration in evaluating subsequent applications for the same kind of project. A subsequent project could be presumed environmentally beneficial unless case-specific factors or impacts would indicate otherwise.

4. Procedural Safeguards

Nothing in current guidance or in this proposal voids or creates an exclusion from any applicable minor NSR preconstruction review requirement in any SIP that has been approved pursuant to section 110(a)(2)(C) of the Act and 40 CFR 51.160 through 164. See footnote 10. Accordingly, the EPA believes that a pollution control project qualifying for this proposed exclusion generally will be required by the applicable SIP to obtain a minor NSR permit prior to beginning construction. The EPA expects the minor NSR permitting process to be the mechanism by which the permitting agency reviews the pollution control project to ensure that the project design is consistent with standard and reasonable practices, determines if a significant net increase in representative actual emissions will occur and, if so, whether the resultant air quality or AQRV impacts are acceptable. See 57 FR 32322.

In addition, as discussed above, for a proposed project to qualify as a pollution control project the permitting agency must first determine that the project will be environmentally beneficial. The decision-making process should include documentation of the basis for a finding that a proposed pollution prevention project is environmentally beneficial. The EPA also solicits comment on the adequacy of these procedural safeguards and the need for any additional or alternative safeguards.

5. Emission Reduction Credits

In general, certain pollution control projects approved for an exclusion from major NSR could result in emission reductions which may serve as NSR offsets or netting credits. Under this proposal, credit may be given for all or part of the emission reductions equal to the difference between the pre-modification actual baseline emissions and post-modification PTE for the decreased pollutant provided that (1) the project will not result in a significant collateral increase in actual emissions of any criteria pollutant, (2) the project is still considered environmentally beneficial, and (3) all otherwise applicable criteria for the crediting of such reductions are met (e.g., quantifiable, surplus, permanent, and enforceable). Where an excluded pollution control project results in a significant collateral increase of a criteria pollutant, emissions reduction credits from the pollution control project for the controlled pollutant could still be granted provided, in addition to (2) and (3) above, the actual collateral increase is reduced below the applicable significance level, through either internal contemporaneous reductions or external offsets. However, neither the exclusion from major NSR nor any credit (full or partial) for emission reductions would be available where the type or amount of the emissions increase which would result from the use of such credits would lessen the environmental benefit associated with the pollution control project to the point where the project would not have initially qualified for an exclusion.

The EPA solicits comment on alternative methods for calculating emissions reduction credits, especially if the NSR applicability rules are revised.

[20] This is in marked contrast to the addition of pollution control equipment which typically does not, in EPA's experience, result in any increase in the source's utilization of the emission unit in question.

[21] The presumption that the listed projects are environmentally acceptable is premised on an understanding that such controls would be designed and operated in a manner consistent with standard and reasonable practices, (e.g., increases in collateral pollutants are minimized within the control's inherent design, no unacceptable increased risk due to the release of toxic pollutants would occur). Where a permitting agency determines that an otherwise listed project would not be constructed and operated in such a manner, then that specific project would not qualify as a listed project for the purpose of the exclusion.

[22] For example, a pollution prevention project which while decreasing emissions of a criteria pollutant results in an unacceptable increased risk due to the release of air toxics should not be considered environmentally beneficial. However, the EPA expects that many pollution prevention projects will be for the purpose of compliance with title III MACT requirements and by their nature will result in reduced risk from air toxics. Consequently, in judging whether a pollution prevention project can be considered environmentally beneficial, permitting authorities may consider as a relevant factor whether a project is being undertaken to bring a source into compliance with a MACT, RACT, or other Act requirement.

*F. Proposed Plantwide Applicability Limitations (PAL)*

The EPA today proposes a new applicability approach for existing sources under which a source, if authorized by a State in a SIP, may base its NSR applicability on a plantwide emissions cap, termed a plantwide applicability limitation (PAL). So long as source activities do not result in emissions above the cap level, the source will not be subject to major NSR. The voluntary source-specific PAL is a straightforward, flexible approach to determine whether changes to an existing major stationary source result in an emissions increase. In the NSR Reform Subcommittee deliberations, the PAL was viewed as an alternative that a plant manager could readily understand. Instead of a case-by-case assessment of whether a modification is excluded from major NSR, the manager knows that as long as the plant stays within its emissions cap, major NSR will not be triggered. Production units can be started and stopped, product lines reconfigured, and products changed and revamped without delay from major NSR.

In addition, the PAL approach should provide a valuable tool for managing a number of other Act requirements. For instance, a NSR PAL may also include terms that allow changes to be made without triggering minor NSR or which essentially preauthorize the minor NSR approval, as allowed by State law and the SIP. In fact, the EPA and the State of Oregon have been working with Intel to develop a NSR/title V permit that uses Oregon's plant site emission limit program, minor NSR pre-approval, pollution prevention, and synthetic minor limits on any HAP to create a flexible permit under title V, major NSR, and the State's preconstruction review program. Available information regarding this permit is in the public docket identified at the beginning of this preamble.

In short, EPA foresees the PAL option offering a number of advantages for industry, permitting authorities and the environment, including (1) increased operational flexibility and the ability to make timely changes to react to market demand; (2) certainty regarding the level of emissions at which a stationary source will be required to undergo major NSR (thereby eliminating the need to establish a baseline for each modification, calculate the contemporaneous increases and decreases, and determine whether the source qualifies under another exclusion or another emissions increase test); (3) a decreased permitting burden for the source and the permitting authority; (4) an incentive for source owners and operators to create room for growth under the cap by implementing pollution prevention and other pollution reduction strategies on existing emissions units; and (5) reduction of some of the ''paper'' emissions in the system, thereby creating additional room for growth for new and modified sources.

1. Background

Plantwide emissions limits for NSR applicability have been used in Oregon for many years and have been utilized by individual sources on a case-by-case basis. The state-wide applicability system in Oregon, known as the ''plant site emission limit'' program, bases major NSR applicability on an emission limit set for each major source in the State. When the program originated, the State capped sources at their actual emissions levels. New sources are capped at their NSR permitted level. During the NSR Reform Subcommittee deliberations, representatives from several companies with operations in Oregon briefed members on the advantages of the system for their firms. They focused on the flexibility afforded under the cap and their ability to expand operations and production without regulatory review.

During the NSR Reform Subcommittee deliberations, the EPA also developed and presented a voluntary, source-specific PAL approach, similar to that demonstrated by a Minnesota Manufacturing and Mining (3M) facility in St. Paul, Minnesota. This permit established a PAL which allowed 3M to make many changes to its facility without triggering NSR review. The source's baseline emissions were based on a level that was lower than past actual emissions but reflected most current actual emissions based on current operations with new controls. Since the 3M permit, EPA understands that other States (and sources) have experimented with the issuance of permits with emissions caps under EPA's existing regulations. Additional information on these approaches is contained in the docket for this proposal.

2. Description of the PAL Proposal

The EPA proposes to revise the NSR regulations to allow States to authorize PAL approaches on a voluntary source-by-source basis. Although a source-by-source PAL approach may be implemented in many situations under the current regulations, several PAL-related issues are not clearly addressed by the current regulations, policies, or practice. The EPA believes that regulatory changes would allow for more ease, clarity, and certainty in the implementation of a PAL approach. Accordingly, the EPA proposes to define PAL and PAL major modification. See proposed §§ 51.165(a)(1)(xxx) and (a)(1)(xxxi), 51.166(b)(44) and (b)(45), 52.21(b)(45) and (b)(46), and 52.24(f).

The EPA proposes to define ''plantwide applicability limitation'' as a federally enforceable plantwide emissions limitation established for a stationary source to limit the allowable emissions of a source to a level such that major NSR is not required for changes under that emissions limitation. The applicable emissions limitation must be established in a federally enforceable permit that includes all conditions needed to make the limitation practically enforceable. The EPA proposes to define a ''plantwide emissions limitation major modification'' as any emissions increase over the PAL, notwithstanding the general definition of ''major modification.''

The EPA proposes to add regulatory provisions that (1) allow the use of a PAL for applicability determinations for major modifications rather than the existing or proposed provisions, (see proposed §§ 51.165(a)(9)(i), 51.166(u)(1) and 52.21(x)(1)); (2) prescribe the basis for establishing a PAL and additional PAL terms and conditions, (see proposed §§ 51.165(a)(9)(iii), 51.166(u)(3) and 52.21(x)(3)); (3) describe control technology application when a source proposes a PAL major modification, (see proposed §§ 51.165(a)(9)(iv), 51.166(u)(4) and 52.21(x)(4)); (4) describe public notice and comment procedures for establishing a PAL, (see proposed §§ 51.165(a)(9)(ii), 51.166(u)(2) and 52.21(x)(2)); (5) describe the process for periodic reevaluation of a PAL, (see proposed §§ 51.165(a)(9)(v), 51.166(u)(5) and 52.21(x)(5)); and (6) describe additional conditions that would ensure a PAL remains protective of air quality while providing flexibility for source operations, (see proposed §§ 51.165(a)(9)(iv)(A), 51.166(u)(4)(i) and 52.21(x)(4)(i)).

3. Discussion

The EPA has determined that the voluntary source-specific PAL is a practical method to provide both flexibility and regulatory certainty to many existing sources, as well as benefits to permitting authorities, while maintaining air quality. Accordingly, the EPA today proposes to revise its NSR regulations to provide for this approach as a voluntary source-specific

option that States may adopt in their SIP.

The regulatory proposal allows PAL to be established for existing major stationary sources in PSD areas, and for proposed and existing major stationary sources in nonattainment areas. In all cases, the EPA is proposing that the PAL be established through a public participation process consistent with the requirements at 40 CFR 51.161, and with a public comment period of at least 30 days. See proposed §§ 51.165(a)(9)(ii), 51.166(u)(2) and 52.21(x)(2).

The EPA considered a number of regulatory options addressing new and existing sources in both areas and is requesting comment on emissions levels for PAL for both areas. The EPA believes that the proposed PAL regulatory provisions offer the best approach for both proposed and existing major stationary sources located in nonattainment areas and existing major stationary sources in attainment/unclassifiable areas. In PSD areas, the ''Clean Facility'' exclusion offers the best flexibility for new major stationary sources. Certainly, when a facility cannot exercise the clean facility exclusion either because its permit is older than 10 years or because a change is not consistent with the PSD permit, it will have historic emissions of at least 2 years upon which to establish a PAL.

A permitting authority may choose to adopt an area-wide PAL approach, rather than a voluntary source-specific approach, so that all major sources in the entire area, designated as nonattainment or attainment/unclassifiable for a given pollutant, would have a PAL. Area-wide PAL approaches would be options for States and not mandatory for any area under this proposal. The EPA seeks comment on area-wide PAL approaches in light of the source specific voluntary criteria in this proposal and requests comment on other criteria or minimum requirements for area-wide PAL approaches. The EPA also seeks comment on whether States adopting an area-wide PAL system should be allowed to establish PAL at levels higher than actual emissions.

The EPA proposes that once a PAL's is established for a facility, the source may make any physical or operational changes at the facility as long as its emissions remain under the PAL. Under the proposal, for a source to increase emissions over its PAL, whether or not in connection with a physical or operational change, it must first undergo major NSR. The EPA proposes to provide that emissions levels set by the PAL may be reevaluated periodically, consistent with the title V permitting and public participation process, to review the need for revisions. The EPA also proposes to require that the PAL must be federally and practicably enforceable and therefore must be incorporated into federally enforceable permits containing compliance methods and monitoring requirements.

*a. PAL Levels.* The EPA proposes that a PAL be based on plantwide actual emissions, including a reasonable operating margin less than the applicable significant emissions rate, for existing sources or on a level established pursuant to recent (within the preceding 5 years) major nonattainment NSR where the source-wide levels were completely offset and relied upon in an EPA-approved attainment demonstration. See proposed §§ 51.165(a)(9)(iii), 51.166(u)(3) and 52.21(x)(3). The EPA requests comment on alternatives for establishing a PAL, including (1) Actual emissions, as defined in existing § 51.166(b)(21)(ii); (2) actual emissions, as defined in proposed § 51.166(b)(21)(ii); (3) actual emissions with the addition of an operating margin greater than the applicable significant emissions rate; (4) for a new stationary source, limits established pursuant to review of the entire facility under PSD, and (5) for nonattainment pollutants (in nonattainment areas), any emissions level completely offset and relied upon in an EPA-approved State attainment demonstration plan, even when the source has not recently received a major NSR permit.

*b. Options for Permitting Authorities.* The proposal would incorporate the PAL approach into the NSR rules by adopting new PAL provisions in §§ 51.165, 51.166, and 52.21. A number of new provisions have been developed to specify the requirements of using a PAL approach. The EPA requests comments on these provisions which are described in more detail below.

The proposed rules allow the use of a PAL for NSR applicability in lieu of the applicability provisions in § 52.21. See proposed § 52.21(x). Similarly, revisions to §§ 51.165 and 51.166 are proposed to provide an alternative applicability approach that States may adopt into SIP to facilitate use of voluntary source-specific PAL. See proposed §§ 51.165(a)(9) and 51.166(u). Under the proposed PAL rules, States may choose to adopt or accept delegation of PAL approaches to apply at sources only in lieu of otherwise applicable major NSR applicability rules, or to apply in lieu of both major and minor NSR requirements. When adopting the PAL approach, States may choose in their SIPs or delegation agreement to adopt the PAL approach on a limited basis. For example, States may choose to adopt the PAL approach only in attainment/unclassifiable areas, only in nonattainment areas, for specified source categories, or only for certain pollutants in these areas. States may also choose to allow the PAL approach only for sources with a record of existing emissions or normal operations for at least 2 years, in order to establish a PAL based on historical actual emissions.

*c. Changes Under the PAL Approach.* The EPA requests comment on several possible scenarios involving changes under the PAL approach. First, under this proposal, facilities that wish to increase source-wide emissions over the PAL would trigger major NSR. See proposed §§ 51.165(a)(9)(iv)(B), 51.166(u)(4)(ii) and 52.21(x)(4)(ii). In some instances, the increase will result from the addition of a new unit or physical or operational change to an existing unit. Clearly, the units associated with the increase would be reviewed for control technology, BACT or LAER, air quality impact modeling, and emissions offsets, if applicable. However, the EPA raises for consideration the situation where a source may wish to increase emissions above the PAL as a result of an increase in an overall plant production rate. In this case, it may not be obvious which units would have to apply BACT or LAER. As proposed, a PAL major modification would require BACT or LAER for each pollutant limited by the PAL which will be increased. Thus, BACT or LAER would apply to each emissions unit that contributes to the emissions increase that occurs above the latest PAL. Id.

The EPA requests comment on how to apply the major NSR requirements to emissions increases that are not directly associated with a particular modification or physical change to an emissions unit. Major NSR could be applied to: (1) all modifications that have occurred under the PAL; (2) all modifications that have occurred under the PAL since the last PAL renewal; (3) all modifications that have occurred under the PAL in the last 5 years; (4) only those modifications that can be associated with the increase, as proposed by the source, or (5) the entire facility and BACT or LAER can apply where most appropriate, i.e, any uncontrolled units or the less controlled units.

In light of the benefits offered by this approach and the ability of the States to impose control technology requirements in SIP, the EPA requests comment on whether to require, for all new units

which net out of major NSR or for all new units added under a PAL, that States must impose some level of control technology, or similarly whether to require in the Federal regulations the application of a particular level of control technology.

*d. Plantwide Applicability Limitation Review and Adjustments.* The PAL, once included in a permit, may be adjusted for a number of reasons. Industry, regulatory agencies, and the public need to understand what adjustments to a PAL may be necessary, both on an immediate basis and during some periodic review cycle. The EPA requests comment on why, how, and when a PAL should be lowered or increased without being subject to major NSR. The need for adjustments would arise, for example, (1) Where technical errors have been made, or technical improvements have become available with regard to calculating past actual emissions or potential emissions or emissions factors; (2) when new requirements apply to the PAL pollutant, such as RACT or other SIP-required reductions [23]; (3) to account for the generation of offsets or permanent shutdowns where the State has the authority to remove permanent shutdowns from the emissions inventory after a certain time period; (4) when any changes (though consistent with the PAL) might cause or contribute to a violation of any NAAQS or PSD increment or would have an adverse impact on air quality related values; and (5) during periodic review, consistent with the title V permit renewal process of the appropriateness of emissions levels set in the PAL. A concern was raised in the NSR Reform Subcommittee discussions about the uncertainty that results from the State review and renewal of the PAL as well as any authority to adjust the PAL. It has been recognized that sources will want to maximize the room for growth under a PAL. If there are too frequent opportunities for a downward adjustment to the PAL, a source may be reluctant to accept a PAL for fear of losing allowable emissions through the State's ability to make adjustments.

This proposal requires adjustments to the PAL to incorporate new applicable requirements. See proposed §§ 51.165(b)(9)(v), 51.166(u)(5) and 52.21(x)(5). Nothing in this proposal prevents the State's PAL program from being more stringent by requiring adjustments in other circumstances such as those described above. In addition, the EPA solicits comments on the need for a specific provision that would require the PAL to be adjusted at any time to address any technical errors in the emissions calculations and other permit deficiencies when discovered by either the source owner or operator or the permitting authority after the permit has been issued.

*e. Plantwide Applicability Limitations in Serious and Above Nonattainment Areas.* The EPA also solicits comment on how a PAL will comply with section 182(c) and (e) of the Act which contains special provisions for modifications to major sources in serious, severe and extreme ozone nonattainment areas. For serious and severe nonattainment areas, depending on the baseline used to establish a PAL, a PAL may effectively assure that sources do not increase emissions (thereby changes under the PAL would not trigger these special provisions). This is because the PAL in an ozone nonattainment area would in most cases be based on actual emissions of the source and require any increase over the PAL to be subject to major NSR with no allowance for de minimis emission increases over the PAL. Thus, with these stipulations, the de minimis emissions rate (25 tpy) under section 182(c)(6) of the Act could not be exceeded without triggering major NSR. In extreme ozone nonattainment areas, section 182(e)(2) of the Act requires major NSR for ''any increase'' at any discrete operation or unit. In such areas a PAL may be problematic because it could allow for an increase at an emissions unit by a change under a PAL, although there would be no emissions increase of the source's PAL. The provisions of section 182(e)(2) appear to allow for a PAL provided that any increase at an emissions unit would impose a LAER emissions limit on that unit and the unit's increase in emissions would have to be ''internally offset'' within the source, which is in effect a 1.3 to 1 internal ''netting'' transaction. Thus a PAL in an extreme nonattainment area may have to be a ''declining value'' cap reducing at a rate that ensures sufficient ''internal offsets'' are undertaken to fulfill the requirements of section 182(e)(2) of the Act. The EPA welcomes additional comment on how a PAL may comport with the statutory requirements for modifications to major sources in these ozone nonattainment areas.

*f. Air Quality Changes.* Certain changes under the PAL, such as changes in effective stack parameters, can change a source's impact area, and must be assessed to demonstrate protection of NAAQS, increments, and AQRV. See proposed §§ 51.165(a)(9)(iv)(A), 51.166(u)(4)(i) and 52.21(x)(4)(i). The EPA requests comment on when modeling or other types of ambient impact assessments should be required for changes occurring under a PAL. Comments may also address the usefulness of existing guidance on similar issues (see e.g., June 28, 1989 Federal Register Notice addressing CMA (54 FR 27274) and the Emissions Trading Policy Statement (51 FR 43814)), and what should be done to protect AQRV in Class I areas.

*G. Actual-to-future-actual Methodology*

As previously discussed, the EPA explicitly limited the scope of the WEPCO rulemaking to one source category, i.e., electric utility steam generating units. In the final rule, however, the EPA indicated that it would ''consider the desirability of adopting for other source categories the changes to the methodology for determining whether a source change constitutes a modification'' in a subsequent rulemaking. See 57 FR 32333. In previous sections, the EPA discusses its proposals to adopt a new pollution control project exclusion applicable to all source categories and to replace its existing baseline regulations with a new provision, again applicable to all source categories. There remains the question of the ''future-actual'' methodology which allows a utility to use a prediction of its post-change actual emissions—excluding any increases in utilization caused by demand growth—to determine whether the change at issue will increase emissions over baseline levels.

The WEPCO rule was challenged by both industry and environmental petitioners. These challenges included a demand from some industries that EPA expand the WEPCO rule to all source categories and a demand from an environmental group that EPA abandon the rule or at least the demand growth exclusion. This litigation is now inactive pending the outcome of this rulemaking. Today, EPA proposes to allow use of the future-actual methodology for all source categories. See proposed §§ 51.165(a)(1)(xii)(F), 51.166(b)(21)(vi), 52.21(b)(21)(vi) and 52.24(f).

As discussed in section II.A. of this preamble, EPA proposes that States be given the choice of whether to retain in their SIP the current actual-to-potential test, or to adopt the actual-to-actual test for all source categories. Although EPA is also proposing the actual-to future

[23] Emissions reductions of HAP to meet MACT at emissions units under a PAL would generally not necessitate a downward adjustment to the PAL because the PAL is not designed to limit HAP. However, if MACT reductions are relied on in the SIP (e.g., VOC reductions in nonattainment areas used for RFP or attainment demonstrations) then the PAL needs adjustment downward.

actual test for the Federal permitting program in lieu of the current actual-to-potential test, EPA solicits comments on whether to retain the actual-to-potential test. In addition, EPA solicits comments on whether to leave the scope of the future actual methodology the same—available only for utility units or eliminating the methodology completely.[24] In addition, in regard to use of a future actual methodology, the EPA solicits comment on what changes if any should be made to the demand growth exclusion and the 5-year tracking requirement.

1. Background

As noted, the WEPCO rule in EPA's regulations prescribed a new methodology for determining whether a physical or operational change would result in a significant increase in emissions and therefore constitute a major modification. The rule provided that the post-change emissions level of a utility unit would be calculated using a projection of the unit's ''future actual'' emissions. The rule was limited to existing electric utility steam generating units and did not apply to the addition of a new unit or the replacement of an existing unit.[25]

Pursuant to the WEPCO rule, the future actual projection is the product of (1) the hourly emissions rate, which is based on the unit's physical and operational capabilities following the change and taking into account federally enforceable operational restrictions that would affect the hourly emissions rate following the change; and (2) projected capacity utilization, which is based on both the unit's historical annual utilization and all available information regarding the unit's likely post-change capacity utilization. See 57 FR 32323.[26] To guard against the possibility that significant unreviewed increases in actual emissions would occur under this methodology, the EPA provided in its final regulations that any utility which uses the ''representative actual annual emissions'' methodology to determine that it is not subject to NSR must submit annually for 5 years after the change sufficient records to demonstrate that the change has not resulted in an emissions increase over the baseline levels. See 57 FR 32325. To meet this requirement, utilities can use continuous emissions monitoring data, operational levels, fuel usage data, source test results, or any other readily available data of sufficient accuracy for the purpose of documenting a unit's post-change actual annual emissions. Where the change does not increase the unit's emissions factor, the utility may submit annual utilization data, rather than emissions data, as a method of tracking post-change emissions. Id. If, during the required 5-year tracking period, the unit's post-change actual emissions exceed its pre-change baseline level, the unit is then subject to NSR. Emissions increases which occur after the required 5-year tracking period are presumed not to be related to the earlier change.[27]

As discussed, the NSR regulatory provisions require that the physical or operational change must ''result in'' an increase in actual emissions in order to consider that change to be a modification. See also the discussion of the term ''modification'' in section II.B. of this preamble. In other words, NSR will not apply unless there is a causal link between the proposed change and any post-change increase in emissions. In the WEPCO rule, EPA clarified this provision in the context of modifications at electric utility generating units to exclude increases due to ''independent factors'' such as demand growth. The EPA stated that:

> where projected increased operations are in response to an independent factor, such as demand growth, which would have occurred and affected the unit's operations during the representative baseline period even in the absence of the physical or operational change, the increased operations cannot be said to result from the change and therefore may be excluded from the projection of the unit's future actual emissions. Conversely, where the increase could have occurred during the representative baseline period but for the physical or operational change, that change will be deemed to have resulted in the increase.

Thus, the promulgated regulatory provision excluded from the calculation of future emissions:

> that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

See, *e.g.*, existing § 51.166(b)(32)(ii).

The EPA explained that this provision allows demand growth to be excluded from the calculation of future emissions only ''to the extent it—and not the physical or operational change—is the cause of the emissions increase.'' See 57 FR 32327. On the other hand, any emissions increases attributable to a physical or operational change that ''significantly alters the efficiency of the plant * * * must be included in the post-change emissions calculations.'' See 57 FR 32327. Thus, the question of exclusion of independent factors, such as system-wide demand growth, is ''a question of fact which must be resolved on a case-by-case basis and is dependent on the individual facts and circumstances of the change at issue.'' Id.

2. Limitation of the WEPCO Rule to One Source Category

The EPA indicated in the WEPCO rule that it had ''high confidence'' that a workable ''future-actual'' methodology could be developed for the utility industry for all changes that did not involve construction of a new unit or the replacement of an existing unit. See 57 FR 32333. Specifically, the EPA pointed to several factors, including (1) a limited and technologically homogeneous source population; (2) oversight by State Public Utility Commissions that typically evaluate utility growth and utilization projections; and (3) requirements in title IV of the Act that mandate continuous emissions monitors (CEM) or other highly accurate methods for recording actual emissions, as well as special reporting requirements. In EPA's judgment, these factors meant that permitting authorities could make independent assessments of the likely post-change emissions and utilization rates of utility emissions units, and could track these predictions for the relevant period to ensure that the utility did not exceed its predicted level of emissions.

The EPA continues to view these characterizations as generally accurate. There are a relatively limited number of electric utility installations and, due to

[24] This discussion of the use of the future-actual methodology as an applicability test is separate from the proposed use of the methodology to project emission increases from pollution control projects in section II.E.

[25] A unit is considered replaced if it would constitute a reconstructed unit within the meaning of 40 CFR 60.15 (the NSPS test for ''reconstruction''). The EPA reasoned that since there is no relevant operating history for wholly new units and replaced units, it is not possible to reasonably project post-change utilization for these units, and hence, their future level of ''representative annual emissions.'' For other changes, past operating history and other relevant information provides a basis for reasonable projections. See 57 FR 32323.

[26] In projecting future utilization and emissions factors, the permitting authority may consider the company's historical operational data, its own representations, filings with Federal, State or local regulatory authorities, and compliance plans developed under title V of the Act. See 57 FR 32323, footnote 19.

[27] The permitting authority may require a longer period, not to exceed 10 years, where it determines that no period within the first 5 years following the change is representative of normal source operations. 57 FR 32325.

title IV and other regulatory programs, the EPA and State and local permitting authorities have extensive information on the type, fuel, size, and other characteristics of the electric generating units in operation. Most of the utilities operating these units are subject to regulatory oversight by a State Public Utility Commission (PUC) which regularly reviews growth patterns and utility strategies for meeting future electrical demand. Finally, as a result of title IV, most large utility units are now, or will be shortly, using CEM to demonstrate continuous compliance with many of the Federal and State requirements applicable to their units. Similarly, the EPA expects that most major sources in the country will be upgrading their monitoring and reporting capabilities due to the Act's monitoring and title V operating permit programs. Thus, these sources should also be able to provide the necessary documentation of their compliance with a post-change emissions prediction.

However, utilities remain the only source category where projections of demand and facility utilization are typically assessed by an independent regulatory agency (the State PUC) and are available to the public. Because of this, permitting authorities should be able to find independent data and assessments regarding current operations and costs for the utility unit subject to the change as well as projected data for the unit after the change. Similarly, the PUC should have made an assessment of future demand growth and utility plans to meet this increased demand so a permitting authority should be able to secure independent corroboration of utility claims in this area as well. Because this kind of information is typically not available for other source categories, the EPA is concerned about the basis permitting authorities would have to review projections for other source categories.

On the other hand, the 5-year tracking provision that was adopted in the final WEPCO rule makes the accuracy of the future projection subject to a safeguard that should guarantee the accuracy of the prediction for at least 5 years. This tracking period may be extended to 10 years where the permitting authority is concerned that the first 5 years will not be representative of normal source operation. See, *e.g.*, existing § 51.166(b)(21)(v). Even after this time period, the permitting authority may still consider whether a particular increase is ''caused'' by the change and thus results in an emissions increase subjecting the original change to major NSR. See 57 FR 32326. In proposing to expand the ''future actual'' methodology to all source categories, the EPA also solicits comment on the adequacy of these safeguards and whether the ''future-actual'' methodology should either be retained only for the electric utilities, or be eliminated entirely.

3. Issues Regarding the ''Future-actual'' Methodology

The EPA seeks comment on two specific parts of the WEPCO rule. First, the EPA solicits comment on whether a demand growth exclusion should be included, with or without changes. Second, the EPA solicits comment on whether the 5-year reporting provision is working as intended and whether it should be changed in any way.

As discussed, the WEPCO rule requires the permitting authority to exclude from the post-change emissions estimate, any increase in utilization that is unrelated to the particular change, ''including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.'' While this provision ''does not amount to a per se exclusion of demand growth from the emissions increase calculation'' (57 FR 32327), it may create confusion outside the utility area as to when demand growth increases may be excluded.

The WEPCO preamble is very clear that any increases at a unit that result from a change that significantly affects the efficiency of the unit must be included in the calculation of future actual emissions, although EPA declined to create a presumption that every emissions increase that follows a change in efficiency (at an utility electric generating unit) is inextricably linked to the efficiency change. Id. Indeed, where the proposed change will increase reliability, lower operating costs, or improve other operational characteristics of the unit, increases in utilization that are projected to follow can and should be attributable to the change. These factors are the very factors that utilities use to order the production dispatch of the various units in the system. The EPA believes that this approach has proven to be effective in distinguishing between demand growth and other factors that result in load shifting for utilities. Comment is requested on the experience to date with the use of the WEPCO demand growth exclusion.

Moreover, it is clear for other source categories that predictions of future demand and its impact on individual emissions units are far more complicated and uncertain. For consumer-driven industries, for instance, demand varies and presumptions regarding its size and source would be more speculative than in the utility industry. In most industries, the prediction of future-actual emissions would be left to the permitting authority for a case-by-case determination of whether the proposed change will cause any increase in emissions or whether all or part of any projected increases will be caused by independent factors. For this reason, EPA seeks specific comments on whether the demand growth exclusion should be (1) expanded to all source categories, (2) retained only for the electric utility sector, or (3) eliminated for all industries.

In addition, the EPA solicits comment on the 5-year tracking requirement which mandates that permitting authorities track projections of future actual emissions for the 5-year period following the change to insure the accuracy of such projections. The EPA believes that the mechanism is working as intended. However, the EPA invites the public to comment on this issue and the experience to date of applicability determinations making use of this safeguard.

*H. Proposal of CMA Exhibit B*

As part of the settlement of a challenge to the EPA's 1980 NSR regulations by CMA and other industry petitioners, the EPA agreed to propose (for public comment) and take final action on a methodology for determining whether a source has undertaken a modification based on its potential emissions. The exact regulatory language the EPA was to propose was set forth in Exhibit B to the Settlement Agreement, which is contained in the docket for this rulemaking. Under this methodology, sources may calculate emissions increases and decreases based on either the actual emissions methodology in the existing rules or the unit's potential emissions, measured in terms of hourly emissions (i.e., pounds of pollutant per hour). Sources could use this potential-to-potential test for NSR applicability, as well as for calculating offsets, netting credits and other emissions reductions credits.

The following discussion describes the proposed alternative in more detail and provides the EPA's preliminary assessment of this alternative.

1. Description of the Exhibit B Methodology

Exhibit B contains a series of revisions to the EPA's NSR regulations. These revisions are all designed to provide sources with the alternative of using their hourly potential emissions to determine baselines for NSR

applicability and other NSR purposes. First, Exhibit B would add the following exclusion to the definition of major modification:

A major modification shall be deemed not to occur if one of the following occurs: (a) there is no significant net increase in the source's PTE (as calculated in terms of pounds of pollutant emitted per hour); or (b) there is no significant net increase in the source's actual emissions.

Exhibit B would also delete all references to actual emissions in the definition of net emissions increase and adds language indicating that all references to ''increase in emissions'' and ''decrease in emissions'' in the definition of ''net emissions increase'' ''shall refer to changes in the source's PTE (as calculated in terms of pounds of pollutant emitted per hour) or in its actual emissions.'' [28]

Other changes in Exhibit B modify the applicability baseline by eliminating the reference to the 2-year baseline period and to a method for determining actual emissions during the representative period.[29] Exhibit B also provides a methodology for determining if an increase in hourly emissions is significant.[30] Finally, Exhibit B provides express authorization for sources to use potential emissions in calculating offsets and in creating emission reduction credits.[31] Industry has championed the Exhibit B alternative because it would maximize the flexibility that a source has in calculating the net emissions increase due to a modification, which would exclude more physical and operational changes at existing sources from major NSR. The Exhibit B approach would also greatly simplify the task of tracking emissions increases and decreases because the level of operations and actual emissions would generally no longer be pertinent.

2. The EPA's Preliminary Analysis

The EPA has undertaken a preliminary analysis of the impact on the NSR program of Exhibit B changes. The EPA agrees that the Exhibit B alternative would provide maximum flexibility to existing sources with respect to determining if a significant net emissions increase would result from a physical change or change in the method of operation. The primary effect of an hourly potential test is to eliminate a source's level of operations as a factor when determining whether a proposed change will result in an increase. Past and future level of utilization of the source are completely disregarded, unless restricted in some way by a federally enforceable SIP or permit limit. Consequently, an existing source could make any change so long as the change does not significantly increase the source's hourly potential emissions rate. For instance, under this test, where a source has a widget maker with maximum hourly emissions of 10 pounds per hour, the source may make any changes it wishes to that machine so long as the hourly emissions rate remains at 10 pounds per hour or less.

Moreover under Exhibit B, an existing source could also use as netting credits a reduction in the hourly potential emissions rate at one emissions unit, even though that emission rate has never been actually realized, against an increase in the hourly potential emissions of a new or modified unit. Thus the widget maker could use credit for reducing the potential hourly emissions from a unit in the plant, even though it had never operated at that emissions level. This credit would allow the hourly emissions rate of the modified unit to increase to greater than 10 pounds per hour without subjecting the source to NSR.

While EPA agrees that the Exhibit B alternative would give a source maximum operational flexibility and reduce the administrative burden for source and permitting agencies, there is concern for the environmental consequences. For example, assume the emissions unit at the widget factory that is emitting 10 pounds an hour but has historically operated at 40 percent capacity due at first to operating cost, but with age, reduced efficiency and reliability. Under the Exhibit B alternative, the owner could modernize the unit, thus lowering the operating costs and increasing efficiency and reliability. This change will allow the owner to use the machine at much higher levels (e.g., more hours per day or week) than it had in the past. As a result actual emissions (measured in tpy) could more than double due to the increase in utilization even though hourly potential emissions remain the same.

Further, since Exhibit B would allow sources to generate netting credits and emission reduction credit (ERC) for offsets based on potential hourly emissions, even if never actually emitted, and unused operating capacity. The effect could be to sanction an even greater actual emissions increase to the environment without any review. Of particular concern are potential emissions levels, which may be consistent with older sources, whose impact have never been assessed.

For example, suppose an old ''grandfathered'' [32] source has an hourly PTE of 100 pounds per hour, which is well under the SIP allowable limits based on some other factor (e.g., process weight table). Unless there are more restrictive permit conditions, 8760 annual hours of operation are assumed, so its annual PTE is 438 tpy. Assume the process is old and inefficient, however, so the source over its life has averaged about 3000 hours of operation annually and emitted 150 tpy. Under Exhibit B, the difference, 278 tpy, is available as a netting credit. However,

[28] For example, Exhibit B calls for EPA to propose these changes to § 52.21 by deleting ''actual'' wherever it appears in paragraph (b)(3), except in paragraph (b)(3)(vi)(B) and adding a new paragraph (b)(3)(ix) to read as follows: ''(ix) For the purposes of this subsection, 'increase in emissions' and 'decrease in emissions' shall refer to changes in the source's potential to emit (as calculated in terms of pounds of pollutant emitted per hour) or in its actual emissions.''

[29] For example, Exhibit B calls for EPA to propose these changes by deleting the second sentence and the word ''2-year'' in the first sentence of existing paragraph (b)(21)(ii).

[30] Since EPA's ''significance levels'' are expressed in tons per year, Exhibit B called for any increase in a source's PTE (as calculated in terms of pounds of pollutant emitted per hour) to be extrapolated to a maximum annual emission rate in order to determine if it is significant. For example, exhibit B proposed to revise § 52.21(b)(23)(iv) by changing it to read as follows: ''A net emissions increase in a source's PTE (as calculated in terms of pounds of pollutant emitted per hour) is significant if that increase, as multiplied by 8760 and divided by 2000, exceeds the rates specified in subparagraph (i) above.''

[31] For example, Exhibit B proposed to revise § 51.165(a)(3)(i) to read as follows: ''Each plan shall provide that for sources and modifications subject to any preconstruction review program adopted pursuant to this subsection, the baseline for determining credit for emissions reductions is either (A) the PTE (as calculated in terms of pounds of pollutant emitted per hour) or (B) the actual emissions of the source from which offset credit is to be obtained'' and by deleting § 51.165(a)(3)(ii) (A) and (B) and renumbering the remaining paragraphs accordingly. However, this proposal on offsets may conflict with the 1990 Amendments. That is, section 173(c) of the Act requires that a source secure sufficient emissions reductions to assure that ''the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction * * * in the *actual emissions* of such air pollutants.'' (Emphasis added). Thus, offsetting emissions reductions (including emissions reduction credits used for offsets) must be calculated in terms of actual emissions.

The CMA Exhibit B also calls for EPA to propose language regarding the amount of offsetting emissions. The relevant passage requires offsets to ''represent (when considered together with the plan provisions required under section 172 of the Act) reasonable further progress (as defined in the plan provisions required under section 172 of the Act).'' The EPA views this proposed insert as merely a restatement of the requirements in sections 172 and 173 of the Act. This proposal could be added as § 52.21(a)(3)(ii)(H).

[32] In this example the ''grandfathered'' describes a source that was permitted to construct prior to promulgation of EPA's PSD regulations. Thus, this source was not subject to the applicable PSD requirements (e.g., control technology review and modeling analysis).

because the plant had never operated more than 3500 hours per year and the 150 tpy emission rate had been constant for several years prior to the most recent inventory, 150 tpy was the value the State used for various air quality analyses. In this example the source could build a second unit with a PTE of 288 tpy by simply limiting the existing unit to its nominal 3000 hours of operation per year.

The magnitude of the environmental impact of Exhibit B, if promulgated, is difficult to predict. Its effects will vary from State to State depending to a great degree on how much cumulative difference exists between the unused potential emissions ( so-called ''paper'' emissions and actual emissions in a given inventory of sources and to what extent those ''paper'' emissions have been used in attainment demonstrations, impacts analyses, etc. If there is little difference between annual allowable and actual emissions as may be the case in some States, the choice of either level as the baseline for netting and other ERC's purposes would have little significance with regard to the impact on air quality.

The EPA conducted an analysis to estimate the potential environmental impacts associated with the CMA Exhibit B potential-to-potential approach. (See ''Results of Data Gathering and Analysis Activities for the CMA Exhibit B Settlement Agreement,'' November 1988, which has been placed in the public docket identified at the outset of this preamble.) This analysis was performed to estimate the difference between allowable and actual emissions for permitted facilities in selected study areas. Available actual, permitted, and SIP allowable emissions data were obtained from the States of North Carolina, Texas, Illinois, and Oregon.

Due to problems with the data and other circumstances, the analysis focused only on the States of Texas and Illinois because these States appeared to have a more thorough data base and realistic distribution of data.[33] Both Texas and Illinois have engaged in substantial permitting activity over the years. The completeness, availability and accessibility of their data, and the mix of source categories thus was found to represent more typical differences between allowable and actual emissions. From each State, a cross section of sources were chosen. Allowable and actual emissions were determined for each source in the sample, based on both annual and hourly emission rates. For the analysis, this information was then segregated by pollutant and source type, and, for combustion sources, further segregated by unit size.

The results of the Texas and Illinois analysis indicate that typical source operation frequently does result in actual emissions that are substantially below allowable emissions levels. In these two States, actual emissions represent from 30 to 86 percent of the allowable emissions, depending on source category and pollutant.

Finally, one of the most troubling side effects of the Exhibit B proposal is that it could ultimately stymie major new source growth by allowing unreviewed increases of emissions from modifications of existing sources to consume all available increment in PSD areas. After the minor source baseline date has been established in an area, all increases, whether subject to major NSR or not, consume increment. As illustrated in the example above, under the CMA Exhibit B test an old grandfathered source could experience a ''significant'' net increase in annual actual emissions, yet it would not necessarily be subject to review. Since increment consumption after the minor source baseline date is calculated based on actual emissions increases, the ''minor'' modification of the grandfathered source would still consume increment. If a major new source with state-of-the-art emission controls proposes to locate in an area in which the increment has been consumed in this manner, it would be barred from building unless and until the increment problem was resolved. At the same time, older plants would continue to be able to make changes resulting in significant unreviewed, and possibly uncontrolled, actual emission increases.

3. The EPA Action

As provided under the CMA Settlement Agreement, the EPA is today proposing the regulatory changes contained in Exhibit B as another alternative, and seeks comments on those changes and the EPA's preliminary analysis described above. The EPA also solicits comment on (1) the environmental impact of the Exhibit B proposal and how any adverse environmental impacts associated with the Exhibit B alternative could be minimized or eliminated; (2) the impact of Exhibit B on the permitting of new ''greenfield'' sources; and (3) whether Exhibit B is consistent with the air quality planning goals of the NSR program. That is, while Exhibit B could allow significant increases in actual emissions to be unreviewed, section 173 of the Act requires offsets to be based on actual emissions, and the PSD increment system as well as many nonattainment area plans are keyed to an actual emissions baseline.

If EPA were to promulgate the Exhibit B settlement as final rules, the Exhibit B rules would need to be updated to reflect other rule changes since 1980 as well as provisions of the 1990 Amendments. In this context, the EPA also solicits comment on updating the Exhibit B language.

*I. Allowed Activities Prior to Receipt of Permit*

Several industry members of the Subcommittee recommended that EPA change the NSR regulations to enable sources to engage in a broader range of activities prior to receipt of an NSR permit in cases involving modifications to existing sources. See, e.g., 40 CFR §§ 51.166(b)(11) and 52.21(b)(11). These industry members asserted that it was unnecessary and inappropriate to prohibit preliminary activities to achieve the statutory purpose of requiring a permit before construction begins, and that such prohibitions caused delay and added expense for no good purpose. EPA realizes that there is a wide difference of opinion on these issues and is soliciting comments. Set forth below is a summary to assist in formulating comments.

New Source Review is a *pre*construction requirement, and the statute plainly bars construction without a permit. The congressional policy behind this is obvious: to insure that well-reasoned permitting decisions that may involve millions of dollars and significant, long-lasting environmental impacts are made *before* companies begin actual construction on a new or modified source of air pollution. If it were otherwise, and companies were given unlimited ability to place ''equity in the ground'' by constructing plants before a permit is issued, permitting authorities' discretion in making permit decisions may be compromised, and the ability of EPA and citizens to challenge the permit that is eventually issued may likewise be undermined. Thus, the general policy at issue is clear, and it is likewise clear that core activities at an industrial site, such as the fabrication or

[33] In conjunction with its plant site emission limit program, Oregon requires sources, after operation for a specified period of time, to take enforceable permit restrictions on annual allowable emissions based on annual actual emissions during normal operation. This requirement effectively removes ''paper emissions'' from its inventory. Oregon appears to be unusual in its comprehensive application of this requirement; consequently, its data could not form the basis of any conclusions about CMA Exhibit B. North Carolina's historical data was determined to be insufficient to allow statewide analysis.

installation of pollution-generating equipment, constitute ''construction'' within the meaning of the Act. At the same time, the statute does not address the details of the construction process, nor does it constrain EPA's discretion to fashion regulatory mechanisms to harmonize the needs of environmental protection and economic growth in a manner consistent with the legislative purpose. Consistent with these statutory goals, the regulations and EPA's longstanding policy clearly identify the scope of prohibited preconstruction activities. The current regulations and policies remain in effect regardless of today's request for comment.

Accordingly, EPA today solicits comments regarding (1) whether there exists a significant problem with the current system, and the specific nature of such problem(s), and if so, (2) whether a broader range of preliminary activities should be allowed prior to the issuance of a final NSR permit, and (3) how EPA would implement any approach ultimately adopted. EPA is seeking comments regarding the need for potential changes to the current regulations that would allow greater flexibility with respect to construction activities in the case of a proposed modification to the source, while preserving the essential characteristics of a preconstruction review program.

The EPA solicits comments on all aspects of this issue, including comments suggesting specific regulatory language to implement it. In taking final action on this proposal, EPA may adopt specific regulatory language consistent with this discussion without further public notice.

## III. Proposed Revisions To Control Technology Review Requirements

### *A. Introduction*

New major emitting facilities and major modifications proposed in areas designated ''attainment'' or ''unclassifiable'' under section 107 of the Act must apply the BACT for each pollutant subject to regulation under the Act (in addition to other preconstruction review requirements). See sections 165(a)(4) and 169(3) of the Act. New or modified major stationary sources proposing to locate in an area designated ''nonattainment'' under section 107 of the Act are required to meet the LAER.[34] See section 173(a)(2) of the Act.

The deliberative nature of BACT and, to some extent, LAER determinations has spawned considerable controversy. Issues have included (1) the scope and comprehensiveness of the universe of candidate technologies which must be considered; (2) when the universe of control technology candidate technologies may be closed to the introduction of new technologies relative to a given permit application and, (3) the methodology for analyzing the candidate technologies for BACT.

The CAAAC made several recommendations to EPA that address issues regarding the management of EPA's BACT/LAER data base and the process by which BACT or LAER is determined. Upon evaluation of those recommendations the EPA is taking steps, described in this preamble, to improve and make more accessible its existing database on BACT and LAER determinations and other technical information resources. These improvements will not only limit the costs permit applicants incur in identifying and evaluating available controls, but will also facilitate timely review of the BACT analysis. The EPA is also proposing regulatory revisions that provide a framework for BACT determinations under EPA-approved State administered programs and a specific, reliable and efficacious methodology for federally-administered programs, which would be available for States to adopt. In proposing these revisions and taking final action, EPA will also discharge certain obligations arising out of several judicial and administrative matters. See section IV.I. of this preamble.

The EPA is also proposing regulatory revisions that significantly limit a permit applicant's responsibility to review new control technologies that are developed or emerge after a complete permit application has been submitted. This revision will reduce the number of delays associated with evaluating emerging control technologies in the post-completeness stage of the permitting process. See proposed § 51.166(j)(5).

The CAAAC's discussions focused primarily on BACT; no specific recommendations were made concerning the methodology for determining LAER. Therefore, the EPA is not proposing changes to existing regulations which govern how to determine LAER.[35] However, the recommendations and resultant improvements to EPA's control technology information systems, the proposed regulatory language pertaining to the universe of candidate technologies, and limitations on the consideration of new technologies also extend to LAER. Thus, the EPA is proposing to add such new provisions applicable to LAER, which are analogous to the proposed changes described above for BACT under the PSD program. See proposed § 51.165(a)(2)(ii).

### *B. Proposed Revisions to the Methodology for Determining BACT*

#### 1. General Description of the BACT Determination Process

Typically, the proposed Major Source Permit Applicant Conducts a BACT analysis to be submitted with the permit application to the permitting authority. The analysis includes an evaluation of the technical feasibility and the energy, environmental, economic impacts, and other costs associated with various alternative control options. The applicant includes in its application the BACT analysis and what it considers to be the best control technology or system of controlling emissions for the particular source or project. The permitting authority reviews the applicant's analysis and, after taking into account the energy, environmental, and economic impacts and other costs, and the public's views, specifies an emissions limitation for the source that, in the permitting authority's reasoned judgment, reflects BACT.[36]

#### 2. The Core Criteria

As noted, BACT requires the adoption of an emission limitation based on the ''maximum degree of reduction...which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable.'' See section 169(3) of the

[34] In serious and severe ozone nonattainment areas, section 182(c)(7) of the Act specifies that BACT may apply in certain circumstances.

[35] A subsequent proposed rulemaking, for implementing changes to the NSR regulations pursuant to provisions in title I parts C and D of the 1990 Amendments, will further update the control technology requirements at 40 CFR 51.165(a)(2) to reflect statutory requirements.

[36] BACT is defined in section 169(3) of the Act as, ''[A]n emission limitation based on the maximum degree of reduction * * * which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.'' 0Section 169(3) also provides that in no event may BACT result in emissions that exceed those allowed by any applicable standard established under section 111 or 112 of the Act. In addition, if the reviewing authority determines that there is no economically reasonable or technologically feasible way to measure the emissions, and hence to impose an enforceable emissions standard, it may require the source to use a design, equipment, work practice or operational standard or combination thereof, to reduce emissions of the pollutant to the maximum extent practicable. See also existing §§ 52.21(b)(12) and 51.166(b)(12).

Act. The Act confers substantial discretion on the permitting authority in establishing BACT.

The State flexibility in weighing relevant factors and determining BACT in any particular circumstance is addressed in the legislative history associated with congressional adoption of the PSD program in the 1977 Amendments. The legislative history provides that a central benefit of State flexibility is that it facilitates implementation of the best available controls, allowing for the widespread adoption of improved technologies far more quickly than would occur with a uniform standard:

> The decision regarding the specific implementation of best available technology is a key one and the committee places this responsibility with the State, to be determined in a case-by-case judgment. It is recognized that the phrase has broad flexibility in how it should and can be interpreted, depending on actual construction location.
>
> In making this key decision on the technology to be used, the State is to take into account energy, environmental, and economic impacts and other costs of the application of BACT. The weight assigned to such factors is to be determined by the State. Such a flexible approach allows the adoption of improvements in technology to become widespread far more rapidly than would occur with a uniform Federal standard. The only Federal guidelines are EPA's individual new source performance standards and hazardous emissions standards, both of which represent a floor for the State's decision.[37]

The legislative history also indicates that an intended benefit of the BACT requirement is the minimization of the amount of increment consumed by any single source, thus allowing for greater growth in an area:

> In the long run, the growth potential of these clean areas may be quickly filled without a reasonable policy to prevent significant deterioration. The first new source built in an area would often absorb the entire available air resource, leaving no capacity for future expansion or growth.
>
> Under the policy to prevent significant deterioration in this bill, the growth options should be enlarged. This is because the provision requires that any major source be constructed to utilize the best available control technology. This should leave room for additional growth.[38]

The legislative history describes the breadth of State discretion in regulating significant air quality deterioration in a community. While the legislative history recognizes that the BACT requirement helps limit the amount of increment new sources consume, it also recognizes that a proposed source meeting BACT may nevertheless consume substantial increment. The legislative history provides that the permitting authority has broad discretion in deciding how much, if any, incremental air quality deterioration to apportion to a proposed source meeting BACT. The legislative history also indicates that a State has discretion to reject a permit application for a proposed source because of impacts the proposed source could have on the character of the community:

> This congressional directive enables the State to consider the size of the plant, the increment of air quality which will be consumed by any particular major emitting facility, as well as such other considerations as anticipated and desired economic growth for the area. The balancing of these factors allows States and local communities to judge how much of the defined increment of significant deterioration will be used by any major emitting facility. If, under the design which a major facility propose [sic], the percentage of the increment would effectively prevent growth after the proposed major facility was completed, the State or community could either refuse to permit construction or limit its size. This is strictly a State and local decision; the legislation provides the parameters for that decision.
>
> Similarly, when an analysis of energy, economics, or environmental considerations indicates that the impact of a major facility could alter the character of that community, then the State could, after considering those impacts, reject the application or condition it within the desires of the State or local community. Flexibility and State judgment are the foundations of this policy.

Accordingly, in adopting the PSD program, Congress emphasized the importance of thorough and public analysis in PSD decision-making. One of the enumerated purposes of PSD is to assure that any decision to permit increased air pollution in any area to which PSD applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decision-making process. See section 160(5) of the Act.

In summary, for a given proposed source or modification, BACT is not a preordained level of emissions reduction, but the result of a determination by the permitting authority based on an analysis of available control methods, systems, and techniques. The permitting authority establishes an emissions limitation based on the maximum degree of reduction that is achievable in light of the circumstances of the individual case taking into account the energy, environmental, economic impacts and other costs of the candidate control alternatives, and the concerns of the State and local community that could be impacted by the source under consideration. Consequently, the EPA believes a BACT determination should, at a minimum, meet two core requirements, including (1) all of the available control systems for the source, including the most stringent, must be considered in the determination,[39] and (2) the selection of a particular control system as BACT must be justified in terms of the statutory criteria and supported by the record, and must explain the basis for the rejection of other more stringent candidate control systems. However, an applicant proposing the most stringent candidate control alternative need not provide cost and other detailed information in regard to other control options.[40]

Today, the EPA is proposing to make the core criteria described herein the minimum requirements for determining BACT. The EPA is proposing to codify in the Federal PSD regulations at 40 CFR 52.21, a specific methodology for determining BACT that effectively implements the statutory requirements and the core criteria. See proposed § 52.21(j)(5) and (n)(2)(iii). However, to allow states more flexibility under their own rules for making case-specific BACT determinations, EPA is proposing to insert the core criteria for BACT determinations into the part 51 PSD regulations. Thus, so long as the core criteria are met, these proposed revisions allow for other methodologies that provide equivalent results with less time and effort. See proposed § 51.166(j)(5) and (n)(2)(iii). The EPA requests public comment on this approach and on the proposed core criteria.

### 3. Description of the Federal Methodology for Determining BACT

Since late 1987 EPA has recommended a specific process for determining BACT. The recommendation evolved from a 1986 national program audit that identified BACT determinations as a deficient aspect of the PSD permitting process, and a 1987 EPA permit appeal

[37] See S. Rep. No. 127, 95th Cong., 1st Sess. 31 (1977).

[38] *Id.*

[39] An applicant could limit its proposed list of technology alternatives to the most effective control technologies. Consideration of technologies that are outdated or are clearly inferior to those in the applicants proposed list would not be necessary. The EPA is also proposing in this notice, limits on the applicant's responsibility to consider control technologies that have not been demonstrated in practice as of the time a permit application is determined to be complete. See section IV.D. of this notice.

[40] The applicant may need to consider collateral emission increases of hazardous air pollutants under other State programs.

decision.[41] The EPA's recommended methodology for determining BACT is described in detail in the 1990 Draft NSR Workshop Manual[42] and is summarized below.

The first step is to identify, for the emissions unit in question, all ''available'' control options.[43] See proposed § 52.21(j)(5). Available control options are those air pollution control technologies or techniques with a practical potential for application to the emissions unit and the regulated pollutant under evaluation, and which have been ''demonstrated in practice.'' See proposed §§ 52.21(b)(42) and (j)(5)(i). Air pollution control technologies and techniques include the application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels or treatment or innovative fuel combustion techniques for control of the affected pollutant. See section 169(3) of the Act. In some circumstances, inherently lower-polluting processes are appropriate for consideration as available control alternatives.

By proposing that for consideration in permit applications, technologies should be ''demonstrated in practice,'' EPA intends to require consideration of technologies in EPA's RACT/BACT/LAER Clearinghouse (see section III.C. of this preamble), technologies identified or required in a regulatory context and technologies meeting minimum operating performance requirements. The EPA proposes to authorize limiting consideration of emerging technologies that are identified after an application is complete. This is discussed in more detail in sections III.D.1. and III.D.2. of this preamble.

In the second step, the technical feasibility of each control option that was identified in step one is evaluated with respect to the source-specific (or emissions unit-specific) factors. See proposed § 52.21(j)(5)(i). One or more of the options may be eliminated from consideration where they are demonstrated to be technically infeasible. A demonstration of technical infeasibility should be clearly documented and should show, based on physical, chemical, and engineering principles, that technical difficulties would preclude the successful use of the control option on the emissions unit under review.

The control technology options identified as available and technically feasible are then ranked by overall control effectiveness for the pollutant under review, with the most effective control alternative at the top. At this point in the analysis, it is initially assumed that the most stringent alternative represents BACT pending the consideration of the source-specific energy, environmental and economic impacts, and other costs associated with each control option. See proposed § 52.21(j)(5)(i). Both beneficial and adverse impacts should be discussed and, where possible, quantified. In general, the BACT analysis should focus on the direct impact of the control alternative.

Cost is often a major concern of the owner or operator of the proposed source and should be included in the analysis. Both average cost effectiveness and marginal (incremental) cost effectiveness should be derived for the control alternatives and considered in the final decision.[44]

If the applicant is disposed toward selecting the most stringent emissions control alternative in the listing as BACT, irrespective of cost, then the analysis need only address generation of other air pollutants, e.g., toxic pollutants. See proposed § 52.21(j)(5)(i). If there are no outstanding issues that would justify selection of an alternative control option, the analysis ends and the results are proposed as BACT.

In the event that the most stringent candidate control alternative is shown to be inappropriate, due to energy, environmental or economic impacts and other costs, the rationale for this finding must be documented for the public record. See proposed § 52.21(j)(5)(i). Then the next most stringent alternative in the listing becomes the new control candidate and is similarly evaluated. This process continues until the technology under consideration cannot be eliminated by any source-specific environmental, energy or economic impacts which demonstrate that alternative to be inappropriate as BACT.

In summary, under the methodology just described, the most effective control option not eliminated based on relevant statutory factors is proposed as BACT for the pollutant and emission unit under review. The EPA believes the proposed BACT determination methodology is a rigorous and reliable way of determining a level of control that conforms with the statutory definition of BACT and the core criteria. For this reason the EPA is proposing to codify this methodology in the Federal NSR regulations. The proposed Federal regulations could also serve as a template for those States that choose to incorporate this method into their SIP.

The EPA requests public comments on alternative methods for determining BACT. Commenters should explain or illustrate how such alternative method will satisfy the following core criteria proposed in this document: (1) All available control systems for the source must be considered in the determination, including the most stringent emissions control alternative, and (2) selection of a particular control system as BACT, and the basis for the rejection of the other more effective emissions control systems, must be justified in terms of the statutory criteria and supported by the record. Specifically, the comments should address how the alternative methodology would provide for consideration of energy, environmental, and economic impacts and other costs. See section 169(3) of the Act.

### 4. Additional Guidance for BACT Determinations

The Federal analytical methodology outlined above provides for reasoned BACT determinations, but it does not dictate a particular result. Although the progression of the analysis is logical, the CAAAC suggested that it would be helpful for EPA to develop more detailed guidance addressing how the method actually works in real-life applications. The CAAAC recommended that the EPA provide

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[41] See ''New Source Review Task Force Report,'' Final Draft, Dec. 1986. *Honolulu Resource Recovery Facility,* PSD Appeal No. 86–8 (Remand Order, June 22, 1987). ''Operational Guidance on Control Technology for New and Modified Municipal Waste Combustors,'' June 26, 1987. ''Improving New Source Review,'' Memorandum from Craig Potter, Assistant Administrator for Air and Radiation to EPA Regional Administrators, Regions I–X, December 1, 1987.

[42] See Chapter B of EPA's 1990 Draft NSR Workshop Manual for a more detailed description of EPA's BACT determination policies, including guidance addressing the consideration of energy, environmental, and economic impacts.

[43] The term ''emissions unit'' may also represent a process or a system that might collect emissions from several discrete pieces of equipment.

[44] Cost effectiveness is the cost of control divided by the mass of emissions (usually in tons) reduced by that control. Average cost effectiveness is the cost per ton that would be incurred compared with baseline controls, (i.e., either uncontrolled or the control level that would be required in the absence of the major source requirements for which the source is making application). Marginal or incremental cost effectiveness is the difference in cost per ton of emissions reduced at the next most stringent level of control, when comparing two control options.

The EPA has developed and published detailed procedural information for performing cost analyses, including average and incremental cost effectiveness, in the OAQPS Cost Manual. The Manual is available through the National Technical Information Service (NTIS) 5285 Port Royal Road, Springfield, Virginia 22161; Phone No. (703) 487–4807. Government agencies can order it from the EPA CTC. The EPA has made parts of the Manual dealing with general cost analysis procedures available as retrievable electronic files on the CTC bulletin board. See also footnote 49 for computer access information.

guidance in the form of specific examples illustrating (1) how the consideration of energy, environmental or economic factors justified establishing a less stringent control technology as BACT, and (2) how the BACT process may properly result in a BACT determination based on control technology more stringent than that initially proposed by the source.

The EPA agrees that the issuance of guidance in the form of illustrative examples would improve understanding of EPA's BACT determination process. Therefore, the EPA is preparing a case study report, containing examples of BACT determinations properly employing the EPA methodology. The EPA's guidance will examine several instances in which a technology less stringent than the most stringent one was determined to represent BACT, and other instances where the permitting authority imposed BACT requirements that were more stringent than those proposed by the applicant. This document will be made available to the public when it is completed, independent of this proposed action. In addition, the existing ''OAQPS Cost Manual'' provides basic guidance on how to perform cost analyses for air pollution control equipment. See footnote 45.

*C. Improving Information about Available Control Technologies: Changes to the Reasonably Available Control Technology (RACT)/BACT/ Lowest Achievable Emission Rate (LAER) Clearinghouse (RBLC)*

The EPA established the original computerized database of BACT and LAER determinations (the BACT/LAER Clearinghouse) at the request of permitting agencies to promote sharing of technology determinations in the permitting process. The clearinghouse was installed on the OAQPS Technology Transfer Network (TTN) for convenient public access. The 1990 Amendments now requires the EPA to make information regarding emission control technology available to the States and to the general public through a central database. The 1990 Amendments directs that the database include control technology information received from States issuing NSR and operating permits, which include RACT[45] SIP requirements. See sections 108(h) and 173(d) of the Act. This discussion will refer to the database as the RBLC. The EPA also established the Control Technology Center (CTC) to assist State and local permitting agencies in identifying and evaluating new control technologies or control technologies for industrial categories that have been previously uncontrolled. It maintains a separate bulletin board (CTC BBS) that operates in concert with the RBLC.

Both bulletin boards, the RBLC and the CTC BBS, are useful sources of publicly available information on control technology determinations, but they are not exhaustive. The CAAAC made numerous detailed recommendations for improving the content and management of the RBLC.[46] The following discussion explains several steps the EPA has taken or is planning to take to improve the control technology information resources that it manages.

- The EPA is proposing in this rulemaking to require permitting authorities to submit BACT and LAER determinations to the RBLC within 60 days following permit issuance. See section VI.C. of this preamble.
- Based on the CAAAC's recommendation that the RBLC should comprehensively catalog information on critical data elements for new entries (rather than obtaining missing data for existing entries), the EPA is considering ways to ensure—through better cooperation with permitting authorities and private industry—that the RBLC is complete and comprehensive. The EPA intends to focus the RBLC's resources on providing complete and correct information about new permit determinations. Data gaps in old determinations will be addressed as resources allow.
- The EPA has simplified the RBLC's reporting form and limited the information in the RBLC. Data fields that were of questionable value or have received little use have been deleted. These changes are expected to reduce the burden on permitting agencies and encourage participation. The EPA has also prepared a stand-alone program on computer disk for use by agencies to submit determinations as an alternative to completing forms and direct data entry to the RBLC.
- The EPA intends, as resources allow, to establish standard emission units for reporting emission limits from all major process categories.
- The EPA intends, as resources allow, to implement a process to highlight the most stringent determinations reported to the RBLC and to provide follow-up verification on installation and compliance.
- Due to the case-by-case and evolutionary nature of BACT, as well as limited Agency resources, EPA does not intend to implement a recommendation that the EPA prepare written guidance indicating demonstrated technology that presumptively should be considered BACT or LAER for certain industries. Nevertheless, EPA will publicize the RBLC's capability to present technology determinations in rank order (most to least stringent) for a particular process and pollutant. The EPA has already placed such lists for several common sources and pollutants in retrievable document files on the RBLC and will periodically update and add to these rankings. Process-and pollutant-specific rankings can be generated directly by users by performing standardized search and download procedures that are integral functions of the RBLC.
- The EPA intends to up-date its RBLC users manual to more clearly explain options and searches available to users. The manual is available in hardcopy from the National Technical Information Service (NTIS) of the U.S. Department of Commerce, the CTC (for government agencies), or as a retrievable file on the RBLC. The RBLC also offers an informational flyer which, in part, fulfills basic user manual functions. The flyer is available to anyone free of charge from the CTC[47] and is a retrievable document file on the RBLC. The EPA will continue to utilize the CTC and the RBLC as well as other available electronic media to disseminate other guidance and technical information such as the OAQPS ''Cost Manual.''

If fully implemented, the impact and scope of the CAAAC's recommendations to expand and improve EPA's technology information services would require a substantial increase in resources. The EPA invites comments on funding alternatives for the RBLC and CTC BB. The EPA also seeks comments on a strategy for prioritizing all or part of the RBLC's functions if full funding is not available.

*D. Streamlining BACT/LAER Determinations*

The EPA's current policy calls for consideration of available control techniques, including emerging technology, in making BACT and LAER

[45] The RACT is an acronym for reasonably available control technology, which applies to existing stationary sources located in nonattainment areas. See section 172(c)(1) of the Act.

[46] July 1, 1994 Letter from Patrick M. Raher to Mary D. Nichols transmitting CAAAC's Recommendations for NSR rule reforms.

[47] Inquiries may be addressed to: Control Technology Hotline, Information Transfer Group, OAQPS (MD–12), Research Triangle Park, NC 27711, Hotline No. (919) 541–0800, OAQPS TTN: Electronic bulletin board, computer access telephone number (919) 541–5642; Internet Access: TELNET ttnbbs.rtpnc.epa.gov.

determinations until the time that a final NSR permit is issued.[48] During the NSR Reform Subcommittee meetings, industry representatives expressed concern about instances when applicants have been required to consider emerging technologies long after their applications were prepared but before a final permit was issued. This practice interposes significant uncertainty in business planning as well as permit delays. For example, permit applicants face the risk of having to substantially redesign a project due to the emergence of new control technology prior to final permit issuance. Further, there are research and related transaction costs, and even project jeopardy, when permit processing is extended while more information about the availability and achievability of an emerging technology is assessed.

The EPA is today proposing to alter its current policy and proposing accompanying changes to its NSR regulations to address this problem. These proposed changes strike a balance between providing more certainty for industry in making technology choices for planning major projects, and ensuring that state-of-the-art technologies are adequately considered.

1. Permit Applications Must Include Analysis of Control Technologies That are Demonstrated in Practice

Specifically, the EPA is proposing to require that the BACT analysis or LAER determination that is submitted with a permit application consider technologies that have been ''demonstrated in practice.'' See proposed §§ 51.165(a)(2)(ii)(A), 51.166(j)(5)(i), and 52.21(j)(5)(i). The proposed regulations define ''demonstrated in practice'' to include all technologies required and reported through existing regulatory programs and those that, while not identified in the regulatory arena, meet specific criteria for determining their availability and appropriateness for consideration in a BACT or LAER analysis. See proposed §§ 51.165(a)(1)(xxviii), 51.166(b)(42), 52.21(b)(43), and 52.24(f).

With regard to regulatory documentation, technologies from the following sources must be considered in the BACT or LAER analysis:

(a) The EPA's RACT/BACT/LAER Clearinghouse;

(b) Major source construction permits issued pursuant to parts C (PSD) and D (NSR in nonattainment areas) of title I of the Act;

(c) Emissions limitations contained in federally-approved implementation plans, excluding emissions limitations established by permits issued pursuant to programs for non-major sources;

(d) Permits and standards developed under sections 111 and 112 of the Act; and

(e) Alternative Control Techniques Documents and Control Techniques Guidelines that have been issued by the EPA.

The EPA is not proposing to require that operating permits issued under federally-approved title V Act programs be among the sources of available control technology that must be examined in preparing a permit application except where sources are issued an ''integrated'' NSR and Operating permit. Title V permits generally compile requirements that are independently established under other Act programs. Title V programs do not mandate substantive requirements concerning the selection, installation and performance of control technologies. Therefore, a title V permit, unless it jointly imposes the substantive requirements of a major NSR permit, would likely not provide significant new control technology information.

Control technologies that may not be implemented in a regulatory context of a substantive Act program may nevertheless be available for a given BACT or LAER analysis. For example, sources often install state-of-the-art technology in order to be classified as a minor source or to avoid NSR requirements for major modifications. (In this case permitting authorities are encouraged to report the technology to the RBLC.) Furthermore, new technologies and innovations of existing technologies occasionally evolve without wide publicity in the regulatory arena. Such technologies also deserve consideration. Consequently, the EPA also proposes to define ''demonstrated in practice'' to include any technology that meets the following criteria: (1) it has been installed and operating continually for at least 6 months on an emissions unit(s) which has been operating at least at 50 percent of design capacity during that period of time; and (2) its performance has been verified during that 6-month period with a performance test or performance data while operating under a load that coincides with either the operation of the emissions units served by the control technology at their PTE, or 90 percent of the control technology's design specifications. See proposed §§ 51.165(a)(1)(xxviii), 51.166(b)(42), 52.21(b)(43), and 52.24(f). The 6-month operating requirement within the definition of ''demonstrated in practice'' is proposed to establish a minimum operating history to demonstrate the performance and reliability of the new technology. The EPA believes that a 6-month period is appropriate because this is the maximum amount of time currently allowed for the shakedown period for establishing emissions of replacement emissions units in NSR netting transactions. See existing §§ 51.165(a)(1)(vi)(F), 51.166(b)(3)(vii) and 52.21(b)(3)(vii). The EPA also believes that the 50 percent continual load factor provides some assurance that the control technology has been placed in meaningful service during the 6-month period, while recognizing that higher loads may not be sustainable by the source for extended periods of time so soon after start-up.

Knowledge of the control technology's ability to perform effectively at specified loads is essential for its consideration in a BACT or LAER determination. Therefore EPA is proposing to add the emissions load criteria for testing a control technology's performance during the 6 months in which the sustained operability of the technology is established. This testing requirement is similar to that found under the NSPS, which requires facilities to conduct performance tests within the period 60 to 180 days after start-up to determine compliance with the applicable standards. See existing 40 CFR 60.8(a). The EPA requests comment on the criteria and rationale described above for determining if a control technology has been demonstrated in practice.

Further, EPA is proposing that consideration of a technology that is demonstrated in practice outside the regulatory context not be required if the operation period and performance test concluded less than 90 days prior to the date a permit application is complete.[49] See proposed §§ 51.165(a)(2)(ii)(A), 51.166(j)(5)(i)(A) and 52.21(j)(5)(i)(A). The proposed 90-day period preceding the date of complete permit application allows time for the installation and performance that is ''demonstrated in practice'' to be publicized in trade journals and company newsletters and the results to be examined by the scientific community. On the other hand, having the 90-day period keyed to the completeness date creates an incentive for the source to resolve incomplete applications expeditiously.

The following examples illustrate the proposed process.

[48] See J. Seitz memo, ''BACT/LAER Determination Cutoff Date,'' January 11, 1990.

[49] In the case of foreign technology that has been installed and operating outside the U.S., the same proposed criteria would apply in determining whether a technology has been demonstrated in practice.

Example A: On June 1 a permit applicant submits an application that is subsequently determined to have been complete on the date of the submittal. The applicant in this case would be responsible for evaluating all technologies reported or required in a regulatory context as of the date of submittal. Those technologies that have been ''demonstrated in practice'' via the operating and performance criteria specified above, as of 90 days prior to June 1st would also have to be evaluated.

Example B: On June 1st, a source submits a permit application. One month later (May 1st), the permitting authority determines the application to be incomplete. The source submits new information on August 1st and the permitting authority finds the application complete as of the day the new information was submitted. The applicant would be responsible for evaluating all technologies reported or required in a regulatory context as of May 1st. Those technologies that have been ''demonstrated in practice'' via the operating and performance criteria specified above as of 90 days prior to the original submittal date would have to be evaluated. Comment is solicited on the proposed 90-day post-demonstration period in light of the 6-month demonstration period within the definition of ''demonstrated in practice.''

Finally the proposed regulations would require, in evaluating control technologies that are demonstrated in practice under both the regulatory and performance-based criteria, the consideration of control technologies on the basis of technology transfer. Technology transfer is appropriate when sources or source categories have similar emission stream characteristics. See proposed §§ 51.166(j)(5)(ii) and 52.21(j)(5)(ii).

Some industry and State representatives on the NSR Reform Subcommittee expressed concern about the administrative delays if a permit application is determined incomplete due to the inadvertent omission from a BACT or LAER analysis of a technology alternative that has been ''demonstrated in practice.'' For example a technology that has recently been ''demonstrated in practice'' may have been publicized in a less well-known publication, and thereby escaped notice of the applicant. Certainly, overt disregard of reasonably accessible information would be grounds for determining the application to be incomplete. Inadvertent omissions should be evaluated by the permitting authority in light of case-specific factors. In all instances, if a technology that should have been evaluated is identified and the permitting authority sustains the completeness finding, there is still a duty to evaluate the omitted technology relative to the other technology alternatives prior to permit issuance.

2. Permitting Authority May Limit Consideration of New or Emerging Technologies After Complete Application

New or emerging technologies are those technologies that have been developed but have not satisfied the criteria to be classified as ''demonstrated in practice.'' Some NSR Reform Subcommittee members recommended that EPA prohibit any consideration of new or emerging technologies identified after the permit application is complete. Other members recommended that EPA not allow any limitations on consideration of new or emerging technologies prior to the end of the public comment period on a permit application. The EPA is proposing new regulatory provisions that would authorize the permitting authority to cut-off consideration of technologies that evolve or appear after the permit application is complete, except under limited circumstances described below. See proposed §§ 51.165(a)(2)(ii)(B) and (a)(7)(iii), 51.166(j)(5)(iii) and (q)(3) and 52.21(j)(5)(iii) and (q)(3).

The EPA today proposes to add provision concerning public recommendations on new and emerging control technologies as part of the new provisions for public participation. Under the proposed rules, the permitting authority may require commenters to submit a recommendation, accompanied by reasonably available information, regarding new or emerging control technologies. The accompanying information could include the name and location of the source utilizing the control technology, the manufacturer and type of control device, the date on which the technology was installed and became operational, appropriate performance requirements, and any resulting test or performance data available. See proposed §§ 51.165(a)(7)(ii) and 51.166(q)(2). With regard to the implementation of the Federal PSD requirements at § 52.21, the EPA is proposing to require that public commenters include the above information along with any recommendation for further consideration of new control technology alternatives. See proposed § 52.21(q)(2).

It should be noted that the existing NSR regulations at § 51.165(a) do not contain an explicit provision for public participation procedures as do the PSD regulations in parts 51 and 52. Nevertheless, the public participation procedures set forth under § 51.161 generally apply for both major and minor new source review permitting. In the proposal, certain minor source actions, e.g. netting, that in effect shield a source from major source permitting requirements would not qualify for less environmentally significant status. In order to make clear the regulatory context for today's proposed provisions concerning a cutoff date and informational requirements for public commenters, the EPA is today proposing to amend § 51.165 to refer to the existing requirements at § 51.161.[50] See proposed § 51.165(a)(7).

The permitting authority shall be responsible for evaluating the supporting documentation that has been provided by commenters asserting new or emerging technologies warrant consideration as BACT or LAER. Based on the facts that are presented, the permitting authority will either accept the recommendation at face value, reject it as being insufficiently demonstrated, or refer it to the permit applicant for further consideration. The EPA is also proposing to require the permitting authority to notify the permit applicant within 10 working days of receipt of comments recommending a new technology for which the permitting authority determines the comments have met the specificity criteria it has established relative to the cut-off date. See proposed §§ 51.165(a)(7)(iii), 51.166(q)(3) and 52.21(q)(3). This requirement would provide applicants with an opportunity to respond to the comments and expedite their investigation relative to the proposed project.

The permitting authority, in determining the extent to which commenters' recommendations deserve further consideration, should consider the difficulty of private citizens and small organizations in getting access to detailed supporting data. If information about the emerging technology is limited, commenters should document their attempts to obtain data about the source and the recommended technology. For example, the commenter may present logs of telephone conversations with company officials and correspondence with trade associations, environmental associations, government agencies and technical consultants that might have relevant information regarding the availability and effectiveness of the technology. A list of questions that are asked and respective responses may be

[50] In a separate rulemaking EPA has proposed revising the public review and comment requirements at 40 CFR 51.161 to give States more flexibility in processing minor source permits for projects that are determined to be ''less environmentally significant.'' See 60 FR 45529, 45549, (August 31, 1995).

helpful. While this information may not actually demonstrate the availability of a recommended technology, it will provide the permitting authority with information to help determine whether further evaluation is warranted either by its staff or the source. The EPA requests comment on the proposed criteria for evaluating public comments addressing the availability of new technologies and the appropriate burden of proof that commenters should bear after a permit is determined to be complete.

Unlike a recommendation to consider new or emerging technology as discussed above, the identification of a technology alternative that has been ''demonstrated in practice'' and should have been assessed prior to completeness, places no burden on the commenter to supply qualifying information about the technology. The permitting authority must ensure that the omitted technology alternative is adequately considered in the BACT or LAER determination. The permitting authority may be able, however, to determine if the alternative is inferior to the technology proposed by the applicant. In all circumstances the permitting authority would be responsible for considering the comments and documenting its associated decisions for the public record.

The proposed approach for considering new or emerging technologies promotes certainty and limits permitting burdens for those applicants that have included a thorough review of control technologies in their permit applications. The proposed regulations would require consideration of only those post-completeness emerging technologies whose availability and effectiveness are substantiated to the satisfaction of the permitting authority.

This proposal also preserves opportunity for public participation. In all instances, the public would have the right to submit comments addressing whether all control technologies that were, in fact, ''demonstrated in practice'' prior to completeness, were adequately considered in the permit application and during review by the permitting authority. In addition, public commenters have the opportunity to recommend new or emerging technologies provided that recommendations are accompanied with supporting information about the existence and capabilities of the technology. The permitting authority would be required to consider timely and documented public comments addressing technologies that emerge after completeness.

In light of the considerations described above, the EPA is also proposing regulatory changes to revise its policy that sets the permit issuance date as the final cut-off for consideration of new and emerging technologies. Proposed revisions to the Federal regulations would set the final cut-off at the close of the public comment period, unless the permit is reopened for review or the source fails to commence construction within a prescribed time period after the permit is issued.

The EPA also requests public comment on alternative regulatory changes that would (1) allow State NSR programs to wholly preclude consideration of public comments about technology that is new or emerging after an application is complete; and (2) provide in the Federal NSR program for wholly precluding consideration of public comments about technology that is new or emerging after an application is complete.

Rules that allow or provide for entirely precluding public comment on technology that emerges after a permit application is complete would provide greater certainty for business planning and have administrative ease and simplicity benefits. On the other hand, such rules would potentially eliminate public input on emerging technologies and for go any resulting emission reductions benefits. If EPA did allow or provide for a categorical cutoff of public comment addressing technologies emerging after an application is complete, EPA may also need to include an exception that provides for consideration of new or emerging technologies in circumstances where substantial time elapses between the completeness determination and final permit issuance (e.g., a permit applicant submits an application that is determined complete but significant deficiencies that substantially delay permit processing with the application are discovered during the full permit review).

Under all of the alternatives presented, the permitting authority would be required to consider public comment addressing whether the technologies available (i.e., ''demonstrated in practice'') at the time the permit is complete were adequately evaluated. The EPA seeks public input on these alternatives and related issues.

### *E. Proposed Complete Application Criteria*

In several of the proposed regulatory and policy changes based on the consideration of the CAAAC recommendations, the completeness determination has emerged as a key step in the permit review process. The cut-off date EPA is proposing to authorize for consideration of new and emerging technology for BACT or LAER, and the proposed procedures for FLM notification and coordination are inseparably tied to the completeness date. As discussed in this section and in section V. (Class I Areas), the evaluation and determination of whether a permit application is complete is the responsibility of the permitting authority. Consequently, EPA is proposing minimum criteria upon which the permitting authority should base its completeness determination. Broadly, EPA is proposing that a permit application shall contain information necessary to make the demonstrations, analyses, and determinations required under the NSR regulations. See proposed §§ 51.165(a)(6), 51.166(n), and 52.21(n).

The completeness criteria is derived from applicable existing provisions on ''Source information'' at §§ 51.166(n) and 52.21(n) that remain unchanged by this rulemaking, as well as proposed revisions and new provisions. In addition, the EPA proposes renaming §§ 51.166(n) and 52.21(n) to ''Complete application criteria,'' and adding similar provisions to § 51.165. Specifically, proposed revisions to §§ 51.166(n)(1) and 52.21(n)(1) assign the completeness determination to the permitting authority and indicate the determination shall be made upon the presence and adequacy of analyses and information required under §§ 51.166(n)(2) through (n)(5) and §§ 52.21(n)(2) through (n)(5), respectively. Proposed revisions at §§ 51.166(n)(2) and (n)(3), and at §§ 52.21(n)(2) and (n)(3), require that the application contain sufficient information to substantiate the following: (1) the BACT recommendation pursuant to proposed §§ 51.166(j)(5) or 52.21(j)(5); (2) the analyses required by §§ 51.166(k) through (m) or §§ 52.21(k) through (m); (3) the additional impact analysis pursuant to §§ 51.166(o) or 52.21(o); (4) determinations and analyses related to the protection of Federal Class I areas pursuant to §§ 51.166(p) or 52.21(p); (5) the establishment of PALs under §§ 51.166(u) or 52.21(x); and (6) undemonstrated technology waiver applications under §§ 51.166(s) and 52.21(v), as appropriate. The EPA is proposing as independent requirements for completeness at §§ 51.166(n)(4) and (n)(5), and §§ 52.21(n)(4) and (n)(5), that key information from the permit application be registered on the applicable EPA electronic bulletin board

and that FLM review and coordination has been provided.

The EPA is proposing similar completeness criteria at § 51.165(a)(6) for nonattainment area major source construction permit applications. Under the proposed provisions, the plan shall require the application to include information pertaining to the LAER, or where applicable, the BACT determination, statewide compliance and undemonstrated technology or application waiver.[51]

The EPA expects that the demonstration of statewide compliance would be met by the owner or operator of the proposed source submitting, with the permit application, the compliance certifications for all other major stationary sources that it owns or operates in the State. See section 173(a)(3) of the Act. Title V compliance certifications may serve to satisfy this demonstration. However, with regard to facilities that have certified noncompliance or have experienced noncompliance since the last title V certification, an updated compliance certification may be necessary to demonstrate statewide compliance.

By proposing these complete application criteria, EPA is not proposing additional substantive requirements for either PSD or nonattainment NSR permits, but is summarizing the information and analyses required by the provisions of the respective program. Generally, information necessary for purposes of a completeness determination is described with the substantive requirements, e.g., see the discussions contained in this proposal on BACT, protection of Federal Class I areas, PALs and undemonstrated technology waivers.

*F. Proposed Undemonstrated Control Technology or Application (UT/A)*

1. Introduction

The EPA proposes to revise the existing Innovative Control Technology (ICT) Waiver. This provision allows sources to satisfy the BACT requirement through the use of innovative control technologies. It is termed a waiver since a source is allowed an extended period of time to bring the new technology into compliance with the required performance level. The EPA today proposes to make the innovative technology alternative simpler and more attractive in PSD areas and, for the first time, proposes to add a similar waiver to nonattainment NSR regulations. These changes are intended to facilitate the use of innovative or undemonstrated pollution control, prevention, or reduction technologies in NSR permitting.

The utilization of undemonstrated technologies or applications generally involves risk-taking on the part of the source, the permitting agency, the public, and the environment. The CAAAC's NSR Reform Subcommittee and the EPA recognized the risks associated with undertaking innovative projects while also recognizing the potential benefits to all stakeholders of a well designed and frequently used waiver that leads to greater use of previously undemonstrated control strategies. As a result, the CAAAC provided the EPA with a series of detailed recommendations on how the existing waiver should be recast. The EPA has evaluated the recommendations and proposes to adopt many of them. Further, the EPA believes that the following proposal minimizes the uncertainty to the source while protecting the environment from undemonstrated technologies that fail.

Specifically, the EPA proposes (1) changing the name of the waiver to ''UT/A'' and changing the definition to expand the environmental considerations, (2) adding UT/A provisions for nonattainment area sources, (3) ensuring FLM consultation in UT/A decisions for sources in PSD areas locating near Class I areas, (4) establishing reference BACT/LAER levels in the permit that grandfathers sources out of application of later demonstrated technologies if the UT/A fails, (5) establishing protective emission limits in the permit for the duration of the waiver, (6) requiring that contingency measures be addressed and established in the application and the permit, (7) reducing the duration of the waiver, and establishing a limit on the number of UT/A waivers issued for any given UT/A to that necessary to demonstrate the performance of a technology or application. The EPA is proposing modifications to the existing ICT regulations that reflect the differences in the proposed UT/A approach. Many of the existing provisions of §§ 51.166(s) and 52.21(v) will remain unchanged. In several instances, the EPA is proposing only minor conforming changes. See proposed §§ 51.166(s)(2) and 52.21(v)(2) and newly created § 51.165(a)(8).

2. Description of Proposed UT/A Waiver

Section 111(j) of the Act provides for the issuance of waivers to sources which propose the use of control technology which the Administrator determines to be innovative. Concerned that a source would be able to obtain a section 111(j) waiver but remain subject to BACT requirements thus discouraging innovation, the EPA incorporated into the PSD regulations a corresponding ICT waiver. See 45 FR 52676 (August 7, 1980). However, this waiver has not been widely used since its adoption 15 years ago.

The CAAAC's NSR Reform Subcommittee examined the reasons for the ICT waiver's limited usage and developed three possible outcomes, other than performance as expected, for the installation of undemonstrated control technology—that the technology performs better than expected; that there is a ''marginal'' failure; or that there is a ''gross failure.'' The Subcommittee recommended options to reward the source for incurring the risk of failure, procedures to be taken by the permitting agency in case of failure, and certain air quality safeguards.

*a. Proposed New Definition and Scope.* The CAAAC recommended that the EPA replace the existing ''Innovative Control Technology'' name with the term ''UT/A.'' The CAAAC recommended the following definition for the waiver: ''any system, process, material, or treatment technology that shows substantial likelihood to operate effectively and to achieve either: (a) greater continuous reductions of air pollutant emissions than any demonstrated system, or (b) comparable emission reductions at lower cost, lower energy input, with lesser non-air environmental impacts, or with other advantages that are defined and mutually agreed on a case-specific basis to justify the use of UT/A provisions.'' In developing the proposed UT/A definition, the EPA has slightly modified the CAAAC's suggested definition. See proposed §§ 51.166(b)(19) and 52.21(b)(19). For PSD areas, the Agency proposes to interpret ''comparable emission reductions'' as allowing the UT/A to achieve marginally less emission reductions in the pollutants subject to BACT than the otherwise applicable BACT. This proposed flexibility allows a permitting agency to issue a PSD UT/A waiver for an undemonstrated technology that achieves somewhat less than the otherwise applicable BACT emission limit provided that the benefits (i.e., energy, environmental or economics) associated with the UT/A

[51] The upcoming proposed rulemaking to implement changes to the NSR regulations pursuant to provisions in parts C and D of the Act as amended in 1990 will provide additional detail of required information for offset showings and the alternatives analysis.

clearly compensate for the increase in emissions. (As is discussed in the next section, the EPA does not believe that such ''comparable'' emissions reductions can satisfy LAER.) In addition, EPA's proposed UT/A definition includes undemonstrated pollution prevention techniques as potentially eligible UT/A candidates. See also discussion of pollution prevention issues in section IV.H. of this preamble.

The EPA has made some changes to the UT/A definition recommended by the CAAAC. The EPA is not proposing the general catch-all phrase for other mutually agreed upon advantages because it is vague and unnecessary, and could potentially lead to misuse of the waiver. In addition, although the choice of ICT or UT/A is generally a mutual agreement between the permitting authority and the source, the existing ICT rules properly make clear that the source makes the request for an ICT, and the permitting authority approves or disapproves the request. The EPA is also omitting ''non-air'' from the CAAAC recommended UT/A definition to allow air-related impacts to be factored into the decision process thus expanding the arena of potential environment impacts that can be considered. The EPA solicits comment on this proposed definition, particularly on whether any other factors should be included in the definition. The proposed PSD definition of UT/A does not affect the section 111(j) ICT waiver for sources seeking a waiver under the NSPS.

*b. Extension to Nonattainment NSR.* The CAAAC's Subcommittee recommended that the UT/A waiver be extended to major nonattainment NSR, in light of the increased number of sources subject to nonattainment NSR after the 1990 Amendments. Many of these sources will be relatively small (compared to typical pre-1990 major nonattainment NSR sources) and may have relatively unique emission units which could greatly benefit from expanded use of undemonstrated control technologies and applications.

However, expanding the UT/A waiver to nonattainment area NSR could create a discrepancy between the UT/A definition and the statutory definition of LAER. The recommended UT/A definition provides that a control technique may qualify if it achieves ''comparable emission reductions.'' As previously discussed, the EPA interprets this as allowing the UT/A to achieve marginally less emission reduction than the applicable emissions level which would otherwise be required by the major NSR permit. However, section 171(3) of the Act defines LAER as the more stringent of either: (1) The most stringent emission limitation contained in the implementation plan of any State for such class or category of source; or (2) the most stringent emission limitation achieved in practice by such class or category of source. The LAER requirement, unlike BACT, does not allow consideration of economic, energy, or other environmental factors to compensate for less emission reductions. Accordingly, it is inappropriate to include in the definition of UT/A for nonattainment areas technologies that achieve only comparable emission reductions.

The EPA is proposing to expand UT/A waiver applicability to nonattainment area NSR and require that all applicable part D requirements (e.g., LAER and offsets) are met prior to issuance of a waiver. See proposed §§ 51.165(a)(1)(xxvi), and 51.165(a)(8). This action supports an Agency objective, as stated in a June 15, 1993 memorandum from Carol Browner, EPA Administrator, entitled ''Pollution Prevention Policy Statement: New Directions for Environmental Protection,'' to further pollution prevention by providing opportunities for technological innovation. The EPA is proposing the recommended UT/A definition for nonattainment NSR, but replaces ''comparable'' with ''equal'' in the ''emission reductions'' language and omits the general, catch all ''other advantages'' language for the same reasons EPA declined to use the language in the PSD context. The EPA solicits comment on this definition, particularly on whether any factors other than those proposed should be included in the definition.

To provide EPA information on the waiver's utilization and types of technologies or applications approved, the EPA is proposing that a copy of the waiver be submitted to the Agency within 30 days of its approval. See proposed §§ 51.165(a)(8)(ix) and 51.166(s)(9).

*c. Federal Land Manager (FLM) Consultation.* As part of the UT/A waiver approval process, the CAAAC recommended that the FLM be consulted before the permitting authority approves an UT/A waiver where impacts on Class I area air quality or AQRV's may result from the UT/A source. Existing §§ 51.166(s)(2)(vi) and 52.21(v)(2)(vi) require that before an ICT waiver can be approved the Class I area protection provisions of §§ 51.166(p) and 52.21(p) must be satisfied with respect to all periods during the life of the ICT source or modification. The EPA believes these provisions and revisions to §§ 51.166(p) and 52.21(p) proposed in this document, address these concerns and proposes to retain these provisions for a UT/A waiver under PSD.

*d. Content of a UT/A Waiver.* Based on the CAAAC's recommendations, the EPA proposes to revise the existing ICT waiver provisions to require that the UT/A waiver contain the emission control performance objective of the UT/A and the otherwise applicable BACT or LAER standard identified in the UT/A permit for reference, but not as enforceable limits during the life of the UT/A waiver. See proposed §§ 51.166(s)(5)(i) and 52.21(v)(5)(i). With regard to a nonattainment area NSR UT/A waiver, the EPA is proposing that the undemonstrated technology comply with the applicable LAER limit. See proposed § 51.165(a)(8)(v)(A).

The CAAAC recommended that, in addition to including the otherwise applicable BACT or LAER emission limit and the UT/A's emission limit objective in the permit, the permitting authority should also establish an upper emission limit for the UT/A. Based on the Subcommittee's discussions, the Agency interprets this recommendation as being an enforceable emission limit established by the permitting authority and not to be exceeded during the term of the UT/A waiver. This issue is discussed further in section IV.f of this preamble.

As recommended by the CAAAC, a proposed UT/A waiver application and permit should include (1) identification of potential failure modes, (2) projections of corresponding emissions increases expected from such failure modes, (3) characterization of such failure modes and corresponding emission increases as marginal or gross failures, and (4) identification of potential contingency measures, both short- and long-term, to reduce or mitigate emission increases in the event of worse-than-expected emissions during the term of the UT/A waiver. The CAAAC recommended that these elements be included in the UT/A permit and that the potential contingency measures not be construed to limit the consideration or use of any other contingency measures that may be identified later, if such measure would better ameliorate worse-than-expected UT/A performance. These projections and contingency measures would, as for any NSR permit term, be subject to public notice, comment and review and approval by the permitting authority.

The EPA has evaluated and largely agrees with the CAAAC's recommendations. Thus, the EPA proposes regulations requiring the permitting authority to include in UT/

A approved permits (1) the UT/A's emission control performance objective and applicable reference BACT or LAER emission limit and (2) the identification and classification of potential failure modes and associated contingency measures. See proposed §§ 51.165(a)(8)(v) (A) and (C), 51.166(s)(5) (i) and (ii), and 52.21(v)(5) (i) and (ii). The EPA also proposes that an application for a UT/A waiver include a detailed description of the continuous emission reduction system and all information used or consulted in applying for a UT/A waiver. See proposed §§ 51.165(a)(6)(ii)(C), 51.166(n)(2)(iii) and 52.21(n)(2)(iii).

The CAAAC recommended that EPA should allow the initial compliance demonstration requirements to be revised by mutual agreement within the life of the UT/A provisions. The CAAAC's rationale was to allow improvements in the suitability, representativeness, repeatability, accuracy, or reliability of emission control performance test results, or for such other causes as are mutually agreed to justify a revision. Currently a permitting authority has the flexibility to revise compliance demonstration requirements in a permit as allowed by applicable law. In addition, EPA is currently modifying its title V permit revision process to allow sources considerable flexibility in making changes to existing permit terms. The EPA expects to allow compliance demonstration changes in the UT/A context consistent with the Title V revision process.

*e. Failure of a UT/A.* The Subcommittee acknowledged that the UT/A may fail to achieve its emission control performance objective and that the level of failure may vary thereby warranting different types of corrective action. As described in the preceding section, the EPA is proposing regulations largely consistent with the CAAAC recommendations that would require the UT/A permit to include potential failure modes. Based on the CAAAC's recommendation, the EPA proposes that potential failure modes be identified as either ''marginal'' or ''gross'' and that emissions levels associated with a ''marginal'' and a ''gross'' failure be specified in the permit along with the corresponding remedial actions. See proposed §§ 51.165(a)(8)(v)(B), 51.166(s)(5)(ii) and 52.21(v)(5)(ii). ''Marginal'' and ''gross'' failure should be expressed as both an emission rate (e.g., pounds/hour) and mass emission limit (e.g., pounds/million British thermal units). Recognizing that the installation of each UT/A will be unique, the EPA is proposing to provide the permitting authority with the flexibility to define both ''marginal'' and ''gross'' failure on a case-by-case basis. To protect public health, NAAQS and AQRV, the EPA is proposing that the ''gross'' failure limit be included in the permit as an enforceable emission limit that is not to be exceeded during the term of the UT/A waiver. See proposed §§ 51.165(a)(8)(viii), 51.166(s)(8) and 52.21(v)(8).

The EPA envisions that a ''marginal'' failure would be addressed with specific contingency measures, but the source would not need to abandon the technology. Thus, the permitting authority is provided with the flexibility to either permit the UT/A at its ''marginal'' failure emission level or require the source to install technology capable of achieving the appropriate reference emission limit (i.e., BACT or LAER). See proposed §§ 51.165(a)(8)(vii), 51.166(s)(7) and 52.21(v)(7). The EPA solicits comment on whether specific definitions of ''marginal'' and ''gross'' failure should be established by the Agency by rule or guidance.

*f. Incentives.* Recognizing that a very limited number of PSD ICT waivers have been requested or approved since 1980, the NSR Reform Subcommittee discussed various options for promoting the use of UT/A's. One option discussed by the Subcommittee would allow a source to use, bank, or trade the portion of emission offsets of a nonattainment pollutant that becomes surplus when the UT/A achieves greater emission reductions than originally anticipated. The second option would allow the permitting authority, on a case-by-case basis, in conjunction with the source and subject to public review, to agree on values of either mass emission reduction credits or emission impact reductions in PSD areas in the UT/A permit. The third option, applicable to both PSD and nonattainment areas, would limit the benefit accruing to the UT/A source to protection from enforcement of the initial UT/A emission limit during the life of the UT/A waiver.

The EPA agrees that incentives should be provided to encourage the development of UT/As and is requesting comment on whether existing policies (e.g., Emission Trading Policy Statement (51 FR 43814) and Economic Incentive Program (59 FR 16690)) provide sufficient guidance concerning emission reduction credits thus making specific UT/A provisions that address credits unnecessary. In addition, the EPA solicits comment on the second option identified by the Subcommittee, i.e. some type of PSD emission reduction (or emission impact reduction) credit. In regard to the third option, the EPA believes that both the current ICT and the proposed UT/A waivers provide the protection envisioned by the Subcommittee, namely a limited shield from enforcement during the term of the UT/A waiver, assuming all applicable UT/A requirements are met. However, the proposed UT/A waiver regulations specifically require the permitting authority to establish an enforceable upper emission limit which is not to be exceeded during the term of the UT/A waiver. See proposed §§ 51.165(a)(8)(viii), 51.166(s)(8) and 52.21(v)(8).

g. *Duration and Number of UT/A Waivers.* The CAAAC recommended that UT/A waiver provisions expire no later than 4 years after start of operation or 7 years after the initial UT/A permit is issued, whichever is earlier, or by any earlier date mutually agreed upon by the parties. As described below, EPA is proposing a shorter waiver period. The EPA is also proposing that upon expiration of the UT/A provisions, either the initial UT/A emissions limit, or a revised limit that meets the requirements for either better-than-expected or less-than-expected emissions control performance, as appropriate, would be incorporated into a final permit (i.e. no longer an UT/A waiver). The EPA also proposes to require reporting of the final permit limits to EPA's RACT/BACT/LAER Clearinghouse. See proposed §§ 51.165(a)(8) (vi) and (vii), 51.166(s) (6) and (7) and 52.21(v) (6) and (7).

The EPA is proposing that the UT/A be allowed no longer than 2 years from the time of startup or 5 years from permit issuance (2/5 years), whichever is earlier, to achieve the emission control performance objective on a continuous basis. See proposed § 51.165(a)(8)(ii)(B), and the amendatory language for §§ 51.166(s)(2)(ii) and 52.21(v)(2)(ii). This proposal is applicable to both PSD and nonattainment area UT/A waivers. The Agency is proposing a compliance timeframe other than the CAAAC's recommendation due to comments received during the Subcommittee's deliberations that indicated, as a general rule, an UT/A must perform as envisioned within a relatively short timeframe, primarily due to production constraints, or it is replaced with a conventional control technology. In addition, in order to protect air quality, especially for nonattainment areas, the EPA considers the proposed 2/5 year compliance timeframe more appropriate than the CAAAC's recommendation.

The EPA solicits comment on the allowable length of a compliance schedule to meet the reference BACT or LAER and on whether the allowable length should be longer for BACT than for LAER.

The CAAAC recommended that the number of UT/A waivers approved for any given UT/A should not exceed the quantity that the permitting authority deems appropriate to determine the particular UT/A's emission control performance potential, its capability to operate safely and effectively, and its capability to protect health, safety, and welfare.

Section 111(j) of the Act contains the same language identified by the Subcommittee; however, neither existing § 51.166(s) nor § 52.21(v) contain such provisions. While EPA is inclined to allow additional waivers if the criteria specified in section 111(j)(1) are met, EPA does have reservations about reissuing waivers for the same system, particularly in nonattainment areas. For both PSD and nonattainment area UT/A waivers, the EPA is proposing to incorporate the criteria referenced in section 111(j)(1)(C) and found in section 111(j)(1)(A) (ii) and (iii) of the Act. See proposed §§ 51.165(a)(8)(x), 51.166(s)(10) and 52.21(v)(9). The EPA solicits comment on this proposal.

*G. Pollution Prevention*

1. The Pollution Prevention Act (PPA) and the EPA's Pollution Prevention Policies

In 1990 Congress passed the PPA which established as national policy ''that pollution should be prevented or reduced at the source whenever feasible; pollution that cannot be prevented should be recycled in an environmentally safe manner, whenever feasible; pollution that cannot be prevented or recycled should be treated in an environmentally safe manner whenever feasible; and disposal or other release into the environment should be employed only as a last resort and should be conducted in an environmentally safe manner.'' See 42 U.S.C. sec. 13101(b). In subsequent correspondence (memorandum dated May 28, 1992, from Hank Habicht III, EPA Deputy Administrator, to all the EPA personnel and memorandum dated June 15, 1993, from Carol Browner, EPA Administrator, to all the EPA personnel), the EPA provided guidance on interpreting the PPA and integrating pollution prevention into the Agency's activities.

The Subcommittee developed several draft recommendations on pollution prevention issues, which were adopted by the CAAAC. The CAAAC also submitted a document from the Business Roundtable related to the definition of pollution prevention. The CAAAC recommended that the EPA define pollution prevention consistent with the PPA and that the term ''pollution prevention project'' include ''pollution prevention processes, strategies, or systems,'' so that the concept is not limited to technology.

In adopting the PPA, Congress found that ''[t]here are significant opportunities for industry to reduce or prevent pollution at the source through cost-effective changes in production, operation, and raw material use.'' See 42 U.S.C. sec. 13101(2). The PPA defines ''source reduction'' to mean any practice which (1) Reduces the amount of any hazardous substance, pollutant, or contaminant entering any waste stream or otherwise released into the environment (including fugitive emissions) prior to recycling, treatment, or disposal; and (2) reduces the hazards to public health and the environment associated with the release of such substances, pollutants, or contaminants. The term includes equipment or technology modifications, process or procedure modifications, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, or inventory control. See 42 U.S.C. sec. 13102(5)(A). The PPA expressly provides that the term ''source reduction'' does not include any practice which alters the physical, chemical, or biological characteristics or the volume of a hazardous substance, pollutant or contaminant through a process or activity which itself is not integral to and necessary of the production of a product or the providing of a service. See 42 U.S.C. sec. 13102(5)(B). Under the PPA, recycling, energy recovery, treatment, and disposal are not included within the definition of pollution prevention.

In the May 28, 1992 EPA pollution prevention policy memorandum, the Agency provided guidance on incorporating pollution prevention into the Agency's ongoing programs. The guidance provides that the selection of a pollution prevention option, in any given situation, depends on the requirements of applicable law, the level of risk reduction achieved, and the cost-effectiveness of that option. In addition, the policy provides that the Agency's environmental management hierarchy is as follows: (1) Prevention, (2) recycling, (3) treatment, and (4) disposal or release, should be viewed as a set of preferences, rather than an absolute judgment that prevention is always the most desirable option. The Agency's hierarchy is applied to many different kinds of circumstances that will involve judgment. Finally, the Agency distinguishes between prevention and recycling by including what is commonly called ''in-process recycling,'' as ''prevention'' but excluding ''out-of-process recycling.'' This guidance memorandum further observes that recycling conducted in an environmentally sound manner shares many of the advantages of prevention in that it can reduce the need for treatment or disposal, and conserve energy and resources.

2. Pollution Prevention in BACT and LAER

The CAAAC recommended that the EPA issue guidance or regulatory authority allowing consideration of pollution prevention when determining BACT or LAER. The CAAAC also recommended that the Agency create separate categories of demonstrated and undemonstrated pollution prevention BACT and LAER. The categories would include systems, processes, or strategies expected to achieve either (1) more stringent emission levels than demonstrated BACT and LAER or (2) comparable emission levels at lower energy input, lower collateral emissions or having cross-media environmental benefits, or other advantages that are defined and mutually agreed upon to justify the pollution prevention approach. Both demonstrated and undemonstrated pollution prevention BACT would take cost into account.

The Agency examined whether existing regulations provide permitting agencies with the flexibility to consider pollution prevention techniques in their analysis of control options. The Act defines ''best available control technology'' as ''an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under the Act emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.'' See section 169(3) of the Act.

The Agency interprets the phrase ''production processes and available methods, systems and techniques'' in

the statutory BACT definition to encompass pollution prevention techniques. Existing §§ 51.166(b)(12) and 52.21(b)(12) incorporate the BACT definition into PSD regulations. The EPA solicits comment on any potential revisions or new provisions in the PSD regulations that would further facilitate consideration of pollution prevention techniques.

Any major stationary source or major modification locating in an area designated nonattainment pursuant to section 107 of the Act is required to meet LAER. See, *e.g.*, sections 172(c)(5) and 173 of the Act. The LAER is defined as the more stringent of (1) the most stringent emission limitation contained in the implementation plan of any State for such class or category of source, unless the owner or operator demonstrates that such limitations are not achievable; or (2) the most stringent emission limitation achieved in practice by such class or category of source. See section 171(3) of the Act. In general, the LAER requirement is based on whether an emission limitation is achievable and, unlike BACT, does not provide for consideration of economic, energy, or other environmental factors on a case-by-case basis. The Agency has interpreted the LAER definition as including any method of emissions reduction provided it achieves the lowest emission rate feasible. Thus, for nonattainment area purposes, pollution prevention techniques can be considered as a control option; however, the techniques must achieve the same emission rate as otherwise applicable LAER.

After review of the Subcommittee's deliberations, the CAAAC's recommendation and public comment, the EPA believes that current PSD and nonattainment NSR regulations, combined with today's proposed version of UT/A waivers, provide the permitting agencies with the flexibility to consider pollution prevention techniques when considering either BACT or LAER control options. Thus, the EPA does not find that additional regulatory authority is necessary. The EPA solicits comment on this view and any suggested rule changes to facilitate the consideration of pollution prevention in NSR permitting.

The Agency also reviewed the CAAAC's recommendation to create separate categories for demonstrated and undemonstrated BACT and LAER control options in regard to the UT/A waiver. As discussed above, the Agency's interpretation of the definitions for BACT and LAER provide for the inclusion of pollution prevention techniques when considering available control options. With respect to a separate category for undemonstrated pollution prevention options and as discussed in the UT/A waiver section, the EPA considers all undemonstrated control options, including pollution prevention, to be eligible to qualify for this waiver. Thus, because the Agency interprets BACT and LAER to allow for demonstrated and certain undemonstrated pollution prevention techniques and because EPA is proposing to explicitly provide that undemonstrated pollution prevention techniques may qualify for a UT/A waiver, the EPA does not believe it necessary to create a separate and unique category for either demonstrated or undemonstrated pollution prevention control options.

Finally, EPA notes that it has addressed pollution prevention elsewhere in this document. In section II.E. of this preamble, EPA proposes to include pollution prevention projects in the proposed pollution control project exclusion. The EPA also proposes an accompanying definition of pollution prevention based on the PPA and EPA's pollution prevention policies. See proposed §§ 51.165(a)(1)(xxix), 51.166(b)(43), 52.21(b)(44), and 52.24(f).

### *H. States' Discretion To Adopt or Enforce More Stringent Requirements*

The regulatory revisions proposed in this action represent minimum Federal requirements under the Act. States retain full discretion to adopt or enforce more stringent air quality protection requirements consistent with section 116 of the Act.

### *I. Addressing the EPA's Obligation under Pending Settlement Agreement*

The ''top-down'' process, the methodology described in section IV.B. of this preamble, is the EPA's recommended approach for determining BACT and is based on the EPA's interpretation of existing statutory and regulatory requirements. On March 29, 1989 (supplemented on May 3 and 10, 1989), the American Paper Institute and the National Forest Products Association (collectively ''API'') petitioned the EPA to rescind the top-down policy and initiate a rulemaking on BACT determinations. The EPA denied this request on May 12, 1989 (supplemented on June 13, 1989), explaining that the top-down approach was neither at variance with, nor a revision of, the PSD regulations, and that no rulemaking was required. Subsequently, API filed suit in the U.S. Court of Appeals for the District of Columbia and in the U.S. District Court for the District of Columbia. *API* v. *Reilly*, No. 89–1428 (D.C. Cir. filed July 10, 1989); *API* v. *Reilly*, No. 89–2030 (D.C.C. filed July 18, 1989). The District Court action was dismissed on January 5, 1993 for lack of subject matter jurisdiction.

A consortium of utilities filed a similar petition for review of the EPA's actions, *Alabama Power Co.* v. *EPA*, No. 89–1429 (D.C. Cir. filed July 11, 1989), and the case was consolidated with the pending *API* case in the D.C. Circuit. On February 1, 1990, the Utility Air Regulatory Group submitted an administrative petition concerning the EPA's policy and practice on BACT determinations. The API also challenged a 1990 draft guidance document by the EPA on top-down BACT, *API* v. *Reilly*, No. 90–1364 (D.C. Cir. filed July 13, 1990).

All of these judicial and administrative matters were resolved by a settlement agreement in which the EPA agreed to publish, by January 6, 1992, a proposed rule ''to revise or clarify the regulations defining BACT'' and ''to revise or clarify how BACT determinations should be made.'' See 56 FR 34202 (July 26, 1991) (request for public comment on proposed settlement). The EPA also agreed to take final action on the proposed rule as expeditiously as practicable. In the event the EPA did not take the specified action, the parties' sole and exclusive remedy under the express terms of the settlement agreement was to reactivate the underlying litigation.

This publication of proposed rules revising and clarifying the BACT regulations and how BACT determinations should be made triggers certain obligations by the other parties to the settlement. The EPA's final action on the proposed rules will discharge all of its remaining obligations under the settlement agreement and require the dismissal or withdrawal of the remaining judicial and administrative matters described above.

## IV. Class I Areas

### *A. Introduction*

The EPA is today providing guidance and proposing a number of revisions to the PSD regulations at 40 CFR 51.166 and 52.21 to address the protection of air quality and air quality related values in Class I areas. In many instances, where it has been deemed appropriate, the EPA is taking action consistent with, or similar to, the CAAAC's recommendations.

In general, the EPA is proposing several changes to better facilitate State notification and coordination with the FLM and to provide the States, permit

applicants and FLM with clearer guidance about their relative roles and responsibilities. The EPA is proposing ''significant impact levels'' for Class I increments that would exclude proposed sources with de minimis ambient impacts from the requirement to conduct comprehensive Class I increment analyses and enable the permitting authority to determine that the emissions from such source would not contribute to an increment violation. The EPA is also establishing a general policy, and proposing regulatory language, allowing the use of offsets to mitigate adverse impacts on AQRV in Federal Class I areas. This policy will provide a reasonable way to allow the permitting of sources that would otherwise face permit denial because of their adverse impact on AQRV. The EPA is also proposing several clarifications to its PSD regulations where confusion about a requirement has created controversy or impeded more expeditious permit review.

*B. Background*

1. Overview of PSD Requirements for Class I Areas

The PSD program applies to ''PSD areas''—areas designated as ''attainment'' or ''unclassifiable'' pursuant to section 107 of the Act.[52] A fundamental aspect of the PSD program is an assessment of a proposed source's impact on the amount of air quality deterioration that is allowed within a particular PSD area. All PSD areas are categorized as either Class I, II or III. See section 162 of the Act. The classification of an area determines the corresponding ''maximum allowable increases'' of air quality deterioration (''increments'') for that area. See section 163 of the Act. Only a relatively small increment of air quality deterioration is permissible in Class I areas and, consequently, these areas are afforded the greatest degree of air quality protection.

The PSD program provides an additional layer of special protection for Federal Class I areas. See section 165(d)(2) of the Act. Mandatory Federal Class I areas are national parks greater than 6,000 acres in size, national wilderness areas greater than 5,000 acres in size and other areas specified in section 162(a) of the Act. These Federal Class I areas are mandatory in that they may not be redesignated as any other classification. All other PSD areas in the country were initially designated as Class II areas in accordance with section 162(b) of the Act. Federal lands not already designated as Class I areas under section 162(a) may be redesignated as Class I areas. See section 164 of the Act.

The FLM and the Federal official charged with direct responsibility for management of any Federal lands within a Class I area have an ''affirmative responsibility'' to protect the AQRV (including visibility) of such lands.[53] See section 165(d)(2)(B) of the Act. The FLM protects AQRV through a prescribed statutory role in assessing the potential impacts of a proposed PSD source. See section 165(d)(2)(C) of the Act. If a proposed source does not cause or contribute to a violation of a Class I increment, the FLM may, nevertheless, demonstrate to the satisfaction of the permitting authority that the source will have an adverse impact on AQRV in a specific Federal Class I area and, if so demonstrated, the PSD permit shall not be issued. Conversely, if the proposed source will cause or contribute to a violation of a Class I increment, then the owner or operator must demonstrate to the satisfaction of the FLM that there will be no adverse impact on AQRV. See sections 165(d)(2)(C) (ii) and (iii) of the Act.

2. The Need To Improve PSD Permit Requirements Related to the Protection of Air Quality Related Values (AQRV) in Federal Class I Areas

Over the past several years Congress, the FLM, and others increasingly have expressed concern about the effects of air pollution being observed and documented in Federal Class I areas, as well as the failure of Act programs to adequately protect Federal Class I areas from such effects. The U.S. General Accounting Office has issued reports addressing these issues.[54]

The FLM have sought to protect Federal Class I areas by, among other efforts, identifying concerns about the potential impacts associated with emissions from new source growth. In their attempts to protect these lands, FLM have indicated that their failure to receive timely notice of relevant permit applications has undermined their ability to exercise their affirmative responsibility to protect Class I areas and that permitting authorities have given insufficient weight to concerns of FLM. Permit applicants have complained that EPA's existing regulations are unclear and that there is confusion and uncertainty about the PSD permit requirements related to the protection of AQRV in Federal Class I areas. Moreover, permitting authorities examining permit applications in the face of objections by FLM have complained to the EPA about the lack of guidance on Class I area protection and the consideration that should be given to an FLM's concerns. The EPA's proposal, described below, attempts to address these various concerns and, thereby, improve the PSD permitting process.

*C. The EPA Proposal*

1. Defining AQRV and Determining Adverse Impacts

The Act and the existing PSD regulations are silent in explaining what an AQRV (other than visibility) is, what procedures should be followed for defining an AQRV, and what criteria should be used for setting critical pollutant loadings for determining whether an adverse impact on AQRV would occur. The EPA is proposing to add general definitions for the terms ''AQRV'' and ''adverse impact on AQRV.'' In addition, the EPA is clarifying the role and responsibilities of the FLM in the PSD permitting process.

*a. Definitions.* The EPA is proposing to add definitions of ''air quality related value'' and ''adverse impact on air quality related values'' to both sets of PSD regulations. As noted, the Act is silent in defining AQRV other than visibility. However, the legislative history provides the following:

[T]he term ''air quality related values'' of Federal lands designated as class I includes the fundamental purposes for which such lands have been established and preserved by the Congress and the responsible Federal agency. For example, under the 1916 Organic Act to establish the National Park Service (16

[52] Areas having air quality that meets the national ambient air quality standards (NAAQS) are designated ''attainment,'' and areas for which there is insufficient information to reach a conclusion about their air quality status are designated ''unclassifiable'' in accordance with procedures set forth in section 107 of the Act.

[53] The ''FLM'' is defined as the Secretary of the department with authority over such lands, i.e., Department of the Interior and Department of Agriculture. See Act section 302(i). It should be noted that FLM authority has been delegated to other officials within these Departments. For example, the Assistant Secretary for Fish and Wildlife and Parks is the FLM for areas under the jurisdiction of the National Park Service and U.S. Fish and Wildlife Service. In today's notice, the EPA is proposing to clarify the definition of ''FLM'' to reflect the FLM's authority to designate another official to act on his or her behalf with respect to Federal Class I areas. See proposed sections 51.166(b)(24) and 52.21(b)(24).

[54] See U.S. General Accounting Office Report to the Chairman, Environment, Energy, and Natural Resources Subcommittee, Committee on Government Operations, House of Representatives, ''Air Pollution: Protecting Parks and Wilderness from Nearby Pollution Sources'' (February 7, 1990) reprinted in 136 Cong. Rec. S2879–2880 (March 21, 1990); U.S. General Accounting Office Testimony before the Environment, Energy and Natural Resources Subcommittee, Committee on Government Operations, House of Representatives, ''Air Pollution: Regional Approaches Are Needed to Protect Visibility in National Parks and Wilderness Areas'' (April 29, 1994).

U.S.C. 1), the purpose of such national park lands ''is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations.''

S. Rep. No. 127, 95th Cong., 1st Sess. 36 (1977).

The EPA proposes to define ''AQRV'' as a scenic, cultural, physical, biological, ecological, or recreational resource which may be affected by a change in air quality, as defined by the FLM for Federal lands and as defined by a State or Indian Governing Body for nonfederal lands within their respective jurisdictions. See proposed §§ 51.166(b)(40) and 52.21(b)(41). The proposed definition addresses the fundamental purposes for which such lands have been established and preserved. The proposed definition also recognizes that (1) The FLM have the responsibility to identify AQRV for Federal lands, and (2) the Act gives authority to States and Indian Governing Bodies to identify AQRV for areas within their respective jurisdictions.[55] The EPA is proposing to define ''adverse impacts on air quality related values'' as a deleterious effect on any AQRV defined by the FLM, resulting from the emissions of a proposed source or modification, that interferes with the management, protection, preservation, or enjoyment of the AQRV of a Federal Class I area. See proposed § 51.166(b)(41) and § 52.21(b)(42). Under the part 52 PSD regulations, the proposed definition would be in addition to the existing definition of ''adverse impact on visibility'' [§ 52.21(b)(29)] which is derived from the EPA's visibility regulations adopted pursuant to the Act's visibility protection program. See existing 40 CFR 51.301(a) and 51.307. Under the Federal PSD requirements, EPA intends that the definition of ''adverse impact on visibility'' continue to be used when the AQRV of concern is visibility. The new definition is intended to encompass all AQRV.

The proposed definition of ''adverse impact on air quality related values'' includes the requirement that such determinations be made on a case-by-case basis, considering the change in existing air quality that will result from the emissions of a particular pollutant from a proposed major source or major modification.[56] Moreover, a determination of whether a source will have an adverse effect must consider the AQRV specifically identified by the FLM and, for each affected AQRV, the projected impact of the emissions from the proposed PSD source on the existing background air quality (including the predicted impacts of recently-permitted sources not yet in operation) in the Class I area.[57] Thus, the FLM's demonstration of adverse impact on AQRV, may consider a source's impact on existing conditions, which may already be regarded as ''adverse.'' The adverse impact demonstration is also discussed in section IV.C.2.d. of this preamble.

The proposed definition also recognizes that the term ''adverse impact on air quality related values'' has special meaning under the Act that is properly limited to Federal Class I areas. See section 165(d) of the Act. As described previously, permits must be denied to sources whose emissions would have an adverse impact AQRV in a Federal Class I area, even though no violation of a Class I increment would result from those emissions.

*b. Role of the FLM in Defining Specific AQRV.* In general, the EPA explicitly recognizes that FLM have special expertise and knowledge about the Federal Class I areas which they manage. In addition, the EPA agrees with the CAAAC's recommendation that the FLM should be expressly recognized as having the primary responsibility for the identification of specific AQRV.

The EPA believes that it is appropriate not to propose regulations that would dictate how the FLM identify AQRV (and associated critical pollutant loadings) or demonstrate an adverse impact on AQRV. These responsibilities are closely tied to the role of the FLM mandated by the Act, and are also integral to the management of those AQRV under the mandates of the Federal Lands statutes as well (e.g., Wilderness Act, 16 U.S.C. 1131 *et seq.*, and 1916 National Park Service Organic Act, 16 U.S.C. 1 *et seq.*) Furthermore, because of the wide variety of Federal Class I areas and AQRV, sensitivities of critical receptors, and the unavailability of data in many cases, the EPA believes that the FLM must have sufficient latitude to address these issues on an area-by-area, as well as a permit-by-permit, basis. At the same time, the EPA encourages FLM to identify AQRV on a regional or national basis where appropriate, and to establish general procedures for identifying AQRV.

*c. Role of the FLM in Triggering a Class I Area Analysis.* It is generally agreed that not all sources applying for PSD permits should have to provide information concerning potential Class I area impacts. Various factors concerning a particular source, including the type and amount of its emissions, and the source's distance from the Class I area, will influence whether the emissions from a proposed source have the potential to adversely impact a Class I area. This proposal links the requirement for a permit applicant to provide Class I impact information with the filing of a notice by the FLM (or certain other government officials) which (1) alleges that emissions of a particular pollutant from a proposed major emitting facility may cause or contribute to a change in air quality in a particular Class I area, and (2) identifies the potential adverse impact of such change in air quality on each affected AQRV. The proposal is consistent with section 165(d)(2)(C)(i) of the Act which provides that once such a notice is filed a permit shall not be issued unless the applicant demonstrates that its proposed emissions will not cause or contribute to a violation of the Class I increments. See proposed §§ 51.166(p)(2)(i) and 52.21(p)(2)(i). The proposal also is in accordance with the provisions under section 165(e)(3)(B) of the Act which require, for a proposed source, an analysis of the ambient air quality, climate and meteorology, terrain, soils and vegetation, and visibility, at the site of the proposed source and ''in the area potentially affected by the emissions from such facility.''

The permitting authority would determine the status of the Class I increments considering, as appropriate, the analysis provided by the applicant. The analysis of potential impacts on Class I area resources will help provide the basis for an eventual determination of whether the source will have an adverse impact on AQRV. The EPA generally believes that the combined informational requirements contained in this proposed provision will greatly facilitate resolution of AQRV issues which must ultimately be addressed as a prerequisite to permit issuance. That

[55] Section 164(e) of the Act provides for EPA protection of AQRV when the EPA is requested to resolve a dispute between a State and Tribe about the redesignation of an area or a proposed PSD permit. The reader is also referred to the discussion in section IV.C.5 of this preamble, where EPA clarifies its position concerning the authority of States and Indian tribes to establish AQRV for their respective lands.

[56] In determining whether emissions from a proposed source would present an adverse impact, the effects of hazardous and toxic pollutant emissions should be considered in the analysis if they are constituents of any criteria pollutant emitted in ''significant'' amounts by the source.

[57] In a previous rulemaking, EPA determined that an assessment of whether a proposed source would cause an adverse impact on visibility requires the permitting authority to review the new source's impact in the context of background impacts caused by both existing and previously permitted (not yet constructed) sources. See 50 FR 28548 (July 12, 1985).

is, the analyses will reveal whether the Class I increments will be violated; establish the relative roles of the applicant; the FLM and the permitting authority in making decisions concerning the AQRV; and provide information needed to determine potential AQRV impacts. Moreover, this proposal would limit an applicant's responsibility to perform Class I area assessments to circumstances where there is an identified potential that the proposed source will have an adverse impact on a Class I area.

If the proposed source will cause or contribute to a violation of a Class I increment, the applicant will provide information pertaining to the source's impacts on, as appropriate in light of the FLM's notice, such things as soils, vegetation and visibility to demonstrate that there will be no adverse impact on the potentially affected AQRV identified by the FLM. See section 165(d)(2)(C)(iii) of the Act. If the FLM agrees with this demonstration, and so certifies, the permitting authority may issue the PSD permit even though a violation of a Class I increment has been shown. Alternatively, when the applicant's analysis shows, to the satisfaction of the permitting authority, that the proposed source will not cause or contribute to a violation of a Class I increment, the information pertaining to impacts on the potentially affected AQRV identified by the FLM will help the FLM determine if the proposed source will have an adverse impact on AQRV, and to make a demonstration of such adverse impact to the permitting authority, where appropriate.

While the Act is silent concerning the timing for filing the notice of potential adverse impacts, the EPA believes that it is reasonable and appropriate to require the FLM or other named officials to file the notice before the permitting authority issues its completeness determination on the permit application. See proposed §§ 51.166(p)(2)(i) and 52.21(p)(2)(i). One reason for this proposal is that the filing of the notice establishes certain informational requirements which serve as a measure of the application's completeness. Moreover, it is generally important that EPA require that the notice be filed early in the permit process to expedite permit review. A requirement for early notice submittal helps ensure that the Class I area issues are identified by FLM and other officials early in the permit process and enables the applicant to provide the appropriate Class I analyses in a timely manner so as not to delay the review and issuance of the permit.

The EPA encourages, particularly where a source proposes to locate within 100 kilometers of a Federal Class I area, the applicant to coordinate with the FLM prior to the submittal of its application in order to be able to learn of any FLM concerns and to submit the Class I analyses along with the other required information in its initial permit application. Otherwise, the FLM would be expected to file the notice alleging potential affects on the Federal Class I area, where appropriate, during the 30-day period for review of the application for completeness, as provided under this proposal and described in section IV.C.2.c of this preamble. In the absence of a notice being filed concerning potential Class I impacts, the applicant will still be required to demonstrate that emissions from the proposed source do not cause or contribute to any violation of the Class II increments or NAAQS.

This proposal to require the applicant to complete a comprehensive Class I impact analysis is tied directly to the filing of a notice (alleging potential adverse impacts) prior to the permitting authority's issuance of its completeness determination. However, this proposal is not intended to preclude the FLM from raising new concerns about effects at a later time during the permit review. The FLM may ultimately submit a demonstration of adverse impact on AQRV even if a notice has not been previously filed. In such cases, where additional information is needed to enable the FLM to make the necessary demonstration, the EPA believes that the permitting authority has discretion to determine whether, and to what extent, the applicant should be required to produce the additional information.

The EPA requests comments on this aspect of the proposal in light of the importance of having to file a notice alleging potential Class I impacts in order to trigger the applicant's responsibility to perform an analysis of its Class I impacts. The EPA has considered alternative approaches for triggering the Class I analysis, including a mandatory Class I analysis for any proposed major source or major modification proposing to locate within 100 kilometers, or some other specific distance, from a Federal Class I area. The proposed approach is consistent with the Act requirement for the filing of a notice.

With respect to alternative approaches not proposed, a rigid distance-based test may necessarily be either over- or under-inclusive. For example, if a cutoff of 100 kilometers was established, some sources locating within 100 kilometers from a Federal Class I area may be required to perform an analysis even though there is no potential that the proposed source will have an adverse impact on the area. Conversely, sources proposing to locate more than 100 kilometers from a Federal Class I area that may nevertheless adversely impact a Class I area would not be required to carry out the appropriate Class I analyses. Thus, a rigid distance cutoff would still need some kind of accompanying triggering mechanism to establish the informational requirement for Class I impacts for potential sources of concern locating beyond any specified cutoff distance. The EPA is interested in alternative approaches which will establish a reasonable requirement for Class I analyses at a reasonable point in the permit process.

With regard to the notice, the EPA believes that it should be in writing, preferably in the form of a letter to the permitting authority, and should address at a minimum (1) the specific pollutant emissions from the proposed source that may cause or contribute to a change in air quality in the specified Federal Class I area, and (2) the potential adverse impact of such change on each specified AQRV. While the alleged change in air quality and potential impacts are naturally preliminary, and perhaps somewhat speculative, the intent is that the allegation should present a potential linkage between the proposed source—based on its specific pollutant emissions and its relative location to the affected Class I area—and the specified AQRV in the affected Federal Class I area as to warrant the required Class I analysis.

The notice is also intended to provide the applicant with sufficient information to focus the required Class I analysis on the appropriate pollutant emissions and AQRV of concern to the FLM. Accordingly, the notice should not be used by the permitting authority for any prejudgment as to whether any potential effects on AQRV will be adverse. If it is plausible that a source may impact the affected Class I area, further analysis should generally be performed. The only basis for rejecting such notice, and thereby determining that a Class I analysis is not required, is that the permitting authority finds no potential linkage between the proposed source's potential impact (i.e., change in air quality in the Class I area) and the AQRV identified by the FLM.

An important related issue concerns the responsibility for carrying out any additional technical analyses which may be necessary for the FLM to demonstrate that a source's emissions will have an adverse impact on AQRV. The EPA generally expects the analyses performed by the applicant under the

proposed provisions to enable a FLM to evaluate the impacts on AQRV. In some cases, however, additional information may be necessary to make a thorough AQRV assessment and there is a question as to who should bear the responsibility for such information. Applicants for PSD permits are typically required to provide information and analyses necessary for the permitting authority to make a variety of ambient air quality decisions because, among other reasons, applicants have detailed knowledge about the proposed source's emissions and operations. Yet, applicants should not necessarily be expected to conduct an unlimited number of studies. The permitting authority should ultimately determine, based on consultation with the FLM, what additional information collection should be required of the applicant.

The EPA solicits public comment on this issue in order to establish an equitable approach for completing the required analyses for Class I areas applicable to individual PSD permit applicants. Specifically, the EPA seeks input in determining what the respective responsibilities of the FLM and the permit applicant should be for carrying out the analyses necessary to enable the FLM to demonstrate an adverse impact on AQRV. The EPA will consider such input and decide whether the regulations should explicitly address these individual roles.

This proposal also recognizes that the FLM is not the only official authorized by the Act to file the notice concerning potential impacts on a Federal Class I area. Section 165(d)(2)(C)(i) of the Act authorizes that the notice be filed by any one of several officials, including the Federal official charged with direct responsibility for management of any lands within the Class I area potentially affected, the Federal Land Manager of such lands, the EPA Administrator, or the Governor of an adjacent State containing such Class I lands. Accordingly, the EPA is including in the proposal that the FLM or other named officials may file a notice when it is believed that a proposed source may affect air quality in a Federal Class I area. See proposed §§ 51.166(p)(2)(i) and 52.21(p)(2)(i). In addition, the EPA is proposing to define the term ''Federal official,'' which is used in the proposed regulatory provision as well as in the Act, as the Federal official charged with direct responsibility for management of any lands within a Federal Class I area.[58] See proposed §§ 51.166(b)(39) and 52.21(b)(40).

[58] The EPA is using the term ''Federal official'' to reflect the terminology used in the Act. The legislative history uses the term ''supervisor of a class I area'' in lieu of ''Federal official.'' See S. Rep. No. 127, 95th Cong., 1st Sess. 35–37 (1977). Once a notice is filed alleging possible adverse impacts, the FLM—not any other Federal official, unless duly designated by the FLM—is authorized to demonstrate to the satisfaction of the permitting authority that a proposed source will have an adverse impact on AQRV and that the permit should be denied (as described elsewhere in this preamble). See section 165(d)(2)(C)(ii) of the Act.

*d. Informational Responsibilities of the FLM.* The EPA believes that a logical adjunct of an FLM's expertise and responsibility for protecting the AQRV of Federal Class I areas and identifying a potential adverse impact on AQRV is the responsibility to provide relevant information to persons involved in the permitting process. Permitting authorities and permit applicants should have access to any information concerning AQRV which an FLM has defined for any Federal Class I areas that may be affected by a proposed source or modification. To address this concern, the EPA is proposing that the FLM be required to provide pertinent information, where available, to PSD permit applicants upon request. See proposed §§ 51.166(p)(2)(ii) and 52.21(p)(2)(ii).

Specifically, the proposal would benefit the owner or operator of a proposed facility that may have an adverse impact on AQRV in a Federal Class I area. The proposed regulations generally call for the FLM to provide all available information about relevant AQRV and methods for analyzing potential impacts on those AQRV when the applicant requests such information. This information would include a current listing of the AQRV, sensitive receptors and critical pollutant loadings for each AQRV, as well as the methods and tools (e.g., models) available to analyze the potential impacts for the affected Class I area. The FLM also would be expected to provide copies of relevant previous findings of adverse impact on AQRV that have been made as part of other PSD permit reviews affecting the same Class I area.

The EPA is pursuing the development of a computerized compilation or clearinghouse of available Class I area information. The cooperation of the FLM would be critical to the utility of this resource. Relevant information would be posted as it becomes available. To the extent that the relevant information is posted in the clearinghouse, it would not be necessary to provide such information to an applicant. If however, the FLM has new information not yet available in the clearinghouse, the FLM should directly provide such information to the applicant when a request is made. This clearinghouse is described in section IV.C.6 of this preamble.

2. Improving Federal Land Manager (FLM)/Permitting Authority Coordination

The CAAAC recommendations reflected general agreement that better State and FLM coordination is integral to avoiding delays and controversies during the PSD permitting process. Accordingly, the EPA is proposing a general provision which requires that the permitting authority provide for consultation and coordination with the FLM. See proposed §§ 51.166(p)(2)(iii) and 52.21(p)(2)(iii). The permitting authority is expected to use its judgment in deciding the appropriate measure of consultation and coordination that will ensure adequate input from the FLM as well as adequate consideration of the FLM's expertise and findings concerning potential Class I area impacts. While this particular provision affords the permitting authority flexibility in determining the appropriate level of interaction with the FLM throughout the permitting process, the EPA also believes that certain specific points of consultation and coordination, as described below, are needed to ensure that the FLM is given adequate opportunity to carry out the responsibilities conferred on the FLM by the Act.

*a. Pre-application Coordination.* The EPA is today proposing to require that the FLM be informed of any advance notification received by the permitting authority from a prospective applicant involving a source that would construct within 100 kilometers of a Federal Class I area. As proposed, the affected FLM must be notified within 30 days of the permitting authority's receipt of any such advance notification of a PSD permit application. See proposed §§ 51.166(p)(3)(i) and 52.21 (p)(3)(i).

The EPA recognizes that the type of early notification that a prospective applicant may provide to the permitting authority will vary from one situation to the next. Thus, the type of notification provided by the permitting authority to the FLM should be commensurate with the type of information which is received. For example, a brief letter or phone call from the permitting authority to the FLM may be appropriate when the information about the potential project is only very preliminary. Generally, it should not be necessary to notify the FLM more than once concerning any early contacts by a prospective applicant with the permitting authority. An exception would be where, as described below, a pre-application meeting is arranged as a

result of subsequent communications between the applicant and the permitting authority.

Consistent with CAAAC recommendations, the EPA is also proposing to require that the permitting authority provide the FLM with notice of, and reasonable opportunity to participate in, pre-application meetings scheduled with prospective PSD applicants that would locate within 100 kilometers of a Federal Class I area. See proposed §§ 51.166(p)(3)(iii) and 52.21(p)(3)(ii). If given such an early opportunity, the FLM would be expected, where possible, to inform the prospective applicant of concerns about Class I impacts, as well as any intention to file a notice alleging potential Class I impacts.

While this proposal for advance notification applies specifically to prospective sources and modifications located 100 kilometers or closer to a Federal Class I area, there should be no automatic presumption that sources located farther than 100 kilometers will not affect a Federal Class I area.[59] There will be instances where it would be prudent for the permitting authority to notify the FLM of a prospective source that would locate more than 100 kilometers from a Federal Class I area. As further described below, the FLM will receive summary notification of such distant sources at the permit application notification stage and may be interested in learning about them as early as possible. However, the EPA has declined to propose requirements for mandatory pre-application notification beyond the 100-kilometer distance. Nevertheless, the EPA will consider a more inclusive cutoff, e.g., 200 kilometers, for mandatory pre-application notification, if for some reason it is unable to implement the database that is intended to inform FLM about the more distant proposed new major sources and major modifications.

The EPA requests public comments on all aspects of these proposed regulatory revisions addressing advance notification, including the appropriate type of notification, the mandatory notification within 100 kilometers of a Federal Class I area, and the 30-day timeframe for providing such notification to the FLM. The EPA is interested in the public's views about the need for these changes in light of the other regulatory revisions, described below, that the EPA is proposing to improve FLM coordination, including the proposed requirement that permit applications for all PSD sources and modifications proposing to locate within 100 kilometers of a Federal Class I area must automatically be transmitted to the FLM.

*b. Coordination of the Permit Application.* Several of the CAAAC recommendations addressed improving coordination between the permitting authority and the FLM once a permit application has been received. Similar to the recommendations for pre-application coordination addressed previously, such coordination was considered important in helping to avoid disputes and delays in carrying out the permit review process.

The EPA is proposing to revise the notification requirements that apply when the permitting authority receives a PSD permit application. The proposed notification requirements are to apply on the basis of the proximity of the proposed source or modification to a Federal Class I area. However, as described previously, sources proposing to locate near a Federal Class I area are not automatically assumed to have an adverse impact on that area. With the proposed revisions, the FLM is afforded an opportunity to review the contents of any PSD permit application to determine whether sufficient information is available to assess the potential impacts on a Federal Class I area. As described earlier, in section IV.C.1.c of this preamble, the EPA has proposed to require that the FLM (or other named officials) file a notice alleging potential Class I impacts in order to trigger specific Class I informational needs in the permit application. The proposed 100 kilometer cutoff described below applies only to the automatic notification (including forwarding of permit application) of the FLM that such source has applied for a PSD permit.

(1) Notification to FLM for Sources Located Within 100 Kilometers of a Federal Class I Area. Because sources located within a 100-kilometer range of Federal Class I areas generally have the greatest potential for affecting the air quality in those areas, EPA is proposing to require notification of the affected FLM when a PSD permit application is received for a new or modified source proposing to locate within 100 kilometers of a Federal Class I area. The proposed notification includes sending a copy of the permit application and any other relevant information. See proposed §§ 51.166(p)(4)(i) and 52.21(p)(4)(i).

The proposed regulations do not mandate that the permitting authority, itself, must send each affected permit application to the FLM. Instead, the State may elect to require the PSD applicant to directly transmit a copy of its application and other relevant information to the FLM. In either case, the EPA believes that the permitting authority will want to ensure that the FLM receives the application promptly so there will be few, if any, delays to the initial phase of the permit process.

With regard to the existing notification provision at § 51.166(p)(1), the EPA proposes to move this provision to a more appropriate location. This provision requires that the permitting authority transmit to the Administrator a copy of each PSD permit application received and does not address FLM notification. In its present location in the regulations, the existing EPA notification requirement could be interpreted to apply only to proposed sources and modifications whose emissions affect a Federal Class I area. The Act provides that the EPA notification requirement apply with respect to all PSD permit applications—not just those affecting Federal Class I areas. See section 165(d)(1) of the Act. In moving the existing provision to the new location in the part 51 regulations, its intended coverage of all PSD permit applications will be better understood. See proposed redesignated § 51.166(q)(1).

(2) Notification to FLM for Sources Locating more than 100 Kilometers from a Federal Class I Area. The EPA recognizes that the FLM will have an interest in reviewing the potential effects associated with emissions from certain sources proposing to locate more than 100 kilometers from a Federal Class I area. It emphatically is not the EPA's intention to enable such sources to be automatically exempted from consideration as to their potential impacts on Class I areas. However, a general requirement to transmit copies of all permit applications to the FLM would be quite burdensome and overly inclusive. Accordingly, the EPA is proposing a different approach for providing notification to the FLM for applications proposing sources more than 100 kilometers from a Federal

[59] The 100-kilometer cutoff being used in this proposal for mandatory notification requirements involving FLM's is consistent with the current EPA policy concerning modeling of Class I impacts. In an October 19, 1992 memorandum from John S. Seitz, Director, Office of Air Quality Planning and Standards to EPA Regional Offices, the EPA clarified its guidance for modeling Class I area impacts under the PSD program. The policy statement advised Regional Office personnel that it was appropriate to routinely consider the ambient impacts resulting from PSD sources proposing to locate within 100 kilometers of a Class I area. The EPA further stated that such guidance was not to be interpreted so as to preclude the consideration of potential impacts of emissions from large sources locating at distances greater than 100 kilometers if there is reason to believe that such sources could adversely affect the air quality in the Class I area.

Class I area. The EPA is developing a special electronic database and proposing to require that a summary of each PSD permit application be entered into this database.[60]

The proposed informational requirements include the name and type of source, the nature of the project, source location and proximity to Class I areas (i.e., within 250 kilometers), the proposed emission rates (or emissions increases) of air pollutants to be emitted by the source, and key mailing addresses. The FLM, as well as the general public, will have access to this information. The administration of this electronic database is addressed in more detail in section IV.C.6. of this preamble, ''Information Clearinghouse.'' See proposed §§ 51.166(n)(4) and 52.21(n)(4).

Once relevant information pertaining to a proposed major source or major modification is registered in the EPA database, the FLM will be able to check the Bulletin Board, determine whether such source represents a potential concern to air quality or air quality related values in the Class I area (based on the summary information contained therein), and request a copy of the entire permit application. In order to ensure that the FLM is given a reasonable opportunity to request a copy of any specific application (for sources that would locate beyond the 100-kilometer range), the EPA is proposing that the FLM will be afforded at least 7 days from the date of registration of information on the electronic database to review such information and request the entire permit application. See proposed §§ 51.166(p)(4)(ii) and 52.21(p)(4)(ii).

The EPA requests public comments on its proposed requirements to improve the notification procedures which inform the FLM about incoming permit applications. In particular, the EPA requests public comments addressing the proposed requirement to transmit a permit application to the FLM when the proposed source is within 100 kilometers of a Federal Class I area.

*c. Coordination of the Completeness Determination.* The EPA is also proposing to revise both sets of PSD regulations by adding a requirement that the FLM be given at least 30 days (starting from receipt of the application by the FLM) to review the application prior to any completeness determination issued by the permitting authority. The 30-day review is required only when the FLM is to receive the permit application as provided under this proposal [See e.g., proposed § 51.166(p)(4)] where the proposed source is located within 100 kilometers from a Federal Class I area or where it is located beyond 100 kilometers but the FLM requests the entire application within 7 days from the inclusion of summary information in EPA's electronic data base. See proposed §§ 51.166(p)(5)(ii) and 52.21(p)(5)(ii).[61]

During the proposed 30-day review period, the FLM will have an opportunity to determine whether there is reason to believe that the proposed source may adversely affect a Federal Class I area and request additional information, to be obtained from the applicant, in order for an adequate Class I impact analysis to be completed. The request for additional information by the FLM may be in the form of a notice alleging that emissions from the proposed source may cause or contribute to a change in air quality in the affected Class I area and identifying the potential adverse impacts of such change on AQRV (see section IV.C.1.c. of this preamble). If such notice is given, the permit applicant would be required to perform the Class I impact analysis, discussed previously, to satisfy its obligation for a complete application. The EPA's proposed regulations would also require permitting authorities to consider, in making a completeness determination, any comments provided by the FLM concerning the completeness of the application within the 30-day review period. See proposed §§ 51.166(p)(5)(iii) and 52.21(p)(5)(iii).

The EPA generally anticipates that the permitting authority will respond affirmatively to the FLM's request for additional information and will notify the applicant that the application is incomplete and require such additional information from the applicant. The permitting authority generally should not announce that an application is deemed complete until the FLM's request for additional information has been satisfied by the applicant, and the FLM has had an opportunity to file a notice alleging potential Class I impacts, if such notice has not already been filed. In some cases, however, the permitting authority may question the request made by the FLM or simply disagree with it. When this occurs, the EPA is proposing that the permitting authority must consult with the FLM and try to resolve whatever problems may exist prior to issuing a completeness determination. See proposed §§ 51.166(p)(5)(iv) and 52.21(p)(5)(iv). Nevertheless, while the permitting authority must give reasonable consideration to the FLM's concerns under the proposed changes, the permitting authority is responsible for making the ultimate decision regarding the application's completeness. The proposed provisions allow the permitting authority to issue its completeness determination any time (either before or after the 30-day period has ended) after any comments from the FLM have been received and consultation with the FLM has occurred about any inconsistency between the permitting authority's views and the FLM's recommendations.

The CAAAC recommended that the EPA consider establishing a formal dispute resolution process as a part of the completeness review. The EPA has declined to propose any specific requirements focusing on the resolution of potential problems between the permitting authority and the FLM. Instead, the EPA's proposal contemplates that the permitting authority and the FLM retain discretion to determine the nature of consultation that is appropriate. The EPA believes that most permitting authorities and permit applicants recognize the merits of early consultation with the FLM and that all affected parties will work in a cooperative manner.

*d. Coordination of the Preliminary Determination.* The Act provides that, if the proposed source or modification will not cause or contribute to a violation of an increment in a Federal Class I area, the FLM has the burden of demonstrating to the satisfaction of the permitting authority that the source will have an adverse impact on AQRV. If so demonstrated, the Act mandates that the permit shall not be issued. Conversely, if a proposed source or modification causes or contributes to an increment violation in a Federal Class I area, the permit may be issued if the owner or operator demonstrates to the satisfaction of the FLM that the proposed source will have no adverse impact on AQRV and the FLM so certifies. See section

[60] Under the part 51 PSD regulations, the proposed requirement does not specify whether the applicant or the permitting authority must enter the data summary. The EPA believes that it is appropriate in this situation to allow permitting authorities to exercise their discretion in determining what specific procedures they will adopt and implement to ensure that the required data is entered into the EPA electronic database.

[61] For proposed sources more than 100 kilometers from a Federal Class I area, the permitting authority may proceed to issue its completeness determination any time after the 7-day period for FLM review if the FLM does not request a copy of the permit application. However, the FLM is not precluded from requesting additional information at any time after the formal 7-day review period. But, such later requests will not trigger the 30-day FLM review period prior to the permitting authority's completeness determination proposed elsewhere in this notice [See, *e.g.*, proposed section 51.166(p)(5)(i)].

165(d)(2)(C)(ii) and (iii) of the Act. In either situation, the FLM has an affirmative responsibility to protect the AQRV associated with the affected Federal Class I area. See section 165(d)(2)(B) of the Act.

The EPA is proposing several revisions to the existing PSD regulations concerning the permitting authority's preliminary determination to issue or not issue the PSD permit where a proposed source will not cause or contribute to a violation of a Class I increment and the FLM has submitted a demonstration that a proposed source will have an adverse impact on AQRV. Specifically, these changes relate to (1) clarifications to existing regulations addressing the scope of the FLM's demonstration of an adverse impact on AQRV, (2) timing for submittal of the FLM's demonstration to the permitting authority for consideration prior to issuing or denying a PSD permit, and (3) criteria which the permitting authority must consider in deciding to nonconcur with the FLM's demonstration.

(1) Scope of the FLM's Demonstration of an Adverse Impact on AQRV. The existing part 52 PSD regulations are inadequate because they only require the Administrator to consider the FLM's demonstration of the visibility impacts of a proposed source, and therefore do not contemplate consideration of other AQRV. See existing § 52.21(p)(3). When the part 52 PSD regulations were originally promulgated, visibility was the only specified AQRV; however, the FLM have identified a variety of AQRV and, as discussed previously, the EPA is proposing a more general definition of AQRV similar to the definition that the FLM have historically been using. See, *e.g.*, proposed § 51.166(b)(40). Thus, the EPA is proposing to delete the existing provision in § 52.21, and, under the proposed revisions described immediately below, provide for consideration of the FLM's demonstration of an adverse impact on AQRV.

(2) Timing for Submittal of the FLM's Demonstration of an Adverse Impact on AQRV. Under the existing part 52 PSD regulations, the FLM is given only 30 days from receipt of a notice (that a PSD application has been submitted) from the Administrator to provide the required demonstration of an adverse impact on AQRV for the Administrator's consideration prior to the Administrator's issuance of a preliminary permit determination. This time constraint places the FLM in a dilemma. The FLM is expected to provide a well-documented, reasoned demonstration of an adverse impact on AQRV that a proposed source will have in a Federal Class I area, but is generally given an abbreviated time to complete this critical task.

In contrast, the part 51 PSD regulations [See existing paragraph (p)(3)] require that the State provide a mechanism whereby the FLM may present a demonstration of an adverse impact on AQRV to the permitting authority after the preliminary determination has been made. This existing requirement does not contemplate that the FLM's demonstration would be best addressed as part of the preliminary determination and then made available for public notice and comment.

The EPA believes that it is important to the permitting process that the FLM's demonstration be submitted before a preliminary determination is made and that sufficient time be allowed to complete the demonstration. Thirty days is generally not a sufficient amount of time for the FLM to complete a demonstration of an adverse impact on AQRV. Instead, the EPA proposes that the FLM be allowed at least 60 days to make the required demonstration. Moreover, the proposed regulations provide that the 60-day period occur prior to a preliminary determination so that any demonstration submitted by the FLM may be adequately considered by the permitting authority and addressed as part of the preliminary determination. See proposed §§ 51.166(p)(6)(i) and 52.21(p)(6)(i).

The EPA also believes that a 60-day period (beginning on the date that the permitting authority formally issues its determination that the application is complete), taken together with the improvements addressed above to facilitate earlier FLM and permitting authority coordination, provides the FLM with a more reasonable period of time. During this period, the FLM may need to conduct a variety of technical analyses or perhaps request (via the permitting authority) that the applicant provide additional analyses to provide sufficient basis for the demonstration to be developed. This will, of course, depend on the amount of information already contained in the application as a result of prior coordination about the potential impacts on AQRV in the Federal Class I area. For example, if the FLM has issued notice pursuant to proposed §§ 51.166(p)(2)(i) or 52.21(p)(2)(i), alleging that the proposed source may impact a Federal Class I area, then the FLM may rely on the ensuing impact analysis performed by the applicant as at least a significant starting point for the FLM's evaluation.

The EPA invites public comments on the adequacy of a 60-day period for completing the demonstration of an adverse impact on AQRV. The EPA will consider a different time period if it can be shown that such different period would allow a more appropriate amount of time for the FLM to complete any necessary analyses without unduly delaying the permit process.

In addition, the EPA requests comments on its own role. Section 165(d)(2)(B) of the Act provides that the FLM and the Federal official charged with direct responsibility for land management have an ''affirmative responsibility'' to ''consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact.'' The EPA is not proposing a specific role, beyond the significant programmatic changes related to Class I area protection proposed today, concerning how it should consult with the FLM. The EPA requests comments on this issue.

(3) Rejection of the FLM's Demonstration of an Adverse Impact on AQRV. The Act and EPA's PSD regulations provide that where the permitting authority determines that a proposed source's emissions will not cause or contribute to a violation of a Class I increment, the FLM must demonstrate ''to the satisfaction of the permitting authority'' that the proposed source will have an adverse impact on AQRV. The permitting authority is thus given the authority to accept or reject the FLM's demonstration. The permitting authority's concurrence with such demonstration means that the permitting authority must propose to deny the PSD permit. See existing §§ 51.166(p)(3) and 52.21(p)(4). [See also proposed §§ 51.166(p)(6)(ii) and 52.21(p)(6)(ii).] If the permitting authority determines that the FLM has not demonstrated to its satisfaction that a proposed source's emissions will have an adverse impact on AQRV, the permitting authority may reject the FLM's demonstration so long as it has a rational basis for doing so.[62]

Recent permit controversies have underscored the need for national guidance addressing the permitting authority's role in evaluating the FLM's demonstration of an adverse impact on AQRV and the rationale for any decision to disagree with the FLM's findings. For example, in a PSD permit appeal proceeding, the EPA's Environmental Appeals Board held that the permitting authority erred in summarily rejecting the demonstrations of the FLM for the

[62] See 50 FR 28544, 28549 (July 12, 1985); see also *Old Dominion Electric Cooperative*, PSD Appeal No. 91–39 at 8 and n. 9 (Jan. 29, 1992).

Shenandoah National Park and James River Face Wilderness that the proposed facility would have an adverse impact on AQRV in those Federal Class I areas.[63]

In an effort to provide clearer guidance and promote more reasoned decision-making, the EPA is proposing to require that certain considerations must be addressed and made public concerning a permitting authority's rejection of the FLM's demonstration of an adverse impact on AQRV. In doing so, the EPA has tried to balance the statutory provisions concerning the affirmative responsibility given to the FLM to protect AQRV and the stipulation that the permitting authority must be satisfied with the FLM's demonstration of adverse impact on AQRV in any particular situation.

The FLM are entrusted with administering the statutes governing the management and preservation of Federal Class I areas, and are expressly entrusted by the Act with an affirmative responsibility to protect AQRV. The FLM have expert knowledge about the unique values associated with Federal lands, and administer ongoing monitoring and research programs to help evaluate the effects that air pollution has on such values. Accordingly, the EPA believes it is appropriate for the permitting authority to recognize the FLM's broad expertise in the identification and evaluation of adverse effects on AQRV. Notwithstanding this expertise, the permitting authority may call upon experts of its own choosing to evaluate the findings in the FLM's demonstration.

Where the permitting authority is not satisfied with the FLM's demonstration of adverse impact on AQRV, the EPA is proposing (1) a general consultation provision necessitating some form of communication and discussion between the permitting authority and the FLM; and (2) a provision requiring the permitting authority to highlight the issues raised by the FLM and explain its reasons for disagreement in the public record. The permitting authority would satisfy this latter requirement by including a brief summary of the Class I area impact issues in the public notice announcing the preliminary permit determination, and explaining in writing, in the public record, its specific reasons for rejecting the FLM's demonstration of adverse impact. See proposed §§ 51.166(p)(6)(iii), 51.166(q)(4)(ii) and (iii), and 52.21(p)(6)(iii). The EPA believes that the requirement to indicate in the public notice that the FLM's demonstration has been rejected will give the public sufficient notice and opportunity to access the permitting authority's reasons for not being satisfied with the FLM's demonstration. Such access will aid the public's ability to comment meaningfully at any public hearing that may be requested. As proposed, the permitting authority's written explanation must address, at a minimum, the following factors:

i. Scientific/Technical Basis. The permitting authority must consider all relevant data and analyses submitted by the FLM and offer a reasoned explanation for its disagreement with such data and the resulting analyses. See proposed §§ 51.166(p)(6)(iii)(A) and 52.21(p)(6)(iii)(A).

ii. Description of the AQRV and Adverse Impact. The permitting authority must address the FLM's findings describing the adverse impact being demonstrated for each affected AQRV, by explaining any conclusions it reaches, about whether the projected impacts of the source's emissions will have an adverse impact on the AQRV, that are inconsistent with the conclusions reached in the demonstration submitted by the FLM. See proposed §§ 51.166(p)(6)(iii)(B) and 52.21(p)(6)(iii)(B).

iii. Mitigative Measures. The permitting authority must describe any efforts that have been undertaken to mitigate the potential impacts of a proposed source on the Federal Class I area of concern, including any estimated emissions reductions, and the effect of such reductions. See proposed §§ 51.166(p)(6)(iii)(C) and 52.21(p)(6)(iii)(C).

Finally, the EPA is proposing to require that, for any permit ultimately issued to a source determined by the FLM to have an adverse impact on AQRV, the permitting authority must address any additional comments or input from the FLM (intended to substantiate or augment its initial demonstration) that may be submitted during the public comment period. See proposed §§ 51.166(p)(6)(iv) and 52.21(p)(6)(iv).

3. Mitigating an Adverse Impact on AQRV

*a. Background.* In general, a PSD permit shall not be issued when the emissions from a proposed facility would have an adverse impact on AQRV in a Federal Class I area. See section 165(d)(2)(C) of the Act. This specific prohibition on permit issuance applies when the FLM of a Class I area demonstrates to the satisfaction of the permitting authority that emissions from a proposed source will have an adverse impact on AQRV, notwithstanding that the proposed source does not cause or contribute to a violation of a Class I increment. See section 165(d)(2)(C)(ii) of the Act. There have been several instances over the past few years where, in such circumstances, the FLM has submitted a demonstration of an adverse impact on AQRV in a Class I area. In some cases, the FLM's concerns have been addressed through successful negotiations between the FLM and the permit applicant, where the source obtained either emissions reductions (offsets) from an existing source, or adopted more stringent control measures, or did some combination of both.[64] In other instances, similar demonstrations of an adverse impact on AQRV have been the subject of contentious administrative litigation.[65]

*b. General Policy for Mitigating Class I Area Impacts.* The CAAAC recommended requiring offsets for any proposed source that would have an adverse impact on AQRV. Specifically, the CAAAC recommended that where the emission offset ratio was less than 1:1, a net air quality benefit analysis should be made to support the specific offset ratio proposed. The CAAAC recommended that, where the emission offset ratio is greater than 1:1, a standardized emission/distance adjustment factor for offsets could be used instead of demonstrating that a net air quality benefit results from the offsets.

While the EPA agrees with the CAAAC's overarching concern that the EPA provide guidance on the

[63] *Hadson Power 14—Buena Vista,* PSD Appeal Nos. 92–3, 92–4 & 92–5 (Oct. 5, 1992). The EPA Environmental Appeals Board reasoned that, ''States do not have unfettered discretion to reject an FLM's adverse impact determination. If a State determines that an FLM has not satisfactorily demonstrated an adverse impact on AQRV from the proposed facility, the State must provide a 'rational basis' for such a conclusion, 'given the FLM's affirmative responsibility and expertise regarding the Class I areas within their jurisdiction.' 50 FR 28549 (July 12, 1985). Arbitrary and capricious rejections of adverse impact demonstrations are not sustainable.'' [*Hadson* at p. 21. (citations omitted)]

[64] See, e.g., *Multitrade Limited Partnership,* PSD Appeal Nos. 91–2 *et alia* (January 21, 1992). In *Multitrade* the proposed source agreed to mitigate its impact through a combination of reduced emissions from the new source as originally proposed and emission offsets from a nearby existing source, resulting in an offset ratio substantially greater than one-to-one. Based on these changes, the FLM concluded that the emissions from the proposed source, if modified, would not have an adverse impact on the Shenandoah National Park. *Id.* at 5.

[65] See *Old Dominion Electric Cooperative,* PSD Appeal No. 91–39 (January 29, 1992); *Hadson Power 14—Buena Vista,* PSD Appeal Nos. 92–3, 92–4 & 92–5 (October 5, 1992).

implementation of mitigating offsets, the EPA declines to recommend rigid tests for assessing the adequacy of offsets. Rather, the EPA proposes that general principles already established under the PSD program guide the implementation of offsets. In addition, the EPA is proposing to add a provision to the PSD regulations that explicitly provides what EPA has previously acknowledged—that sources may mitigate an adverse impact on AQRV in order to obtain a PSD permit.[66] See proposed §§ 51.166(p)(7) and 52.21(p)(7).

The proposed provision specifies that PSD programs shall allow for mitigation by a proposed source and specifically provides that the permitting authority may issue a permit for a proposed major source or major modification that would otherwise be denied a permit because of an adverse impact on AQRV, if the permitting authority determines, in consultation with the FLM, that the source has mitigated the adverse impact on AQRV. The EPA believes that sound technical evidence should support a demonstration of mitigation. The demonstration should show that there will be no net adverse impact as a result of the proposed source's emissions. The proposed provision specifically acknowledges offsets as a mitigation option where the owner or operator of a proposed source obtains enforceable and permanent emissions reductions of sufficient amount and in such location that the reductions will offset the change in air quality in the Federal Class I area that would have resulted from the proposed source. See proposed §§ 51.166(p)(7) and 52.21(p)(7). The quantitative amount of the offsetting emissions should, therefore, be shown to be sufficient to in fact mitigate the adverse impact on AQRV that would otherwise be caused by the proposed emissions increase. This will involve consideration of the location of the offsetting source relative to the Class I area, as well as the meteorological and topographical conditions which affect dispersion of the offsetting emissions.

Another possible consideration in evaluating whether any potential emission reductions identified at existing sources can be used to mitigate the adverse impact on any AQRV is whether the reductions are already required by some other Act-mandated program. In nonattainment areas, section 173(c)(2) of the Act plainly prohibits emission reductions otherwise required under the Act from being credited as offsets for new source review purposes.[67]

Unlike the nonattainment NSR program, offsets under the PSD program are not expressly addressed by the Act. The EPA is interested in the public's views about the crediting of those emission reductions already required for other purposes as offsets for mitigating a proposed source's adverse impact on an AQRV.

As an alternative to emissions offsets, a more stringent emission limitation than the limitation that would otherwise be required by BACT may be established to mitigate an adverse impact on an AQRV in a Federal Class I area. Depending upon the remaining emissions released and the sensitivity of the AQRV of a Class I area, an emissions limitation that would otherwise be required by BACT, if an adverse impact on an AQRV was not considered, may be inadequate to entirely mitigate the adverse impact. Thus, emission offsets, a stricter emission limitation, or some combination of both, may be appropriate to mitigate an adverse impact on an AQRV.

The EPA believes that measures such as emission offsets from existing sources represent a reasonable approach which enables the mitigation of an adverse impact on an AQRV. The EPA's mitigation policy provides needed flexibility to the PSD permitting process by allowing a new major source or major modification that mitigates an adverse impact on AQRV to receive a construction permit, even though its proposed emissions increase is otherwise demonstrated by the FLM, and concurred with by the permitting authority, to have an adverse impact on AQRV. The adoption of this policy is also intended to promote dispatch in the PSD permit process by providing a clearly available elective recourse enabling applicants to avoid potentially contentious and protracted permitting disputes where the FLM demonstrates an adverse impact on AQRV and the applicant wishes to mitigate its demonstrated impacts prior to a formal concurrence with the demonstration by the permitting authority.

*c. Post-construction Monitoring.* The CAAAC recommendations addressing mitigation of an adverse impact on AQRV included consideration of post-construction monitoring for Class I areas. Post-construction monitoring alone would not directly mitigate an adverse impact on AQRV. However, such monitoring may provide critical information about a source's impact on a Class I area.

The EPA is proposing to amend its PSD regulations to clarify that post-construction ambient monitoring may be required for the purpose of determining the effect emissions from a facility may have, or are having, on AQRV in a Federal Class I area. The existing PSD regulations at §§ 51.166(m)(2) and 52.21(m)(2) currently require the owner or operator of a new major source or major modification to conduct such post-construction ambient monitoring, as the permitting authority determines to be necessary, to determine the effect emissions may have, or are having, on air quality in any area. However, the current EPA regulations do not specify that such ambient monitoring may include the monitoring of air quality-related impacts in Federal Class I areas. The EPA is, therefore, proposing to amend the PSD regulations to specifically state that post-construction ambient monitoring may be required in Class I areas. *See* proposed amendatory language for §§ 51.166(m)(2) and 52.21(m)(2). The EPA requests comments on this proposed regulatory change.

4. Class I Significant Impact Levels

Some members of the NSR Reform Subcommittee recommended that the EPA provide criteria indicating the circumstances in which a proposed source's projected contribution to ambient concentrations in a Class I area may be considered de minimis for certain planning requirements. These members recommended that the EPA identify a level of contribution (ambient concentration) that is de minimis, or insignificant, so that a proposed source having a contribution less than that concentration will know with certainty that it will not be subject to the full requirements for an increment analysis in Class I areas. The EPA believes that it is reasonable to extend the use of significant impact levels to the Class I increments. Levels of significant impact are currently used as a matter of policy in the PSD program for determining whether a proposed source may be excluded from certain requirements (e.g., significant emissions rates, and significant monitoring concentrations).[68]

[66] See *Multitrade* at p. 7–8, n.5.

[67] Incidental emission reductions not otherwise required by the Act are to be creditable under section 173(c)(2) of the Act. See also 57 FR 13553 (April 16, 1992) (guidance on creditable reductions under the nonattainment NSR program).

[68] For example, under the PSD regulations, a comprehensive preconstruction review must be conducted for each regulated pollutant that a proposed major source or major modification will have the PTE in ''significant'' amounts, as defined in existing section 51.166(b)(23)(i) and 52.21(b)(23)(i). Under existing section 51.166(i)(8)

Continued

See, also, discussion in section IV.C.5.a. of this preamble, addressing the proposed codification of significant impact levels for NAAQS and Class II and III increments.

Administrative agencies may exempt ''truly de minimis'' situations from a statutory command ''when the burdens of regulation yield a gain of trivial or no value.'' [69] Accordingly, the EPA is proposing to add significant impact levels for Class I increments to both sets of PSD regulations. See proposed §§ 51.166(b)(23)(v) and 52.21(b)(23)(v). The proposed significant impact levels would apply to the existing Class I increments for PM–10, $SO_2$, and $NO_2$ in the PSD regulations. The significant impact levels would be used to determine whether a new major source or major modification, due to the predicted ambient concentration from its own emissions, would be required to conduct a comprehensive Class I increment analysis for a given pollutant. A de minimis impact resulting from the emissions from a proposed source would serve as the basis for a determination that such emissions will not contribute to a violation of the applicable Class I increments.

The proposed significant impact levels for Class I increments were derived by taking four percent of the concentration defined for the existing Class I increment for each applicable pollutant and averaging period. The EPA believes that where a proposed source contributes less than four percent to the Class I increment, concentrations are sufficiently low so as not to warrant a costly and detailed analysis of the combined effects of the proposed source and all other increment-consuming emissions. The EPA previously used a similar rationale to establish the significant emissions rates for PSD applicability purposes, concluding in part that emissions rates which resulted in ambient impacts less than four percent of the 24-hour standards for particulate matter and $SO_2$ were sufficiently small so as to be considered de minimis.[70]

It should be noted that, while the FLM representing the National Park Service and the U.S. Fish and Wildlife Service agree that the general use of significant impact levels for Class I increments may be appropriate, they have indicated that such levels should be adequately conservative. These FLM have, in fact, recommended significant impact levels that are more restrictive than those being proposed today by EPA. Their recommended levels were developed using the ratios derived from a comparison of existing significant impact levels—used by EPA for NAAQS and Class II increment analyses—and the respective NAAQS. For comparative purposes the significant impact levels being proposed today by EPA and the levels recommended by the FLM are shown below.

| Pollutant | Averaging time | Levels proposed by EPA (ug/m$^3$) | Levels Recommended by FLM (ug/m$^3$) |
|---|---|---|---|
| Sulfur Dioxide | Annual | 0.1 | 0.03 |
| | 24-hour | 0.2 | 0.07 |
| | 3-hour | 1.0 | 0.48 |
| Particulate Matter | Annual | 0.2 | 0.08 |
| | 24-hour | 0.3 | 0.27 |
| Nitrogen Dioxide | Annual | 0.1 | 0.03 |

The EPA wishes to emphasize that the specific significant impact levels that it is proposing today for the Class I increments are not intended to serve as thresholds for determining the need for an AQRV analysis or whether an adverse impact on AQRV will occur. An adverse impact on AQRV in a Class I area depends upon the sensitivity of the particular AQRV and involves an assessment of potential harm. An ambient pollutant concentration that is deemed to be of relatively insignificant consequence for purposes of increment consumption should not automatically be considered inconsequential relative to the inherently fact-specific demonstration upon which an adverse impact on AQRV is to be based. Thus, a notice may be filed (as described in section IV.C.1.c. of this preamble) alleging that a proposed source's emissions may cause or contribute to a change in the air quality in a Federal Class I area and identifying the potential adverse impact of such change. The fact that such source's predicted ambient impact is less than the applicable significant impact level for Class I increments would neither relieve the applicant from having to complete an analysis of impacts on AQRV nor automatically allow the permitting authority to reject the FLM's demonstration of adverse impact on AQRV. The EPA requests comments on its proposal to establish significant impact levels for Class I increments in general, and the proposed levels in particular.

The EPA is declining to propose specific significance levels for determining whether the emissions from a proposed source may have an adverse impact on AQRV. The FLM is specifically entrusted by the Act with protecting AQRV and the decision to establish any appropriate significance levels for AQRV should be made primarily by the FLM. Conceptually, such significance levels would represent ambient air pollutant concentrations or deposition rates below which only de minimis effects on AQRV will occur. Accordingly, emissions increases not resulting in ambient concentrations or deposition rates exceeding the prescribed significance levels would therefore be excluded from a review of AQRV impacts.

The EPA generally recognizes the administrative benefits of categorically eliminating certain pollutant-emitting activities from regulatory review and has employed significance levels in other contexts in the NSR program, including the significance levels proposed above for Class I increments. However, there are many obstacles to formulating reasonable significance levels in the AQRV context. For example, there are numerous AQRV and there is a wide variance in sensitivity to emissions increases for particular AQRV.

The FLM have been working with other air pollution effects scientists to develop lists of sensitive resources (e.g., species of plants and invertebrates, and particular streams and lakes) and sensitivity thresholds that could help

and section 52.21(i)(8), the permitting authority may exempt a proposed source from having to include ambient monitoring data in its permit application for a particular pollutant if the applicant's air quality impact for such pollutant is less than the ''significant'' concentration prescribed in the regulations.

[69] *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 360–61 (D.C. Cir. 1979).

[70] See 45 FR 52676, 52707–52708 (August 7, 1980).

establish significant impact levels for individual AQRV in the future. However, many studies conducted to date have not yielded the information needed to establish a critical threshold level from which a significance level could be derived. The EPA encourages the FLM to continue pursuing research on AQRV effects, and anticipates an evolving process by which research and information may eventually support the establishment of site specific significance levels for individual AQRV. Any significant impact levels for AQRV may necessarily be site specific since each AQRV and its associated critical pollutant loadings may be different from one area to another and even within individual Federal Class I areas. In any event, EPA encourages the establishment of an electronic database about Class I area resources, described elsewhere in this preamble, that will make information about available research on AQRV effects more accessible.

The EPA requests public comment on the issue of significance levels for AQRV. In particular, EPA is interested in suggestions regarding alternative approaches that promote regulatory certainty by excluding from consideration proposed sources that have truly de minimis impacts on Class I resources while still ensuring that AQRV are adequately protected in the PSD permitting process. Commenters should fully consider the legal standards that govern the establishment of de minimis regulatory exemptions. See *e.g.*, *Alabama Power Co.* v. *Costle*, 636 F. 2d 323, 360–61 (D.C. Cir. 1979).

5. Clarification of Miscellaneous Issues

The discussion which follows addresses several relatively discrete issues. The EPA is clarifying current policy in areas where there is potential for significant confusion or uncertainty and, in some instances, is proposing conforming changes to the implementing regulations. The EPA is also proposing changes that largely codify existing policy.

*a. Significant Impact Levels for NAAQS and Class II and III Increments.* The EPA is proposing several changes to the PSD regulations at both §§ 51.166 and 52.21 to make the rules consistent with current practice. First, the EPA is proposing to revise the provisions of existing §§ 51.166(k) and 52.21(k) to clarify that a source's own emissions must make a ''significant contribution'' to a violation of any NAAQS or PSD Class II or III increment before that source would be denied a PSD permit. See proposed amendatory language for §§ 51.166(k) and 52.21(k). Second, the EPA is proposing to incorporate into the PSD regulations the significant impact levels currently set forth at § 51.165(b)(2)—which are being used to determine whether major new source or major modification contributes to a violation of a NAAQS—so that they may be directly applied to the ''significant contribution'' test in the PSD regulations. See proposed §§ 51.166(b)(23)(iv) and 52.21(b)(23)(iv). The EPA has long interpreted the ''significant contribution'' test set forth in existing § 51.165(b)(2) to apply to PSD sources, as well, since the provision applies to major new sources and major modifications located in attainment and unclassifiable areas.

Finally, the EPA is proposing to add significant impact levels for the Class II and Class III increments. See proposed §§ 51.166(b)(23)(v) and 52.21(b)(23)(v). The proposed levels are the same as those levels at existing § 51.165(b)(2), which define a significant contribution to a violation of the NAAQS, and simply codify current EPA policy which allows the significant impact levels from § 51.165(b)(2) to be directly applied to the PSD program to determine a significant contribution to either the NAAQS or PSD increments. The EPA requests comment on the need to include these significant impact levels in the PSD regulations and the need for significant impact levels for Class II and Class III increments. Furthermore, the EPA requests comment on the proposed significant impact levels for the Class II and Class III increments, specifically whether they should be lower than the levels used for NAAQS compliance.

*b. Analysis of Impacts on Federal Class II Areas.* This proposal also clarifies the requirement for the ''additional impact analysis'' under § 51.166 and 52.21. In addition to the central requirements that each PSD source must demonstrate that its allowable emissions will not cause or contribute to a violation of any NAAQS or PSD increment, each such source is generally required to prepare further analyses for the pollutants that it will emit. Such ''additional impact analysis'' is consistent with the statutory provisions under section 165(e)(3)(B) of the Act, and includes an assessment of the impairment of visibility, soils, and vegetation within the proposed source's impact area, including Federal Class I and II areas. See proposed amendatory language for §§ 51.166(o)(1) and 52.21(o)(1). In addition, the EPA is proposing more specific provisions for Federal Class I areas that require similar analysis where a FLM alleges that an adverse impact on AQRV may occur in Federal Class I area lands located beyond the area normally considered to be within the proposed source's impact area. See proposed §§ 51.166(p)(2)(i)(A)(*2*) and 52.21(p)(2)(i)(A)(*2*), and related discussion in section IV.C.1.c. of this preamble.

The FLM have expressed concern that the existing provisions, see, e.g., existing § 51.166(o)(1), which enable the applicant to exclude from analysis any impact on vegetation ''having no significant commercial or recreational value,'' could exclude the analysis of certain vegetation with ecological significance in the lands under their jurisdiction, i.e., Federal Class I and II areas. The EPA is proposing a change in the existing provisions so that applicants may not presume that soils and vegetation in Federal Class I and II areas are of no significant commercial or recreational value, except where the FLM indicates that such analysis is not needed. See proposed amendatory language for §§ 51.166(o)(1) and 52.21(o)(1).

*c. Clarification of PSD Requirements Applicable to Non-Federal Lands Redesignated as Class I Areas.* Individual CAAAC members and Tribal representatives have asked the EPA to provide guidance on the PSD provisions that apply to ''non-Federal'' reservation lands that are redesignated as Class I areas.[71] In particular, guidance has been requested concerning whether AQRV may be established for such lands and how these values are to be protected under the PSD program. The discussion below is intended to clarify the EPA's views on these issues and to describe the accompanying, largely technical, regulatory revisions that the EPA is today proposing. The policies described in the following discussion would also apply to non-Federal State lands redesignated as Class I areas.

(1) Redesignation of Class I Areas. Section 164(c) of the Act gives federally-recognized Indian Tribes[72] broad authority to request redesignation of lands within the exterior boundaries of

[71] Lands within reservation boundaries may be Federal lands under Federal Indian law and may or may not be ''Federal lands'' within the specific meaning of the PSD program. ''Federal lands'' under the PSD program include: national wilderness areas, national memorial parks, national parks, national monuments, national reserves, national seashores and other similar national public land areas. See, *e.g.*, sections 160(2), 162(a) and 164(d) of the Act. The term ''non-Federal'' is used here to refer to State lands or lands within the boundaries of an Indian reservation that are not Federal lands within the meaning of the Act's PSD program.

[72] See section 302(r) of the Act. The Department of the Interior periodically publishes a list of Tribes officially recognized by the Federal government. See 58 FR 54364 (Oct. 21, 1993).

their reservations as Class I areas. Several Indian Tribes have already had lands within reservation boundaries redesignated as Class I areas. The EPA has approved redesignation of the Northern Cheyenne Indian Reservation, the Flathead Indian Reservation, the Fort Peck Indian Reservation and the Spokane Indian Reservation on the basis of tribal requests. See 40 CFR 52.1382(c) and 52.2497. States also have broad authority under section 164(a) to request redesignation of lands as Class I areas. To date, the EPA has not received such a State PSD redesignation request.

(2) Status of AQRV Protection for Non-Federal Lands Redesignated as Class I Areas. Any State or federally-recognized Tribe may establish AQRV for non-Federal lands within its jurisdiction which have been redesignated as Class I areas. The mechanism identified in the Act, by which a State or Tribe may seek protection of such AQRV when a proposed or modified major source in another jurisdiction will affect any AQRV which have been established, is contained in section 164(e) of the Act. See also § 52.21(t). Section 164(e) of the Act is a special dispute resolution provision involving intervention by the EPA Administrator. If the governing body of an affected Indian Tribe or Governor of an affected State determines that a proposed PSD source ''will cause or contribute to a cumulative change in air quality in excess of that allowed in this part [i.e., part C, title I of the Act, containing the PSD program]'' the Tribe or State may request that the Administrator enter into negotiations with the parties involved to resolve the dispute.[73] If requested by the Tribe or State, the Administrator must make a recommendation ''to resolve the dispute and protect the air quality related values of the lands involved.'' See section 164(e) of the Act.

The EPA proposes to interpret these provisions to direct EPA intervention, at the request of a State or Tribe, when a State or Tribe determines that a proposed source will cause or contribute to a violation of a NAAQS or PSD increment or will harm AQRV established by a State or Tribe. In accordance with section 164(e), the PSD provisions prohibit ''changes in air quality'' that exceed these requirements. See proposed § 51.166(t) and existing § 52.21(t). Further, as to AQRV, their protection is a stated purpose of the EPA's involvement in the dispute—'' the Administrator shall make a recommendation to resolve the dispute and protect the AQRV of the lands involved.'' See section 164(e) of the Act.[74] Accordingly, AQRV may be identified by States and Tribes for redesignated non-Federal Class I areas and these areas may be protected by a State's or Tribe's request for the EPA to resolve an intergovernmental dispute over a proposed PSD facility pursuant to section 164(e). The EPA requests comments on its proposed interpretation of the circumstances that authorize a State or Tribe to involve the EPA in resolving interjurisdictional permitting disputes pursuant to section 164(e).

The EPA, in the preceding discussion, is drawing a key distinction between the authority bestowed solely on FLM under section 165(d) of the Act to protect the AQRV of Federal Class I areas and the authority States and Tribes have under section 164(e) to protect the AQRV of non-Federal lands through the dispute resolution mechanism. The EPA intends to clearly distinguish between provisions that apply to the protection of AQRV of non-Federal class I areas and the provisions that apply to FLM under paragraph (p) of the existing and proposed PSD regulations in parts 51 and 52 by proposing a definition for ''Federal Class I areas.'' The EPA proposes to define ''Federal Class I areas'' as those areas owned by the United States and either (1) designated by Congress as mandatory Class I areas, unable to be redesignated, pursuant to section 162(a) of the Act, or (2) redesignated as Class I pursuant to paragraph (g) of the existing PSD regulations. See proposed §§ 51.166(b)(38) and 52.21(b)(39).

The existing part 52 PSD regulations already contain a dispute resolution provision based on section 164(e) of the Act. However, the existing provision at § 52.21(t) of the PSD regulations requires that, when the parties involved in a dispute do not reach agreement, the Administrator's determination (or the results of agreements reached through some other means) is to become part of the applicable ''State implementation plan.'' To avoid confusion, the EPA is proposing to revise the language to conform with the statutory language, which refers instead to the ''applicable plan.'' The EPA believes that the more general reference to the ''applicable plan'' used in the statutory language will avoid potential confusion because, in disputes involving a State and an Indian Tribe, the Administrator's determination should be made part of the applicable State implementation plan or Federal implementation plan, whichever is appropriate for the affected State, or the applicable Tribal implementation plan or Federal implementation plan, whichever is appropriate for the affected Indian Tribe. Therefore, the EPA is proposing to amend the existing regulatory provision by changing the words ''State implementation plan'' to read ''applicable plan'' consistent with the language in the Act. See proposed amendatory language for § 52.21(t).

The same wording problem is found in existing §§ 51.166(g) and 52.21(g), concerning area redesignation proposed by States or Indian Tribes. In that particular case, the regulatory provisions provide that the redesignation is subject to approval as a revision to the ''applicable State implementation plan.'' Accordingly, for the same reasons, the EPA is proposing clarifying revisions to §§ 51.166(g) and 52.21(g) by changing ''applicable State implementation plan'' to read ''applicable plan.'' See proposed amendatory language for §§ 51.166(g)(1) and 52.21(g)(1). The proposed addition of the dispute resolution provision in the part 51 PSD regulations will similarly use the statutory language, the ''applicable plan.'' See proposed § 51.166(t).

The EPA is also proposing to revise superseded definitions of ''Indian Reservation'' in existing §§ 51.166(b)(27) and 52.21(b)(27). The 1990 Amendments to the Act added several provisions relating to the authority of Indian Tribes to administer Act programs in the same manner as States. See sections 301(d) and 110(o) of the Act. Section 110(o) provides that implementation plans for Tribes are to be effective ''within the exterior boundaries of the reservation, notwithstanding the issuance of any patent and including rights-of-way running through the reservation.'' On August 25, 1994, the EPA published proposed rules implementing the general Act Tribal authority added in the 1990 amendments and proposed to define reservation under those rules as ''all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.'' See 59 FR 43956 at 43980 (proposed 40 CFR 49.2). In the accompanying preamble, the EPA explained:

> Based on recent Supreme Court case law, EPA has construed the term 'reservation' to

[73] Section 164(e) also provides that a State or Tribe may request EPA to enter into negotiations to resolve interjurisdictional disputes about PSD air quality redesignation.

[74] Note also that the dispute resolution provisions are not limited to class I areas.

incorporate trust land that has been validly set apart for use by a Tribe, even though that land has not been formally designated as a 'reservation.' See 56 FR at 64,881 (Dec. 12, 1991); see also *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe of Oklahoma,* 111 S.Ct. 905, 910 (1991). The EPA will be guided by relevant case law in interpreting the scope of 'reservation' under the Act.

See 59 FR at 43,960. Accordingly, the EPA adopts this interpretation of reservation for the PSD program and proposes to make conforming changes to the definition of ''Indian Reservation.'' See proposed §§ 51.166(b)(27) and 52.21(b)(27).

6. Information Clearinghouse (Federal Class I areas)

The CAAAC recommended that the EPA establish a clearinghouse of information about Federal Class I areas. The EPA has been working on a clearinghouse project that was originally planned to be incorporated into the EPA's public NSR BB which is hosted by the OAQPS TTN.[75] The advent of the ''Internet©'' system and new budgetary constraints are causing EPA to consider new strategies for transferring information. Nevertheless, the EPA plans to address the CAAAC's recommendations in two respects.

First, consistent with the proposed requirement to improve permitting authority and FLM coordination, described in section IV.C.2., above, the EPA is planning to create a publicly accessible, electronic bulletin board for posting notice of major NSR permit applications by permitting authorities and/or permit applicants. On this bulletin board will be logged very basic source information, such as the name and type of source, a brief description of its location in terms of the State and county in which it will construct and operate (including UTM coordinates), the distance between the proposed source and all Federal Class I areas within 250 kilometers, and the proposed emission rate or net emissions increase of each air pollutant associated with the project. It also will allow permit applicants and permitting authorities to present questions to the FLM regarding air quality issues relative to any Federal lands potentially affected by the proposed new or increased emissions, and, conversely, provide a contact to whom the FLM may direct inquiries and information. See proposed §§ 51.166(n)(4) and 52.21(n)(4).

[75] Historically, users of the NSR BB have been able to retrieve, then read and/or download full text of recent policy and guidance material. The users may also solicit from or provide to other parties in the NSR permitting community, information pertaining to areas of interest within NSR.

Second, EPA will pursue the development of a FLM Clearinghouse in which the FLM and the EPA will post the following information as it becomes available:

—Boundaries and size of existing Federal Class I areas
—Area-specific AQRV information, including sensitive receptors, critical loadings, current source inventory, current loadings from sources in the source inventory, and existing adverse conditions;
—Source-specific information on increment consumption and impacts on AQRV in specific Federal Class I areas;
—Reports of research and investigations about the impacts of air pollution on natural resources in Federal Class I areas, and contact persons for further information;
—Comment letters and any findings of an adverse impact on AQRV issued relative to specific draft PSD permits;
—Adjudicative appeals and corresponding orders from the EPA Environmental Appeals Board and court decisions relative to issues involving Federal Class I areas.

All users of the NSR BB will be able to download all the documents posted in this clearinghouse. As suggested earlier, the host mechanism, the schedule for completion and the degree of sophistication of this clearinghouse will depend greatly on available resources, the dynamics of the electronic communications industry, and the cooperation of the FLM Agencies.

7. Visibility New Source Review

If adopted, these proposed revisions to the PSD rules related to the protection of air quality related values (including visibility) in Federal Class I areas may necessitate revisions to EPA's existing visibility new source review rules (the ''visibility NSR'' rules), which are codified separately from the PSD rules. See, *e.g.*, existing 40 CFR 51.307, 52.27 and 52.28. Section 169A(a)(1) of the Act established as a national goal the prevention of any future, and the remedying of any existing, manmade impairment of visibility in mandatory Federal Class I areas. Section 169A also called for EPA to promulgate regulations to assure reasonable progress toward meeting the national goal. See section 169A(a)(4) of the Act. Accordingly, EPA has promulgated visibility regulations to address prospective visibility impairment in mandatory Federal Class I areas from certain new or modified major stationary sources.

The visibility NSR rules establish independent visibility protection requirements that apply in areas designated attainment and unclassifiable (PSD areas) and in areas designated nonattainment. For efficiency, these requirements generally are implemented in conjunction with PSD and nonattainment NSR permitting. The current visibility NSR rules contain FLM coordination procedures. In some instances, the visibility NSR rules also adopt, by cross reference, some of the provisions of the PSD rules EPA is proposing to revise today.

The EPA may therefore need to revise its current visibility NSR rules, depending upon the outcome of the rules proposed today. The EPA would want to ensure that the different sets of rules are appropriately harmonized in light of the permit streamlining goals embodied in this proposal and the potential for overall improvement in FLM, State and permit applicant coordination reflected in the rules proposed today.

V. Prevention of Significant Deterioration Preconstruction Monitoring

Applicants for PSD permits often must provide continuous air quality monitoring data as part of the air quality analysis requirements set forth in §§ 51.166(m) and 52.21(m) of the PSD regulations. In both sets of regulations the air quality data provision generally requires that an applicant for a new major source or major modification submit with the permit application continuous air quality monitoring data representing the 12-month period preceding application submittal.[76] Historically, this data requirement has been satisfied largely through the use of monitoring data collected from existing State or local agency air quality monitoring networks. However, in the absence of existing data, it is the applicant's responsibility to establish, operate and maintain sufficient air monitoring stations to collect the necessary ambient data to satisfy the data requirement.

The prospect of having to operate their own monitoring networks and

[76] The PSD regulations currently provide that the permitting authority has discretion to exempt an applicant from the requirement to collect continuous air quality monitoring data if (1) the predicted ambient impact caused by the proposed source, or (2) the ambient pollutant concentrations that the proposed source would affect, are less than prescribed significant monitoring concentrations for the pollutants listed in the PSD regulations (or if the pollutant emitted from the proposed source is not among those listed). If, however, both the predicted impacts and the existing ambient concentrations exceed the significant monitoring concentrations, then the applicant must provide the required monitoring data. See existing sections 51.166(i)(8) and 52.21(i)(8).

collect ambient data for 1 year prior to the submittal of a complete PSD application has long been a concern of industry, particularly in cases where there is no practical need for the data in the air quality analysis. This monitoring responsibility obligates a considerable amount of an applicant's resources and often interposes significant time prior to permit application submittal. Permitting authorities frequently have agreed that the monitoring requirement imposes an unnecessary burden on industry where the data is not needed for the air quality analysis but is required by regulation nevertheless.

The air quality data requirement originates in the Act at section 165(e) (1) and (2). Section 165(e)(1) requires, for each PSD source, a preconstruction analysis ''of the ambient air quality at the proposed site and in areas which may be affected by emissions from such facility for each pollutant subject to regulation under [the Act] which will be emitted from such facility.''

Section 165(e)(2) of the Act requires that the air quality analysis ''shall include continuous air quality monitoring data gathered for purposes of determining whether emissions from such facility will exceed the maximum allowable increases or maximum allowable concentrations permitted under [the PSD provisions].'' Further, section 165(e)(2) provides that data for the analysis shall be gathered over a period of 1 calendar year preceding the permit application or for a shorter period if a State determines that a complete and adequate analysis may be accomplished, according to the EPA regulations.[77]

On June 19, 1978, the EPA promulgated regulations which required a source to submit an air quality analysis that included continuous air quality monitoring data only for those pollutants, emitted by the source, which would impact an existing NAAQS. See 43 FR 26380. Monitoring data was not required to determine whether the source would cause or contribute to a violation of a PSD increment. In *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 371–372 (D.C. Cir. 1979), the reviewing court found the June 19, 1978 regulation to be deficient in that it did not provide for continuous preconstruction monitoring for purpose of determining impacts on both NAAQS and increments. On August 7, 1980, the EPA corrected the deficiency by promulgating the current PSD regulations covering preconstruction monitoring requirements. See 45 FR 52676.

The EPA had argued in the *Alabama Power* case that monitoring air quality concentrations was technologically infeasible for all but a small number of pollutants and that the available monitoring techniques were at best of questionable accuracy even for the relatively straightforward measurement of whether an applicable NAAQS has been exceeded. The Court rejected the EPA's arguments, reasoning that the statute clearly required monitoring for determining whether PSD increments would be exceeded. The Court discerned from the Act that Congress had a technology forcing intent in requiring such monitoring. The Court indicated that Congress intended that the development of monitoring techniques and the resulting data impose discipline on the use of modeling. The Court explained that Congress intended ''that the employment of modeling techniques [the principal device relied on for predicting source impacts] be held to earth by a continual process of confirmation and reassessment, a process that enhances confidence in modeling, as a means for realistic projection of air quality.'' See *Alabama Power*, 636 F.2d at 372. However, the Court added, ''[o]f course even a congressional mandate, such as a technology-forcing requirement based on a congressional projection of emergence of technology for the future, is subject to a justified excuse from compliance where good-faith effort to comply has not been fruitful of results.'' Id. The Court found that such a legitimate ''excuse'' had not been presented in the case, in which the EPA exempted sources from preconstruction monitoring for PSD increments based upon current technological infeasibility.

The Court's opinion thus contemplates that the EPA, after an additional 15 years of experience under the PSD program since *Alabama Power*, may excuse strict compliance with the requirements of section 165(e)(2) where a good-faith effort in preconstruction monitoring has failed in producing fruitful results. Elsewhere in the *Alabama Power* decision the court also indicated that there is a basis for a statutory exemption ''when the burdens of regulation yield a gain of trivial or no value.'' Id. at 360–61.

In the years since the court's decision, questions have continued concerning the provisions requiring the submittal of air quality monitoring data in cases where such data is not deemed necessary or useful as part of the air quality analysis. Modeled estimates of air quality are often sufficient to make the required demonstrations of source compliance with NAAQS and PSD increments. Yet some sources still are confronted with the requirement to provide air quality monitoring data as part of a complete application.

Further, the use of air quality data has been used only to a limited extent in the past to calibrate models for specific SIP-related applications; however, such calibration of air quality models has not been a common practice. Moreover, the EPA's Guideline on Air Quality Models describes the uncertainty associated with comparing short-term model estimates with ambient measurements and concludes that ''short term model calibration is unacceptable.'' See 58 FR 38816 at 38835, July 20, 1993. In addition, ambient monitoring techniques that could be used to measure increment consumption are still not available because of the inability of ambient monitors to separate the pollutant concentrations attributable to increment-consuming and non-increment consuming source emissions. Available ambient monitoring methods cannot make such distinctions.

The EPA believes that it is appropriate to reassess the regulatory requirement for preconstruction monitoring data for proposed PSD construction to address situations where the collection of such air quality data serves no practical purpose in the required air quality analysis. A more reasonable approach is to give the permitting authority discretion not to require the submittal of air quality monitoring data—including the installation and operation of monitoring stations by the applicant—where the permitting authority determines such data to be unnecessary to assess the air quality in the area affected by the proposed source.

However, before the EPA decides whether to propose specific changes to the existing requirements, it is seeking public input concerning the benefits and disadvantages of the current air quality monitoring requirements. The EPA is also seeking information concerning those specific situations where air quality monitoring data was required as part of a complete application, and whether the data was considered to serve a necessary or useful purpose in the required air quality analysis. Based on the resulting comments and information, the EPA will determine whether it is appropriate to subsequently propose changes to the current air quality monitoring requirements at §§ 51.166(m)(1) and 52.21(m)(1).

[77] See, *e.g.*, existing section 51.166(m)(1)(iv).

## VI. Changes Resulting From the 1990 Clean Air Act (1990) Amendments

### *A. NSR Provisions for Nonattainment Area Permitting*

#### 1. Provisions for Ozone Nonattainment Areas

New sections 182 through 185 (part D, title I) of the Act contain new NSR requirements specifically for ozone nonattainment areas that supplement the basic requirements in section 173 of the Act. In general, Congress intended that these new requirements vary in stringency according to the severity of the ozone nonattainment problem. The severity of the ozone nonattainment problem is as expressed through a series of area classifications.

*a. Area Classifications.* Section 181(a) defines five area classifications for ozone based on ambient ozone concentrations (ozone design values).[78] These five classifications (in ascending order of severity) are marginal, moderate, serious, severe, and extreme.

Some ozone nonattainment areas do not fit under the section 181 classifications. Therefore, the EPA has classified these ''nonclassifiable'' nonattainment areas into three additional groupings referred to as transitional, submarginal, and incomplete/no data areas. The nonclassifiable ozone nonattainment areas should all be considered of equal classification for purposes of implementing the applicable NSR requirements, and are subject to the NSR requirements under section 173 (the basic requirements). However, when such area is located within an OTR, the area will be treated as a moderate area for NSR purposes.

*b. Major Stationary Sources.* Congress retained the 100 tpy major source threshold for stationary sources of VOC in the less severely polluted ozone nonattainment areas. For those more severely polluted areas, including ozone transport areas, Congress specified progressively lower thresholds. The existing threshold of 100 tpy continues to apply generally to sources of VOC in areas classified as marginal, moderate, or any category of nonclassifiable ozone nonattainment areas. However, when any of the above areas is in an ozone transport area, the major source threshold is 50 tpy of VOC pursuant to section 184(b)(2). New section 182 establishes new major source thresholds of 50 tpy, 25 tpy, and 10 tpy for sources of VOC in areas classified as serious, severe, and extreme, respectively.

Section 182(f) sets forth the presumption that $NO_X$ is an ozone precursor unless the Administrator makes a finding of nonapplicability or grants a waiver pursuant to criteria contained in that subsection.[79] Specifically, section 182(f) provides that requirements applicable for major stationary sources of VOC shall apply to major stationary sources of $NO_X$, unless otherwise determined by the Administrator. Pursuant to section 182(f), EPA is proposing that in cases where $NO_X$ is considered an ozone precursor, major stationary sources of $NO_X$ are also subject to the part D NSR requirements applicable for VOC in ozone nonattainment areas and OTR's. See proposed § 51.165(a)(12). The major stationary source thresholds for $NO_X$ and VOC are the same except in the OTR for marginal, moderate, or unclassified ozone nonattainment areas and attainment (or nonclassifiable) ozone areas. For these latter areas, the major stationary source threshold for VOC is 50 tpy while the major source threshold for $NO_X$ is 100 tpy. In serious, severe, and extreme ozone nonattainment areas, the applicable major stationary source threshold for $NO_X$ is 50 tpy, 25 tpy, and 10 tpy, respectively. Note that $NO_X$ is not considered an ozone precursor in nonclassifiable ozone nonattainment areas unless the area is in the OTR.

In this proposal, the EPA is changing the existing definition of ''major stationary source'' to add the new statutory major source thresholds for both VOC and $NO_X$ emissions, as applicable. See proposed §§ 51.165(a)(1)(iv)(A) (*1*) and (*2*).

*c. Major Modifications.* The 1990 Amendments change the requirements applicable to modifications of stationary sources in serious, severe, and extreme ozone nonattainment areas to determine whether such a modification is a major modification subject to nonattainment NSR. The 1990 Amendments do not mandate a change in approach for marginal, moderate, and nonclassifiable ozone nonattainment areas.

(1) The Current Regulations. The EPA's current regulations for determining a major modification are set out at 40 CFR 51.165. These regulations define a ''major modification'' as:

> * * *any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act* * *

See existing § 51.165(a)(1)(v)(A). Under these regulations, the ''net emissions increase'' is calculated taking into account all contemporaneous, creditable, actual emissions increases and decreases on a plant-wide basis. See existing § 51.165(a)(1)(vi). Emissions increases and decreases are ''contemporaneous'' with the increase from the proposed project only if they occur before the date that the increase from the proposed project occurs, and no earlier than the reasonable contemporaneous time period specified by the reviewing authority. *Id.* ''Significant'' is defined for ozone to mean, in reference to a ''net emissions increase,'' a rate of emissions equal to or exceeding 40 tpy of VOC. See existing § 51.165(a)(1)(x). Thus, a net emissions increase of VOC that is less than 40 tpy is considered de minimis.

The EPA's policy under its existing NSR regulations has been that a proposed modification resulting in a *de minimis* increase (standing alone without considering any decreases associated with the proposed modification), is not major, regardless of previous contemporaneous emissions increases and decreases. This policy was discussed in detail in an EPA memorandum dated June 3, 1983 entitled ''Net Emission Increase Under PSD'' from Sheldon Myers, Director, OAQPS. This has been called a ''non-aggregation policy'' because netting contemporaneous increases and decreases would not be necessary unless the proposed modification standing alone would result in a significant emissions increase.

(2) Modifications in Marginal, Moderate, and Nonclassifiable Ozone Nonattainment Areas. As noted above, the 1990 Amendments do not mandate a change in the current regulatory approach for major stationary sources of VOC emissions in marginal, moderate, and nonclassifiable ozone nonattainment areas,[80] or major stationary sources in the ozone attainment areas in the OTR under section 184(b)(2). Therefore the

[78] A detailed description of the individual area classifications for ozone nonattainment areas is contained in the EPA's General Preamble for the Implementation of Title I of the 1990 Amendments, 57 FR 13498 (April 16, 1992). The reader who is not already familiar with these classifications, as well as the general new SIP requirements for ozone, should refer to the General Preamble for background information.

[79] The EPA policy on the applicability of $NO_X$ requirements under section 182(f) of the Act is in the document ''Guideline for Determining the Applicability of Nitrogen Oxides Requirements Under Section 182(f)'', December 1993, U.S. EPA, OAQPS, and two memoranda, dated May 27, 1994 and February 8, 1995, both entitled, ''Section 182(f) Nitrogen Oxides ($NO_X$) Exemptions—Revised Process and Criteria,'' from John Seitz, Director of the OAQPS, to EPA's Regional Air Directors.

[80] Nonclassifiable nonattainment areas include transitional, submarginal, and incomplete or ''no data'' areas, as defined in the General Preamble, 57 FR 13524 (April 16, 1992).

approach for determining whether modifications at major stationary sources of VOC emissions are major (hence subject to nonattainment NSR) in these areas will default to that which emerges from the proposed NSR reforms described in section II of this preamble. Because Congress did not specify a different significance level for these areas, the EPA is not proposing to change the current significance threshold level for VOC emissions of 40 tpy for modifications at major VOC sources in these areas.

For the entire OTR, section 184(b)(2) requires that at a minimum the nonattainment NSR provisions applicable to moderate ozone nonattainment areas also apply to major stationary sources of VOC. Again, section 182(f) makes requirements for proposed modification applicable to major stationary sources of $NO_X$ in an OTR, as well. This means that, within an OTR, the $NO_X$ requirements of section 182(f) apply to classified and nonclassifiable ozone nonattainment areas and to ozone attainment (or unclassifiable) areas.

The EPA is also proposing that the approach retained for determining whether a modification at an existing stationary source of VOC emissions is major will also apply to modifications at major source of $NO_X$ in these areas. See proposed § 51.165(a)(12). In addition, in areas where the VOC significance threshold for modifications is 40 tpy, the EPA is also proposing that the significance threshold level for $NO_X$ emissions for modifications at major $NO_X$ sources be 40 tpy. See proposed § 51.165(a)(1)(x)(C). Since Congress generally intended to treat major $NO_X$ sources in a manner similar to major VOC sources and did not specify a $NO_X$ significance threshold different from the current VOC level, the EPA believes it is appropriate to propose a $NO_X$ significance level for modifications that parallels the 40 tpy VOC significance level.

(3) Special Modification Provisions in Serious and Severe Areas. Sections 182(c)(6), (7), and (8) of the Act change the procedures for determining the applicability of the nonattainment NSR requirements to a major stationary source of ozone [and in some areas $NO_X$ under section 182(f) of the Act] which undergoes a modification in a serious or severe ozone nonattainment area.[81] The States have requested EPA's interpretation of the new special provisions to help States change their NSR rules to implement these new provisions of the Act. In addition, sources are awaiting EPA's proposed interpretation so that sources may use internal offsets to minimize the NSR requirements as allowed under the Act. In response to these requests EPA is proposing to amend the nonattainment NSR regulations to include the new special provisions for modifications in serious and severe ozone nonattainment areas as discussed below. See proposed § 51.165(a)(1)(v)(D).

In sum, for serious and severe ozone nonattainment areas the EPA is proposing the following changes to the current method for determining whether proposed modifications emitting VOC at major stationary sources of VOC are subject to nonattainment NSR:

- The new significance level for modifications would change from 40 tpy or more to greater than 25 tpy;
- The provisions for determining the net emissions increase (netting) during the 5-year contemporaneous period would apply to emissions increases from the proposed modifications, including such increases that are less than ''significant'' standing alone;
- The contemporaneous time period for netting would be the 5-year period that includes the calendar year in which the proposed modification will begin emitting and the 4 previous calendar years; and
- As a source option, creditable internal offsets at a ratio of at least 1.3:1 could be used for the proposed modification (or for any discrete unit, operation, or pollution-emitting activity that is part of the proposed modification) to either: (a) avoid nonattainment NSR at existing major sources that emit, or have the potential to emit, less than 100 tpy of VOC; or (b) avoid LAER at existing major sources that emit, or have the PTE, 100 tpy or more of VOC.

Section 182(f) of the Act generally requires new or modified sources of $NO_X$ located in ozone nonattainment areas classified as serious or severe to meet permit requirements consistent with those applicable to major sources of VOC. Accordingly, the EPA is proposing to require, in addition to the proposed special provisions described below, that such provisions also apply to $NO_X$ emissions at modifications of major sources of $NO_X$. See proposed § 51.165(a)(11). The proposed regulatory language also provides that such requirements shall not apply to sources of $NO_X$ in areas where the Administrator has determined that the provisions of section 182(f) do not apply.

i. The De Minimis Rule. The new section 182(c)(6) of the Act specifies a new approach for determining whether proposed modifications are subject to nonattainment NSR. It states that increased emissions of VOC resulting from any modification of a major stationary source:

> * * * shall not be considered de minimis for purposes of determining the applicability of the permit requirements established by this chapter unless the increase in net emissions of such air pollutant from such source does not exceed 25 tons when aggregated with all other net increases in emissions from the source over any period of 5 consecutive calendar years which includes the calendar year in which such increase occurred * * *

In short, this provision changes the current significance level for VOC emissions (in serious and severe ozone nonatttainment areas) from 40 tpy to ''greater than 25 tpy,'' i.e., 25 tpy or less is de minimis. See proposed § 51.165(a)(1)(x)(B). As explained below, the EPA does not believe that this provision necessarily changes the approach to ''netting'' increases and decreases. It does, however, specify a ''contemporaneous'' period slightly different than that currently used, and departs from the ''nonaggregation'' policy to require netting over the contemporaneous period in all instances where there is an increase in net emissions from the proposed modification standing alone.

The EPA is proposing that the first step in applying section 182(c)(6) is to determine the ''increase in net emissions'' from the proposed modification for which NSR applicability is in question.[82] The net emissions from the proposed modification (referred to here as the ''project net'') is the sum of all proposed creditable emissions increases and decreases proposed at the source between the date of application for the modification and the date the modification begins emitting.[83] See proposed § 51.165(a)(1)(v)(D)(1). If the project net is an emissions increase, then the next step is to aggregate the project net emissions increase with all

[81] The 1990 Amendments do not mandate a change in approach for modifications in marginal, moderate, and nonclassifiable ozone nonattainment areas.

[82] Note that it is only the project net emissions increase from the proposed modification that could potentially trigger the netting under section 182(c)(6). Therefore, it is only the proposed modification that may possibly have to meet the new source requirements, not all of the previous projects that are aggregated in the determination of contemporaneous ''net emissions increase'' under section 182(c)(6). There is no requirement, for example, to retroactively apply LAER to prior changes within the 5 year contemporaneous period.

[83] States have the flexibility to be more stringent than the EPA in their rules. For example, States may opt to not allow emissions decreases when determining the project net.

other ''net increases in emissions from the source'' over the 5-year contemporaneous period. This aggregation is referred to as the contemporaneous net. Note that this is a change from the current regulatory approach, in which proposed de minimis modifications are not subject to nonattainment NSR and there is no aggregation over a contemporaneous period for them.

Two associated issues must be addressed in interpreting the new provisions of section 182(c)(6) of the Act: the first, is to what extent creditable decreases in emissions may be aggregated together with creditable increases in emissions; the second, is the precise 5-year period over which the emissions are to be aggregated. In implementing these special modification provisions, note that increases and decreases are creditable for netting only to the extent the creditability criteria under existing § 51.165(a)(1)(vi) are met. This netting criterion requires that the emissions reductions are consistent with the area's attainment demonstration and plan for reasonable further progress (RFP).

*(a) Netting Increases and Decreases.* The EPA believes that this new provision is most reasonably understood to change the significance threshold emissions level for serious and severe ozone nonattainment areas, and to continue to allow both creditable increases and creditable decreases occurring during the contemporaneous period to be ''netted'' together. The language of section 182(c)(6) is ambiguous. It refers to aggregating ''net increases in emissions from the source.'' While the language omits any reference to ''decreases,'' the word ''net'' indicates that decreases may be deducted from the increases. The EPA believes that Congress intended for the EPA and the States to use the current netting criteria to determine what emission reductions are creditable. The rationale for this position is outlined below.

The statutory provision does not address how increases and decreases are to be ''netted'' to calculate the ''net increases'' that are to be aggregated. The use of the plural ''net increases'' arguably contradicts a single netting calculation of increases and decreases over the 5-year period. Under this view, increases and decreases over the 5 years would have to be grouped to result in a series of ''net increases.'' The reference to increases in emissions ''from the source,'' does not seem to limit netting of increases and decreases that occur from changes at a ''discrete operation, unit, or other pollutant emitting activity.'' Compare with subsections 182(c) (7) and (8). Another alternative might be to calculate a ''net increase'' for changes that are made at the same time, as part of a single project in a single application. But there does not seem to be a significant reason Congress would have wanted to provide an incentive for sources to plan decreases at the particular time increases would occur within the 5-year period. Thus, the EPA believes that Congress did not intend to exclude permanent, quantifiable, enforceable, and otherwise creditable decreases from the netting calculation. The Agency believes that Congress emphasized increases simply because it is those that are necessary to exceed the 25-ton threshold, and, by this action, Congress did not thereby intend to exclude otherwise creditable decreases from the netting calculations.

The Agency believes the legislative history supports the above conclusion. The House Report summarized the treatment of ''netting'' in H.R. 3030 (containing the same language as the statute as enacted) as follows:

> In addition, the graduated control requirements include continued use of ''netting'' in other than extreme areas subject to increasingly stringent limitations for higher classifications. The netting process allows sources making modifications that would otherwise be subject to the new source review requirements of the Act to escape such requirements upon a showing that the emissions increase associated with the modification is ''netted out'' to a de minimis overall level by emission decreases from elsewhere within the source. The netting concept has in many cases allowed sources to modernize and expand without application of new source review provisions intended to assure that modernization and expansions bring about continued air quality improvement. It is the Committee's view that new source review should reconcile economic growth with clean air. It is an important concept for modifications that affect ongoing operations of existing facilities and related existing jobs. Limitations on netting in serious and severe areas include a lowered de minimis level from today's level of 40 tons per transaction, to a 5-year total of no more than 25 tons.

See H. Rep. No. 490, part 1, 101st Cong., 2d Sess., at 234–35 1990. This discussion highlights the important netting changes involving the threshold level mandatory aggregation,[84] but omits any discussion of a change in eligibility of decreases in the netting calculation. Had Congress intended such an important change, it would be surprising that it is not mentioned in this discussion. Nor do other places in the legislative history clearly specify such a change. See *id.* at 241–42; Cong. Rec. at H12870 (Oct. 26, 1990) (statement of Rep. Oxley). The EPA requests comment on this interpretation. The EPA specifically requests comments on whether emissions reductions should be credited when determining the ''project net'' and the ''contemporaneous net.''

For these special modification provisions, the quantity of emissions that must be offset to meet the nonattainment NSR general offset provisions is the project net emissions increase for proposed major modifications. This means that the project net emissions increase from the proposed modification, and not the contemporaneous net emissions increase calculation over the contemporaneous period, determines the quantity of emissions from the proposed modification that must be offset. While only the project net emissions increase need be offset, States are required to reconcile their emissions inventory by accounting for all increases in emissions in order to demonstrate RFP and attainment. For cases where discrete emissions limits are offset internally at a 1.3:1 offset ratio under section 182(c) (7) or (8) of the Act, the amount to be offset is the emissions increase from the units within the proposed project. However, if such units replace existing units, the emissions reduction from the replaced units may be credited towards reducing the quantity of emissions that must be internally offset.

*(b) The 5-Year Contemporaneous Period.* A remaining issue is the time period over which other net increases from the source are to be aggregated. Section 182(c)(6) of the Act specifies ''any period of 5 calendar years which includes the calendar year in which such increase occurred.'' From this plain language, the period must include the full calendar year in which the increase occurred, including the rest of the calendar year beyond the actual time of the increase. This differs from the EPA's current regulations that allow the reviewing authority to specify a longer period extending before construction of the particular change and through the date that the increase from the particular change occurs. See existing § 51.165(a)(1)(vi)(B).

An ambiguity arises from the provision's reference to ''any'' 5-year period. The EPA's current regulations specify a single period. *Id.* The reference to ''any'' in section 182(c)(6) raises an issue whether the contemporaneous period may include other combinations

[84] Section 182(c)(6) of the Act also changes the bounds of the contemporaneous period from the pre-existing regulations. But this is not a major change, and it is not surprising that it is not raised in the legislative history discussions.

of 5 consecutive years including the year of the particular increase. Other combinations would, of course, include future years beyond the year of the particular increase. The EPA does not believe Congress intended that the contemporaneous period include such future years. This is because the NSR program has always been limited to addressing the emissions impact of new growth when it occurs, including both ''offset'' and LAER technology requirements. If NSR applicability is based on future actions, the need for offsets and LAER could not be finally determined at the time a particular modification is made. Instead, the EPA believes that the reference to ''any'' was included simply in recognition of the fact that the particular span of calendar years will change over time. In short, Congress simply recognized that the period of 5 calendar years, from, for example, 1992 to 1996 is different than the period from 1993 to 1997.

Therefore, for these special modification provisions the EPA is proposing that the 5-year contemporaneous period is the period of 5 consecutive calendar years ending with the full calendar year when the increase in emissions from the proposed modification is to occur. See proposed § 51.165(a)(1)(vi)(C)(*1*). In any case, the EPA believes consideration of future years in the de minimis calculation beyond the calendar year when the increase occurs would raise serious implementation problems, because increases in future years must be projected and may not be certain. The permitting authority might impose permit conditions to ensure that a source limits increases in future years consistent with a projection on which a current de minimis calculation is based.[85] The EPA solicits comments on whether the 5-year period may extend beyond the calendar year when the increase in emissions from the proposed modification is to occur.

The EPA also requests comment on whether a State may propose a different contemporaneous period, so long as the State can demonstrate that any such period is as stringent as the EPA's. To the extent increases may be netted with decreases over the contemporaneous period, the EPA is concerned there may be no way to tell in a particular case whether a longer or different contemporaneous period is more stringent than the EPA's proposed approach.

*(c) Trivial Increases.* Some States have inquired whether every single increase that is a modification must be tracked under the new de minimis rule or whether States may adopt sub-de minimis levels and exclude increases (and, presumably, decreases) below these levels. The EPA is not now proposing a particular level of sub-de minimis increases and decreases, but the EPA may consider whether such levels are acceptable in States' NSR SIP submissions. The EPA requests comment on the following discussion of this issue, and on what type of sub-de minimis level, if any, might be acceptable.

This issue turns on the EPA's legal authority to exclude emissions increases (and decreases) from a rule that, on its face, seemingly applies to every emission increase—no matter how small the increase may be. In *Alabama Power Co.* v. *Costle,* 636 F.2d 323, 357 (D.C. Cir. 1979), the court discussed two bases for categorical regulatory exemptions that could apply here. Where these grounds exist, the availability of a categorical regulatory exemption may be presumed ''save in the face of the most unambiguous demonstration of congressional intent to foreclose them.'' 636 F.2d at 357. However, the EPA lacks the power to revise legislative directives in a manner ''inconsistent with the clear intent of the relevant statute.'' *Id.* at 358 [quoting *NRDC* v. *Costle,* 568 F.2d 1369, 1377 (D.C. Cir. 1977)].

First, the Agency may create a categorical regulatory exemption out of administrative necessity, where compliance with the explicit instructions of a statute may be infeasible, impractical, or impossible. See *Alabama Power,* 636 F.2d at 358–59. However, there is a ''heavy'' burden where, as here, the Agency seeks to create a ''prospective exemption of certain categories from a statutory command based upon the Agency's prediction of the difficulties of undertaking regulation.'' *Id.* at 359. The EPA believes that, since very small increases resulting from modifications (physical changes or changes in the method of operation) are routinely tracked today as part of State construction programs, a showing of administrative necessity may be difficult for all but the smallest increases and decreases.

Second, under *Alabama Power* categorical exemptions may also be permissible as an exercise of an Agency's powers to recognize inconsequential situations. *Id.* at 360. In general, an Agency can create this exemption where the application of a regulation across all classes will ''yield a gain of trivial or no value.'' *Id.* The exemption is not available where the regulatory scheme ''does provide benefits, in the sense of furthering the regulatory objectives, but the Agency concludes that the acknowledged benefits are exceeded by the costs.'' *Id.* A determination of when a matter can be classified as de minimis turns ''on the assessment of particular circumstances'' of the individual case. *Id.* The EPA believes that a State's demonstration that a particular increase is trivial and of no consequence in furthering the statutory purpose must take account of the size of the applicable threshold and major source thresholds applicable in the various areas. For example, a 5-ton increase is 20 percent of the de minimis threshold for serious and severe areas and half the major source threshold in extreme areas. It is not at all clear that an increase of that size could be characterized as trivial. On the other hand, a level of less than one ton might conceivably be more reasonable. Any such showing by a State would surely have to be supported by solid scientific evidence and analysis.

In any case, the EPA emphasizes that States must track and quantify all emissions increases to the extent necessary to ensure progress toward attainment. Small measurable increases from any stationary source should be addressed in States' stationary source permitting programs consistent with section 110(a)(2)(C) of the Act to assure that NAAQS are achieved. In addition, small measurable increases should be counted as minor source growth under section 173(a)(1)(A) of the Act. These provisions suggest a very high hurdle to show that tracking such small increases is either trifling or will administratively frustrate the NSR program.

ii. Special Modification Rules. If a particular physical or operational change at a major stationary source in a serious or severe ozone nonattainment area is not considered de minimis under section 182(c)(6), then the provisions of sections 182(c) (7) and (8) of the Act apply. Those provisions establish special rules for major modifications at sources that emit, or have the potential to emit, less than 100 tpy, or 100 tpy or more, respectively of VOC [or $NO_x$,

[85] Congressman Waxman, in a law review article, suggests that section 182(c)(6) requires that the sum of net emissions increases be below the *de minimis* level over *all* 5-year periods, including the year of the particular increase. Under this approach, no emissions increase could be determined to be *de minimis* ''until 5 years after it has occurred.'' See Waxman, Wetstone, and Barnett, ''Roadmap to Title I of the Clean Air Act Amendments of 1990,'' 21 *Northwest Univ. Envir. L. Rev.* 1843, 1874 (1991). The EPA believes this interpretation, while conceivable on its face, conflicts with the structure of NSR as a preconstruction permitting program. Under Waxman's approach, projects that have been reviewed, approved, and completed could be subject to retroactive NSR.

consistent with section 182(f)]. These subsections offer sources options that may be more desirable than would otherwise apply. Specifically, sections 182(c) (7) and (8) offer sources the option of obtaining 1.3:1 internal offsets in order to avoid NSR entirely (for sources emitting less than 100 tpy), or to avoid LAER (for sources emitting 100 tpy or more). These special provisions are discussed below.

(a) *Modifications at Sources Emitting Less Than 100 TPY.* Section 182(c)(7) of the Act specifies a special rule for modifications at existing major stationary sources of VOC that emit, or have the PTE, less than 100 tpy. This rule applies to any change [as described in section 111(a)(4)] at the source:

* * * that results in any increase (other than a de minimis increase) in emissions of volatile organic compounds from any discrete operation, unit, or other pollutant emitting activity at the source * * *

Thus, while the determination of de minimis under section 182(c)(6) requires that all changes within the 5-year contemporaneous period at the source be considered, sections 182(c) (7) and (8) apply to the particular change at the discrete unit, operation or activity at issue. Sections 182(c)(7) and (8) do not apply to other previous increases within the 5-year period that are unrelated to the change at issue. Of course, if the contemporaneous net emissions increase for the proposed modification is a de minimis increase [as defined in section 182(c)(6)], then the nonattainment NSR provisions need not apply at all.

The special rule for sources of less than 100 tpy is that the particular increase at issue:

* * * shall not be considered a modification for [purposes of sections 172(c)(5) and 173] if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of VOC concerned from other operations, units, or activities within the source at an internal offset ratio of at least 1.3:1 * * *

A question may arise as to what sources would choose to utilize the 1.3:1 offset ratio where the source could possibly avoid NSR entirely by applying creditable decreases at a ''1:1 ratio'' such that the aggregated increase remains at 25 tons or less under section 182(c)(6). The EPA believes that sources may not have enough emissions decreases to internally ''net'' the entire proposed modification to 25 tons or less. However, where the proposed modification results in increases at more than one discrete unit, the source may have sufficient creditable internal emissions decreases to apply a 1.3:1 offset ratio and avoid review for that particular unit. While some sources may be able to plan modifications at various units over time so that each could avoid review through netting under section 182(c)(6), the EPA believes that not all sources will be able to do so, and will have reason to utilize the 1.3:1 internal offset ratio option. See proposed § 51.165(a)(1)(v)(D)(*2*). Once an internal offset has been used to exempt a particular increase from NSR, the particular increase and decrease(s) would not be creditable for future netting and offset transactions. See proposed § 51.165(a)(10)(iii).

If the source does not avoid NSR under the internal offset option, the change is a modification subject to nonattainment NSR. When applying the nonattainment NSR requirements, note that the special rule in section 182(c)(7) of the Act provides that BACT is to be substituted for LAER for sources of less than 100 tpy. See proposed § 51.165(a)(10)(ii).

*(b) Modifications of Sources Emitting 100 TPY or More.* Section 182(c)(8) of the Act provides a special rule for modifications at major stationary sources of VOC that emit, or have the PTE, 100 tpy or more. This special rule applies to any change at the source according to the same terms as the special rule in section 182(c)(7).

The special rule for sources of 100 tpy or more is that:

* * * if the owner or operator of the source elects to offset the increase by a greater reduction in emissions of VOC from other operations, units, or activities within the source at an internal offset ratio of at least 1.3 to 1, the requirements of section 173(a)(2) of this title [concerning the LAER (LAER)], shall not apply * * *

This option to avoid LAER could be utilized in the same circumstances as described in section 182(c)(7), above. While a source could avoid NSR entirely for the proposed modification by netting creditable emissions reductions at any internal operations, units, or activities at a 1:1 ratio under section 182(c)(6), it may nevertheless have the ability to arrange proposed modifications over time in order to avoid review under section 182(c)(7), or the LAER requirement under section 182(c)(8). In such circumstances under section 182(c)(8), the source would have reason to use creditable internal decreases that were insufficient to avoid nonattainment NSR for the entire project to avoid LAER for discrete units at a 1.3:1 internal offset ratio. See proposed § 51.165(a)(10)(i).

An additional issue under section 182(c)(8) is whether sources satisfying the internal offset ratio of 1.3:1 to avoid LAER must secure additional offsets to separately satisfy the general offset ratio requirements of sections 182(c)(10) (1.2:1 ratio for serious areas) and 182(d)(2) (1.3:1 ratio for severe areas, or 1.2:1 if all major sources use BACT). The EPA believes section 182(c)(8) of the Act may reasonably be interpreted to provide that the 1.3:1 internal offset ratio is in lieu of the general offset ratio. The EPA recognizes that the only remaining NSR requirements of section 182(c)(8) would be less geared toward emissions control at the source, such as the alternative siting analysis of section 173(a)(5) and the compliance demonstration of section 173(a)(3) of the Act. But the EPA believes it is reasonable to believe Congress intended to provide an incentive to obtain offsets internally, where the actual impact of the new emissions may be most precisely counteracted. Also, the 1.3:1 internal offset ratio would generally offset minor source growth and contribute to RFP as specified in section 173(a)(1)(A). Of course, if more reductions are needed to offset minor source growth and contribute to RFP under section 173(a)(1)(A), the State may need to require offsets beyond the 1.3:1 internal offset requirement. The EPA requests comment on this interpretation.

iii. Examples. Examples of the EPA's proposed approach for the special modification provisions follow. Note that the examples also apply to $NO_X$ emissions consistent with section 182(f) of the Act.

(a) Example A.

An existing major stationary source of VOC has the PTE 285 tpy of VOC and is located in a serious ozone nonattainment area. The source proposes a modification (a physical change or change in the method of operation) that includes the following changes in VOC emissions:

+40 tpy from addition of new unit A
−30 tpy from shutdown of existing unit B
−60 tpy from the addition of control equipment on existing unit C

The shutdown of unit B and the addition of controls to unit C are proposed by the source as federally enforceable permit conditions to occur during the period between the date of permit application for the proposed modification and the date the proposed modification will begin emitting. Both emissions reductions meet all criteria for netting. As a result, the resultant project net of VOC from the proposed modification is −50 tpy (+40 −30 −60), which is not an increase. Therefore, since the special provisions may only apply to proposed modifications that result in a net project emissions increase, nonattainment NSR does not apply to this proposed modification.

(b) Example B.

An existing major stationary source of VOC has the potential to emit 90 tpy of VOC and

is located in a severe ozone nonattainment area. The source proposes a modification (a physical change or change in the method of operation) with the following VOC emissions changes:

+110 tpy from addition of new unit A
−20 tpy from shutdown of existing unit B
+10 tpy from the addition of new unit C

The shutdown of unit B is proposed by the source as a federally enforceable permit condition. The shutdown is to occur during the period between the date of permit application for the proposed modification and the date the proposed modification will begin emitting. As a result, the project net is +100 tpy of VOC, which is a VOC emissions increase subject to netting over the 5-year contemporaneous period.

The proposed modification is to begin emitting in 1997, so the contemporaneous period for netting is the calendar years 1993 through 1997. Creditable VOC emissions increases and decreases at the source during the contemporaneous period are +80 tpy in 1994, −60 tpy in 1996, and +100 tpy from the proposed modification. The contemporaneous net emissions increase of +120 tpy is significant (>25 tpy). Therefore, the proposed modification is major and subject to the special modification provisions for existing major stationary sources of VOC with a PTE less than 100 tpy of VOC. The major modification is subject to nonattainment NSR, including a requirement to provide at least 130 tpy (100×1.3) of emissions offsets. However, nonattainment NSR may be avoided if the source elects to use the internal offsets alternative. Under this option, the entire proposed modification is not subject to NSR if an internal offset of at least 130 tpy (100×1.3) is provided by the source. However, it is not likely that this option is viable for this source of the size given. Another option is to avoid NSR for new unit C by providing at least 13 tpy (10×1.3) of internal offsets for that unit. Consequently, only unit A would be subject to NSR.

If in this example the existing major stationary source has the PTE 100 tpy or greater, then nonattainment NSR applies to the major modification, except that the LAER provision will not apply if the source elects to provide internal offsets at a ratio of at least 1.3:1. The remaining part D nonattainment NSR provisions still apply. Alternatively, the source may elect either to avoid LAER for the entire modification if at least 130 tpy of internal offsets is secured or to avoid LAER for new unit C if at least 13 tpy of internal offsets is provided. Note than an emissions reduction at the source occurring prior to the 5-year contemporaneous period may be used as an internal offset to the extent it meets all otherwise applicable criteria for a creditable offset.

iv. Transition. For purposes of permitting in the absence of State NSR SIP revisions, the EPA does not intend to apply the interpretations proposed here for the special modification provisions of sections 182(c) (6), (7), and (8) of the Act, except that the lower significance threshold of greater than 25 tpy for applicability is in effect. The EPA believes that the remainder of these special modification provisions are sufficiently complicated that it is appropriate to defer implementation until State NSR rules implementing the provisions are in place or when the EPA takes final action on this proposal, whichever comes first. Upon promulgation of the final rule, the EPA expects to review each State's NSR SIP and issue a call for any necessary additional SIP revisions under section 110(k)(5) of the Act to ensure that States' NSR SIP's are ultimately consistent with the provisions of the final rule.

(4) Modifications in Extreme Areas. For modifications of major stationary sources of VOC [and $NO_X$ consistent with section 182(f)] located in extreme ozone nonattainment areas, the 1990 Amendments eliminate the concept of de minimis altogether for purposes of determining a major modification. New section 182(e)(2) provides that any physical change or change in the method of operation at the source that results in any increase in emissions from any discrete operation, unit, or other pollutant-emitting activity at the source generally must be considered a modification subject to the part D NSR permit requirements, regardless of any decreases elsewhere at the source. Thus, the EPA is proposing to amend the both the definition of ''major modification and the definition of ''significant'' to specifically address proposed modifications of major stationary sources of VOC (and presumptively $NO_X$) in extreme areas for ozone. The proposed change would reflect the statutory requirement by requiring that any increase in emissions from any discrete operation, unit, or permit emitting activity at a source locating in an extreme ozone nonattainment area is considered ''significant'' and, thereby, a major modification. See proposed §§ 51.165(a)(1)(v)(E) and 51.165(a)(1)(x)(F)].

d. Emissions Offset Ratios. The 1990 Amendments clarified the existing statutory offset requirements under part D of title I of the Act by stipulating that:

* * *the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal *or greater reduction, as applicable,* in the actual emissions of such air pollutant from the same or other sources in the [nonattainment] area * * *. [Emphasis added.]

See section 173(c)(1) of the Act. Elsewhere in the 1990 Amendments, Congress prescribed a set of emissions offset ratios, calling for greater than one-for-one emissions reductions, to be applied to stationary sources of VOC according to the severity of the ozone nonattainment problem. Wherever $NO_X$ emissions are considered an ozone precursor under section 182(f), the emissions offset ratios for VOC also apply to $NO_X$ emissions. For purposes of satisfying the section 173 emissions offset provisions, new section 182 established five separate minimum emission offset ratios, each corresponding to one of five area classifications for ozone nonattainment areas, as follows: (1) 1.1:1 in marginal areas; (2) 1.15:1 in moderate areas; (3) 1.2:1 in serious areas; (4) 1.3:1 in severe areas; and (5) 1.5:1 in extreme areas. The minimum offset ratio in the OTR is 1.15:1. For ozone nonattainment areas outside the OTR that the EPA has categorized as nonclassifiable (transitional, submarginal, or incomplete/no data), the emissions offset ratio must be at least 1:1. Consistent with section 173(c)(1), the EPA interprets that the offset ratio, in each case, is the ratio of total actual emissions reductions of VOC (or $NO_X$, where applicable) to the total allowable emissions increase of such pollutant from the new or modified stationary source.

In the case of severe and extreme areas, section 182(c)(10) provides that the emissions offset ratio is reduced to a ratio of at least 1.2:1 if the applicable SIP contains the requirement that all existing major sources in such nonattainment areas must use BACT for the control of VOC emissions. Because BACT changes over time as technologies advance, some methodology must be adopted for States to demonstrate that all existing sources in a given nonattainment area have met the BACT requirement in section 182(d)(2). In the PSD program, BACT applies to new sources at the time of permitting. In the context of existing sources, this requirement could conceivably apply at a fixed point in time, or might apply continuously so that existing sources must be using technology that constitutes BACT at particular intervals. The EPA believes that it may be most appropriate to require BACT as of the time the attainment demonstration is due, so that the technology and offsets

requirements will be consistent with the overall attainment plan. Alternatively, it may be appropriate to require BACT as of the time the permitting program that would switch the offset ratio to 1.2:1 is adopted. The EPA requests comment on the appropriate methodology for applying the BACT requirement in section 182(d)(2) to existing sources. The EPA is proposing the minimum offset ratios in ozone nonattainment areas and in the OTR in accordance with the 1990 Amendments. See proposed § 51.165(a)(14).

For extreme ozone nonattainment areas section 182(e)(2) also provides for an exemption from the section 173(a)(1) offset requirements if the owner or operator of the major stationary source agrees to offset any proposed increase by a greater reduction in onsite emissions from other discrete operations, units, or activities at an internal offset ratio of 1.3:1. EPA is proposing this exemption for extreme ozone nonattainment areas at proposed § 51.165(a)(15). The remaining part D NSR provisions still apply. In addition, this new section stipulates that the offset requirements do not apply in extreme areas if the modification consists of installing equipment required to comply with the applicable implementation plan, permit, or the Act itself. The EPA notes with respect to this offsets exemption in extreme areas that the State must nonetheless account for collateral increases in emissions associated with installation of equipment required to comply with another legal mandate. For example, where a source incinerates VOC in order to limit VOC emissions, $NO_X$ emissions may increase. The State may still require offsets as an approach more stringent than that the Act provides, or must otherwise ensure that such increases in emissions are counteracted by other SIP measures so as to comply with sections 110(a)(2)(C) and 173(a)(1)(A) of the Act. Of course, any increase is still subject to the LAER technology requirement, even where offsets are not applicable. The EPA encourages States to require alternatives for compliance with legal mandates that minimize collateral emissions increases, so that the State's obligation to counteract such increases will also be minimized. Finally, pursuant to section 182(e)(2) of the Act, EPA is also proposing that, in extreme ozone nonattainment areas, sources need not offset emissions increases of VOC resulting from modifications consisting of equipment that is needed to comply with a SIP, permit, or Act requirement. See proposed § 51.165(a)(15)

2. Provisions for Carbon $MoNO_X$ide (CO) Nonattainment Areas

New subpart 3 of part D of the Act contains new NSR requirements for CO nonattainment areas as determined by the area's CO design value. The 1990 Amendments established an area classification system for the CO nonattainment air quality problem based on the area's CO design value. Only two types of area classifications are defined in section 186 for CO nonattainment areas— moderate and serious.

The major stationary source threshold for moderate areas is 100 tpy. Pursuant to section 187(c), the EPA is proposing to amend the definition of ''major stationary source'' to incorporate a lower emissions threshold of 50 tpy for serious areas in which stationary sources are significant contributors to CO levels as determined by the Administrator. See proposed § 51.165(a)(1)(iv)(A)(*1*)(*vi*). Also, for such CO moderate areas, EPA is proposing a significance threshold of 50 tpy for defining a major modification at an existing major stationary source of CO. See proposed § 51.165(a)(1)(x)(E).

In addition to the two classifications for CO nonattainment areas, some nonattainment areas do not fit into the classification scheme and are considered ''nonclassifiable'' CO nonattainment areas. The following discussion describes the EPA's proposed NSR requirements for all CO nonattainment areas (moderate, serious and nonclassifiable). Like those for ozone, the NSR requirements for CO are additive (i.e., a serious area has to meet all moderate requirements in addition to all serious requirements, etc.). Requirements discussed for moderate areas will be repeated for serious areas only if the requirements are different.

*a. Moderate Areas with a Design Value of 12.7 Parts Per Million and Below*. The part D NSR requirements of section 173 apply in CO nonattainment areas. All States with moderate CO nonattainment areas with a design value of 12.7 parts per million (ppm) or less must submit proposed part D NSR programs no later than November 15, 1993. The provisions of these plans must be developed in accordance with the requirements of sections 172(c)(5) and 173 of the Act.

*b. Moderate Areas with a Design Value Greater than 12.7 Parts Per Million*. In the General Preamble (57 FR 13533), the EPA interpreted sections 187(a)(7) to require that all CO nonattainment areas with a design value greater than 12.7 ppm submit part D NSR programs meeting section 172(c)(5) and 173 requirements not later than November 15, 1992. Unless otherwise noted, all moderate areas above 12.7 ppm are also to meet those requirements applicable to moderate areas below 12.7 ppm.

*c. Serious Areas*. As specified in section 187(c)(1), for serious CO nonattainment areas in which stationary sources contribute significantly to CO levels (as determined according to rules issued by the Administrator), a SIP shall be submitted by November 15, 1992, that provides that ''major stationary source'' includes any stationary source that emits or has the PTE 50 tpy or more of CO. If stationary sources do not contribute significantly to CO levels under section 187(c)(1), then ''major stationary source'' includes any stationary source that emits or has the potential to emit 100 tpy or more of CO.

*d. Nonclassifiable Areas*. The ''nonclassifiable'' category of CO nonattainment areas is comprised of two subcategories—''not classified'' and ''incomplete/no-data.'' The EPA describes an area as ''not classified'' if the area was designated nonattainment both prior to enactment and (pursuant to section 107(d)(1)(C) of the Act) at enactment and if it did not violate the primary NAAQS for CO in either year for the 2-year period 1988 through 1989. The EPA defines an ''incomplete/no-data'' area as an area that retained its nonattainment designation at enactment [under section 107(d)(1)(C)] but for which data are not available to indicate whether or not violations of the standard have occurred. For a more detailed discussion of nonclassifiable CO nonattainment areas, see the General Preamble (57 FR 13535). The specific requirements of subpart 3 of part D of the Act do not apply to CO ''not classified'' and ''incomplete/no data'' areas. However, because these areas are designated nonattainment, the requirements of section 172(c)(5) apply. Therefore, States with CO nonattainment areas classified as ''not classified'' or ''incomplete/no data'' areas, are required to adopt part D NSR programs meeting the requirements of section 173, as amended. As required by section 172(b), States' changes to NSR SIP's for such areas were due to the EPA no later than 3 years (November 15, 1993) from designation under section 107(d)(4)(A)(ii).

3. Provisions for PM–10 Nonattainment Areas

This proposal also adds certain new requirements pertaining to PM–10 to the nonattainment NSR permit regulations at 40 CFR 51.165. These particular changes are being made in accordance

with new statutory provisions contained in new subpart 4 of part D of the Act.

Prior to the 1990 Amendments, designations identifying the attainment status of an area pursuant to section 107(d) did not exist for PM–10. Consequently, new and modified stationary sources were not required to undergo preconstruction review under NSR nonattainment permit requirements based on the amount of PM–10 which they could emit. The 1990 Amendments established an area classification system under section 188 to define the severity of the air quality problem in designated nonattainment areas for PM–10. Only two types of area classifications for PM–10 nonattainment areas were defined—moderate and serious. A detailed discussion of the nonattainment designation process for PM–10 is contained in the General Preamble (see 57 FR 13537).

*a. Moderate Areas.* Section 189(a)(1)(A) of the Act provides that each State with a PM–10 nonattainment area classified as moderate is to submit an implementation plan [as required by section 172(c)(5)] containing a permit program meeting the requirements of section 173 for the construction of new and modified major stationary sources of PM–10 (and in some cases PM–10 precursors). In moderate areas for PM–10, new stationary sources are determined to be ''major'' in accordance with section 302(j) (also existing § 51.165(a)(1)(iv)(A)). Major stationary sources of PM–10 will be subject to preconstruction review under the NSR nonattainment permit regulations if they emit, or have the potential to emit, 100 tpy or more of PM–10 emissions (or in some cases PM–10 precursors). No changes to the applicability requirements are needed under the current Federal NSR regulations to cause major new sources of PM–10 to undergo the necessary preconstruction review.

The regulations currently require that any modification to an existing stationary source that is major for the same pollutant is subject to the part D NSR requirements if the net emissions increase of the applicable nonattainment pollutant is significant. The EPA is today proposing for nonattainment purposes a significance threshold of 15 tpy for PM–10 emissions. See proposed § 51.165(a)(1)(x)(A). This threshold is the same emissions rate currently used to define ''significant'' for PM–10 emissions under the PSD regulations at §§ 51.166 and 52.21. See, e.g., existing § 51.166(b)(23)(i).

*b. Serious Areas.* For nonattainment areas classified as serious for PM–10, Congress determined that stationary sources emitting 70 tpy or more of PM–10 emissions must be considered major stationary sources. See section 189(b)(3) of the Act. Therefore, the EPA is proposing to amend the current definition of ''major stationary source'' to add a 70 tpy major source threshold for any stationary source of PM–10 located in a serious area for PM–10. See proposed § 51.165(a)(1)(iv)(A)(*1*)(*i*) This new emissions threshold would apply to new stationary sources of PM–10, as well as existing major sources proposing a modification resulting in an increase in PM–10 emissions. An existing major stationary source of PM–10 would be considered a major modification when it proposes a change that will result in a significant net emissions increase. The EPA is also proposing that the proposed significance threshold of 15 tpy, as described above, apply to any major modification of PM–10 in a serious PM–10 nonattainment.

*c. PM–10 precursors.* Section 189(e) provides that the part D NSR requirements applicable to major stationary sources of PM–10 shall also apply to major stationary sources of PM–10 precursors ($SO_2$, $NO_X$, and VOC). As described earlier, the EPA is proposing regulatory language which calls for each plan to subject major stationary sources of specific PM–10 precursors to the same part D permit requirements applicable to major stationary sources of PM–10. See proposed § 51.165(a)(13). States will not be required to implement this particular requirement in PM–10 nonattainment areas where the Administrator determines that PM–10 precursors (i.e., $SO_2$, $NO_X$, and VOC) are not significant contributors of ambient PM–10.

To implement the new applicability requirement for PM–10 precursors in serious PM–10 nonattainment areas, the EPA is proposing a major source threshold of 70 tpy or more of any individual PM–10 precursor. See proposed § 51.165(a)(1)(iv)(A)(*1*)(*i*). For stationary sources of PM–10 precursors located in moderate PM–10 nonattainment areas, the EPA does not intend to propose an emissions threshold different from the existing general threshold of 100 tpy or more of any pollutant. Thus, under this proposal the existing threshold of 100 tpy would also apply to such sources of PM–10 precursors.

The EPA is also proposing that any modification of a source emitting a PM–10 precursor meet the same part D permit requirements that apply to modifications at major stationary sources of PM–10. See proposed § 51.165(a)(1)(v)(G). For purposes of defining a significant increase in emissions of any PM–10 precursor, the EPA is proposing a 40 tpy threshold. See proposed § 51.165(a)(1)(x)(D). This proposed threshold is the same emissions rate used to define significant emissions increases individually for $SO_2$, $NO_X$, and VOC. Thus, the 40 tpy threshold would be used to determine whether a major modification would occur under the part D NSR requirements with respect to each proposed net emissions increase of a PM–10 precursor from a major stationary source of that PM–10 precursor, except in areas where the Administrator determines that the sources of PM–10 precursors do not contribute significantly to the PM–10 nonattainment problem in the area.

The EPA considered several approaches before deciding on the use of a level equal to the original significance threshold in each case. One approach involved the EPA's procedures for defining the significant emissions rate for each criteria pollutant under the current PSD and part D NSR programs. In selecting those existing rates for the criteria pollutants, the EPA used four percent of the short-term primary standard for each pollutant as a design value. The design values were then converted to emissions rates in accordance with EPA's modeling procedures.[86] The difficulty in using this approach to select a significance level for PM–10 precursors is the uncertainty concerning the PM–10 conversion rate for each of the affected pollutants. Such conversion rates depend on the specific chemistry of the pollutant emissions, as well as a number of meteorological factors which are area-specific. Thus, a standard conversion rate has not been developed that would apply to all sources emitting a particular PM–10 precursor.

Another approach for PM–10 precursors involved the use of the 15 tpy significance level already used for PM–10 emissions under the PSD regulations, and being proposed today for PM–10 emissions under the part D NSR regulations. The EPA rejected this approach, however, because of its overly conservative nature. The EPA does not believe that it would be reasonable to assume a 100 percent conversion rate for each of the PM–10 precursors.

Careful consideration should be given before approving offsets between PM–10 and PM–10 precursors. An increase in PM–10 emissions should not be offset by an equivalent decrease in emissions of a PM–10 precursor. This is because a reduction of a PM–10 precursor

[86] See 50 FR 13145, April 2, 1985.

ordinarily will not negate an equivalent increase in PM–10, as not all of a PM–10 precursor will ordinarily convert to the same mass of PM–10. The conversion process may depend on several variables, including the availability of chemical reactants in the atmosphere for the conversion process, and the difference in mass between the PM–10 precursor molecule and the PM–10 particle that the precursor reacts to become. Another concern is that the rate of conversion of the precursor to PM–10 may be so long that the precursor may not entirely convert to PM–10 within the same nonattainment area. Thus, there would be less counteracting effect and no net improvement to air quality in the area.

Under the EPA's proposal, a source of a PM–10 precursor may offset its increased emissions with the same precursor type or PM–10 (or a combination of the two). In this situation, a net improvement in air quality would be assured. At this point, however, the EPA is not proposing to allow offsetting among different types of PM–10 precursors, or offsetting PM–10 increases with reductions in PM–10 precursors, because the Agency does not now have a scientific basis to propose conversion factors. However, the Agency does not intend through this rulemaking to preclude trading between PM–10 precursors at such time as technical data supporting such a scheme is developed. The Agency expects that the approvability of a scheme allowing trading between precursors will be addressed in subsequent guidance or in the context of individual SIP reviews, though the Agency is considering resolving certain policy and legal issues in this rulemaking.

The EPA believes that nothing in subpart 4 of part D of the Act would prohibit trading between PM–10 and PM–10 precursors, or among PM–10 precursors. The Agency recognizes that section 173(c)(1) of the Act may be relevant to whether Congress intended to allow offsets trading among PM–10 precursors or between PM–10 and PM–10 precursors, and requests comment on the legal, technical, and policy aspects of this issue.

Also, the EPA believes that trading among PM–10 and PM–10 precursors raises significant issues, including the issue of scientific uncertainty. The EPA requests comment on this issue and on whether or how trading should be allowed for netting in determining NSR applicability. The scientific basis supporting offsets conversions and trading conceptually should apply with equal force to netting. But allowing such trading may improperly allow what would have otherwise been major modifications to escape review. Finally, the Agency requests comment on whether allowing trading among PM–10 and PM–10 precursors for offsets and netting purposes should affect the treatment of these emissions for major source threshold applicability purposes. The EPA requests comment on the policy, technical and legal considerations regarding all of these issues.

4. Statutory Restrictions for New Sources

The EPA is also proposing to amend its regulations at 40 CFR 52.24 which contain restrictions on the construction or modification of new major stationary sources (the construction ban). The changes made by the 1990 Amendments that alter the applicability of the construction ban provisions are reflected and clarified in this proposal. The EPA is also proposing that the definitions contained in proposed § 51.165 also apply in § 52.24.

Under the 1977 Amendments, section 110(a)(2)(I) of the Act required the EPA to place certain areas under a federally imposed construction moratorium (ban) that prohibited the construction of new or modified major stationary sources in nonattainment areas where the State failed to have an implementation plan meeting all of the requirements of part D. The 1990 amendments removed the provision under section 110(a)(2)(I) requiring this prohibition of construction. However, in section 110(n)(3) of the Act (Savings Clause), the 1990 Amendments retained the prohibition in cases where it was applied prior to the 1990 Amendments based upon a finding that the area (1) lacked an adequate NSR permitting program (as required by section 172(b)(6) of the 1977 Act), or (2) the State plan failed to achieve the timely attainment of the NAAQS for sulfur dioxide by December 31, 1982. All other construction bans pursuant to section 110(a)(2)(I) are lifted as a result of the new statutory provision. This includes previously imposed construction bans based upon a finding that the plan for the area did not demonstrate timely attainment and maintenance of the ozone or CO NAAQS. In accordance with the amended section 110(n)(3) of the Act, any construction ban retained remains in effect until the EPA determines that the SIP meets either the amended part D permit requirements, or the requirements under subpart 5 of part D for attainment of the NAAQS for sulfur dioxide, as applicable.

Section 173 and the various subparts of title I of the Act contain the requirements for the issuance of NSR permits to new or modified major stationary sources in nonattainment areas or ozone transport regions. To issue such permits, the permit authority must first find per section 173(a)(4) that the ''Administrator has not determined that the applicable implementation plan is not being adequately implemented for the nonattainment area'' in accordance with the requirements of part D. If the Administrator determines that the SIP for meeting the part D requirements is not being adequately implemented for the nonattainment area where the new source or modification wants to locate, permits that would otherwise meet the requirements of section 173 cannot be issued. The Administrator intends to make the determination by letter to the permit authority, with a follow-up notice to be published in the Federal Register and need not undertake notice-and-comment procedures before taking final action. The EPA solicits comments on this method of communicating the determination. Specifically, the EPA requests comments on the need for an opportunity for public notice and comment prior to making the determination effective.

While the EPA policy is generally to impose a FIP where States fail to adopt adequate NSR provisions, section 113(a)(5) of the Act provides that the EPA may issue an order prohibiting the construction or modification of any major stationary source in any area, including an attainment area, where the Administrator finds that the State is out of compliance with the NSR requirements. Specifically, the EPA may issue an order under section 113(a)(5) banning construction in an area whenever the Administrator finds that a State is not acting in compliance with any requirement or prohibition of the Act relating to construction of new sources or the modification of existing sources.

This proposal does not include the transition provisions under existing § 52.24 (c) and (g). These paragraphs were removed because they were originally designed to clarify the applicable requirements for permits issued prior to the initial SIP revisions required by the 1977 Amendments. The EPA solicits comments on the removal of these paragraphs. Specifically, comments are requested on the possible need to maintain these paragraphs for enforcement purposes for sources that constructed prior to the initial SIP revisions required by the 1977 Amendments.

In addition to the significant changes already discussed, the proposed changes to § 52.24 include several minor

changes. These minor changes include: (1) The addition of requirements applicable to transport regions, (2) the inclusion of requirements applicable to criteria pollutant precursors, (3) incorporation of the definitions proposed in § 51.165(a), (4) revisions to the language at § 52.24 (h) (2), and (5) revisions to § 52.24(j).

In §§ 52.24 (b), (d), (e), and (i), the EPA proposes that all the requirements of § 52.24 applicable to nonattainment areas are now also applicable to transport regions. The proposed revised regulations also incorporate requirements for criteria pollutant precursors. Where previously only criteria pollutants were covered under §§ 52.24 (d) and (e), the EPA proposes that the construction ban provisions of proposed § 52.24 now extend to major stationary sources of precursors of pollutants for which the area is in nonattainment or for which it is in a transport region.

The EPA believes that the proposed definitions at § 51.165(a) should also apply when implementing the provisions of proposed § 52.24. Instead of listing each definition from § 51.165(a) in the amended § 52.24, the EPA proposes that the definitions at proposed § 51.165(a) apply under § 52.24(f). Also, by referring to the definitions in § 51.165(a), the fugitive emissions language at existing § 52.24(h) is not needed, since the applicable definition is contained in the definitions under § 51.165(a) which the EPA is today proposing to incorporate into § 52.24(f). The proposed changes to existing NSR definitions and the rationale for these changes is discussed in the appropriate sections of this preamble which discuss proposed changes to regulations at § 51.165.

At § 52.24(g)(2), the EPA is proposing to add that, under certain conditions when an enforceable limitation is relaxed, the requirements of § 51.165(a) apply.

5. Applicability of Nonattainment NSR to Internal Combustion Engines

Using new and revised definitions contained in the 1990 Amendments Congress drew a distinction between emissions resulting from stationary internal combustion engines and newly-defined ''nonroad engines'' (for purposes of regulating internal combustion engines under titles I and II of the Act). Section 216(10) of the Act defines ''nonroad engine'' as ''an internal combustion engine (including the fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under sections 111 or 202.'' Congress also added a definition of ''nonroad engine'' in section 216(10), a definition of ''nonroad vehicle'' in section 216(11), a new definition of ''stationary source'' in section 302(z), and revised the existing definition of ''stationary source'' in section 111(a)(3). Both definitions of ''stationary source'' include the distinction between stationary and nonroad internal combustion engines.

Under the amended Act, emissions from a ''stationary internal combustion engine'' are generally considered part of a stationary source and subject to control under title I State NSR permit programs. On the other hand, emissions resulting directly from internal combustion engines considered to be nonroad engines, or from nonroad vehicles, are generally subject to separate regulation under title II of the Act. On June 17, 1994, the EPA published regulations at 40 CFR part 89 regarding new nonroad engines and nonroad vehicles, which included definitions of the two terms. See 59 FR 31306.

In today's document, the EPA is proposing to amend the various NSR regulations by revising the definition of ''stationary source'' to include emissions from stationary internal combustion engines, and to exclude emissions from nonroad engines and nonroad vehicles, as well as from emissions resulting directly from an internal combustion engine used for transportation purposes. See proposed § 51.165(a)(1)(i). The EPA is also proposing to complement the definition of ''stationary source'' with new definitions addressing the terms ''stationary internal combustion engine,'' ''nonroad engine,'' and ''nonroad vehicle.'' [87] See proposed §§ 51.165 (a)(1)(xxxii) through (a)(1)(xxxiv), respectively. It should be noted that the proposed definitions of ''nonroad engine'' and ''nonroad vehicle'' are the same definitions that EPA promulgated under 40 CFR part 89 on June 17, 1994 (59 FR 31337). As proposed, a ''stationary internal combustion engine'' refers to any internal combustion engine that is regulated by a Federal NSPS promulgated under section 111 of the Act, or an internal combustion engine that is none of the following: a nonroad engine, an engine used to propel a motor vehicle or a vehicle used solely for competition, or an engine subject to standards promulgated under section 202 of the Act. See proposed § 51.165(a)(1)(xxxii).

It is the EPA's intent to continue to regulate internal combustion engines that function in a stationary manner as stationary internal combustion engines. Apart from engines regulated under section 111 and engines used to propel a motor vehicle or a vehicle used solely for competition, the proposed definitions distinguish nonroad engines from stationary internal combustion engines primarily on the basis of engine mobility and residence time. Engines that are permanently affixed or are otherwise non-portable and non-transportable are clearly stationary internal combustion engines. In addition, the definition of nonroad engine provides that while portable and transportable internal combustion are generally to be regulated as nonroad engines, those internal combustion engines that remain in a particular location for over 12 months (or a shorter period of time for engines operating at sources with seasonal operating schedules) are to be treated as stationary internal combustion engines (this excludes engines in self-propelled equipment and equipment intended to be propelled while performing its intended function).

Typical stationary internal combustion engines generally include, but are not limited to, engines associated with pipeline pump and compressor drives, electric power generation, and certain well-drilling operations. Examples of internal combustion engines which, for the most part, would be considered nonroad engines (and nonroad vehicles) include diesel locomotives, farm and construction equipment, utility engines (such as lawn and garden equipment), forklifts, mobile cranes, and airport service vehicles. Some internal combustion engines perform both mobile and stationary activities—i.e., they are used both to propel a vehicle and to operate some equipment or device when the vehicle is stationary. The EPA is proposing that such engines would be considered nonroad engines, and not subject to review as stationary internal combustion engines.

The EPA notes that as part of the rulemaking on nonroad engines on June 17, 1994 (59 FR 31311), it is a prohibited act to attempt to circumvent the exclusion based on the residence time of a portable or transportable engine by means of removing the engine from its location for a period and then returning it to that same location. In such cases, the time between removal of

[87] The proposed revisions to the definition of ''stationary source,'' as well as the addition of new definitions for ''stationary internal combustion engine,'' ''nonroad engine,'' and ''nonroad vehicle'' are also being proposed for inclusion in the PSD regulations as discussed in section VI.B.3 of this preamble.

the engine and its return to service (or replacement) would be counted toward the time period specified in paragraph (2)(iii). An example of the final sentence of paragraph (2)(iii) of the definition of nonroad engine is when a portable generator engine that functions as a permanent backup generator is replaced by a different engine (or engines) that performs the same function. In that case, the cumulative residence time of both generators, including the time between removal of the original engine and installation of the replacement, would be counted toward the consecutive residence time period.

The definition of nonroad engine includes a provision that if an engine is replaced by another engine within the 12-month period, that the replacement engine should be considered in calculating the consecutive time period. This provision is designed to ensure that where an internal combustion engine is necessary for the operation of a stationary facility, the replacement of one particular engine with another would not prevent the engines from being included as part of the stationary facility. The EPA solicits comment on the appropriateness of the proposed definition of stationary internal combustion engine and of the appropriateness of incorporating the same definition of nonroad engine as was promulgated in part 89.

The EPA published on June 17, 1994 (59 FR 31339) an interpretative rule as an appendix to 40 CFR part 89 explaining the EPA's views concerning the ability of States to regulate internal combustion engines manufactured prior to the effective date of part 89, as well as the ability to impose in-use restrictions on nonroad engines. Paragraphs 1 and 2 of the Appendix relating to engines manufactured prior to the effective date of part 89 have been remanded to EPA and ordered to be vacated pursuant to a voluntary motion by EPA to the Court of Appeals for the District of Columbia Circuit. The EPA expects to give further consideration to the interpretations in these paragraphs in a separate action. The full text of the remaining paragraph (paragraph 3) of the appendix is repeated here:

3. Moreover, EPA believes that States are not precluded under section 209 from regulating the use and operation of nonroad engines, such as regulations on hours of usage, daily mass emission limits, or sulfur limits on fuel; nor are permits regulating such operations precluded once the engine is placed into service or once the equitable or legal title to the engine or vehicle is transferred to an ultimate purchaser, as long as no certification, inspection or other approval related to the control of emissions is required as a condition precedent to the initial retail sale, titling, or registration of the engine or equipment. The EPA believes that States are not prevented by section 209 from requiring retrofitting of nonroad engines in certain circumstances once a reasonable time has passed after the engine is no longer new, as long as the requirements do not amount to a standard relating back to the original manufacturer. Therefore, EPA believes that modest retrofit requirements may be required after a reasonable amount of time (e.g., at the time of reregistration or rebuilding) and more significant retrofit requirements may be required after a more significant period of time (e.g. after the end of the useful life of the engine).

### *B. NSR Provisions for Prevention of Significant Deterioration*

As discussed below EPA is proposing several changes pursuant to the 1990 Amendments to the PSD rules at 40 CFR 51.166 and 40 CFR 52.21 to codify some of revised preconstruction permit requirements of part C of title I of the Act. These changes include (1) the applicability of PSD to ozone depleting substances (ODS) regulated under title VI of the Act, and (2) the exemption of the HAP listed under section 112 of the Act from Federal PSD applicability. The EPA is considering future rulemaking to propose other changes to EPA's PSD program in light of the 1990 Amendments.

#### 1. Stratospheric Ozone-Depleting Substances

New title VI of the Act, entitled ''Stratospheric Ozone Protection,'' regulates the production and consumption of substances that deplete the stratospheric ozone layer. These substances are typically used as refrigerants for both household and commercial purposes, and for other common uses such as fire suppression, solvents, and foam blowing. Methyl bromide is also a listed ozone depleting substance that is used as a broad spectrum biocidal agricultural fumigant. Pursuant to section 165(a)(4)[88], the PSD regulations apply to all pollutants regulated under the Act.[89] See also, *e.g.*, existing § 51.166(b)(23)(ii).

Section 602 of title VI of the Act lists ODS for regulation and classifies the substances as either Class I or Class II. The Class I list includes the substances previously regulated to implement the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).[90] The Class I substances list contains specific chlorofluorocarbons (CFC), specific halons, carbon tetrachloride, and methyl chloroform, methyl bromide, and the hydrochlorofluorocarbons (HCFC); the Class II substances list contains specific HCFC. These Class I and Class II lists also include the isomers of the listed substances, except for 1,1,2-trichloroethane, which is an isomer of methyl chloroform. Pursuant to the listing criteria of section 602, the Administrator may by rule add new substances to the lists of Class I and Class II substances. The EPA added methyl bromide and the hydrobromofluorocarbons (HBFC) to the Class I list pursuant to Section 602. See 58 FR 65018, 65028 (December 10, 1993).

As ODS are regulated under title VI of the Act, they are pollutants ''subject to regulation'' under the Act for PSD applicability purposes. The EPA is therefore proposing that new major stationary sources and major modifications of sources of these pollutants are subject to BACT for ODS. Under section 169(1), a stationary source is major if it is one of 28 listed source categories and it emits, or has the PTE, 100 tpy or more of any air pollutant. Likewise, for other source categories, the major stationary source threshold is 250 tpy. Absent an EPA determination of a ''significance level'' for a particular pollutant, a modification at a major stationary source resulting in any net increase in emissions of the pollutant is subject to the PSD requirements. See existing § 52.21(b)(23)(ii).

The EPA is proposing that the ODS listed under section 602 be aggregated as a single pollutant for PSD applicability purposes. See proposed §§ 51.166(b)(23)(i) and 52.21(b)(23)(i). Since these substances are in many cases used for the same purposes and can be substituted for each other, and because the nature of their environmental impact is the same, the EPA believes it is appropriate to aggregate them as a single pollutant for purposes of PSD applicability. Also, treating ODS as a single pollutant is similar to treatment of VOC for PSD purposes. Like VOC, ODS have varying levels of environmental impacts (or reactivity), but PSD applicability for VOC is nevertheless based on a total

[88] Section 165(a)(4) of the Act provides that, in order to obtain a PSD permit, a source must be ''subject to the BACT for each pollutant subject to regulation under this Act emitted from, or which results from, such facility.'' (Emphasis Supplied.)

[89] Note that new section 112(b)(6) of the Act exempts the HAP listed under section 112 from the PSD provisions of part C of title I.

[90] Prior to enactment of the new title VI, on August 12, 1988 (53 FR 30566) the EPA published rules implementing the Montreal Protocol. These rules regulate CFC 11, 12, 113, 114, 115 and halons 1211, 1301 and 2402 as ODS. The PSD regulations applied to the ODS regulated under the Montreal Protocol.

mass of emissions without adjustment for reactivity.

As part of the same proposed change, the EPA is proposing a significance level of 100 tpy for determining PSD applicability to modifications at major stationary sources that result in a net increase in emissions of aggregate ODS. The EPA has determined significance levels for all other pollutants based on the local ambient impact associated with that particular amount of emissions. Since emissions causing stratospheric ozone depletion is strictly a global problem, no appreciable local ambient impact will result from emissions from a particular source. Among regulated pollutants, ODS are unique in this regard. Also, the global stratospheric ozone impact from a particular source is far below an amount that would have a measurable local ambient impact. In addition, the EPA believes that title VI constitutes a fairly comprehensive approach to addressing ODS emissions, including a program to recycle and reduce emissions under section 608 of the Act.

On the other hand, the Act provides that a new source emitting 100 tpy of ODS (and for some source categories 250 tpy) should be subject to PSD review, including the BACT requirement. The EPA believes that PSD should apply to any modification at a major stationary source that would result in a net emissions increase in ODS of at least 100 tpy, which is the lower major source threshold. This is consistent with the purposes of Congress in enacting the PSD provisions to identify facilities which are responsible for deleterious pollution and which, due to their size, are financially able to bear the costs imposed by PSD. See *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 353 (D.C. Cir. 1979) (discussing Congress's intent in enacting PSD provisions). However, for the reasons discussed above, the Agency believes that the global ambient impact of emissions below that threshold are de minimis. The EPA requests comment on its proposed 100 tpy significance level for ODS. Commenters should specify the basis for any other suggested significance level.

The EPA is also considering an alternative whereby groups of ODS that may be used for the same purposes would be aggregated, but that those that are used for different purposes and cannot be substituted for each other would be treated separately for PSD applicability. The current groupings under section 602 may represent such use groups. The EPA recognizes, however, that these groups may not sufficiently represent chemicals that can be substituted for each other because some within the same group may not be substitutes, and because substitutes may exist across groups. (Of course, as discussed below, HCFC may be substituted for CFC.) Under this alternative, the major source thresholds and the significance level would apply independently for each group of substitutable ODS. The EPA requests comment on this option, and on the appropriate groupings of ODS under such an approach.

The EPA notes that the termination date for production and consumption [91] of halons passed with the end of 1993, and that the termination date for production and consumption of the CFC was the end of 1995. Therefore, significant increases in emissions of halons and CFC are not likely to occur after final promulgation of this rule. Rather, the EPA understands that it intends that the termination of production and consumption of the more potent ODS will force users to substitute less potent ODS. The most common switch is the substitution of the lower ozone-depleting potential HCFC for the higher ozone-depleting potential CFC. Much of this will have been accomplished by the time of final promulgation of this rule.

Currently, the EPA's regulations would appear to require that any increase in the mass of emissions from a non-routine change involving substitution of HCFC for CFC would trigger PSD review. Existing equipment in many cases may have to be altered or replaced to accommodate the substitute ODS. Since the EPA's title VI program is geared toward forcing such changes because they are environmentally beneficial, the EPA has indicated that it will consider treating such substitutions as pollution control projects. The EPA issued policy concerning pollution control projects in a July 1, 1994 memorandum from John S. Seitz, Director, OAQPS, entitled ''Pollution Control Projects and New Source Review (NSR) Applicability.'' The EPA also took the position that the proposed substitution of HCFC–141b for CFC–11 at Whirlpool Corporation's Forth Smith, Arkansas facility would qualify for a case-by-case exclusion from PSD review as a pollution control project.[92] See 57 FR 32314, 32320 (July 21, 1992) (explaining that the EPA will consider pollution control projects on a case-by-case basis). This may be appropriate at least where the switch will not increase emissions of any other pollutant which would impact a NAAQS, PSD increment, or air quality-related value, will not cause any cross-media concerns, and will not increase any risk associated with toxic or HAP.

The EPA is proposing this approach as a regulatory exclusion. The title VI program is designed to force such substitution in order to reduce the harmful effect of ODS on the stratospheric ozone layer, and the Agency encourages voluntary or early substitution. Because substitution of less potent ODS for more potent ODS is a primary goal of the EPA's ODS regulatory program, the Agency believes that an existing major stationary source that emits ODS should be able to make a change to use other ODS with less ozone-depleting potential without triggering PSD review. So long as the modifications needed to accomplish such substitution do not result in an increase of the production capacity of the ODS-emitting equipment, the EPA believes that applying PSD and the BACT requirement would not be within the intended scope of the PSD program. However, if the physical change or change in the method of operation is other than what is needed to accommodate the switch in ODS, and if there is a significant net emissions increase of 100 tpy or greater of ODS, then the change is a major modification subject to PSD and the BACT requirement. Accordingly, to implement this policy regarding ODS substitution, the EPA is proposing to provide that such substitutions would not be considered a physical change or change in the method of operation, and therefore would not be a major modification for PSD purposes. See proposed §§ 51.166(b)(2)(iii)(N) and 40 CFR 52.21(b)(2)(iii)(N).

The EPA recognizes that the very specific assessment of ozone-depleting potential for all listed substances under section 602 of the Act also may support a broader incorporation of relative ozone-depleting potential into PSD applicability for all ODS-related modifications. In short, as noted above, EPA is considering an alternative whereby all modifications would be assessed on a weighted basis relative to their ozone-depleting potential. Under this alternative approach, any increase in amount of ODS emitted as a result of a change to a substance with lower ozone-depleting potential would be discounted by the relative ODP of the new substance. For example, if a facility using 500 tpy of CFC–11 (with an ozone-depleting potential of 1.0) switched to use 1000 tpy of an HCFC

[91] Consumption equals production plus imports minus exports.

[92] Letter from A. Stanley Meiburg, U.S. EPA Region VI, to Randall Mathis, Arkansas Department of Pollution Control and Ecology (February 1, 1994).

with an ODP of 0.1, there would actually be a decrease in total ozone-depleting potential, and PSD review would not apply. This approach is arguably consistent with the purpose of PSD to prevent deterioration in air quality. To the extent a switch in ODS actually reduces overall ozone-depleting potential, no deterioration in air quality would result. Were the EPA to adopt this alternative approach, it would be consistent for purposes of the PSD netting calculation to adjust the mass of each ODS involved based on its ozone-depleting potential to determine if a modification results in a significant net emissions increase.

The EPA recognizes that the significant variation in ozone-depleting potential could allow substantial plant expansions contemporaneous with the elimination of a substance having a higher ozone-depleting potential. This approach would thus allow a source that builds new units contemporaneously with a substitution to avoid PSD (and the pollution minimization opportunity it affords), whereas a ''green field'' source simply building the new units would be subject to PSD. Nevertheless, from an environmental impact standpoint, this is arguably no different than an existing utility replacing an uncontrolled $NO_X$-emitting boiler contemporaneously with the construction of several well-controlled new boilers.

Still, section 165 of the Act specifies preconstruction review requirements for construction of ''major emitting facilities,'' defined in section 302(j) in terms of tons of pollutant emitted per year. These provisions do not specifically consider the relative reactivity of pollutants in determining whether PSD applies. The general rule is that physical or operational changes that do not increase emissions on a plant-wide basis are excluded from the PSD program because Congress intended this program to prevent significant increases in air pollution and, hence, deterioration in air quality. *Alabama Power,* 636 F.2d at 401. The EPA recognizes that, based on our knowledge of the reactivity of ODS, air quality deterioration can be prevented despite certain increases in the tpy of ODS emissions.

But the Agency does not believe it is obligated to adjust the increases in the mass of pollution on a reactivity basis in order to ensure that PSD apply only where an increase in the mass of pollution would actually deteriorate air quality. This is particularly so where title VI of the Act represents a Congressional determination that existing levels of ODS are unacceptable and must be reduced (and ultimately eliminated), and where PSD review may constitute a tool for reducing ODS emissions associated with major new construction. The EPA therefore believes that it has discretion to apply PSD in a straight-forward manner under section 165 to unadjusted mass increases where sources are expanding capacity in order to ensure BACT is applied to such modifications.

The EPA believes this alternative could promote early substitution of less potent ODS to support expansion in capacity. The EPA is also sensitive to any incentive it might provide to delay substitution until the source is ready for plant expansion or other physical or operational changes that may result in a significant net increase in ODS. Since sources could utilize credit from substitution throughout the 5-year contemporaneous period for netting, the incentive to delay substitution may be limited to unusual situations where a source has flexibility to delay substitution for 5 years and is aware of construction it intends to commence long in the future.[93] The Agency expects that the extra incentive for substitution this approach will provide should outweigh any risk of an incentive to delay substitution. The EPA requests comment on this alternative approach. The EPA specifically requests that commenters address the incentives this alternative would create, the legal basis for adjusting mass emissions in light of the ozone-depleting potential and the costs and benefits of applying BACT and other PSD requirements to the variety of ODS-emitting sources.

Finally, the Agency is again aware that the phaseout schedule for the CFC and halons is likely to prompt the bulk of substitution to HCFC even before the Agency takes final action on this rule. As noted above, the Agency has already taken the position for one such facility that substitution of HCFC–141b for CFC–11 would qualify for a case-by-case exclusion from PSD review as a pollution control project, where the project would not increase production capacity at the plant or result in increased utilization of existing capacity. The Agency may need to address whether modifications involving increases in plant capacity or utilization and overall reduction in total ozone-depleting potential should qualify as a pollution control project based on an overall decrease in emissions, weighted on the basis of ozone-depleting potential, from the project. The Agency requests comment on whether a project involving expansion in plant capacity or utilization may reasonably be considered part of a pollution control project. In any case, even if the Agency does not allow such projects to qualify as a pollution control project, if the Agency adopts the ozone depletion weighting alternative for all modifications, substitutions that occur before the final rule may still generate credit to support expansions later in the 5-year contemporaneous period after promulgation of the final rule. The EPA requests comment on this view.

[93] Nevertheless, a hypothetical source in 1997 might delay substitution until 2003 because it wishes to preserve the credit it would get from the substitution for use to avoid PSD applicability for new construction at the plant in 2008.

2. Listed Hazardous Air Pollutants (HAP)

Under the 1977 Act Amendments and regulations issued thereunder, the PSD requirements of the Act apply to all ''major'' new sources and ''major modifications,'' i.e., those sources exceeding certain annual tonnage thresholds. See, *e.g.*, existing §§ 51.166(b)(2)(i) and (b)(23)(i). Typically, new sources and modifications become subject to PSD because their potential emissions exceed the specified tonnage threshold for a criteria pollutant (i.e., a pollutant for which a NAAQS has been established under section 109 of the Act). For a major new source, 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 modification to an existing major source, for which there is a significant net emissions increase. See, *e.g.*, existing § 52.21(b)(23)(i). Under the 1977 Act Amendments, BACT and other PSD requirements applied 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 section 112. This regulatory structure was altered by the 1990 Amendments.

Section 112(b)(6) of Act generally excludes the HAP listed in section 112 (as well as any pollutants that may be added to the list) from the PSD provisions of part C. Some of the chemical compounds listed in (b)(1) are arsenic compounds, beryllium compounds, lead (Pb) compounds, and mercury compounds. These compounds are defined as including any unique chemical substance that contains the named chemical (i.e., arsenic, beryllium, etc.) as part of the chemical's infrastructure. These named chemicals are not independently listed on the section 112(b)(1) list; however, with the exception of Pb, the EPA is proposing that the named chemicals (i.e., arsenic,

beryllium, etc.) that are components of the compounds listed under section 112(b)(1) are, like their compounds, exempt from the Federal PSD requirements. Regarding Pb, section 112(b)(7) states that elemental Pb (the named chemical) may not be listed by the Administrator as a HAP under section 112(b)(1); therefore, elemental Pb emissions are not exempt from the Federal PSD requirements because section 112(b)(6) exempts only the pollutants listed in section 112. Elemental Pb continues to be a criteria pollutant subject to the Pb NAAQS and other requirements of the Act.

The regulations specifying a significance level refer to ''Pb'' and do not specify whether the Pb covered is ''elemental'' or ''Pb compounds.'' As noted in the EPA's transition guidance,[94] the elemental Pb portion of Pb compounds (as tested for in 40 CFR part 60, appendix A, Method 12) is still considered a criteria pollutant subject to the Pb NAAQS and regulated under PSD. Thus, the EPA intends that the reference to ''Pb'' in the proposed regulations covers the Pb portion of Pb compounds. The Agency requests comment on this position. The EPA also requests comment on whether references in the regulations should specify ''elemental'' Pb, or whether the word ''elemental'' might mislead the public to believe that only Pb that is not part of a Pb compound is covered.

Pollutants regulated under the Act and not on the list of HAP, such as fluorides (except for hydrogen fluoride), total reduced sulfur compounds, and sulfuric acid mist, continue to be regulated under PSD.[95] Because they are on the initial HAP list of section 112(b)(1), the following pollutants, which had been regulated under PSD because they were covered by the section 112 NESHAP, are now exempt from Federal PSD applicability:

- Arsenic;
- Asbestos;
- Benzene (including benzene from gasoline);
- Beryllium;
- Mercury;
- Radionuclides (including radon and polonium);
- Vinyl chloride.

Pursuant to section 116 and the preservation clause in section 112(d)(7), States with an approved PSD program may continue to regulate the HAP 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 remain in effect unless a State revised them to provide similar exemptions. Such provisions that are part of the SIP are federally enforceable. Additionally, the listed HAP continue to be subject to any other applicable State and Federal rules; the exclusion is only for the part C rules for PSD.

The EPA is proposing that any HAP listed in section 112(b)(1) which are regulated as constituents or precursors of a more general pollutant listed under section 108 are still subject to PSD as part of the more general pollutant, despite the exemption in section 112(b)(6). For example, VOC (a term which includes benzene, vinyl chloride, methanol, toluene, methyl ethyl ketone, and numerous other compounds) are still regulated as VOC (but not as individual pollutants such as benzene, etc.) under the PSD regulations because these pollutants are ozone precursors, not because they are HAP. Also, particulates (including Pb compounds and asbestos) are still regulated as particulates (both PM–10 and PM) under the PSD regulations.

Section 112(b)(6) provides: ''The provisions of part C (PSD) shall not apply to pollutants listed under this section.'' Under the plain terms of section 112(b)(6), PSD does not apply to substances by virtue of their inclusion on the list of substances that the Administrator is to promulgate under section 112(r), Prevention of Accidental Releases. Subsection (r) establishes a program to prevent and minimize the consequences of an accidental release of the listed HAP. Section 112(r) is not intended to address emissions of these pollutants outside of an accident, and certain regulated sources may have no emissions at all outside of accidental releases. It thus makes sense that the PSD program, which is designed to limit and control emissions that occur in the ordinary course of a source's operations, does not apply to substances by virtue of their listing under section 112(r).

But, like substances listed under section 112(b)(1), substances regulated under section 112(r) may still be subject to PSD if they are regulated under other provisions of the Act. For example, the EPA believes that even though H2S is listed under section 112(r), hydrogen sulfide is still regulated under the Federal PSD provisions because it is regulated under the NSPS program in section 111. This means that the listing of a substance under section 112(r) does not exclude the substance from the Federal PSD provisions; the PSD provisions apply if the substance is otherwise regulated under the Act.

In summary, the following pollutants currently regulated under the Act as of January 1, 1996, are still subject to Federal PSD review and permitting requirements:

- CO;
- $NO_X$;
- $SO_2$;
- PM and PM–10;
- Ozone (VOC);
- Pb (elemental);
- Fluorides (excluding hydrogen fluoride);
- Sulfuric acid mist;
- $H_2S$;
- Total reduced sulfur compounds (including $H_2S$);
- Reduced sulfur compounds (including $H_2S$);
- CFC's 11, 12, 112, 114, 115;
- Halons 1211, 1301, 2402;
- Municipal waste combustor (MWC) acid gases, MWC metals and MWC organics.
- ODS regulated under title VI.

The PSD program will also automatically apply to newly regulated pollutants, for example, upon final promulgation of an NSPS applicable to a previously unregulated pollutant.

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, including those not regulated by PSD. Once a project is subject to BACT due to the emission of nonexempted pollutants, the EPA believes that the BACT analysis should therefore consider the impact of the various control options under consideration on all pollutants, including the section 112(b)(1) listed HAP previously subject to PSD, in determining which control strategy is best. Likewise, consideration of alternatives to a proposed PSD source, as discussed in Section IV.D.7 of this preamble, may include impacts from listed HAP and other pollutants not directly regulated under the PSD program.

In addition, section 112(q) retains existing NESHAP regulations by

[94] Memorandum from John S. Seitz, Director, OAQPS, ''New Source Review (NSR) Program Transitional Guidance,'' (March 11, 1991).

[95] The compound hydrogen sulfide ($H_2S$) was inadvertently on the section 112(b)(1) list of HAP's in the 1990 Amendments. To correct this clerical error, $H_2S$ was removed from the section 112(b)(1) list by a joint resolution of Congress. The resolution by the Senate was on August 1, 1991, while the House resolution was on November 25, 1991. This means that the PSD provisions of the Act continue to apply to $H_2S$, which is still regulated under section 111 of the Act. The compound $H_2S$ is still on the section 112(r) list.

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 NESHAP regulations, are still applicable.

To implement the new requirements of section 112 in the NSR program rules, the EPA today proposes to exempt the HAP listed under statutory section 112, including any HAP that may be added to the lists, from the Federal PSD permitting requirements. See proposed § 52.21(i)(14). Should a listed pollutant be removed from the list under the provisions of section 112(b)(3) or 112(r)(3) of the Act, such pollutant would be subject to the applicable PSD requirements of part C to the extent it is otherwise regulated under the Act. The EPA also proposes to eliminate the applicability of the PSD requirements to individual HAP by deleting from the existing regulations those HAP listed under section 112, including beryllium, mercury, vinyl chloride and asbestos. See proposed §§ 52.21(b)(23)(i) and 52.21(i)(8)(i).

The PSD regulations at 40 CFR 51.166, which list the minimum criteria for State SIP conformance, are also being amended to reflect the changes mentioned above. Accordingly, the EPA proposes to allow States to exempt from PSD the section 112(b)(1) list of HAP. See proposed § 51.166(i)(13). The EPA also proposes to revise the current pollutant listings by deleting the HAP which are now exempt from Federal PSD applicability. See proposed §§ 51.166(b)(23)(i) and 51.166(i)(8)(i).

3. Applicability of PSD Requirements to Internal Combustion Engines

In accordance with the provisions of the amended Act, the EPA today proposes to revise the definition of ''stationary source'' in the PSD regulations to include ''stationary internal combustion engines,'' and to exclude ''nonroad engines'' and ''nonroad vehicles.'' See proposed §§ 51.166(b)(5) and 52.21(b)(5). Accordingly, the EPA is also proposing to add new definitions to address the terms ''stationary internal combustion engine,'' ''nonroad engine,'' and ''nonroad vehicle.'' See proposed §§ 51.166(b) (46) through (48) and §§ 52.21(b) (47) through (49). The rationale and background for these changes are the same as those provided in section VI.A.5. of this preamble, which describe similar changes to the definition of ''stationary source'' under the nonattainment NSR regulations.

*C. Control Technology Information*

Section 108(h) of the Act requires the EPA to maintain a central database of information regarding emissions control technology, such as the RACT/BACT/LAER Clearinghouse. Section 108(h) also requires this information to be disseminated by the EPA to the States and to the general public. Today, the EPA is proposing to require that permitting authorities submit to EPA's RACT/BACT/LAER Clearinghouse, within 60 days of issuance of either a nonattainment NSR or PSD permit, all requisite information on emission control technology contained in any such permit. See proposed §§ 51.165(a)(16), 51.166(j)(5), and 52.21(j)(5)].

Section 173(d) of the Act specifically requires such control technology information from States for permitted sources located in nonattainment areas. This proposal extends that requirement to apply to permits for PSD sources as well. The EPA also solicits comment on the availability of information in the RACT/BACT/LAER Clearinghouse.

VII. Other Proposed Changes

*A. Emissions Credits Resulting From Source Shutdowns and Curtailments*

The EPA's current regulations limit the use as offsets of emissions reductions achieved by shutting down an existing source or curtailing production or operating hours below baseline levels. See existing § 51.165(a)(3)(ii)(C). These regulations provide that such emissions reductions cannot be used as new source offsets if the State lacks an approved attainment demonstration, unless the shutdown or curtailment occurs on or after the date the new source permit application is filed or the applicant can establish that the proposed new source is a replacement for the shutdown or curtailed source. Such shutdown or curtailment credits may be generally credited if the reductions are permanent, quantifiable, and federally enforceable, if the area has an EPA-approved attainment demonstration.

In 1989, when EPA adopted the current regulations regarding crediting of shutdowns, it focused on the large degree of discretion granted to it under the Act to shape implementing regulations, as well as the need to exercise that discretion in a manner consistent with the statutory directive that offsets insure that new source growth is consistent with reasonable further progress (RFP) toward attainment of the NAAQS, and on the presence of an adequate nexus between the new source and the shutdown source. See 54 FR 27292. At that time, EPA believed that adequate safeguards to assure RFP were present when an area had an approved attainment demonstration, and so relaxed the 1980 regulations by allowing the crediting, for offset purposes, of shutdowns that occur after an application for a new or modified major source is filed. *Id.* The EPA also believed that the necessary assurances of RFP were lacking, and that the transactional ''match'' between the new source and the shutdown source was inadequate, when an area was lacking an approved attainment demonstration, and so the Agency retained the restrictions on pre-application shutdowns in such cases. *Id.* at 27292–94.

Passage of the 1990 Amendments has significantly altered the landscape that confronted EPA at the time of the 1989 rulemaking. Congress significantly reworked the attainment planning requirements of part D of title I of the Act, such that EPA now believes it is appropriate to delete the restrictions on crediting of emissions reductions from source shutdowns and curtailments that occurred after 1990. In particular, Congress enhanced the importance of the requirement in section 172(c)(3) that States prepare a ''comprehensive, accurate, current inventory of actual emissions from all sources'' in a nonattainment area as the fundamental tool for air quality planning. This was done by restating the inventory requirement as the first requirement in several pollutant-specific planning provisions, most notably for ozone nonattainment areas. See section 182(a)(1) of the Act, requiring submission of an inventory of ozone precursor emissions within 2 years of enactment of the amendments. Congress also required submission of a revised ozone precursor inventory every 3 years thereafter. See section 182(a)(3)(A) of the Act.

In addition, Congress added several new provisions in 1990 that are keyed to the inventory requirements. Ozone nonattainment areas must adopt a series of planning requirements including specific reduction strategies and ''milestones'' that enable areas to demonstrate that specific progress toward attainment has been made. This progress is measured from the 1990 ozone precursor inventory, or subsequent revised inventories, and must take any source shutdown or curtailment into account. See General Preamble, 57 FR 13498, 13507–13509 (April 16, 1992).

Moreover, the 1990 Amendments mandate several adverse consequences for States that fail to meet the planning or emissions reductions requirements of the amended Act that are tied to the emissions inventories. For example, the Act contains mandatory increased new source offset sanctions for States that fail to submit a required attainment demonstration. The Act's sanction for failure to submit a required demonstration is 2:1 offsets. The 1990 Amendments also contain provisions to require that when an area fails to attain the air quality standard by its statutory attainment date, EPA must bump the area up to the next higher classification or the classification based on its design value, whichever is higher. Additional regulatory requirements are imposed as a result of the higher classification. Also, sections 181(b)(4) and 185 of the Act contain fee provisions applicable to severe ozone nonattainment areas that do not attain the standard by their statutory attainment date.

Thus, there is now a host of negative impacts that flow from a State's failure to plan for and make reductions in the amount of pollution set forth in the emissions inventories. The EPA has tentatively concluded that, taken together, these statutory changes justify a shift away from the focus of the current regulations on individual offset transactions between a specific new source and a specific source that will be shut down, and towards a systemic approach. The EPA believes that a benefit from easing the shutdown restrictions is that emissions reductions from the closing of some military installations may be available as offsets for new sources to build.

In this proposal, the EPA is proposing to revise the existing provisions for crediting emissions reductions by restructuring existing §§ (a)(3)(ii)(C)(*1*) and (*2*) for clarity without changing the current requirements therein. See proposed §§ (a)(3)(ii)(C)(*1*) through (*4*). In addition, EPA is proposing two alternatives which would ease, under certain circumstances, the current restrictions on the use of emissions reductions as offsets from source shutdowns and curtailments.

Under Alternative 1, EPA is proposing for ozone nonattainment areas to lift the current offset restriction applicable to emissions reductions from source shutdowns and curtailments in such areas without EPA-approved attainment demonstrations, so long as the emissions reductions occur after November 15, 1990 and the area is current with part D ozone nonattainment planning requirements. See proposed §§ 51.165(a)(3)(ii)(C)(*5*) and (*6*)[*Alternative 1*]. Proposed Alternative 2 generally lifts the current offset restriction applicable to emissions reductions from source shutdowns and source curtailments for all nonattainment areas and all pollutants where such reductions occur after the baseyear of the emissions inventory used (or to be used) to meet the applicable provisions of part D of the Act. See proposed § 51.165(a)(3)(ii)(C)(*5*)[*Alternative 2*]. Neither alternative changes the current offset restrictions with respect to their application to emissions reductions that occur prior to the base-year of the emissions inventory in nonattainment areas without EPA-approved attainment demonstrations. Moreover, both alternatives allow States, if they so choose, to retain the current restrictions on the use of shutdown and curtailment credits for offset purposes. The EPA is seeking comments on these proposed alternatives. Discussion of the two proposed alternatives follows.

1. Shutdown Alternative 1

In a July 21, 1993 policy statement, the EPA reconsidered the applicability of these regulatory requirements for ozone nonattainment areas and ozone attainment and unclassifiable areas in the OTR in light of the 1990 Amendments.[96] The EPA explained that States should be able to allow shutdown or curtailment credits to be used under conditions applicable to areas with approved attainment demonstrations until the EPA action to approve or disapprove a timely submitted attainment demonstration. The EPA also explained that, if the State is delinquent in submitting specified SIP revisions or if the State's attainment demonstration is disapproved, the use of shutdown credits would again be restricted to those occurring on or after the filing date of the new source permit application (unless the applicant can establish that the proposed new source is a replacement for the one that was shutdown or curtailed). The EPA also took the position that areas not required to submit an attainment demonstration should be allowed to follow the less restrictive shutdown policies applicable to areas in compliance with the attainment demonstration requirements under the current regulations.

The EPA also specified that creditable shutdowns or curtailments must (1) have occurred on or after November 15, 1990, (2) have reduced emissions that are included in the emissions inventory for attainment demonstration and RFP milestone purposes, and (3) generate an amount of credit equal to the lower of actual or allowable emissions for the source. Consistent with the current regulations, the EPA noted that all shutdown or curtailment reductions must be permanent, quantifiable, and federally enforceable in order to be creditable.

The EPA clearly explained in the July 21, 1993 policy statement that it did not supersede existing Federal or State regulations or approved SIP, but intended solely to provide guidance during the interim period prior to submission and approval of attainment demonstrations under the 1990 Amendments. The EPA also explained that it would address matters relating to shutdown credits in the rulemaking regarding regulatory changes mandated by the 1990 Amendments and would take comment on its policy at that time. The EPA chose to address this issue through a policy statement rather than through binding regulatory changes because there was a need for immediate guidance during the interim period. The EPA therefore is proposing regulatory changes in light of the 1990 Amendments to address the creditability of shutdown and curtailment reductions.

The EPA's proposal regarding the treatment of shutdown and curtailment credits will affect a number of different circumstances. First, the EPA believes the interim period prior to approval or disapproval of attainment demonstrations for ozone nonattainment areas will continue after the promulgation of this final rule. The attainment demonstration for serious and above ozone nonattainment areas was not due until November 15, 1994, and the EPA action to approve or disapprove these submissions may not occur until some time after that. Second, areas may be designated as new ozone nonattainment areas in the future that will have future attainment dates, and if designated moderate or above will have future dates for submission of an attainment demonstration. Third, ozone nonattainment areas not reaching attainment by the applicable dates may be ''bumped up'' to the next higher nonattainment classification, and may be given new future dates for submission of an attainment demonstration and for reaching attainment.

The EPA's rationale for its July 21, 1993 policy statement was rooted in the belief that the 1990 Amendments new schedules for submitting attainment demonstrations rendered the restrictions on the use of so-called ''prior shutdown credits'' as unnecessarily hindering a

[96] See Memorandum from John Seitz, Director of EPA's OAQPS (July 21, 1993).

State's ability to establish a viable offset banking program. For those ozone nonattainment areas (and areas in the OTR), the EPA explained that the purposes of the prior shutdown credits restrictions would not be served if these areas were treated as if they had failed to make such a demonstration.

As explained in the July 21, 1993 policy statement, the EPA's concern in its final action establishing the current regulatory approach to shutdown credits in 40 CFR 51.165 was that unrestricted use of prior shutdown credits would lead to offset transactions without any nexus between the decision to shut down or curtail operations at the existing source and the decision to construct new capacity. Thus, shutdowns or curtailments that would have occurred in any case (not prompted by a new source seeking offsets) would not be applied to RFP, but would instead be used to accommodate additional emissions growth in the nonattainment area.

The EPA explained in the July 21, 1993 policy statement that the 1990 Amendments merit a less restrictive approach to the use of prior shutdown and curtailment credits in ozone nonattainment areas. The EPA took the position that such credits may be used as offsets until the EPA acts to approve or disapprove an attainment demonstration that is due. The 1990 Amendments established new attainment deadlines for all nonattainment areas. Ozone nonattainment areas classified as moderate and above must submit new attainment demonstrations. (Marginal and unclassifiable areas, as well as attainment areas in the OTR, are not obligated to submit an attainment demonstration.) These ozone nonattainment areas must adopt a series of planning requirements including specific reduction strategies and ''milestone'' requirements that areas demonstrate that specific progress toward attainment has been made. This progress is measured from a specific 1990 ozone inventory, for which any prior shutdown or curtailment reductions must be taken into account. See General Preamble, 57 FR 13498, 13507–13509 (April 16, 1992). For pollutants other than ozone, the EPA stated that it would consider requests for relaxation of the shutdown and curtailment credits policy on a case-by-case basis.

As Alternative 1, for ozone nonattainment areas in general, the EPA is proposing to adopt the policies reflected in the July 21, 1993 policy statement as regulatory changes. See proposed §§ 51.165(a)(3)(ii)(C)(*5*) and (*6*) [*Alternative 1*]. The EPA continues to adhere to its view in the July 21, 1993 policy statement that the 1990 Amendments' provisions for ozone nonattainment areas justify use of prior shutdown and curtailment credits as offsets in the interim period before the EPA approves or disapproves any required attainment demonstration. The EPA believes that the safeguards in the new requirements of the 1990 Amendments provide adequate assurance of progress toward attainment so that restrictions on the use of prior shutdown or curtailment credits is not necessary. Thus, the EPA is proposing that prior shutdown and curtailment credits may be used as offsets in ozone nonattainment areas (as well as areas in the OTR, to the extent applicable), as long as when they come due the State (1) submits a complete emissions inventory for the area under section 182(a)(1), (2) submits complete revisions to its NSR program under section 182(a)(2)(C), (3) submits the 15 percent plan for the area under section 182(b)(1)(A) for moderate and above areas, (4) submits the attainment demonstration for the area under section 182(b)(1)(A) (for moderate areas) or section 182(c)(2) (for serious and above areas), (5) submits the 3 percent reduction plan under section 182(C)(2)(B) for serious and above areas, and (6) submits milestone demonstrations under section 182(g)(2) for serious and above areas. To the extent ozone nonattainment areas are classified marginal (or lower), States are not required by the Act to submit an attainment demonstration, and may rely on shutdown and curtailment credits for offsets.

The EPA also continues to adhere to the limitations explained in the July 21, 1993 policy statement. The EPA is therefore proposing in Alternative 1 that the restrictions on the use of prior shutdown and curtailment credits will again apply as soon as a State fails to make any of these submissions, or if such a submission is deemed incomplete or is disapproved. These limitations address the concern underlying the initial imposition of these restrictions that use of prior shutdown and curtailment credits in such circumstances would be inconsistent with the RFP requirement. Also, if a State is late in making any of these submissions, once the submission is made to the EPA, the State is allowed to implement the less restrictive shutdown credits policy. The EPA is also proposing that, if a State becomes delinquent during review of a permit application that relies on emissions reductions from prior shutdowns or curtailments, the State may allow offsets to remain creditable if the application was complete before the State became delinquent.

Areas currently designated attainment or unclassifiable for ozone under section 107(d)(4) of the Act may be redesignated under section 107(d)(3) to nonattainment, and at the time of redesignation will be classified by operation of law under section 181(b). The EPA is proposing that shutdown and curtailment credits be available as offsets in these new areas under the same conditions applicable to those areas now designated as nonattainment. Just as the ozone nonattainment provisions of the 1990 Amendments provide assurance that currently designated areas will achieve RFP and attainment, so, too, do those provisions provide assurance that new ozone nonattainment areas will achieve RFP and attainment.

Pursuant to section 181(b)(2), ozone nonattainment areas that fail to reach attainment by the applicable date are to be reclassified (bumped up) by operation of law to the higher of the next higher classification or the classification applicable to the area's design value at the time (except no area is to be reclassified as extreme). Pursuant to section 182(i), areas that are reclassified on failure to attain are to meet the requirements applicable to the new classification, according to the prescribed schedules, except that the Administrator may adjust deadlines other than the attainment dates to the extent necessary or appropriate to assure consistency among the required submissions.

Thus, moderate areas failing to attain by November 15, 1996, will be reclassified as serious and the Administrator may revise submission dates including the date for submission of a new attainment demonstration. The EPA does not believe that prior shutdown and curtailment credits should be used as offsets in such areas where the date for a new attainment demonstration has been extended. Having failed to reach attainment by the date specified in the 1990 Amendments, the EPA does not believe it may continue to regard the new statutory provisions as providing an ''independent assurance of RFP.'' Rather, the EPA believes that it should regard failure to attain by the applicable date as a delinquency rendering prior shutdown and curtailment credits unavailable as offsets.

Section 181(b)(3) of the Act provides that the Administrator shall grant the request of any State to reclassify a

nonattainment area in that State to a higher classification. Upon voluntary reclassification, the fixed deadlines applicable for the higher classified area may well be later than those otherwise applicable to the original classification. For example, the attainment demonstration submission date applicable for a serious area is later than such date for a moderate area.

Under alternative 1, the EPA is proposing that shutdown and curtailment credits be available as offsets for voluntarily reclassified areas under the same conditions applicable if the area were originally classified in the higher category. The EPA does not believe voluntary reclassification constitutes a delinquency, and believes the provisions applicable to the higher classification will provide the necessary assurance that the area will achieve RFP and attainment. The EPA requests comment on this approach.

2. Shutdown Alternative 2

Under this alternative the EPA is proposing for all nonattainment areas and all pollutants that the current offset restrictions on crediting of emissions reductions from source shutdowns and curtailments be lifted where the reductions occur after the baseyear of the emissions inventory used (or to be used) to meet the applicable part D requirements of the Act.

In light of the NSR requirements in the 1990 Amendments, EPA believes that the Act now contains sufficient procedures, air quality tests, penalties, and assurances to address air quality concerns in nonattainment areas lacking EPA-approved attainment demonstrations. Specifically, the Act requires a mandatory 2:1 offset sanction for new or modified major sources in States that fail to submit a required attainment demonstration. Consequently, the EPA is proposing that continuing a prohibition on the use of source shutdown and curtailment credits generated after the baseline year of the most recent inventory is not warranted.

Under alternative 2, the EPA believes that emissions reductions from the shutdown or curtailment of emissions which occur after the baseyear of the most recent emissions inventory may be fully creditable for offset purposes, and that no additional nexus between source shutdowns or curtailments and the new source is necessary to insure that construction of the new source will result in reasonable further progress towards attainment. From an air quality planning perspective, such emissions actually impacted the measurements of air quality used in determining the nonattainment status of an area. Subsequently, reductions in these emissions from source shutdowns or curtailments are reductions in actual emissions, and their use as emission offsets at the statutorily-required greater than 1:1 ratio constitutes progress towards improved air quality. Also, for all classified ozone nonattainment areas, the Act now requires emission offsets at ratios ranging from 1.15:1 to 1.5:1 be obtained from either the same nonattainment area or an area of equal or greater classification.

For nonattainment areas for pollutants other than ozone, the NSR regulations also require each applicant to perform modeling analyses to demonstrate that the major new source or modification will not interfere with reasonable further progress and the State's ability to produce an attainment plan. The applicant must not only secure actual emission reductions sufficient to meet the numerically calculated amount necessary under the Act to offset the associated allowable emissions increase for the new source or modification, but enough offsets such that the modeling demonstrates no significant adverse air quality impact from the proposed major new source or modification.

*B. Judicial Review of NSR Permits*

The EPA is clarifying that the Act and the EPA's implementing regulations require SIP to provide applicants and affected members of the public with an opportunity for State judicial review of PSD and nonattainment NSR permit actions under approved NSR SIP to ensure an adequate and meaningful opportunity for public review and comment on all issues within the scope of the permitting decision as required under parts C and D of title I. The PSD provisions of the Act emphasize the importance of public participation in permitting decisions. See section 160(5) of the Act. In addition, section 165(a)(2) of the Act provides that no PSD permit shall be issued unless ''a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of the source, alternatives thereto, control technology requirements, and other appropriate considerations.'' Further, § 51.166(a)(1) provides that ''[i]n accordance with the policy of section 101(b)(1) of the Act and the purposes of section 160 of the Act, each applicable State implementation plan shall contain emission limitations and such other measures as may be necessary to prevent significant deterioration of air quality.'' See also section 161 of the Act.

The EPA interprets existing law and regulations to require an opportunity for State judicial review of PSD and nonattainment NSR permit actions under approved NSR SIP by permit applicants and affected members of the public in order to ensure an adequate and meaningful opportunity for public review and comment on all issues within the scope of the permitting decision. The EPA believes that the opportunity for public review and comment, as provided in the statute and regulations, is seriously compromised where an affected member of the public is unable to obtain judicial review of an alleged failure of the State to abide by its NSR SIP permitting rules. Accordingly, all such persons, as well as the applicant, must be able to challenge NSR permitting actions in a judicial forum.

In section 307(b) of the Act, Congress expressly provided an opportunity for judicial review of NSR permitting decisions when the EPA is the permitting authority. There is no indication that Congress intended that citizens' rights would be diminished upon the EPA approval of a State's NSR program. Similarly, Congress has provided citizens the ability to challenge the failure of a major source to obtain the NSR permit required under part C or D or the violation of such permit in Federal district court under the citizen suit provisions of section 304(a)(3), regardless of whether the permitting authority is the EPA or a State.

The operative language of section 304(a)(3) could be read as equivalent to the Federal NSR enforcement provisions of sections 113(a)(5) and 167, which enables EPA to challenge in Federal court both construction without any permit and construction without a permit that satisfies applicable NSR requirements. The EPA believes that the better view is that expressed in the legislative history of the 1977 Amendments, which provided Federal court jurisdiction under section 304 for citizen suits directed at the failure to obtain any major NSR permit, but directed citizen challenges to the terms of major NSR permits to State court: ''[i]n order to challenge the legality of a permit which a State has actually issued, or proposes to issue, under [the PSD provisions of the Act] however, a citizen must seek administrative remedies under the State permit consideration process, or judicial review of the permit in State court.'' Staff of the Subcomm. on Environmental Pollution of the Senate Comm. on Environment

and Public Works, 95th Cong., 1st Sess., A Section-by-section Analysis of S. 252 and S. 253, Clean Air Act Amendments 36 (1977), reprinted in five *Legislative History of the Clean Air Act Amendments of 1977* (*1977 Legislative History*) 3892 (1977). (Section 304(a)(3) originated in S. 252; the House bill had no such provision; the conference committee expanded the coverage of the provision to apply to nonattainment major new source review as well. See H.R. Conf. Rep. No. 564, 95th Cong., 1st Sess., reprinted in three *1977 Legislative History* at 553). This reading is supported by the limited case law on the subject. See *Ogden Projects, Inc.* v. *New Morgan Landfill Co., Inc.*, No. 94–CV–3048 (E.D. Pa.), Jan. 10, 1996 (slip op. at 5–9); see also *League to Save Lake Tahoe, Inc.* v. *Trounday*, 598 F.2d 1164, 1173 (9th Cir.), *cert. denied*, 444 U.S. 943 (1979). The EPA believes that Congress intended such opportunity for State judicial review of PSD and nonattainment NSR permit actions to be available to permit applicants and at least those members of the public who can satisfy threshold standing requirements under Article III of the Constitution. The EPA also solicits comment on whether the statute should instead be interpreted as providing for citizen challenges to State-issued permits in Federal court under section 304(a)(3), on whether citizens should be given the option of proceeding in State or Federal court, and on whether citizens should be allowed to proceed in Federal court only if a State court remedy is not provided.

The EPA seeks to codify its interpretation by proposing in this action expressly to require that a SIP provide for judicial review by private parties in State court of PSD and nonattainment NSR permit actions. Such review must be available to the applicant and any person who participated in the public participation process (unless that person can demonstrate that it was impracticable to raise an objection during the comment period, e.g., because the permit term complained of was one added to the final permit without prior notice) and who can satisfy threshold Article III standing requirements. The EPA also solicits comment on whether to require States, either instead of such a SIP revision requirement or in addition to such a SIP revision requirement, to submit a legal opinion from the Attorney General for the State, or the chief attorney for an air pollution control agency that has independent legal counsel, demonstrating that the State has adequate legal authority to provide for and implement the opportunity for State judicial review of a PSD or nonattainment NSR permit action by the applicant and members of the public who participated in the public participation process and who can satisfy threshold Article III standing requirements.

The SIP may also provide that this opportunity for judicial review is the exclusive means by which citizens may obtain judicial review of the permit, and that all such actions for judicial review must be filed within a reasonable period of time specified in the SIP. If the SIP includes such a time limit, it must also provide that if new grounds for challenge arise after the review period has ended, a person may challenge the permit on such new grounds within a reasonable period specified in the SIP after the new grounds arise. Such new grounds may be limited to new information which was not available during the review period.

Finally, EPA also solicits comment on the extent to which judicial review of the provisions of PSD and nonattainment NSR permits through the provisions of title V of the Act may substitute for judicial review under the terms of the SIP. In August 1995 EPA issued a supplemental rulemaking notice proposing changes to the requirements of 40 CFR Part 70 governing State operating permit programs under title V of the Act. 60 FR 45529 (Aug. 31, 1995). In that document, EPA proposed to require that certain activities governed by a State review program, including the issuance of a PSD or nonattainment NSR permit under parts C or D of title I of the Act, meet the procedural requirements of title V, such that there would only be a single round of public process and EPA review, as opposed to possibly duplicative permit issuance procedures under title I and title V. EPA solicited comment, however, on whether EPA review and, ultimately, judicial review under title V should address all or only some of the requirements of PSD and nonattainment NSR permits. Thus, it is not clear at this juncture whether EPA and judicial review under part 70 will extend to all PSD and nonattainment NSR requirements, and hence, whether adoption of the proposed changes to part 70 would obviate the need for a separate judicial review requirement under title I. The EPA will coordinate final action under both proposals, and will take care to ensure that final action under this proposal and under the proposed revisions to part 70 are consistent and do not result in duplicative or unnecessary requirements.

For the reasons discussed above, the EPA is proposing that SIP provide for judicial review in State court for PSD and nonattainment NSR permits issued under parts C and D of title I, respectively. See proposed §§ 51.165(a)(5)(iii) and 51.166(q)(6). The EPA seeks comment on this proposal.

### *C. Department of Defense (DOD) Concerns*

The DOD has raised the question of whether the NSR rules should provide to military sources temporary exclusions from the requirement for preconstruction review of major modifications in the event of a ''national security emergency.'' The DOD defines ''national security emergency'' as a situation where rapid response is required on the part of a Military Department or a DOD Component (i.e., the Army, the Navy, the Air Force, the Marines, the Coast Guard when in the naval service, the National Guard, and the Reserves) to respond to emergency situations that make it impractical to meet the procedural requirements for obtaining a major NSR permit in advance of a major modification and the associated increase in emissions. ''National security emergencies'' would include situations where United States forces are introduced into hostilities or peacekeeping operations, other situations where involvement in hostilities is indicated, and situations where U.S. forces are called upon to provide emergency humanitarian relief or protect the public health or welfare, such as responding to civil disturbances and natural disasters such as hurricanes, earthquakes, and wildfires. Under a temporary national security emergency exclusion, in lieu of the normal preconstruction review process, the military facility would apply for and obtain an NSR permit, if necessary, after the emergency has ended. A temporary national security emergency exclusion, if provided, would be invoked only in emergencies that require physical or operational changes to military sources that are significant enough to trigger the NSR permitting requirements for a major modification.

The DOD believes that regulatory provisions to address ''national security emergencies'' are necessary to enable the DOD to immediately and dramatically respond to support specifically designated national security missions or civilian emergencies. The absence of such emergency provisions could hinder the ability of local commanders to comply with Presidential directives in a timely manner because of the time periods and

public notice requirements involved in obtaining NSR permits.

The EPA is requesting comment on the need for an explicit regulatory exclusion in the NSR rules for ''national security emergencies.'' In particular, the EPA is soliciting comment on the legal authority and necessity for such an exclusion in light of Act section 118, whether such an exclusion should be mandatory or voluntary for States with approved NSR SIP, and whether such an exclusion should be limited to the DOD, or whether it should be made available to other public agencies that may be called on to protect the public health or welfare in response to unforeseen natural or civilian emergencies. In addition, the EPA is requesting comment on the specific form that any such provisions should take, including how to structure a definition for ''national security emergency'' that is sufficiently descriptive to be implemented as intended.

The August 31, 1995 supplemental proposal concerning the EPA's regulations at 40 CFR parts 70 and 71, that address requirements for title V operating permit programs, raised the issue of whether similar exclusion provisions should be added to parts 70 and 71 to authorize local governments (and other sources) to make changes without revising the source's title V permit under specified circumstances to respond to emergencies such as natural disasters and severe weather conditions. (See 60 FR 45560–45561) The EPA requested comments on this topic in response to preproposal comments submitted by State and local air pollution control agencies that already have authority to grant temporary exclusions as a matter of State or local law. In that document, the Agency solicited comment on the proper scope and terms of any such authorization provision that might be added to parts 70 and 71, including appropriate procedural safeguards for exercising such authority considering the scope of the authorization. Examples of procedural safeguards include prior notification of a change by the source requesting emergency authorization, unless prior notification is not possible, and authorization for the permitting authority to attach conditions to the authorization, as it deems appropriate, to ensure that the change is being made in a manner that will cause the least change, modification, or adverse impact to life, health, property, or natural resources. The EPA believes that similar considerations are appropriate in the context of a temporary national security emergency exclusion that might be added to the NSR rules in parts 51 and 52. Furthermore, in the context of responding to comments on the August 31, 1995 supplemental proposal and on this proposal, the EPA will consider whether temporary national security emergency exclusion provisions that specifically address DOD sources should be added to parts 70 and 71 as well as to the NSR regulations. Although the EPA is not reopening the public comment period for the August 31, 1995 supplemental proposal, the EPA solicits comments in this document on whether such temporary national security emergency exclusion provisions for the DOD should be added to parts 70 and 71 and on how such provisions should differ from those that may be incorporated in the NSR regulations, should such provisions be adopted for either program.

The DOD has suggested the following approach for including ''national security emergency'' provisions in the NSR regulations. Sections 51.165(a), 51.166, 52.21 and 52.24 would be amended to add a definition for ''national security emergency'' that is based on the description of that term above. A new, stand-alone paragraph would be added in §§ 51.165(a), 51.166, 52.21 and 52.24, entitled ''Temporary exclusions for national security emergencies,'' which would read as follows:

Each plan shall provide that actions on the part of a military facility to respond to a national security emergency that otherwise would constitute a major modification shall not constitute a major modification for the purposes of this section for the duration of the temporary exclusion provided by this paragraph, provided that the Commanding Officer of the military facility complies with the following conditions. For the purposes of this section, ''military facility'' shall mean the major stationary source that is owned or operated by a United States Department of Defense Component and that is engaged in national security or related activities.

(1) As soon as practicable, but no later than seven calendar days after the military facility begins to use the national security emergency exclusion, the Commanding Officer of the military facility shall notify in writing all affected State permitting authorities and EPA Regional Offices, and the appropriate Secretary of the Military Department or Head of the Department of Defense Component, that the military facility is responding to a national security emergency and is using the exclusion. During the 7-day notice period and the 30 calendar days after the date of the document, the Commanding Officer of the military facility shall be authorized to determine when the exclusion under this section applies. Such determination shall be made only after the Commanding Officer has made all reasonable efforts to accommodate the emissions increase without deviating from otherwise applicable permitting requirements.

(2) If the military facility seeks to rely on the temporary national security emergency exclusion for longer than 30 calendar days from the date of the notice in paragraph (1), the continued use of the exclusion must be reviewed and approved by the appropriate Secretary of the Military Department or Head of the Department of Defense Component taking into account any public health, welfare, or environmental concerns raised in consultation with all affected permitting authorities. The authorization to continue use of the temporary national security exclusion shall be required for each consecutive 30-day period following the date of the notice required in paragraph (1).

(3) During the national security emergency, the Commanding Officer of the military facility shall take all reasonable measures, where practicable, to ensure that any physical or operational changes to the source that would result in an emissions increase that otherwise would constitute a major modification are made in a manner that will minimize the emissions increase or otherwise minimize any potential for adverse impact to public health and welfare or the environment. Such measures may include the use of emission controls and proper operation and maintenance practices and/or choosing materials or operating scenarios that minimize deviations from existing permit terms and conditions. In addition, the Commanding Officer of the military facility shall make a reasonable effort, where practicable, to monitor emissions during the emergency in order to quantify the emissions resulting from the physical or operational changes.

(4) As soon as practicable, but no later than 7 calendar days after the use of this exclusion is no longer needed, the Commanding Officer of the military facility shall notify in writing all affected State permitting authorities and EPA Regional Offices, and the appropriate Secretary of the Military Department or Head of the Department of Defense Component, that the military facility has ceased responding to a national security emergency for the purposes of this section.

(5) As soon as practicable, but no later than 45 calendar days after the date of the notification in paragraph (4), the

Commanding Officer of the military facility shall provide a written report to all affected State permitting authorities and EPA Regional Offices, and to the appropriate Secretary of the Military Department or Head of the DOD Component, that describes the reasons for relying on the exclusion, the emissions units affected, the amount of increased emissions, and other information needed to determine the nature and extent to which the source deviated from otherwise applicable permitting requirements.

(6)(i) The Commanding Officer of the military facility need not submit an application to the permitting authority for a permit under this section if the physical or operational changes to the source resulted only in a temporary modification, that is, a modification that lasts no longer than the period of the national security emergency and that does not expand the capacity of the source to emit at an increased level after the cessation of the emergency.

(ii) As soon as practicable, but no later than 45 calendar days after the date of the notification required in paragraph (4), the Commanding Officer of the military facility shall submit an application for a permit under this section in the event that the physical or operational changes made at the source in response to the national security emergency are not temporary. For example, a permit shall be required if the military facility is physically changed or has capacity added in ways that are not later reverted or otherwise actually returned to the pre-modification conditions.

(7) The permit application under paragraph (6)(ii) and the permitting authority's actions on that application shall comply with the requirements of this section as though construction had not yet commenced on the modification.

The DOD has provided some examples of actions that military installations could be called on to take during national security emergencies that would result in ''temporary'' and ''nontemporary'' modifications that otherwise would be subject to major NSR. In the event of a national security emergency involving hostilities, the DOD may have to make physical changes to a source to be able to paint tactical equipment at that location. These changes could involve the construction of new painting facilities. If these changes would result in emissions increases but, after the cessation of the emergency they are returned to their pre-modification condition, under the DOD's suggested language, the changes would be considered ''temporary'' and would not be required to undergo post-modification NSR permitting. However, if the changes are not returned to their pre-modification condition after the cessation of the emergency, the changes would be considered a ''nontemporary'' modification and they would be required to undergo post-modification NSR permitting.

The EPA is requesting comments on the appropriateness and sufficiency of the preceding suggested language for inclusion in parts 51 and 52. In particular, the EPA is soliciting comments on whether any type of authorization by the permitting authority should be required before a military installation may use the temporary national security emergency exclusion, if one is adopted. In extraordinary circumstances, the permitting authority may have concerns about the public health, welfare, or environmental impacts that would result from an emissions increase or other changes made at a military source to respond to a national security emergency. In such circumstances, the EPA believes it may be appropriate for the permitting authority to work with the DOD to mitigate such adverse impacts before the DOD facility continues to rely on the national security emergency exclusion provision. The EPA expects that the permitting authority's assessment in such circumstances would be made rapidly and would take into account the urgency with which the DOD must respond to the particular emergency. Under any version of the exclusion, where the permitting authority is a State or local agency, the EPA is requesting comment on whether the Agency should have a formal role in the process for determining whether the DOD can extend use of a national security emergency exclusion beyond the initial 30-day period.

In addition, the EPA seeks comment on the open-ended nature of the DOD's proposed national security emergency exclusion and whether there should be some limit on the total duration of the exclusion, especially where an excluded activity may have the potential for an adverse impact on public health and welfare or the environment. Furthermore, when a national security emergency is expected to last for an extended period (such as longer than 30 days), the EPA requests comment on whether a military facility acting under such an exclusion should be required to apply for and obtain an NSR permit, if necessary, at some point after the emergency response has commenced, rather than waiting until the national security emergency has ended. The EPA also seeks comment on whether a national security emergency exclusion should apply to the construction of a new major source where the existing military facility is not an existing major source.

Finally, the EPA is interested in knowing commenters' opinions and concerns about any additional requirements that should or could be included, such as additional elements that could be included in the report on emissions increases resulting from physical or operational changes made to respond to a national security emergency, and about the implications of providing for a national security emergency exclusion if such provisions are not mandatory for all states.

The DOD also requested that the rules at 40 CFR 51.161 and 51.166 be revised to provide an exclusion from public availability requirements for classified information. The EPA agrees with the DOD that information properly classified under applicable laws, including Executive Orders 12958 and 12968, is not required to be made publicly available, and the Agency proposes to codify this view in the minor and major NSR rules. As suggested by the DOD, the EPA proposes that ''classified information'' be defined in the NSR rules as it is defined in the Classified Procedures Act, 18 U.S.C. App. 3, section 1(a), as ''any information or material that has been determined by the United States Government pursuant to an Executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security.'' The EPA notes that criminal penalties exist for the unauthorized disclosure of classified information, defined as ''information, which at the time of a violation of this section, is, for reasons of national security, specifically designated by a U. S. Government Agency for limited or restricted dissemination or distribution.'' 18 U.S.C. 798(b). The DOD and the EPA believe that these laws must be read in congruence with the Act and the need for public availability of permitting information. The Act cannot be reasonably interpreted to require a violation of criminal law by making classified information publicly available. As recommended by the DOD, the EPA proposes that the public availability provisions be revised as follows. Existing § 51.161(b)(1) would be revised to read:

Availability for public inspection in at least one location in the area affected of the information, except for classified information, submitted by the owner or operator and of the State or local

agency's analysis of the effect on air quality. Classified information provided by the Department of Defense or other Federal agencies or contractors for such agencies and designated as such will be controlled by applicable law concerning the release of classified information. Existing § 51.166(q)(2)(ii) would be revised to read:

Make available in at least one location in each region in which the proposed source would be constructed a copy of all materials, except for classified information, the applicant submitted, a copy of the preliminary determination, and a copy or summary of other materials, if any, considered in making the preliminary determination. Classified information provided by the Department of Defense or other Federal agencies or contractors for such agencies and designated as such will be controlled by applicable law concerning the release of classified information.''

The EPA is proposing to adopt this exclusion from public availability requirements for classified information not only in §§ 51.161 and 51.166 but also in §§ 51.165 and 52.21. The EPA solicits comment on all aspects of this proposed provision.

## VIII. Additional Information

### *A. Public Docket*

This rulemaking action is subject to section 307(d) of the Act. The aspects of the rulemaking action related to PSD are subject to section 307(d), in accordance with section 307(d)(1)(J) of the Act. Pursuant to section 307(d)(1)(V), the Administrator hereby determines that the other aspects of this rulemaking action are subject to section 307(d). Accordingly, section 307(d) applies to this entire rulemaking action.

The public docket for this rulemaking action is A–90–37. The docket is a file of the information relied upon by the EPA in the development of this proposed rule (as well as interagency review materials related to the proposed rule). The EPA will also place the following materials in the docket: (1) Written comments EPA receives during the public comment period; (2) the transcript of the public hearing, if any; (3) any documents that EPA determines are of central relevance to the rulemaking; (4) EPA's response to significant comments; (5) any additional information the final rule is based on; and (6) interagency materials related to the final rule. The docket, excluding interagency review materials, will represent the record for judicial review. See section 307(d)(7)(A) of the Act. The docket is available for public review and copying at EPA's Air Docket, as indicated in the **ADDRESSES** section at the beginning of this document.

### *B. Public Comments and Public Hearing*

The EPA requests public comment on all aspects of this proposed action. All public comments must be addressed to the Docket for this rulemaking and received no later than October 21, 1996, at the address indicated in the **ADDRESSES** section at the beginning of this document.

The EPA plans to convene a meeting of the NSR Reform FACA Subcommittee in conjunction with the public comment period. In this meeting the Subcommittee will review today's proposed rulemaking. A transcript of the Subcommittee's meeting, will be available for public inspection in EPA Air Docket No. A–90–37. The NSR Reform Subcommittee meeting will be open to the public although seating may be limited. Further information regarding the specific dates, location and starting time will be published in the Federal Register prior to the meeting.

The EPA plans to hold a public hearing on this proposed action. A public hearing is scheduled for 10:00 a.m. to 4:00 p.m. in Research Triangle Park, North Carolina on September 23,1996. A notice announcing additional information about the public hearing, including the specific location, will be published in the Federal Register.

Persons wishing to make oral presentations at the public hearing should contact the EPA as indicated in the DATES section at the beginning of this preamble. The order of presentation will be based on the order in which EPA receives requests to speak. Written statements in lieu of, or in addition to, oral testimony are encouraged and may be any length. If necessary, oral presentations will be time limited. The hearing may be canceled if no requests to speak have been received 15 days prior to the scheduled hearing date.

### *C. Executive Order 12866*

Section 3(f) of Executive Order 12866 (E.O. 12866) defines ''significant regulatory action'' for purposes of centralized regulatory review by the Office of Management and Budget (OMB) to mean any regulatory action that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Drafts of this proposed rule and associated materials were reviewed by the OMB because of the novel policy issues presented and anticipated public interest in this action. Interagency review materials have been placed in the public docket in accordance with section 307(d)(4)(B)(ii) of the Act and section 6(a)(3)(E) of E.O. 12866 (including documents identifying the substantive changes made between the draft submitted to OMB for review and the action proposed, and the changes that were made at the suggestion or recommendation of OMB).

The EPA has prepared a draft Regulatory Impact Analysis (RIA) for these proposed rules and it is included in the docket for this rulemaking. The EPA projects that as a result of the rule changes being proposed today, the overall costs and burdens for the major NSR program to decrease. As shown in the draft RIA for this rule, the EPA has estimated the total annualized ''information collection request'' (ICR) cost burden of the NSR permitting program under the proposed reforms to be $27.6 million. This includes costs for preparation of permit applications, including technology and environmental impact analyses, record-keeping, and reporting requirements. It represents a projected decrease of $11.1 million in the annual ICR cost burden to industry. The burden to State and local air pollution control agencies is expected to decrease by approximately $2.5 million, and to EPA by approximately $200,000.

Other cost savings will be realized by sources that avoid major NSR and thus become subject to minor NSR programs implemented at the State and local levels. The greatest savings, based on industry comments during the NSR Reform Subcommittee meetings, would be realized due to the shorter processing time of a minor versus major NSR permit. Also, the streamlining of some of the time-intensive aspects of the major source requirements would have a similar effect. The total industry savings would be difficult to predict given the diversity of industries covered by this program; nevertheless, every facility would experience less down time, quicker start up and resumption of

revenue generation. Further savings would accrue the extent that the minor NSR technology control requirements and mitigation measures are less costly than the major source requirements and measures. Industry and State representatives reported that the difference in emissions between minor and major source technology requirements are insignificant in most cases. The incremental cost savings could be quite large, however, if the minor source requirements are applicable. The EPA solicits further comment on the cost savings that would be derived from this proposed rulemaking.

The reader should note that the ICR cost burden reduction estimates in the draft RIA are highly sensitive to the estimated impact of the proposed revisions to the applicability test for modifications at existing major stationary sources. The EPA estimates that 20 percent fewer sources will be classified as major as a result of revising the period for establishing the baseline for actual emissions from which to calculate emissions increases to the highest 12 consecutive months operation by the source. Another 6% reduction is anticipated from the ''clean unit'' and ''clean facility'' tests and the exclusion for pollution control and pollution prevention projects. The EPA estimates still another 25 percent of modifications, which would otherwise be subject to major NSR, would be excluded due to allowing sources to use projected future actual emissions to calculate emissions increases rather than requiring the calculation to be based on the source's potential to emit in each case. The EPA solicits comments on these estimated impacts on the burden reduction of revising the regulations for netting as proposed.

The proposed revisions include certain provisions which, while generally intended to clarify the statutory Class I area protection process under the existing PSD program and improve coordination between the permitting authority and the FLM (an area of the PSD rules that has been the subject of significant confusion and controversy), may, in certain circumstances, place additional burdens on the permit applicant and the permitting authority. The EPA requests public comment on whether these proposed revisions represent a net increase in costs and burdens for permitting authorities and permit applicants in comparison with the existing rules related to the protection of Class I areas. These issues are described in more detail in the Information Collection Request (ICR) and will be further assessed in the draft RIA for the final rule.

*D. Regulatory Flexibility Act*

Under the Regulatory Flexibility Act, 5 U.S.C. 601–612, EPA must prepare and make available for public comment an initial regulatory flexibility analysis assessing the impact of a proposed rule on small entities. See 5 U.S.C. 603. Small entities include small businesses, small not-for-profit enterprises and government entities with jurisdiction over populations of less than 50,000. See 5 U.S.C. 601. However, the requirement to prepare a regulatory flexibility analysis does not apply if the Administrator certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities. See 5 U.S.C. 605(b).

The major NSR program applies to new major stationary sources and major modifications to existing major stationary sources, as explained elsewhere in this preamble. These rules reform the existing major NSR rules, making them less burdensome and generally improving the rules for any small entities that might be affected by the major NSR program. Accordingly, the Administrator hereby certifies that these rules, if promulgated, will not have a significant economic impact on a substantial number of small entities.

*E. Paperwork Reduction Act*

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1230.08) and a copy may be obtained from Sandy Farmer, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2136); 401 M St., SW.; Washington, DC 20460 or by calling (202) 260–2740.

Section 110 of the Act requires all States to adopt into their SIPs preconstruction review programs for new or modified stationary sources. The programs must include provisions that meet the specific requirements of Part C ''Prevention of Significant Deterioration'' (PSD) and Part D ''Plan Requirements for Nonattainment Areas'' of title I of the Act for permitting construction and modification of major stationary sources. Implementing regulations for State adoption of the two NSR programs into their SIPs are promulgated at §§ 51.160 through 51.166 and appendix S. Federal permitting regulations are promulgated at § 52.21 for PSD areas that are not covered by a SIP program. Essentially a source cannot construct without securing a permit to ensure that the requirements of the Act are met.

Part C of title I of the Act outlines specific preconstruction permitting requirements for new and modified sources constructing in areas that do not violate the NAAQS. These PSD rules, generally require a prospective major new or modified source to: (1) Demonstrate that the NAAQS and increments will not be exceeded, (2) ensure the application of best available control technology (BACT), and (3) protect Federal Class I areas from adverse impacts, including adverse impacts on air quality related values (AQRVs).

Similarly, Part D of title I of the Act specifies requirements for major new and modified sources constructing in areas designated as nonattainment for a NAAQS pursuant to section 107 of the Act. The part D provisions also apply to major source permitting in the Northeast Ozone Transport Region as established under section 184 of the Act. The part D rules generally require a major new or modified source to: (1) ensure the application of controls which will achieve the lowest achievable emission rate (LAER), (2) certify that all major sources in a State owned or controlled by the same person (or persons) are in compliance with all air emissions regulations, and (3) secure reductions in actual emissions from existing sources equal to or greater than the projected increase to show attainment and maintenance of the applicable NAAQS (offsets). A public review and comment period is required for all major source permit actions and some non-major source actions.

A new source that would be major if operated at full capacity may accept specific enforceable permit conditions to keep its emissions below the major source threshold. Similarly existing major sources that propose modifications that would produce significant emissions increases as a result of new or modified emissions units may either contemporaneously retire existing emissions units to generate emissions reductions credits or take permit limits on future emissions or both to avoid major NSR.

Prospective sources must conduct the necessary research, perform the appropriate analyses and prepare permit applications with documentation to support the conclusion that their project meets all applicable Statutory and regulatory, requirement summarized above. The specific activities are described further in the draft RIA and

the ICR for this proposed rulemaking, which are available from OPPE at the address stated above and in the Docket for this rulemaking.

Permitting agencies, either State, local or Federal, review the permit applications to affirm the proposed source or modification will comply with the Act and applicable regulations, conduct the public review process, issue the permit and then verify that a source has constructed and subsequently operates in compliance with the permit conditions. The EPA, more broadly, reviews a fraction of the total applications and audits the State and local programs for its effectiveness. Consequently, information prepared and submitted by the source is essential for proper administration and management of the NSR program.

Information that is to be submitted by sources as a part of their permit application, should generally be a matter of public record given the requirements for public participation in issuing permits. See sections 165(a)(2) and 110(a)(2)(C), (D) and (F) of the Act. Notwithstanding, to the extent that the information required for the completeness of a permit is proprietary, confidential, or of a nature that it could impair the ability of the source to maintain its market position, that information is collected and handled according to EPA's policies set forth in title 40, chapter 1, part 2, subpart B—Confidentiality of Business Information (see 40 CFR part 2). See also section 114(c) of the Act.

As mentioned previously, this proposed rulemaking would provide substantial reduction in major NSR permits, which would translate into a reduction in industry respondents and number of reviews by the Federal, State, and local permitting agencies. The baseline for comparison is drawn from that of the NSR program ICR approved in September 1995. A copy may be obtained from OPPE at the address stated above. As a result of this proposal, the estimated number of major PSD permits is expected to decrease from 320 to 144. Major part D nonattainment permits would decrease from 590 to 266. The number of minor source actions would increase by the combined reduction in both major source programs. The burden for PSD permits is estimated to increase for industry respondents by about 11 hours per permit, and the burden for part D permits should decrease by an estimated 5 hours per permit. The burden for State and local permitting agencies is estimated to decrease from 280 to 272 hours per permit for PSD, and stay about the same for part D permits and minor source actions, 110 hours and eight hours per permit respectively. The EPA burden on a per permit basis is expected to remain unchanged—15 hours for all major source permits and 2 hours for minor source permits. The resulting cost savings is estimated to be $11 million for industry, about $2.5 million for States and local agencies and about $250,000 for the EPA. These estimates are discussed in detail in the draft RIA and the Information ICR for this rulemaking.

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An Agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15.

Comments are requested on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques. Send comments on the ICR to the Director, OPPE Regulatory Information Division; U.S. Environmental Protection Agency (2136); 401 M St., SW.; Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th St., NW., Washington, DC 20503, marked ''Attention: Desk Officer for EPA.'' Include the ICR number in any correspondence. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after July 23, 1996, a comment to OMB is best assured of having its full effect if OMB receives it by August 22, 1996. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

*F. Unfunded Mandates Reform Act*

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1-year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

As shown in the draft RIA for this rule, EPA has estimated the total annualized cost of the NSR permitting program including the proposed reforms does not include a Federal mandate that may result in expenditures of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. Therefore, this proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. In addition, EPA has determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments, which generally do not have new source permitting authority.

Executive Order 12875 (''Enhancing the Intergovernmental Partnership'') is designed to reduce the burden to State, local, and tribal governments of the cumulative effect of unfunded Federal mandates, and recognizes the need for these entities to be free from unnecessary Federal regulation to enhance their ability to address problems they face and provides for Federal agencies to grant waivers to these entities from discretionary Federal requirements.

In accordance with the purposes of Executive Order 12875, the EPA has already initiated consultations with the government entities affected by the NSR changes. From August 1992 through June 1993 EPA convened three NSR simplification workshops, inviting representatives from among those involved with and affected by the major source NSR permitting program. In July 1993 EPA formed the NSR Reform Subcommittee under the auspices of the CAAAC, a committee formed in accordance with the Federal Advisory Committee Act (FACA) (5 U.S.C. App.) This committee is composed of representatives from industry, State and local air pollution control agencies, environmental organizations and other Federal agencies. The purpose of this Subcommittee was to provide, under the direction of the CAAAC, independent advice and counsel to the EPA on policy and technical issues associated with reforming the major NSR program. Specifically, the responsibilities of the Subcommittee included developing draft recommendations on approaches for reforming the major NSR rules in order to reduce complexity and perceived impediments to speedy review of permit applications in the current systems, while at the same time maintaining the environmental goals and benefits embodied in the current approach. Upon proposal EPA anticipates reconvening the NSR Reform FACA Subcommittee to review the proposed revisions which will afford another opportunity for State, local and Tribal Governments to participate in this rulemaking effort.

List of Subjects

*40 CFR Part 51*

Environmental protection, Administrative practice and procedure, Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, BACT, LAER offsets and Class I increments.

*40 CFR Part 52*

Administrative practice and procedure, Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides, BACT, and Class I increments.

Dated: April 3, 1996.

Carol M. Browner,

*Administrator.*

For the reasons set forth in the preamble, parts 51 and 52 of chapter I of title 40 of the Code of Federal Regulations are proposed to be amended as follows:

## PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for part 51 is revised to read as follows:

Authority: 42 U.S.C. 7401–7671q.

2. Section 51.165 is amended as follows:

a. Revising paragraph (a)(1)(i);

b. Revising paragraph (a)(1)(iv)(A);

c. Amending paragraph (a)(1)(v)(C)(*6*) by adding the words ''Standing alone,'' at the beginning of the sentence, and revising the word ''An'' to read ''an'';

d. Revising paragraph (a)(1)(v)(C)(*8*);

e. Adding new paragraphs (a)(1)(v)(C)(*10*) through (*15*);

f. Adding new paragraphs (a)(1)(v) (D) through (G);

g. Revising paragraph (a)(1)(vi)(C)(*1*);

h. Removing the word ''and'' at the end of paragraph (a)(1)(vi)(E)(*2*), adding the word ''and'' at the end of paragraph (a)(1)(vi)(E)(*3*), and revising paragraph (a)(1)(vi)(E)(*4*);

i. Redesignating paragraph (a)(1)(x) as (a)(1)(x)(A)

j. Amending newly redesignated paragraph (a)(1)(x)(A) by adding the words ''Particulate matter: 15 tpy of PM–10 emissions.'' at the end of the list of pollutant emission rates;

k. Adding new paragraphs (a)(1)(x) (B) through (F);

l. Revising paragraph (a)(1)(xii)(B);

m. Amending paragraph (a)(1)(xii)(C) by removing the word ''reviewing'' and adding in its place ''permitting'';

n. Adding new paragraph (a)(1)(xii)(F);

o. Amending paragraph (a)(1)(xxii) by removing the word ''it'' and adding in its place ''the project'';

p. Revising paragraph (a)(1)(xxv) introductory text and (a)(1)(xxv)(A);

q. Removing paragraph (a)(1)(xxv)(B) and redesignating paragraphs (a)(1)(xxv)(C) and (D) as newly redesignated paragraphs (a)(1)(xxv) (B) and (C);

r. Adding new paragraphs (a)(1) (xxvi) through (xxxiv);

s. Redesignating paragraph (a)(2) as (a)(2)(i);

t. Adding new paragraph (a)(2)(ii);

u. Revising paragraph (a)(3)(ii)(C);

v. Adding new paragraph (a)(5)(iii);

w. Adding new paragraphs (a) (6) through (16).

**§ 51.165 Permit requirements.**

(a) * * *

(1) * * *

(i)(A) *Stationary source* means any building, structure, facility, installation, or stationary internal combustion engine which emits or which may emit any air pollutant subject to regulation under the Act.

(B) A stationary source does not include emissions resulting directly from an internal combustion engine used for transportation purposes, or from a nonroad engine or nonroad vehicle.

* * * * *

(iv)(A) *Major stationary source* means:

(*1*) Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act, except that lower emissions thresholds shall apply as follows:

(*i*) 70 tons per year of PM–10 or, where applicable, 70 tons per year of a specific PM–10 precursor, in any serious nonattainment area for PM–10.

(*ii*) 50 tons per year of volatile organic compounds in any serious nonattainment area for ozone.

(*iii*) 50 tons per year of volatile organic compounds in an area within an ozone transport region except for any severe or extreme nonattainment area for ozone.

(*iv*) 25 tons per year of volatile organic compounds in any severe nonattainment area for ozone.

(*v*) 10 tons per year of volatile organic compounds in any extreme nonattainment area for ozone.

(*vi*) 50 tons per year of carbon monoxide in any serious nonattainment area for carbon monoxide, where stationary sources contribute significantly to carbon monoxide levels in the area (as determined under rules issued by the Administrator);

(*2*) For the purposes of applying the requirements of paragraph (a)(12) of this section to stationary sources of nitrogen oxides located in an ozone nonattainment area or in an ozone transport region, any stationary source which emits, or has the potential to emit, nitrogen oxides emissions as follows:

(*i*) 100 tons per year or more of nitrogen oxides in any ozone

nonattainment area classified as marginal or moderate.

(*ii*) 100 tons per year or more of nitrogen oxides in any ozone nonattainment area classified as a transitional, submarginal, or incomplete or no data area, when such area is located in an ozone transport region.

(*iii*) 100 tons per year or more of nitrogen oxides in any area designated under section 107(d) of the Act as attainment or unclassifiable for ozone that is located in an ozone transport region.

(*iv*) 50 tons per year or more of nitrogen oxides in any serious nonattainment area for ozone.

(*v*) 25 tons per year or more of nitrogen oxides in any severe nonattainment area for ozone.

(*vi*) 10 tons per year or more of nitrogen oxides in any extreme nonattainment area for ozone; or

(*3*) Any physical change that would occur at a stationary source not qualifying under paragraphs (a)(1)(iv)(A)(*1*) or (*2*) of this section as a major stationary source, if the change would constitute a major stationary source by itself.

* * * * *

(v) * * *

(C) * * *

(*8*) The addition, replacement, or use of a pollution control project at an existing emissions unit unless the pollution control project will result in a significant net increase in representative actual annual emissions of any pollutant regulated under the Act and the permitting authority determines that this increase will cause or contribute to a violation of any national ambient air quality standard or any maximum increase over baseline concentrations (in accordance with § 51.166(c) or § 52.21(c) of this chapter) or will have an adverse impact on visibility in accordance with the definition at § 51.301(a). For the purpose of this paragraph (a)(1)(v)(C)(*8*), in lieu of the source's representative actual annual emissions, the emissions levels used for the source in the most recent air quality impact analysis in the area conducted for the purpose of title I, if any, may be used.

* * * * *

(*10*) Any activity undertaken at an existing emissions unit for which a federally enforceable emission limit has been established, provided the activity or project will not increase the maximum emissions rate, in pounds or kilograms per hour, above the maximum emissions rate achievable by the emission unit at any time during the 180 consecutive days which precede the date of the activity or project and the emissions increase is determined by:

(*i*) Material balances, continuous emission monitoring data, or manual emission tests using the EPA-approved procedures, where available, and conducted under such conditions as the permitting authority will specify to the owner or operator based on representative performance of the emission units affected by the activity or project, including at least three valid test runs conducted before, and at least three valid test runs conducted after, the activity or project with all operating parameters which may affect emissions held constant to the maximum feasible degree for all such test runs; or

(*ii*) Emission factors as specified in the latest issue of ''Compilation of Air Pollutant Emission Factors,'' EPA Publication No. AP–42, available from EPA, MD14, Emission Inventory and Factors Group, RTP, NC 27711, or other emission factors determined by the permitting authority to be superior to AP–42 emission factors, in such cases where use of emission factors demonstrates that the emission level resulting from the activity or project will clearly not increase emissions.

(*11*) Any activity undertaken at an existing emissions unit for which a federally enforceable emission limit has been established, provided the federally enforceable emissions limit at the time of the change is comparable to the emission limit that, considering the air quality designation of the area where the source is located, would result from a current review in accordance with either paragraph (a)(2) of this section or regulations approved pursuant to § 51.166(j), or § 52.21(j) of this chapter, for emission units of the same class or source category. The permitting authority may presume that a source satisfies this paragraph (a)(1)(v)(C)(*11*) if:

(*i*) The activity would occur no later than 120 consecutive months from the date of issuance of the permit, issued under either this section or regulations approved pursuant to § 51.166 or § 52.21 of this chapter, that established the currently applicable emission limit for the emissions unit;

(*ii*) The activity would occur no later than 120 consecutive months from the date of issuance of the permit, issued under regulations approved pursuant to §§ 51.160 through 51.164, that established the currently applicable emission limit for the emissions unit, provided the permit was issued under regulations that were determined by the Administrator to provide for permits that contain emission limitations satisfying this paragraph (a)(1)(v)(C)(*11*); or

(*iii*) The activity would occur no later than 60 consecutive months from the date on which the permitting authority made a determination, with public notice and opportunity for public comment consistent with § 51.161, that the emissions satisfied paragraph (a)(1)(v)(C)(*10*)(*iii*) of this section.

(*12*) Any activity undertaken at an existing emissions unit for which a federally enforceable emission limit has been established, provided the activity would not require a revision to, or cause a violation of, any federally enforceable limit or condition in a permit issued either under regulations approved pursuant to §§ 51.160 through 51.166 or under § 52.21 of this chapter.

(*13*) Any activity undertaken at an existing emissions unit for which a federally enforceable emission limit has been established, provided the activity or project does not include the replacement or reconstruction of an emissions unit.

(*14*) Any activity undertaken at an existing major stationary source, provided:

(*i*) The activity would not require a revision to, or cause a violation of, any federally enforceable limit or condition in a permit issued under either regulations approved pursuant to §§ 51.160 through 51.166 or § 52.21 of this chapter; and

(*ii*) The entire major stationary source was permitted, and received the currently applicable emission limits for all emissions units under either this section or regulations approved pursuant to § 51.166 or § 52.21 of this chapter no more than 120 consecutive months prior to the proposed activity.

(D) For the purposes of applying the requirements of this section to any source of volatile organic compounds locating in a serious or severe ozone nonattainment area:

(*1*) A proposed modification shall not be considered to result in a significant net emissions increase for volatile organic compounds and is therefore not a major modification for if the project's net increase of volatile organic compounds (any proposed creditable increases and creditable decreases in emissions of volatile organic compounds at the source that are federally enforceable and occur between the date of permit application for the proposed modification and the date that the proposed modification begins to emit) from the proposed modification results in no increase of volatile organic compounds;

(*2*) The provisions of this section shall not apply to any and all discrete

emissions unit(s) (or other operations or pollutant emitting activities) that are part of a proposed modification (that is otherwise a major modification) at an existing major stationary source that emits, or has the potential to emit, less than 100 tons per year of volatile organic compounds if such source proposes creditable emissions reductions from the source to internally offset the emissions increase from the selected discrete emissions unit(s) (or other operations or pollutant emitting activities) at a ratio of at least 1.3:1.

(E) For the purpose of applying the requirements of paragraph (a)(12) of this section to modifications at major stationary sources of nitrogen oxides located in ozone nonattainment areas or in ozone transport regions, any significant net emissions increase of nitrogen oxides is considered significant for ozone.

(F) Any physical change in, or change in the method of operation of a major stationary source of volatile organic compounds located in an extreme nonattainment area for ozone which results in any increase in emissions of volatile organic compounds from any discrete operation, emissions unit, or other pollutant emitting activity at the source shall be considered a significant net emissions increase and a major modification for ozone.

(G) For the purposes of applying the requirements of paragraph (a)(13) of this section to modifications at major stationary sources of PM–10 precursors, any significant net emissions increase of a PM–10 precursor is considered significant for PM–10.

(vi) * * *

(C) * * *

(*1*) It occurs within a reasonable contemporaneous period to be specified by the reviewing authority, except that for emissions of volatile organic compounds from sources locating in serious and severe ozone nonattainment areas the contemporaneous period shall be the period of 5 consecutive calendar years that ends with the full calendar year in which such increase is to occur; and

* * * * *

(E) * * *

(*4*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change such that, at a minimum, the decrease is sufficient to prevent the proposed increase from causing or contributing to a violation of any national ambient air quality standard or maximum allowable increase over baseline concentrations (in accordance with either § 51.166(c) or § 52.21(c) of this chapter) or having an adverse impact on visibility in accordance with the definition at § 51.301(a).

* * * * *

(x) * * *

(B) Notwithstanding the significant emissions rate for ozone under paragraph (a)(1)(x)(A) of this section, significant means any net emissions increase, as defined under paragraph (a)(1)(vi) of this section, in actual emissions of volatile organic compounds that would result from any physical change in, or change in the method of operation, of a major stationary source locating in a serious or severe ozone nonattainment area if such net emissions increase of volatile organic compounds exceeds 25 tons per year.

(C) For the purposes of applying the requirements of paragraph (a)(12) of this section to modifications at major stationary sources of nitrogen oxides located in an ozone nonattainment area or in an ozone transport region, the significant emission rates and other requirements for volatile organic compounds in paragraphs (a)(1)(x)(A) and (B) of this section shall apply to nitrogen oxides emissions.

(D) For the purposes of applying the requirements of paragraph (a)(13) of this section, where applicable, to a major stationary source of a PM–10 precursor located in a PM–10 nonattainment area, the significant emission rate for a PM–10 precursor is 40 tons per year or more of that precursor.

(E) Notwithstanding the significant emissions rate for carbon monoxide under paragraph (a)(1)(x)(A) of this section, a net emissions increase in actual emissions of carbon monoxide that would result from any physical change in, or change in the method of operation, of a stationary source in a serious nonattainment area for carbon monoxide is significant if such increase equals or exceeds 50 tons per year, provided the Administrator has determined that stationary sources contribute significantly to carbon monoxide levels in that area.

(F) Notwithstanding the significant emissions rates for ozone under paragraphs (a)(1)(x)(A) and (B) of this section, any increase in actual emissions of volatile organic compounds from any emissions unit at a major stationary source of volatile organic compounds located in an extreme nonattainment area for ozone shall be considered a significant net emissions increase.

(xii) * * *

(B) Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted for any 12 consecutive months during the 120 consecutive months that precede the commencement of construction of a proposed physical or operational change at the source, and any current, federally enforceable limitations on emissions required by the Act, including but not limited to, best available control technology (as defined at § 51.166(b)(12)), lowest achievable emission rate, reasonably available control technology, or emissions standards for hazardous air pollutants under section 112 of the Act.

* * * * *

(F) In lieu of paragraphs (a)(1)(xii)(D) and (E) of this section, the plan may provide that for any emissions unit, actual emissions of the unit following a physical or operational change shall equal the representative actual annual emissions of the unit, provided the source owner or operator maintains and submits to the permitting authority, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the permitting authority if the permitting authority determines such a period to be more representative of normal source post-change operations.

* * * * *

(xxv) *Pollution control project* means:

(A) Any activity or project undertaken at an existing emissions unit which, as its primary purpose, reduces emissions of air pollutants from such unit. Such activities or projects do not include the replacement of an existing emissions unit with a newer or different unit, or the reconstruction of an existing emissions unit, and are limited to any of the following:

(*1*) The installation of conventional or advanced flue gas desulfurization, or sorbent injection for $SO_2$;

(*2*) Electrostatic precipitators, baghouses, high efficiency multiclones, or scrubbers for particulate matter or other pollutants;

(*3*) Flue gas recirculation, low-$NO_X$ burners, selective non-catalytic reduction or selective catalytic reduction for $NO_X$;

(*4*) Regenerative thermal oxidizers, catalytic oxidizers, condensers, thermal incinerators, flares, or carbon absorbers for volatile organic compounds or hazardous air pollutants;

(*5*) Activities or projects undertaken to accommodate switching to an inherently less polluting fuel, including

but not limited to, natural gas or coal reburning, or the cofiring of natural gas and other inherently less polluting fuels, for the purpose of controlling emissions, and including any activity that is necessary to accommodate switching to an inherently less polluting fuel;

(*6*) Pollution prevention projects which the permitting authority has determined through a process consistent with § 51.161 to be environmentally beneficial. Pollution prevention projects that may result in an unacceptable increased risk from the release of hazardous pollutants are not environmentally beneficial; and

(*7*) Installation of a technology, for purposes set forth in paragraph (a)(1)(xxv) of this section, which is not listed in paragraphs (a)(1)(xxv)(A)(1) through (5) of this section but meets the following:

(*i*) Its effectiveness in reducing emissions has been demonstrated in practice; and

(*ii*) It is determined by the permitting authority to be environmentally beneficial;

* * * * *

(*xxvi*) *Undemonstrated technology or application* means any system, process, material, or treatment technology (including pollution prevention), that has not been demonstrated in practice, but would have a substantial likelihood to:

(A) Operate effectively; and

(B) Achieve either equal or greater continuous reductions of air pollutant emissions than any demonstrated system at lower cost, lower energy input, or with less environmental impact.

(xxvii) *Complete* means, in reference to an application for a permit required under this section, that the permitting authority has deemed the application to contain the information necessary to begin formal review of the application. Determining an application complete for the purpose of beginning formal review does not preclude the permitting authority from requiring additional information as may be needed to determine whether the applicant satisfies all requirements of this section.

(xxviii) *Demonstrated in practice* means, for the purposes of this section, a control technology that has been—

(A) Listed in or required by any of the following:

(*1*) The EPA's RACT/BACT/LAER Clearinghouse;

(*2*) A major source construction permits issued pursuant to either part C or D of title I of the Act;

(*3*) An emissions limitations contained in a federally-approved plan, excluding any emissions limitations established by permits issued pursuant to programs for non-major sources;

(*4*) A permits or standard under either section 111 or 112 of the Act; and

(*5*) The EPA's Alternative Control Techniques documents and Control Techniques Guidelines; or

(B) Notwithstanding paragraph (a)(1)(xxviii)(A) of this section, installed and operating on an emissions unit (or units) which:

(*1*) Has operated at a minimum of 50 percent of design capacity for 6 months; and

(*2*) The pollution control efficiency performance has been verified with either:

(i) A performance test; or

(*ii*) Performance data collected at the maximum design capacity of the emissions unit (or units) being controlled, or 90 percent or more of the control technology's designed specifications.

(xxix) *Pollution prevention* means any activity that through process changes, product reformulation or redesign, or substitution of less polluting raw materials, eliminates or reduces the release of air pollutants and other pollutants to the environment (including fugitive emissions) prior to recycling, treatment, or disposal; it does not mean recycling (other than certain ''in-process recycling'' practices), energy recovery, treatment, or disposal.

(xxx) *Plantwide applicability limit* means a plantwide federally enforceable emission limitation established for a stationary source such that subsequent physical or operational changes resulting in emissions that remain less than the limit are excluded from preconstruction review under this section.

(xxxi) *Plantwide applicability limit major modification* means, notwithstanding the requirements of paragraph (a)(1)(v) of this section, any increase in the emissions rate, in tons per year, over the plantwide applicability limit. Any emissions increase of volatile organic compounds shall be considered an increase for ozone.

(xxxii)(A) *Nonroad engine* means, except as discussed in paragraph (a)(1)(xxxii)(B) of this section, any internal combustion engine:

(*1*) In or on a piece of equipment that is self-propelled or that serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway mobile cranes and bulldozers);

(*2*) In or on a piece of equipment that is intended to be propelled while performing its function (such as lawnmowers and string trimmers); or

(*3*) That, by itself or in or on a piece of equipment, is portable or transportable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform.

(B) An internal combustion engine is not a nonroad engine if:

(*1*) The engine is used to propel a motor vehicle or a vehicle used solely for competition, or is subject to standards promulgated under section 202 of the Act;

(*2*) The engine is regulated by a Federal new source performance standard promulgated under section 111 of the Act; or

(*3*) The engine otherwise included in paragraph (a)(1)(xxxii)(A)(3) of this section remains or will remain at a location for more than 12 consecutive months, or a shorter period of time for an engine located at a seasonal source. A location is any single site at a building, structure, facility, or installation. Any engine (or engines) that replaces an engine at a location and that is intended to perform the same or similar function as the engine replaced will be included in calculating the consecutive time period. An engine located at a seasonal source is an engine that remains at a seasonal source during the full annual operating period of the seasonal source. For purposes of this paragraph (a)(1)(xxxii)(B)(*3*), a seasonal source is a stationary source that remains in a single location on a permanent basis (i.e., at least 2 years) and that operates at that single location approximately 3 months (or more) each year. This paragraph (a)(1)(xxxii)(B)(*3*) does not apply to an engine after the engine is removed from the location.

(xxxiii) *Nonroad vehicle* means a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.

(xxxiv) *Stationary internal combustion engine* means:

(A) Any internal combustion engine that is regulated by a Federal new source performance standard promulgated under section 111 of the Act; or

(B) Any internal combustion engine that is none of the following:

(*1*) A nonroad engine;

(*2*) An engine used to propel a motor vehicle or a vehicle used solely for competition; or

(*3*) An engine subject to standards promulgated under section 202 of the Act.

(2) * * *

(ii) *Control technology review.*

(A) In determining the lowest achievable emission rate the applicant shall consider all control technology alternatives that have been demonstrated in practice pursuant to paragraph (a)(1)(xxviii)(A) of this section prior to the date on which the permit application is complete, and paragraph (a)(1)(xxviii)(B) of this section 90 days prior to the date on which the permit application is complete.

(B) The plan may establish a cut-off date as the date on or subsequent to the date that an application is complete pursuant to paragraph (a)(6) of this section, after which the permit applicant will not be required to consider control technology alternatives that are identified through public comments and that are in addition to those alternatives required under paragraph (a)(2)(ii)(A) of this section, unless the permitting authority determines that the alternatives warrant further consideration by the applicant.

(3) * * *

(ii) * * *

(C)(*1*) Emissions reductions achieved by shutting down an existing source or curtailing production or operating hours below baseline levels may be generally credited if:

(*i*) Such reductions are surplus, permanent, quantifiable, and federally enforceable;

(*ii*) The area has an EPA-approved attainment plan, except that the plan may provide that the reductions described in paragraph (a)(3)(ii)(C)(*1*)(*i*) of this section may be credited in the absence of an EPA-approved attainment demonstration in areas where the Act does not require an attainment demonstration, including any area designated attainment or unclassifiable for ozone (areas) in an ozone transport region and any marginal or nonclassified ozone nonattainment area; and

(*iii*) The shutdown or curtailment occurred on or after the date specified for this purpose in the attainment plan, and if such date is on or after the date of the most recent emissions inventory used in the plan's demonstration of attainment.

(*2*) Where the plan does not specify a cutoff date for shutdown credits, the date of the most recent emissions inventory or attainment demonstration, as the case may be, shall apply. However, in no event may credit be given for shutdowns which occurred prior to August 7, 1977.

(*3*) For purposes of paragraph (a)(3)(ii)(C)(*1*)(*iii*) of this section, a permitting authority may choose to consider a prior shutdown or curtailment to have occurred after the date of its most recent emissions inventory, if the inventory explicitly includes as current existing emissions the emissions from such previously shutdown or curtailed sources.

(*4*) The reductions described in paragraph (a)(3)(ii)(C)(*1*) of this section may be credited in the absence of an approved attainment demonstration in an area where an attainment demonstration is or will be required only if the shutdown or curtailment occurred on or after the date the new source permit application is filed, or if the applicant can establish that the proposed new source is a replacement for the shutdown or curtailed source, and the cutoff date provisions of paragraph (a)(3)(ii)(C) of this section are observed.

Alternative 1—paragraphs (a)(3)(iii)(C)(*5*) and (a)(3)(iii)(C)(*6*):

(*5*) Notwithstanding paragraph (a)(3)(ii)(C)(*4*), the plan may provide that for ozone nonattainment areas the reductions described in paragraph (a)(3)(ii)(C)(*1*) of this section, occurring after November 15, 1990, may be credited in the absence of an EPA-approved attainment demonstration in an area where an attainment demonstration is or will be required if the following conditions are met as they come due:

(*i*) The State has submitted a complete emissions inventory as required by section 182(a)(1) of the Act;

(*ii*) The State has submitted complete revisions to its new source review permitting program as required under section 182(a)(2)(C) of title I of the Act;

(*iii*) The State has submitted the 15 percent volatile organic compounds reduction plan required under section 182(b)(1)(A) of the Act for moderate (or higher) ozone nonattainment areas;

(*iv*) The State has submitted the attainment demonstration required for moderate ozone nonattainment areas under section 182(b)(1)(A) of the Act or serious (or higher) ozone nonattainment areas under section 182(c)(2) of the Act;

(*v*) The State has submitted the 3 percent reduction plan for serious (or higher) ozone nonattainment areas under section 182(c)(2)(B) of the Act; and

(*vi*) The State has submitted milestone demonstrations for serious (or higher) ozone nonattainment areas under section 182(g)(2) of the Act.

(*6*) If any of the submissions included in paragraph (a)(3)(ii)(C)(*5*) of this section are delinquent, or deemed incomplete or disapproved by the Administrator, then at such time the restrictions of paragraph (a)(3)(ii)(C)(*4*) of this section are in effect. However, during review of a permit application, if a State becomes delinquent for any of these submissions, or a submission is deemed incomplete or disapproved by the Administrator, the plan may allow the reductions to remain creditable if the permit application was complete (as determined in writing by the reviewing authority) before the State became delinquent or had a submission deemed incomplete or disapproved by the Administrator.

Alternative 2—paragraph (a)(3)(iii)(C)(*5*) only:

(*5*) Notwithstanding paragraph (a)(3)(ii)(C)(*4*) of this section, the plan may provide that the reductions described in paragraph (a)(3)(ii)(C) of this section may be credited in the absence of an EPA-approved attainment demonstration if such reductions occurred after the last day of the baseline year of the most recent base year emissions inventory used (or to be used) in the plan.

* * * * *

(5) * * *

(iii) The reviewing authority shall provide an opportunity for judicial review in State court of the final permit action by the applicant and any person who participated in the public participation process provided pursuant to this part. The plan may provide that the opportunity for judicial review shall be the exclusive means by which citizens may obtain judicial review of the terms and conditions of permits, and may require that such actions for judicial review be filed no later than a reasonable period after the final permit action. If such a limited time period for judicial review is provided in the plan, then the plan shall provide that petitions for judicial review of final permit actions nevertheless can be filed after the deadline if they are based solely on grounds arising after the deadline for judicial review and if filed within a reasonable period specified in the plan after the new grounds for review arise.

(6) *Complete application criteria.*

(i) The plan shall provide that the permitting authority shall—

(A) Determine that a permit application is complete or deficient based on the permitting authority's consideration of determinations, analyses and other information contained in the application, and adequacy thereof, as specified in paragraphs (a)(6)(ii) through (iii) of this section; and

(B) Notify each applicant within a specified time period as to either the completeness of the application or any deficiencies in the application or

information submitted. In the event of such a deficiency, the date of receipt of the complete application shall be the date on which the permitting authority has received all required information.

(ii) The plan shall provide that such information shall include:

(A) A description of the nature, location, design capacity, and typical operating schedule of the source or modification, including specifications and drawings showing its design and plant layout;

(B) A detailed schedule for construction of the source or modification;

(C)(*1*) A detailed description of the system of continuous emissions reduction which the applicant has submitted in a permit application for the source or modification to qualify for either the lowest achievable emission rate or an approved undemonstrated technology in accordance with the waiver provision under paragraph (a)(8) of this section; and

(*2*) All information used or consulted by the applicant in recommending a system of continuous emissions reduction that qualifies as either the lowest achievable emission rate or an approved undemonstrated technology; and

(D) All information necessary to document that the owner or operator of the proposed source or modification has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under the Act.

(iii) The plan shall provide that an application shall not be considered complete unless the permit application has been registered on the applicable EPA electronic bulletin board. To register, at a minimum, the following must be provided:

(A) Name and type of source;

(B) Nature of proposed project, i.e., new facility or modification;

(C) Proposed location of the source in state/county (including Universal Transverse Mercator coordinates) and the distance between the source and each Class I area within 250 kilometers;

(D) Anticipated allowable emissions, or increase in emission rate, for each affected air pollutant regulated under the Act;

(E) Source contact mailing address and telephone number; and

(F) The agency responsible for issuing the permit.

(7) *Public participation.*

(i) The plan shall provide that prior to issuing a permit under this section the requirements under § 51.161 shall be met;

(ii) The plan may set forth the minimum information which must be submitted by public commenters to accompany any recommendations for control technology alternatives for which permit applicants would not otherwise be responsible to consider in determining the lowest achievable emission rate as of the date an application is complete according to paragraph (a)(2)(ii) of this section. Such information may include the name and location of the source utilizing the control technology, manufacturer and type of control device, date of installation and operation of control device, and performance requirements and available test data; and

(iii) The plan shall provide that—

(A) After any cut-off date established in accordance with paragraph (a)(2)(ii)(B) of this section, the permitting authority shall notify a permit applicant within 10 working days from the date of receipt of a public comment concerning any control technology alternatives that the permitting authority determines to warrant further consideration by the applicant; and

(B) The permitting authority shall make available in the public record all information that was submitted with public comment regarding control technology alternatives and provide the basis for its decision to either require or not require the permit applicant to further consider such control technology alternatives.

(8) *Undemonstrated technology or application waiver.*

(i) The plan may provide that an owner or operator of a proposed major stationary source or major modification may satisfy the requirements of paragraph (a)(2)(ii) of this section through the use of an undemonstrated technology or application as set forth in this section. The plan may provide that the owner or operator shall provide to the permitting authority a written request for approval of an undemonstrated technology or application as part of the permit application.

(ii) The plan may provide that the permitting authority may approve a system of undemonstrated technology or application for a particular source or modification if:

(A) The proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function;

(B) The owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under paragraph (a)(2)(ii) of this section, by a date specified by the permitting authority. Such date shall not be later than 2 years from the time of startup or 5 years from permit issuance;

(C) The source or modification would meet the requirements equivalent to those in paragraph (a)(2) of this section, based on the emissions rate that the stationary source employing the system of undemonstrated technology or application would be required to meet on the date specified by the permitting authority;

(D) The source or modification would not, before the date specified by the permitting authority, cause or contribute to any violation of an applicable national ambient air quality standard; and

(E) All other applicable requirements including those for public participation have been met.

(iii) The plan shall provide that the permitting authority shall withdraw any approval to employ a system of undemonstrated technology or application made under this system if:

(A) The proposed system fails by the specified date to achieve the required continuous emissions reduction rate;

(B) The proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(C) The permitting authority decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

(iv) The plan shall provide that, if the permitting authority withdraws approval of a system of undemonstrated technology or application, the owner or operator shall bring the affected emissions unit(s) into compliance with the reference lowest achievable emission rate within 18 months from the date of withdrawal.

(v) The plan shall provide that the permitting authority shall include, as a minimum, the following information in a waiver issued pursuant to paragraph (a)(8) of this section:

(A) The undemonstrated technology or application's emission control performance objective and the applicable reference lowest achievable emission rate;

(B) The marginal and gross failure emission limits as defined by the permitting authority on a case-by-case basis; and

(C) Identification and classification of potential failure modes and associated contingency measures.

(vi) The plan shall provide that if, by the date established in paragraph (a)(8)(ii)(B) of this section, the undemonstrated technology or application does not achieve the permitted emission limit, but actual emissions are equal to or less than the lowest achievable emission rate referenced in the permit, the permitting authority shall:

(A) Issue a final permit with the emissions limit equal to the undemonstrated technology or application's consistently achieved actual emission rate; and

(B) Report the final permit limits to the EPA's RACT/BACT/LAER Clearinghouse as a demonstrated control technology.

(vii) The plan shall provide that if, by the date established in paragraph (a)(8)(ii)(B) of this section, the actual emissions from the undemonstrated technology or application constitute marginal failure the owner or operator may petition the permitting authority to permit the undemonstrated technology or application to operate at its actual emissions limit. Accordingly, the permitting authority may either:

(A) Approve the petition and proceed in accordance with paragraph (a)(8)(vi) of this section; or

(B) Disapprove the petition and require the owner or operator to comply with paragraph (a)(8)(iv) of this section.

(viii) The plan shall provide that if, at any time prior to or on the date established in paragraph (a)(8)(ii)(B) of this section, the actual emissions from the undemonstrated technology or application constitute gross failure—

(A) The permitting authority shall withdraw approval pursuant to paragraph (a)(8)(iv) of this section; and

(B) The owner or operator shall mitigate all emissions increases above the emissions limit equivalent to the applicable reference lowest achievable emissions rate by reducing actual emissions.

(ix) The plan shall provide that the permitting authority submit to the Administrator a copy of the approval of the system of undemonstrated technology or application within 30 days of its approval.

(x) The plan shall provide that the permitting authority shall limit the number of waivers granted to the number necessary to ascertain whether or not such system complies with sections 111(j)(1)(A)(ii) and (iii) of the Act.

(9) *Plantwide applicability limit.*

(i) *Applicability.* The plan may provide that the owner or operator of a proposed or existing major stationary source may request the permitting authority to approve a plantwide applicability limit for any one or more pollutants, and that the permitting authority may approve a plantwide applicability limit in accordance with paragraphs (a)(9)(ii) through (iv) of this section.

(ii) *Procedure.* The plan shall provided that a plantwide applicability limit for:

(A) A proposed major stationary source may be established only through a process that complies with paragraph (a)(7) of this section;

(B) An existing major stationary source may be established only through a procedure consistent with § 51.161, and with at least 30 days allowed for public notice and opportunity for comment.

(iii) *Emission limitations and conditions.*

(A) The plan shall provide that a plantwide applicability limit shall be established based on either:

(*1*) Plantwide actual emissions (not to exceed current allowable emissions), including a reasonable operating margin that is less than the applicable significant emissions rate as defined under paragraph (a)(1)(x) of this section; or

(*2*) Source-wide limits on annual emissions established in a permit issued within the immediately preceding 5 years under regulations approved pursuant to this section, where the source-wide emissions limits were completely offset and relied upon in an approved state attainment demonstration plan.

(B) The plan shall provide that any plantwide applicability limit emissions limitations shall be achievable through application of production processes or available methods, systems, and techniques including, but not limited to, emissions control equipment, fuel cleaning or treatment, fuel combustion techniques, substitution of less polluting materials, or limits on production that represent normal source operations.

(C) The plan shall provide that specific terms and conditions which assure the practical enforceability of plantwide applicability limit emissions limitations shall be contained in a federally enforceable permit applicable to the source.

(D) The plan shall provide that the emissions limitations and conditions established for a plantwide applicability limit shall not relieve any owner or operator of the responsibility to comply fully with any applicable control technology requirements.

(iv) *Plantwide applicability limit modifications.* The plan shall provide that:

(A) Notwithstanding paragraphs (a)(1)(v) and (vi) of this section (the definitions for major modification and net emissions increase), any physical or operational change consistent with plantwide applicability limit terms and conditions and paragraph (a)(1)(vi)(E)(*4*) of this section shall not constitute a major modification for the pollutants covered by the plantwide applicability limit. All decreases in emissions shall have approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change;

(B) Requirements equivalent to those contained in paragraphs (a)(2) through (7) of this section shall apply to any plantwide applicability limit major modification as if it were a major modification, except that in lieu of paragraph (a)(2)(ii)(B) of this section, a plantwide applicability limit major modification shall apply the lowest achievable emission rate for each pollutant subject to regulation under the Act if an emissions increase above the plantwide applicability limit would occur; and

(C) The lowest achievable emission rate requirement applies to each emissions unit that contributes to the emissions increase above the plantwide applicability limit.

(v) *Plantwide applicability limit reevaluation.* (A) The plan shall provide that the permitting authority shall reevaluate the plantwide applicability limit emission limitations pursuant to—

(*1*) Permit renewal and public notification procedures under parts 70 or 71 of this chapter; or

(*2*) Another proceeding with public notice and opportunity for public comment.

(B) As part of the reevaluation, the permitting authority may reduce permitted emission limitations or otherwise adjust, but not increase, permitted emission limitations to reflect—

(*1*) Air quality concerns arising after the approval of the plantwide applicability limit;

(*2*) Changes at the source; or

(*3*) Other appropriate considerations.

(C) The plan shall provide that the permitting authority shall adjust the source's plantwide applicability limit emission limitations to reflect new applicable requirements as they become effective.

(10) For a major modification of volatile organic compounds at a

stationary source locating in a serious or severe ozone nonattainment area the plan shall include enforceable procedures to provide that:

(i) The lowest achievable emission rate requirement pursuant to paragraph (a)(2)(i) of this section does not apply to any discrete emissions unit(s) (or other operations or pollutant emitting activities) that is part of the proposed major modification of volatile organic compounds at an existing stationary source which emits, or has the potential to emit, 100 tons per year or more of volatile organic compounds if such source proposes creditable emissions reductions from the source to internally offset the emissions increase from the selected discrete emissions unit(s) (or other operations or pollutant emitting activities) at a ratio of at least 1.3:1;

(ii) Notwithstanding the requirement for the lowest achievable emission rate pursuant to paragraph (a)(2)(i) of this section, the best available control technology requirement of section 165(a)(4) of the Act shall apply to a proposed major modification of volatile organic compounds at an existing major stationary source which emits, or has the potential to emit, less than 100 tons of volatile organic compounds per year; and

(iii) Any emissions reduction of volatile organic compounds used as an internal offset pursuant to this section shall meet the applicable requirements for crediting emissions reductions under paragraph (a)(3)(ii) of this section.

(11) For modifications at major stationary sources of nitrogen oxides in serious or severe ozone nonattainment areas the plan shall require that the provisions of this section applicable to modifications of volatile organic compounds in serious and severe ozone nonattainment areas shall also apply to nitrogen oxides, except for serious or severe ozone nonattainment areas where the Administrator has determined that the requirements of section 182(f) of the Act do not apply.

(12) The plan shall provide that the requirements of this section applicable to major stationary sources and major modifications of volatile organic compounds shall apply to nitrogen oxides emissions from major stationary sources and major modifications of nitrogen oxides in an ozone transport region or in any ozone nonattainment area classified as marginal, moderate, serious, severe, or extreme, except in:

(i) Areas where the Administrator determines that the net air quality benefits are greater in the absence of nitrogen oxides reductions;

(ii) Nonattainment areas not within an ozone transport region if the Administrator determines (when the Administrator approves a plan or plan revision) that additional reductions of nitrogen oxides would not contribute to attainment of the national ambient air quality standard for ozone in the area; or

(iii) Areas within an ozone transport region if the Administrator determines (when the Administrator approves a plan or plan revision) that additional reductions of nitrogen oxides would not produce net air quality benefits in such region.

(13) The plan shall require that the requirements of this section applicable to major stationary sources and major modifications of PM–10 shall also apply to major stationary sources and major modifications of PM–10 precursors, except where the Administrator determines that such sources do not contribute significantly to PM–10 levels which exceed the PM–10 ambient standards in the area.

(14)(i) The plan shall require that in meeting the emissions offset requirements of paragraph (a)(2) of this section for ozone nonattainment areas, the ratio of total actual emission reductions of VOC to the emissions increase of VOC shall be as follows:

(A) In any marginal nonattainment area for ozone—at least 1.1:1;

(B) In any moderate nonattainment area for ozone—at least 1.15:1;

(C) In any serious nonattainment area for ozone—at least 1.2:1;

(D) In any severe nonattainment area for ozone—at least 1.3:1 (except that the ratio may be at least 1.2:1 if the approved plan also requires all existing major sources in such nonattainment area to use BACT for the control of VOC); and

(E) In any extreme nonattainment area for ozone—at least 1.5:1 (except that the ratio may be at least 1.2:1 if the approved plan also requires all existing major sources in such nonattainment area to use BACT for the control of VOC); and

(ii) Notwithstanding the requirements of paragraph (a)(14)(i) of this section for meeting the requirements of paragraph (a)(2) of this section, the ratio of total actual emissions reductions of VOC to the emissions increase of VOC shall be at least 1.15:1 for all areas within an ozone transport region except for serious, severe, and extreme ozone nonattainment areas.

(15) The plan shall require that a major modification of a major stationary source of VOC locating in an extreme nonattainment area for ozone shall be considered to comply with the emissions offset requirements under paragraph (a)(2) of this section if the owner or operator of the source elects to offset the proposed emissions increase of such VOC by a greater reduction in actual emissions of VOC from other discrete operations, units, or pollutant emitting activities within the same stationary source at a ratio of at least 1.3:1. Also, in extreme ozone nonattainment areas emissions increases of VOC resulting from modifications consisting of equipment that is needed to comply with the applicable implementation plan, permit, or provision under the Act need not be offset under this section.

(16) The plan shall require that the permitting authority shall, for each new major source and major modification subject to the provisions of this section, submit to the RACT/BACT/LAER Clearinghouse within 60 days of issuance of the permit, all relevant information on the emissions prevention or control technology for the new major source or major modification.

3. Paragraphs in § 51.166 are redesignated as follows:

| Old paragraph | New paragraph |
|---|---|
| (b)(1)(i)(*a*) through (*c*) | (b)(1)(i)(A) through (C). |
| (b)(1)(iii)(*a*) through (*aa*) | (b)(1)(iii)(A) through (AA). |
| (b)(2)(iii)(*a*) through (*k*) | (b)(2)(iii)(A) through (K). |
| (b)(3)(i)(*a*) and (*b*) | (b)(3)(i)(A) and (B). |
| (b)(3)(vi)(*a*) through (*c*) | (b)(3)(vi)(A) through (C). |
| (b)(13)(i)(*a*) and (*b*) | (b)(13)(i)(A) and (B). |
| (b)(13)(ii)(*a*) and (*b*) | (b)(13)(ii)(A) and (B). |
| (b)(14)(i)(*a*) and (*b*) | (b)(14)(i)(A) and (B). |
| (b)(14)(ii)(*a*) and (*b*) | (b)(14)(ii)(A) and (B). |
| (b)(14)(iii)(*a*) and (*b*) | (b)(14)(iii)(A) and (B). |
| (b)(15)(ii)(*a*) and (*b*) | (b)(15)(ii)(A) and (B). |
| (f)(4)(iii)(*a*) and (*b*) | (f)(4)(iii)(A) and (B). |
| (i)(4)(ii)(*a*) through (*aa*) | (i)(4)(ii)(A) through (AA). |
| (i)(4)(iii)(*a*) through (*d*) | (i)(4)(iii)(A) through (D). |
| (i)(8)(i)(*a*) through (*m*) | (i)(8)(i)(A) through (M). |
| (m)(1)(i)(*a*) and (*b*) | (m)(1)(i)(A) and (B). |
| (s)(2)(iv)(*a*) and (*b*) | (s)(2)(iv)(A) and (B). |

4. Section 51.166 is amended as follows:

a. Amending newly redesignated paragraph (b)(2)(iii)(F) by adding the words ''Standing alone,'' at the beginning of the sentence and revising the word ''An'' to read ''an'';

b. Revising newly redesignated paragraph (b)(2)(iii)(H);

c. Adding new paragraphs (b)(2)(iii)(L) through (N);

d. Revising newly redesignated paragraph (b)(3)(vi)(C);

e. Revising paragraph (b)(5);

f. Revising paragraphs (b)(19), (b)(21)(ii), and (b)(22);

g. Adding a new paragraph (b)(21)(vi);

h. Revising paragraph (b)(23);

i. Amending paragraph (b)(24) by adding the words ''(or the Secretary's designee)'' after the word ''lands'' at the end of the sentence;

j. Revising paragraph (b)(27);

k. Revising paragraphs (b)(31) introductory text and (b)(31)(i);

l. Removing paragraph (b)(31)(ii) and redesignating paragraphs (b)(31)(iii) and (iv) as new paragraphs (b)(31)(ii) and (iii);

m. Adding new paragraphs (b)(38) through (b)(48);

n. Amending paragraph (g)(1) by removing the words ''State implementation'' from the last sentence;

o. Amending paragraph (i)(8)(i) by removing newly redesignated paragraphs (i)(8)(i)(G), (H) and (J) and redesignating paragraph (i)(8)(i)(I) as paragraph (i)(8)(i)(G) and (i)(8)(i)(K) through (i)(8)(i)(M) as (i)(8)(i)(H) through (i)(8)(i)(J);

p. Adding new paragraph (i)(13);

q. Adding new paragraphs (j)(5) and (6);

r. Amending the introductory text of paragraph (k) by adding the word ''significantly'' after the words ''would not cause or'';

s. Amending paragraph (m)(2) by removing the word ''ambient'', removing the word ''reviewing'' and adding in its place ''permitting'', and adding the words '', or on air quality related values of a Federal Class I area. Decisions about post-construction monitoring for air quality related values in Federal Class I areas shall be made in consultation with the Federal Land Manager.'' at the end of the paragraph;

t. Revising the heading of paragraph (n);

u. Revising paragraph (n)(1);

v. Redesignating paragraph (q)(1) as new paragraph (n)(1)(ii);

w. Amending newly redesignated paragraph (n)(1)(ii) by removing the words ''The reviewing authority shall'', and capitalizing ''n'' in the word ''notify'', adding the word ''complete'' after the words ''receipt of the'' in the last sentence, and removing the word ''reviewing'' and adding in its place ''permitting'';

x. Amending paragraph (n)(2) introductory text by removing the word ''may'' and adding in its place ''shall'' and removing the words ''shall include'' and adding in its place ''includes'';

y. Revising paragraph (n)(2)(iii) and adding new paragraph (n)(2)(iv);

z. Revising paragraph (n)(3);

aa. Adding new paragraphs (n)(4) and (n)(5);

bb. Amending paragraph (o)(1) by adding '', except that for Federal Class I and II areas such analysis may be excluded only by approval of the Federal Land Manager'' to the end of the second sentence;

cc. Revising the heading of paragraph (p);

dd. Redesignating paragraph (p)(1) as new paragraph (q)(1);

ee. Adding new paragraph (p)(1);

ff. Revising paragraphs (p)(2) and (p)(3);

gg. Redesignating paragraphs (p)(4) through (p)(7) as new paragraphs (p)(8) through (p)(11);

hh. Adding new paragraphs (p)(4) through (p)(7);

ii. Amending newly redesignated paragraph (p)(9)(i) by revising the citation ''(q)(4)'' to read ''(p)(7)'';

jj. Amending newly redesignated paragraphs (p)(9)(iii) and (p)(10)(iii) by removing the citation ''(q)(7)'' and adding in its place ''(p)(11)'';

kk. Amending newly redesignated paragraph (p)(11) by removing the citation ''(q)(5) or (6)'' and adding in its place ''(p)(9) or (p)(10)'';

ll. Amending newly redesignated paragraph (q)(1) by removing the words ''Notice to EPA,'' and in the first sentence, removing the word ''reviewing'' and adding in its place ''permitting'';

mm. Redesignating paragraph (q)(2) introductory text through (q)(2)(v) as new paragraphs (q)(4) introductory text through (q)(4)(v);

nn. Redesignating paragraphs (q)(2)(vi) through (viii) as new paragraphs (q)(5)(i) through (iii);

oo. Adding new paragraphs (q)(2) and (q)(3);

pp. Amending newly redesignated paragraph (q)(4)(ii) by removing the words ''if any'' and adding in its place ''such as any information concerning an adverse impact on air quality related values required under paragraph (p)(6)(iii) of this section'';

qq. Amending newly redesignated paragraph (q)(4)(iii) by adding the words ''any potential adverse impact on air quality related values,'' after the words ''source or modification,'';

rr. Adding new paragraph (q)(6);

ss. Revising paragraph (r)(1);

tt. Revising the heading of paragraph (s);

uu. Revising paragraphs (s)(1) and (s)(2) introductory text;

vv. Amending paragraph (s)(2)(ii) by removing the cite ''(j)(2)'' and adding in its place ''(j)'', removing the word ''reviewing'' and adding in its place ''permitting'', removing the words ''4 years'' and adding in its place ''2 years'', and removing the words ''7 years'' and adding in its place ''5 years'';

ww. Amending the introductory text of both paragraphs (s)(2)(iii) and (s)(3) by removing the word ''reviewing'' and adding in its place ''permitting'' and removing the words ''innovative control technology'' to read ''undemonstrated technology or application'';

ww. Revising paragraph (s)(4);

xx. Adding new paragraphs (s)(5) through (s)(10);

yy. Adding new paragraphs (t) and (u).

**§ 51.166 Prevention of significant deterioration of air quality.**

* * * * *

(b) * * *

(2) * * *

(iii) * * *

(H) The addition, replacement, or use of a pollution control project at an existing emissions unit unless the pollution control project will result in a significant net increase in representative actual annual emissions of any pollutant regulated under this section and the permitting authority determines that this increase will cause or contribute to a violation of any national ambient air quality standard or any maximum allowable increase over the baseline concentration, or will have an adverse impact on air quality related values at any Class I area. For the purpose of this paragraph, in lieu of the source's representative actual annual emissions, the emissions levels used for that source in the most recent air quality impact analysis in the area conducted for the purpose of title I of the Act, if any, may be used.

* * * * *

(L) Any activity undertaken at an existing emissions unit for which a federally enforceable emission limit has been established, provided that:

(*1*) The activity or project will not increase the maximum emissions rate, in pounds or kilograms per hour, above the maximum emissions rate achievable by the emission unit at any time during the 180 consecutive days which precede the date of the activity or project and the emissions increase is determined by:

(*i*) Material balances, continuous emissions monitoring data, or manual

emissions tests using the EPA-approved procedures, where available, and conducted under such conditions as the permitting authority will specify to the owner or operator based on representative performance of the emissions units affected by the activity or project, including at least three valid test runs conducted before, and at least three valid test runs conducted after, the activity or project with all operating parameters which may affect emissions held constant to the maximum feasible degree for all such test runs; or

(*ii*) Emission factors as specified in the latest issue of ''Compilation of Air Pollutant Emission Factors,'' EPA Publication No. AP–42, or other emission factors determined by the permitting authority to be superior to AP–42 emission factors, in such cases where use of emission factors demonstrates that the emissions level resulting from the activity or project will clearly not increase emissions;

(*2*) The federally enforceable emissions limit at the time of the change is comparable to the emission limit that, considering the air quality designation of the area where the source is located, would result from a review in accordance with either paragraph (j) of this section or regulations approved pursuant to § 51.165(a)(2), or a review in accordance with § 52.21(j) of this chapter, for emission units of the same class or source category. The permitting authority may presume that a source satisfies paragraph (b)(2)(iii)(L)(*2*) of this section if:

(*i*) The activity would occur no later than 120 consecutive months from the date of issuance of the permit issued under regulations approved pursuant to either this section or § 51.165, or § 52.21 of this chapter, that established the currently applicable emission limit for the emissions unit;

(*ii*) The activity would occur no later than 120 consecutive months from the date of issuance of the permit issued under regulations approved pursuant to §§ 51.160 through 51.164, that established the currently applicable emissions limit for the emissions unit, provided the permit was issued under regulations that were determined by the Administrator to provide for permits that contain emission limitations that satisfy paragraph (b)(2)(iii)(L)(*2*) of this section; or

(*iii*) The activity would occur no later than 60 consecutive months from the date on which the permitting authority made a determination, with public notice and opportunity for public comment consistent with § 51.161 of this part, that the emissions limit satisfied paragraph (b)(2)(iii)(L)(*2*) of this section.

(*3*) The activity would not require a revision to, or cause a violation of, any federally enforceable limit or condition in a permit issued under either § 52.21 of this chapter or regulations approved pursuant to §§ 51.160 through 51.166;

(*4*) The activity or project does not include the replacement or reconstruction of an emissions unit; and

(M) Any activity undertaken at an existing major stationary source, provided:

(*1*) The activity would not require a revision to, or cause a violation of, any federally enforceable limit or condition in a permit issued under either § 52.21 of this chapter or regulations approved pursuant to §§ 51.160 through 51.166; and

(*2*) The entire major stationary source was permitted, and received the currently applicable emission limits for all emission units at the source issued in accordance with either this section, or regulations approved pursuant to § 51.165 or a permit issued under § 52.21 of this chapter, no more than 120 consecutive months prior to the proposed activity.

(N) A change to ozone-depleting substances with lower ozone-depleting potential under the provisions of sections 601 and 602 of the Act, including changes to ozone-depleting substances emitting equipment needed to accommodate the change, as long as the productive capacity of the equipment is not increased.

* * * * *

(3) * * *

(vi) * * *

(C) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change such that, at a minimum, the decrease is sufficient to prevent the proposed increase from causing or contributing to a violation of any national ambient air quality standard or any applicable maximum allowable increase over baseline concentrations or having an adverse impact on air quality related values in Class I areas.

* * * * *

(5)(i) *Stationary source* means any building, structure, facility, installation, or stationary internal combustion engine which emits or which may emit any air pollutant subject to regulation under the Act.

(ii) A stationary source does not include emissions resulting directly from an internal combustion engine used for transportation purposes, or from a nonroad engine or nonroad vehicle.

* * * * *

(19) *Undemonstrated technology or application* means any system, process, material, or treatment technology (including pollution prevention) that has not been demonstrated in practice, but would have a substantial likelihood to operate effectively and achieve:

(i) A greater continuous reduction of air pollutant emissions than any demonstrated system; or

(ii) A comparable emissions reduction at lower cost, or with lower energy input, or with less environmental impact.

* * * * *

(21) * * *

(ii) Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted for any 12 consecutive months during the 120 consecutive months that precede the commencement of construction of a proposed physical or operational change at the source and any current, federally enforceable limitations on emissions required by the Act, including, but not limited to, best available control technology, lowest achievable emission rate (as defined at § 51.165(a)(1)(xiii)), reasonably available control technology, or emissions standards for hazardous air pollutants under section 112 of the Act.

* * * * *

(vi) In lieu of paragraphs (b)(21)(iv) and (v) of this section, the plan may provide that, for any emissions unit, actual emissions of the unit following a physical or operational change shall equal the representative actual annual emissions of the unit, provided the source owner or operator maintains and submits to the reviewing authority, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the reviewing authority if it determines such a period to be more representative of normal source post-change operations.

(22) *Complete* means, in reference to an application for a permit required under this section, that the permitting authority has deemed the application to contain the information necessary (in accordance with the criteria contained in paragraph (n) of this section) to begin formal review of the application. Determining an application complete for the purpose of beginning formal review does not preclude the permitting

authority from requiring additional information as may be needed to determine whether the applicant satisfies all requirements of this section.

(23) *Significant* means:

(i) In reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

POLLUTANT AND EMISSIONS RATE

Carbon monoxide: 100 tons per year
Nitrogen oxides: 40 tons per year
Sulfur dioxide: 40 tons per year
Ozone: 40 tons per year of volatile organic compounds
Particulate matter: 25 tons per year of particulate matter emissions; 15 tons per year of PM–10 emissions
Lead: 0.6 tons per year
Fluorides: 3 tons per year
Sulfuric acid mist: 7 tons per year
Hydrogen sulfide: 10 tons per year
Total reduced sulfur (including hydrogen sulfide): 10 tons per year
Reduced sulfur compounds (including hydrogen sulfide): 10 tons per year
Municipal waste combustor organics (measured as total tetrathrough octa-chlorinated dibenzo-p-dioxins and dibenzofurans): $3.2 \times 10^{-6}$ megagrams per year ($3.5 \times 10^{-6}$ tons per year)
Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tons per year)
Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tons per year)
Ozone-depleting substances (ODS): 100 tons per year.

(ii) In reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the Act that paragraph (b)(23)(i) of this section does not list, any emissions rate. However, for purposes of the applicability of this section, the hazardous air pollutants listed under section 112(b)(1) of the Act, including the hazardous air pollutants that may be added to the list, are not considered subject to regulation under the Act.

(iii) Notwithstanding paragraph (b)(23)(i) of this section, any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class 1 area, and have an impact on such area equal to or greater than 1 microgram per cubic meter (24-hour average).

(iv) In reference to the predicted ambient impact that the emissions from a proposed major source or major modification will have for purposes of determining compliance with the national ambient air quality standards, concentrations which exceed any of the following:

| Pollutant | Averaging time | Significant Impact |
|---|---|---|
| $SO_2$ | Annual | 1.0 μg/m³ |
| | 24-Hour | 5.0 μg/m³ |
| | 3-Hour | 25.0 μg/m³ |
| PM–10 | Annual | 1.0 μg/m/³ |
| | 24-hour | 5.0 μg/m³ |
| $NO_2$ | Annual | 1.0 μg/m³ |
| CO | 8-hour | 0.5 mg/m³ |
| | 1–Hour | 2.0 mg/m³ |

(v) In reference to the predicted ambient impact that emissions from a proposed major source or major modification will have for purposes of determining compliance with the maximum allowable increases in pollutant concentrations contained in paragraph (c) of this section, concentrations in excess of any of the following:

| Pollutant | Averaging time | Class I significant impact | Class II significant impact | Class III significant impact |
|---|---|---|---|---|
| $SO_2$ | Annual | 0.1 μg/m³ | 1.0 μg/m³ | 1.0 μg/m³ |
| | 24–Hour | 0.2 μg/m³ | 5.0 μg/m³ | 5.0 μg/m³ |
| | 3–Hour | 1.0 μg/m³ | 25.0 μg/m³ | 25.0 μg/m³ |
| PM–10 | Annual | 0.2 μg/m³ | 1.0 μg/m³ | 1.0 μg/m³ |
| | 24-Hour | 0.3 μg/m³ | 5.0 μg/m³ | 5.0 μg/m³ |
| $NO_2$ | Annual | 0.1 μg/m³ | 1.0 μg/m³ | 1.0 μg/m³ |

* * * *

(27) *Indian reservation* means all land within the limits of any Indian Reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

* * * * *

(31) *Pollution control project* means:

(i) Any activity or project undertaken at an existing emissions unit which, as its primary purpose, reduces emissions of air pollutants from such unit. Such activities or projects do not include the replacement of an existing emissions unit with a newer or different unit, or the reconstruction of an existing emissions unit, and are limited to any of the following:

(A) The installation of conventional or advanced flue gas desulfurization, or sorbent injection for $SO_2$;

(B) Electrostatic precipitators, baghouses, high efficiency multiclones, or scrubbers for particulate or other pollutants;

(C) Flue gas recirculation, low-$NO_X$ burners, selective non-catalytic reduction or selective catalytic reduction for $NO_X$;

(D) Regenerative thermal oxidizers, catalytic oxidizers, condensers, thermal incinerators, flares or carbon absorbers for volatile organic compounds or hazardous air pollutants;

(E) Activities or projects undertaken to accommodate switching to an inherently less polluting fuel, including but not limited to natural gas or coal reburning, or the cofiring of natural gas and other inherently less polluting fuels for the purpose of controlling emissions, and including any activity that is necessary to accommodate switching to an inherently less polluting fuel;

(F) Pollution prevention projects which are determined by the permitting agency through a process consistent with § 51.161 to be environmentally beneficial. Pollution prevention projects that may result in an unacceptable increased risk from the release of hazardous pollutants are not environmentally beneficial; and

(G) Installation of a technology, for purposes set forth in paragraph (b)(31) of this section, which is not listed in paragraphs (b)(31)(i)(A) through (E) of this section but meets the following:

(*1*) Its effectiveness in reducing emissions has been demonstrated in practice; and

(*2*) It is determined by the permitting authority, consistent with § 51.161, to be environmentally beneficial.

* * * * *

(38) *Federal Class I area* means any Federal lands within the United States either designated by Congress as Class I pursuant to section 162(a) of the Act (and which may not be redesignated) or redesignated as Class I pursuant to either paragraph (g) of this section or § 52.21(g) of this chapter.

(39) *Federal official* means the Federal official charged with direct

responsibility for management of any lands within a Federal Class I area.

(40) *Air quality related value* means, for purposes of this section, visibility or a scenic, cultural, physical, biological, ecological, or recreational resource that may be affected by a change in air quality, as defined by the Federal Land Manager for Federal lands, or by the applicable State or Indian Governing Body for nonfederal lands.

(41) *Adverse impact on air quality related values* means, for purposes of this section, a deleterious effect on any air quality related value identified by a Federal Land Manager, resulting from emissions from a proposed major source or major modification, that interferes with the management, protection, preservation, or enjoyment of such air quality related values of a Federal Class I area. This determination shall be made on a case-by-case basis taking into account existing air quality conditions.

(42) *Demonstrated in practice* means, for the purposes of this section, a control technology that has been—

(i) Listed in or required by any of the following:

(A) The EPA's RACT/BACT/LAER Clearinghouse;

(B) A major source construction permit issued pursuant to either part C or D of title I of the Act;

(C) An emissions limitation contained in a federally-approved plan, excluding emissions limitations established by permits issued pursuant to programs for non-major sources;

(D) A permit or standard under section 111 or 112 of the Act;

(E) The EPA's Alternative Control Techniques documents and Control Techniques Guidelines; or

(ii) Notwithstanding paragraph (b)(42)(i) of this section, installed and operating on an emissions unit (or units) which:

(A) Has operated at a minimum of 50 percent of design capacity for 6 months; and

(B) The pollution control efficiency performance has been verified with either:

(*1*) A performance test; or

(*2*) Performance data collected at the maximum design capacity of the emissions unit (or units) being controlled, or 90 percent or more of the control technology's designed specifications.

(43) *Pollution prevention* means any activity that through process changes, product reformulation or redesign, or substitution of less-polluting raw materials, eliminates or reduces the release of air pollutants (including fugitive emissions) and other pollutants to the environment prior to recycling, treatment, or disposal; it does not mean recycling (other than certain ''in-process recycling'' practices), energy recovery, treatment, or disposal.

(44) *Plantwide applicability limit* means a plantwide, federally enforceable emission limitation established for a stationary source such that any subsequent physical or operational changes resulting in emissions that remain less than the limit, are excluded from preconstruction review under this section.

(45) *Plantwide applicability limit major modification* means, notwithstanding the requirements of paragraph (b)(2) of this section, any increase in the emissions rate (in tons per year) over the plantwide applicability limit. Any emissions increase of volatile organic compounds shall be considered an increase for .

(46)(i) *Nonroad engine* means, except as discussed in paragraph (b)(46)(ii) of this section, any internal combustion engine:

(A) In or on a piece of equipment that is self-propelled or that serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway mobile cranes and bulldozers);

(B) In or on a piece of equipment that is intended to be propelled while performing its function (such as lawnmowers and string trimmers); or

(C) That, by itself or in or on a piece of equipment, is portable or transportable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform.

(ii) An internal combustion engine is not a nonroad engine if:

(A) The engine is used to propel a motor vehicle or a vehicle used solely for competition, or is subject to standards promulgated under section 202 of the Act;

(B) The engine is regulated by a Federal new source performance standard promulgated under section 111 of the Act; or

(C) The engine otherwise included in paragraph (b)(46)(i) of this section remains or will remain at a location for more than 12 consecutive months, or a shorter period of time for an engine located at a seasonal source. A location is any single site at a building, structure, facility, or installation. Any engine (or engines) that replaces an engine at a location and that is intended to perform the same or similar function as the engine replaced will be included in calculating the consecutive time period. An engine located at a seasonal source is an engine that remains at a seasonal source during the full annual operating period of the seasonal source. For purposes of this paragraph (b)(46)(ii)(C), a seasonal source is a stationary source that remains in a single location on a permanent basis (i.e., at least 2 years) and that operates at that single location approximately 3 months (or more) each year. This paragraph (b)(46)(ii)(C) does not apply to an engine after the engine is removed from the location.

(47) *Nonroad Vehicle* means a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.

(48) *Stationary internal combustion engine* means:

(i) Any internal combustion engine that is regulated by a Federal new source performance standard promulgated under section 111 of the Act; or

(ii) Any internal combustion engine that is none of the following: a nonroad engine, an engine used to propel a motor vehicle or a vehicle used solely for competition, or an engine subject to standards promulgated under section 202 of the Act.

* * * * *

(i) * * *

(13) The plan may provide that the provisions of this section do not apply to any stationary source with respect to any or all of the hazardous air pollutants listed in section 112 the Act, as well as any or all pollutants that may be added to the list under the provisions of section 112(b)(2) of the Act. However, the applicable provisions of this section shall apply to any pollutant listed under sections 112(b)(1) or (b)(2) of the Act that is deleted from such list under the provisions of section 112(b)(3) of the Act. Any hazardous air pollutants listed in section 112 of the Act which are regulated as constituents or precursors of a more general pollutant listed under section 108 of the Act are still subject to the provisions of this section, notwithstanding section 112(b)(6) of the Act.

(j) * * *

(5)(i) In determining best available control technology:

(A) The applicant shall identify and evaluate all available and technically feasible control technology alternatives that have been demonstrated in practice pursuant to either paragraph (b)(42)(i) of this section prior to the date on which the permit application is complete, or paragraph (b)(42)(ii) of this section 90 days prior to the date on which the permit application is complete; and

(B) The applicant shall demonstrate to the satisfaction of the permitting

authority that the rejection of all alternatives more stringent than the one recommended as best available control technology is justified by the energy, environmental, and economic impacts and other costs of those alternatives. If the most stringent technology is chosen, the permitting authority may wave the requirement to analyze less effective control technologies. Documentation supporting the demonstration shall be included in the public record pursuant to paragraph (q)(6)(iii) of this section.

(ii) The control technology alternatives considered in paragraph (j)(5)(i) of this section shall be based upon control technologies and methods for the same and similar source categories, i.e., those categories including sources that have similar emissions-stream characteristics.

(iii) The plan may establish a cut-off date on or subsequent to the date that an application is complete pursuant to paragraph (n) of this section, after which the permit applicant will not be required to consider control technology alternatives that are identified through public comments and that are in addition to those alternatives required under paragraph (j)(5)(i)(A) of this section, unless the permitting authority determines that, based on information submitted pursuant to paragraph (q)(2) of this section, the alternatives warrant further consideration by the applicant.

(6) For determinations of best available control technology under the requirements of this section, the reviewing authority shall submit the control technology information to the EPA's RACT/BACT/LAER Clearinghouse within 60 days after permit approval.

* * * * *

(n) Complete application criteria.

(1) The plan shall provide that the permitting authority shall—

(i) Determine that a permit application is complete or deficient based on the permitting authority's consideration of determinations, analyses and other information contained in the application, and adequacy thereof, as specified in paragraphs (n)(2) through (n)(5) of this section; and

* * * * *

(2) * * *

(iii)(A) A detailed description of the system of continuous emissions reduction which the applicant has submitted in a permit application for a source or modification, to qualify either as best available control technology, or for an undemonstrated technology waiver in accordance with paragraph (s) of this section; and

(B) All information used or consulted by the applicant in recommending a system of continuous emissions reduction as either the best available control technology or an approvable undemonstrated technology.

(iv) Information and data used to perform all required analyses or determinations under paragraphs (o), (p), (r), (s) and (u) of this section, as applicable.

(3) The plan shall provide that upon request of the permitting authority, the owner or operator shall provide any information and data used to perform all required analyses or determinations under paragraphs (k), (l) and (m) of this section.

(4) The plan shall provide that an application shall not be considered complete unless the permit application has been registered on the applicable EPA electronic bulletin board. To register, at a minimum, the following must be provided:

(i) Name and type of source;

(ii) Nature of proposed project, i.e., new facility or modification;

(iii) Proposed location of the source in state/county (including Universal Transverse Mercator coordinates) and the distance between the source and each Class I area within 250 kilometers;

(iv) Anticipated allowable emissions, or increase in emissions rate, for each affected air pollutant regulated under the Act;

(v) Source contact mailing address and telephone number; and

(vi) The agency responsible for issuing the permit.

(5) The plan shall provide that prior to making a completeness determination, the permitting authority shall provide for any Federal Land Manager review and coordination required under paragraph (p)(5) of this section.

* * * * *

(p) *Sources potentially impacting Federal Class I areas.*

(1) *Protection of air quality related values.* The Federal Land Manager and the Federal Official have an affirmative responsibility to protect the air quality related values of Federal Class I areas and to consider, in consultation with the Administrator, whether a proposed source or modification will have an adverse impact on such values.

(2) *General requirements.*

(i) *Notification of potential impacts on a Federal Class I area and requirement for impact assessment.* The plan shall provide that:

(A) Where the Federal Official, Federal Land Manager, the Administrator, the Governor of an adjacent State, or the governing body of an adjacent Indian Tribe containing a Federal Class I area, files, prior to the date a completeness determination is made pursuant to paragraph (n)(1) of this section, a written notice alleging that emissions of a particular pollutant from a proposed major source or major modification may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change on affected air quality related values identified in the area by the Federal Land Manager, a permit shall not be issued unless the owner or operator of such source:

(*1*) Demonstrates to the satisfaction of the permitting authority that emissions will not cause or contribute to ambient pollutant concentrations in the Federal Class I area which violate the maximum allowable increases over baseline concentrations; and

(*2*) Provides an analysis of the potential impacts on air quality related values at the Federal Class I area.

(B) Notwithstanding the restriction on issuing a permit under paragraph (p)(2)(i)(A)(*1*) of this section, a permit otherwise prohibited under paragraph (p)(2)(i)(A)(*1*) of this section may be issued in accordance with the variance provisions in paragraphs (p)(8) through (p)(11) of this section.

(ii) *Available information on air quality related values and analytical methods.* The Federal Land Manager or Federal Official shall, upon request, provide to the owner or operator of a proposed major source or major modification that may have an adverse impact on air quality related values in a Federal Class I area all available information about such values and methods to analyze potential impacts.

(iii) *Consultation with Federal Land Manager.* The plan shall provide for consultation and coordination with the Federal Land Manager, including the procedures contained in paragraphs (p)(3) through (p)(6) of this section.

(3) *Pre-application coordination.* The plan shall provide that, for a proposed major source or major modification within 100 kilometers of a Federal Class I area the permitting authority shall:

(i) Notify the affected Federal Land Manager shall be notified within 30 days from receipt by the permitting authority of advance notification of a permit application; and

(ii) Give the affected Federal Land Manager reasonable notice and an opportunity to participate in pre-application meetings with the applicant.

(4) *Permit application coordination.* The plan shall provide that:

(i) The Federal Land Manager of any Federal Class I area within 100

kilometers of a proposed major source or major modification shall be provided with a copy of the permit application and other relevant information; and

(ii) The Federal Land Manager shall be provided with a copy of a permit application requested within 7 days from the date information about such application is registered on the applicable EPA electronic bulletin board (in accordance with paragraph (n)(4) of this section).

(5) *Completeness determination coordination.* The plan shall provide that prior to making the completeness determination under paragraph (n)(1) of this section, the permitting authority shall:

(i) Ensure that the applicant has provided any analysis required pursuant to paragraph (p)(2)(i) of this section;

(ii) Give the Federal Land Manager 30 days from receipt of an application to review the application, where the Federal Land Manager has received such application pursuant to paragraph (p)(4) of this section;

(iii) Consider any comments provided by the Federal Land Manager within the time period under paragraph (p)(5)(ii) of this section; and

(iv) Consult with the Federal Land Manager about any inconsistency between the determination by the permitting authority and the Federal Land Manager's recommendations.

(6) *Preliminary and final permit determination—No Class I increment violation.* The plan shall provide that, where the permitting authority has determined that the emissions from the proposed major source or major modification will not cause or contribute to ambient pollutant concentrations in the Federal Class I area which violate the maximum allowable increases over baseline concentrations—

(i) The permitting authority shall not issue a preliminary permit determination until the Federal Land Manager has been given at least 60 days (from the date of issuance of the completeness determination required under paragraph (n)(1) of this section to submit a demonstration that a proposed major source or major modification will have an adverse impact on air quality related values;

(ii) If the permitting authority agrees with the Federal Land Manager's demonstration under paragraph (p)(6)(i) of this section, the permitting authority shall propose to deny the permit;

(iii) If the permitting authority is not satisfied with the Federal Land Manager's demonstration under paragraph (p)(6)(i) of this section, the permitting authority shall consult with the Federal Land Manager, reference the Federal Land Manager's demonstration and its rejection of the demonstration in the public notice announcing the preliminary permit determination and propose to approve the permit with an explanation in writing (for inclusion in the public record along with the Federal Land Manager's demonstration) of the reasons for rejecting the Federal Land Manager's demonstration. The permitting authority's written explanation shall address, at a minimum, the following:

(A) The basis for any disagreement with the data and analyses contained in the Federal Land Manager's demonstration of adverse impact on air quality related values;

(B) Any conclusions the permitting authority reaches, about whether the projected impacts of the proposed source's emissions will have an adverse impact on air quality related values, that are inconsistent with the conclusions reached in the demonstration submitted by the Federal Land Manager; and

(C) Any measures undertaken to mitigate the potential adverse impacts of proposed emissions increases, including the estimated effect of any mitigation;

(iv) In the final permit determination, the permitting authority shall address any comments made by the Federal Land Manager concerning the permitting authority's preliminary determination.

(7) *Mitigation of adverse impacts.* The plan may provide that the permitting authority may issue a permit for a proposed major source or major modification that would otherwise be denied a permit under paragraph (p)(6) of this section, if the permitting authority determines, in consultation with the Federal Land Manager, that the source has mitigated its adverse impact on air quality related values. The owner or operator of a proposed major source or major modification may mitigate an adverse impact by obtaining enforceable and permanent emissions reductions of sufficient amount and in such location that the reductions will offset the change in air quality in the Federal Class I area that would have resulted from the proposed source.

* * * * *

(q) * * *

(2) The plan may set forth the minimum information which must be submitted by public commenters to accompany any recommendations for control technology alternatives for which permit applicants would not otherwise be responsible to consider in determining best available control technology as of the date an application is complete according to paragraph (j)(5)(iii) of this section. Such information may include the name and location of the source utilizing the control technology, manufacturer and type of control device, date of installation and operation of control device, and performance requirements and available test data.

(3) The plan shall provide that—

(i) After any cut-off date established pursuant to paragraph (j)(5)(iii) of this section, the permitting authority shall notify a permit applicant within 10 working days from the date of receipt of a public comment concerning any control technology alternatives that the permitting authority determines to warrant further consideration by the applicant; and

(ii) The permitting authority shall make available in the public record all information that was submitted with public comment regarding control technology alternatives and provide the basis for its decision to either require or not require the permit applicant to further consider such control technology alternatives.

* * * * *

(6) The reviewing authority shall provide an opportunity for judicial review in State court of the final permit action by the applicant and any person who participated in the public participation process provided pursuant to this section. The plan may provide that the opportunity for judicial review shall be the exclusive means for obtaining judicial review of the terms and conditions of permits, and may require that such petitions for judicial review be filed no later than a reasonable period after the final permit action. If such a limited time period for judicial review is provided in the plan, then the plan shall provide that petitions for judicial review of final permit actions can be filed after the deadline only if they are based solely on grounds arising after the deadline for judicial review and only if filed within a reasonable period specified in the plan after the new grounds for review arise.

(r) *Source obligation.*

(1) The plan shall include enforceable procedures to—

(i) Provide that approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the plan and any other requirements under local, State or Federal law; and

(ii) Require any owner or operator to construct and operate a source or modification in accordance with the application submitted pursuant to this

section or with the terms of any approval to construct.

* * * * *

(s) *Undemonstrated technology or application waiver.*

(1) The plan may provide that an owner or operator of a proposed major stationary source or major modification may satisfy the requirements of paragraph (j) of this section through the use of an undemonstrated technology or application as set forth in this section. The plan may provide that the owner or operator shall provide to the permitting authority a written request for approval of an undemonstrated technology or application as part of the permit application.

(2) The plan may provide that the permitting authority may approve a system of undemonstrated technology or application for a particular source or modification if:

* * * * *

(4) The plan shall provide that, if the permitting authority withdraws approval of a system of undemonstrated technology or application, the owner or operator shall bring the affected emissions unit(s) into compliance with the reference best available control technology emissions limit within 18 months from the date of withdrawal.

(5) The plan shall provide that the permitting authority shall include, as a minimum, the following information in a waiver issued pursuant to paragraph (s) of this section:

(i) The undemonstrated technology or application's emission control performance objective and the applicable reference best available control technology emissions limit;

(ii) The marginal and gross failure emissions limit(s) as defined by the permitting authority on a case-by-case basis; and

(iii) Identification and classification of potential failure modes and associated contingency measures.

(6) The plan shall provide that if, by the date established in paragraph (s)(2)(ii) of this section, the undemonstrated technology or application does not achieve the permitted emission limit, but actual emissions are equal to or less than the best available control technology emission limit referenced in the permit, the permitting authority shall:

(i) Issue a final permit with the emission limit equal to the undemonstrated technology or application's consistently achieved actual emission rate; and

(ii) Report the final permit limits to the EPA's RACT/BACT/LAER Clearinghouse as a demonstrated control technology.

(7) The plan shall provide that if, by the date established in paragraph (s)(2)(ii) of this section, the actual emissions from the undemonstrated technology or application constitute marginal failure, the owner or operator may petition the permitting authority to permit the undemonstrated technology or application at its actual emission limit. Accordingly the permitting authority shall either:

(i) Approve the petition and proceed in accordance with paragraphs (s)(6)(i) and (ii) of this section; or

(ii) Disapprove the petition and require the owner or operator to comply with paragraph (s)(4) of this section.

(8) The plan shall provide that if, at any time prior to, or on, the date established in paragraph (s)(2)(ii) of this section, the actual emissions from the undemonstrated technology or application constitute gross failure:

(i) The permitting authority shall withdraw approval pursuant to paragraph (s)(4) of this section; and

(ii) The owner or operator shall mitigate all emission increases above the applicable reference best available control technology emission limit by reducing actual emissions.

(9) The plan shall provide that the permitting authority submit to the Administrator a copy of the approval of the system of undemonstrated technology or application within 30 days of its approval.

(10) The plan shall provide that the number of waivers granted by the permitting authority shall not exceed such number as necessary to ascertain whether or not such system complies with section 111(j)(1)(A)(ii) and (iii) of the Act.

(t) *Disputed permits or redesignations.* If any State affected by the redesignation of an area by an Indian Tribe, or any Indian Tribe affected by the redesignation of an area by a State disagrees with such redesignation of an area, or if a permit is proposed to be issued for any major stationary source or major modification proposed for construction in any State which the Governor of an affect State or Governing Body of an affected Indian Tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this section within the affected State or Indian Reservation, the Governor or Indian Governing Body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian Tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and the Administrator's determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values.

(u) *Plantwide applicability limit.*

(1) *Applicability.* The plan may provide that an owner or operator of an existing major stationary source may request the permitting authority to approve a plantwide applicability limit for any one or more pollutants, and that the permitting authority may approve a plantwide applicability limit for an existing major stationary source, in accordance with paragraphs (u)(2) through (5) of this section.

(2) *Procedure.* The plan shall provide that a plantwide applicability limit for an existing major stationary source may be established only through a procedure consistent with § 51.161 of this chapter, and with at least 30 days allowed for public notice and opportunity for comment.

(3) *Emission limitations and conditions.* (i) The plan shall provide that a plantwide applicability limit shall be established based on either:

(A) Plantwide actual emissions (not to exceed current allowable emissions) and a reasonable operating margin less than the applicable significant emissions rate; or

(B) Source-wide limits on annual emissions established in a permit issued within the immediately preceding 5 years under regulations approved pursuant to § 51.165 of this part, where the source-wide emissions limits were completely offset and relied upon in an approved state attainment demonstration plan.

(ii) The plan shall provide that any plantwide applicability limit emission limitations shall be achievable through application of production processes or available methods, systems, and techniques including, but not limited to, emissions control equipment, fuel cleaning or treatment, fuel combustion techniques, substitution of less polluting materials, or limits on production that represent normal source operations.

(iii) The plan shall provide that specific terms and conditions that assure the practical enforceability of plantwide applicability limit emission limitations shall be contained in a

federally enforceable permit applicable to the source.

(iv) The plan shall provide that the emissions limitations and conditions established for a plantwide applicability limit shall not relieve any owner or operator of the responsibility to comply fully with any applicable control technology requirements.

(4) *Plantwide applicability limit modifications.* The plan shall provide that:

(i) Notwithstanding paragraphs (b)(2) and (b)(3) of this section (the definitions for major modification and net emissions increase), any physical or operational change consistent with plantwide applicability limit terms and conditions of this section shall not constitute a major modification for the pollutants covered by the plantwide applicability limits. All decreases in emissions shall have approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change;

(ii) Requirements equivalent to those contained in paragraphs (j) through (r) of this section shall apply to any plantwide applicability limit major modification as if it were a major modification, except that in lieu of paragraph (j)(3) of this section, a plantwide applicability limit major modification shall apply best available control technology for each pollutant subject to regulation under the Act if an emissions increase above the plantwide applicability limit would occur; and

(iii) The best available control technology requirement applies to each emissions unit that contributes to the emissions increase above the plantwide applicability limit.

(5) *Plantwide applicability limit reevaluation.*

(i) The plan shall provide that the permitting authority shall reevaluate the plantwide applicability limit emission limitations pursuant to:

(A) Permit renewal and public notification procedures under parts 70 or 71 of this chapter; or

(B) Another proceeding with public notice and opportunity for public comment.

(ii) As part of the reevaluation required under paragraph (u)(5)(i) of this section, the permitting authority may reduce permitted emission limitations or otherwise adjust (but not increase) permitted emission limitations to reflect:

(A) Air quality concerns arising after the approval of the plantwide applicability limit;

(B) Changes at the source; or

(C) Other appropriate considerations.

(iii) The plan shall provide that the permitting authority shall adjust the source's plantwide applicability limit emissions limitations to reflect new applicable requirements as they become effective.

## PART 52–APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 is revised to read as follows:

Authority: 42 U.S.C. 7401–7671q.

2. Section 52.21 is amended by redesignating the paragraphs as follows:

| Old paragraph | New paragraph |
|---|---|
| (b)(1)(i) (*a*) through (*c*). | (b)(1)(i) (A) through (C). |
| (b)(1)(iii) (*a*) through (*aa*). | (b)(1)(iii) (A) through (AA). |
| (b)(2)(iii) (*a*) through (*k*). | (b)(2)(iii) (A) through (K). |
| (b)(3)(i) (*a*) and (*b*) .... | (b)(3)(i) (A) and (B). |
| (b)(3)(vi) (*a*) through (*c*). | (b)(3)(vi) (A) through (C). |
| (b)(13)(i) (*a*) and (*b*) | (b)(13)(i) (A) and (B). |
| (b)(13)(ii) (*a*) and (*b*) | (b)(13)(ii) (A) and (B). |
| (b)(14)(ii) (*a*) and (*b*) | (b)(14)(ii) (A) and (B). |
| (b)(14)(iii) (*a*) and (*b*) | (b)(14)(iii) (A) and (B). |
| (b)(15)(ii) (*a*) and (*b*) | (b)(15)(ii) (A) and (B). |
| (i)(4)(ii) (*a*) through (*c*). | (i)(4)(ii) (A) through (C). |
| (i)(4)(iv) (*a*) through (*c*). | (i)(4)(iv) (A) through (C). |
| (i)(4)(v) (*a*) through (*c*). | (i)(4)(v) (A) through (C). |
| (i)(4)(vii) (*a*) through (*aa*). | (i)(4)(vii) (A) through (AA). |
| (i)(4)(viii) (*a*) through (*d*). | (i)(4)(viii) (A) through (D). |
| (i)(4)(ix) (*a*) through (*c*). | (i)(4)(ix) (A) through (C). |
| (m)(1)(i)(*a*) and (*b*) .... | (m)(1)(i) (A) and (B). |
| (m)(1)(v) (*a*) through (*c*). | (m)(1)(v) (A) through (C). |
| (v)(2)(iv) (*a*) and (*b*) | (v)(2)(iv) (A) and (B). |

3. Section 52.21 is amended as follows:

a. Amending newly redesignated paragraph (b)(2)(iii)(F) by adding the words ''Standing alone,'' at the beginning of the sentence and revising the word ''An'' to read ''an'';

b. Revising newly redesignated paragraph (b)(2)(iii)(H);

c. Adding new paragraphs (b)(2)(iii)(L) through (N); Revising newly redesignated paragraph (b)(3)(vi)(C);

e. Revising paragraph (b)(5);

f. Revising paragraphs (b)(19), (b)(21)(ii), and (b)(22);

g. Adding new paragraph (b)(21)(vi);

h. Revising paragraph (b)(23);

i. Amending paragraph (b)(24) by adding the words ''(or the Secretary's designee)'' after the word ''lands'' at the end of the sentence;

j. Revising paragraph (b)(27);

k. Revising paragraphs (b)(32) introductory text and (b)(32)(i);

l. Removing paragraph (b)(32)(ii) and redesignating paragraphs (b)(32)(iii) and (iv) as new paragraphs (b)(32)(ii) and (iii);

m. Adding new paragraphs (b)(39) through (b)(49);

n. Amending paragraph (g)(1) by removing the words ''State implementation'' from the the last sentence;

o. Revising paragraph (i)(8)(i);

p. Adding new paragraph (i)(14);

q. Adding new paragraphs (j)(5) and (6);

r. Amending paragraph (k) introductory text by adding the word ''significantly'' after the words ''would not cause or'';

s. Amending paragraph (m)(2) by removing the word ''ambient'' and adding the words '', or on air quality related values of a Federal Class I area. Deci sions about post-construction monitoring for air quality related values in Federal Class I areas shall be made in consultation with the Federal Land Manager.'' at the end of the paragraph;

t. Revising the heading and removing the introductory text of paragraph (n);

u. Redesignating paragraph (n)(2) as paragraph (n)(3) and revising it;

v. Redesignating paragraph (n)(1) as paragraph (n)(2);

w. Revising newly redesignated paragraph (n)(2) introductory text and newly redesignated paragraph (n)(2)(iii) and adding new paragraph (n)(2)(iv);

x. Adding new paragraphs (n)(1), (n)(4) and (n)(5);

y. Amending paragraph (o)(1) by adding the words '', except that for Federal Class I and II areas such analysis may be excluded only by approval of the Federal Land Manager'' to the end of the second sentence;

z. Revising the heading of paragraph (p);

aa. Removing paragraph (p)(1);

bb. Redesignating paragraph (p)(2) as paragraph (p)(1);

cc. Amending newly redesignated paragraph (p)(1) by revising the heading and removing the words ''charged with direct responsibility for management of such lands'';

dd. Adding new paragraph (p)(2);

ee. Revising paragraphs (p)(3) and (p)(4);

ff. Redesignating paragraphs (p)(5) through (p)(8) as paragraphs (p)(8) through (p)(11);

gg. Adding new paragraphs (p)(5) through (p)(7);

hh. Amending the newly redesignated paragraph (p)(9) by removing the citation ''(q)(4)'' and adding in its place ''(p)(7)'';

ii. Amending the newly redesignated paragraphs (p)(9) and (p)(10) by removing the citation ''(q)(7)'' and adding in its place ''(p)(11)'';

jj. Amending the newly redesignated paragraph (p)(11) by removing the citation ''(q) (5) or (6)'' and adding in its place ''(p)(9) or (p)(10)'';

kk. Revising paragraph (q);

ll. Amending paragraph (t) by removing the words ''State implementation'' in the phrase ''applicable State implementation plan'';

mm. Revising the heading of paragraph (v);

nn. Revising paragraphs (v)(1) and (v)(2) introductory text;

oo. Amending paragraph (v)(2)(ii) by removing the cite ''(j)(2)'' and adding in its place ''(j)'', removing the words ''4 years'' and adding in its place ''2 years'', and removing the words ''7 years'' and adding in its place ''5 years'';

pp. Amending paragraphs (v)(2)(iii) and (v)(3) introductory text by removing the words ''innovative control technology'' and adding in its place ''undemonstrated technology or application'';

qq. Revising paragraph (v)(4);

rr. Adding new paragraphs (v)(5) through (v)(9);

ss. Adding new paragraph (x).

**§ 52.21 Prevention of significant deterioration of air quality.**

* * * * *

(b) * * *

(2)—* * *

(iii) * * *

(H) The addition, replacement, or use of a pollution control project at an existing emissions unit unless the pollution control project would result in a significant net increase in representative actual annual emissions of any pollutant regulated under this section and the Administrator determines that this increase would cause or contribute to a violation of any national ambient air quality standard or any maximum allowable increase over the baseline concentration or will have an adverse impact on any air quality related value at any Class I area. For the purpose of this paragraph, in lieu of the source's representative actual annual emissions, the emissions levels used for that source in the most recent air quality impact analysis in the area conducted for the purpose of title I of the Act, if any, may be used.

* * * * *

(L) Any activity undertaken at an existing emissions unit for which a federally enforceable emissions limit has been established, provided that:

(*1*) The activity or project will not increase the maximum emissions rate, in pounds or kilograms per hour, above the maximum emissions rate achievable by the emissions unit at any time during the 180 consecutive days which precede the date of the activity or project and the emissions increase is determined by:

(*i*) Material balances, continuous emissions monitoring data, or manual emissions tests using the EPA-approved procedures, where available, and conducted under such conditions as the permitting authority will specify to the owner or operator based on representative performance of the emissions units affected by the activity or project, including at least three valid test runs conducted before, and at least three valid test runs conducted after, the activity or project with all operating parameters which may affect emissions held constant to the maximum feasible degree for all such test runs; or

(*ii*) Emission factors as specified in the latest issue of ''Compilation of Air Pollutant Emission Factors,'' EPA Publication No. AP–42, or other emission factors determined by the permitting authority to be superior to AP–42 emissions factors, in such cases where use of emission factors demonstrates that the emissions level resulting from the activity or project will clearly not increase emissions;

(*2*) The federally enforceable emissions limit at the time of the change is comparable to the emission limit that, considering the air quality designation of the area where the source is located, would result from a current review in accordance with either paragraph (j) of this section or regulations approved pursuant to § 51.165(a)(2) or § 51.166(j) of this chapter, for emissions units of the same class or source category. The Administrator may presume that a source satisfies this paragraph (b)(2)(iii)(L)(*2*) if:

(*i*) The activity would occur no later than 120 consecutive months from the date of issuance of the permit issued under either this section or regulations approved pursuant to § 51.165 or § 51.166 of this chapter, that established the currently applicable emissions limit for the emissions unit;

(*ii*) The activity would occur no later than 120 consecutive months from the date of issuance of the permit issued under regulations approved pursuant to §§ 51.160 through 51.164 of this chapter, that established the currently applicable emissions limit for the emissions unit, provided the permit was issued under regulations that were determined by the Administrator to provide for permits that contain emissions limitations that satisfy paragraph (b)(2)(iii)(L)(*2*) of this section; or

(*iii*) The activity would occur no later than 60 consecutive months from the date on which the applicable permitting authority made a determination, with public notice and opportunity for public comment consistent with § 51.161 of this chapter, that the emissions limit satisfied paragraph (b)(2)(iii)(L)(*2*) of this section.

(*3*) The activity would not require a revision to, or cause a violation of, any federally enforceable limit or condition in a permit issued under either this section or regulations approved pursuant to §§ 51.160 through 51.166 of this chapter;

(*4*) The activity or project does not include the replacement or reconstruction of an emissions unit; and

(M) Any activity undertaken at an existing major stationary source, provided :

(*1*) The activity would not require a revision to, or cause a violation of, any federally enforceable limit or condition in a permit issued under either this section or regulations approved pursuant to §§ 51.160 through 51.166 of this chapter; and

(*2*) The entire major stationary source was permitted, and received the currently applicable emissions limits for all emissions units, at the source issued in accordance with either this section or regulations approved pursuant to §§ 51.165 through 51.166 of this chapter no more than 120 consecutive months prior to the proposed activity.

(N) A change to ozone-depleting substances with lower ozone-depleting potential under the provisions of sections 601 and 602 of the Act, including changes to ozone-depleting substances emitting equipment needed to accommodate the change, as long as the productive capacity of the equipment is not increased.

* * * * *

(3) * * *

(vi) * * *

(C) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change such that, at a minimum, the decrease is sufficient to prevent the proposed increase from causing or contributing to a violation of any national ambient air quality standard or any applicable maximum allowable increase over baseline concentrations or having an adverse impact on air quality related values in Class I areas.

* * * * *

(5) (i) *Stationary source* means any building, structure, facility, installation, or stationary internal combustion engine which emits or which may emit any air

pollutant subject to regulation under the Act.

(ii) A stationary source does not include emissions resulting directly from an internal combustion engine used for transportation purposes, or from a nonroad engine or nonroad vehicle.

* * * * *

(19) *Undemonstrated technology or application* means any system, process, material, or treatment technology (including pollution prevention) that has not been demonstrated in practice, but would have a substantial likelihood to operate effectively and achieve:

(i) A greater continuous reduction of air pollutant emissions than any demonstrated system; or

(ii) A comparable emissions reduction at lower cost, or with lower energy input, or with less environmental impact.

* * * * *

(21) * * *

(ii) Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during any 12 consecutive months during the 120 consecutive months that precede the commencement of construction of a proposed physical or operational change at the source, and any current, federally enforceable limitation on emissions, as required by the Act, including but not limited to, best available control technology, lowest achievable emission rate (as defined at § 51.165(a)(1)(xiii) of this chapter), reasonably available control technology, or emissions standards for hazardous air pollutants under section 112 of the Act.

* * * * *

(vi) In lieu of paragraphs (b)(21)(iv) and (v) of this section, actual emissions of the unit following a physical or operational change shall equal the representative actual annual emissions of the unit, provided the source owner or operator maintains and submits to the Administrator, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the Administrator if the Administrator determines such a period to be more representative of normal source post-change operations.

(22) *Complete* means, in reference to an application for a permit required under this section, that the Administrator has deemed the application to contain the information necessary (in accordance with the criteria contained in paragraph (n) of this section) to begin formal review of the application. Determining an application complete for the purpose of beginning formal review does not preclude the Administrator from requiring additional information as may be needed to determine whether the applicant satisfies all requirements of this section.

(23) *Significant* means:

(i) In reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

POLLUTANT AND EMISSIONS RATE

Carbon monoxide: 100 tons per year
Nitrogen oxides: 40 tons per year
Sulfur dioxide: 40 tons per year
Ozone: 40 tons per year of volatile organic compounds
Particulate matter: 25 tons per year of particulate matter emissions; 15 tons per year of PM–10 emissions
Lead: 0.6 tons per year
Fluorides: 3 tons per year
Sulfuric acid mist: 7 tons per year
Hydrogen sulfide: 10 tons per year
Total reduced sulfur (including hydrogen sulfide): 10 tons per year
Reduced sulfur compounds (including hydrogen sulfide): 10 tons per year
Municipal waste combustor organics (measured as total tetrathrough octa-chlorinated dibenzo-p-dioxins and dibenzofurans): $3.2\times10^{-6}$ megagrams per year ($3.5 \times 10^{-6}$ tons per year)
Municipal waste combustor metals (measured as particulate matter): 14 megagrams per year (15 tons per year)
Municipal waste combustor acid gases (measured as sulfur dioxide and hydrogen chloride): 36 megagrams per year (40 tons per year)
Ozone-depleting substances (ODS): 100 tons per year.

(ii) In reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the Act that paragraph (b)(23)(i) of this section does not list, any emissions rate. However, for purposes of the applicability of this section, the hazardous air pollutants listed under section 112(b)(1) of the Act, including the hazardous air pollutants that may be added to the list, are not considered subject to regulation under the Act.

(iii) Notwithstanding paragraph (b)(23)(i) of this section, any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class 1 area, and have an impact on such area equal to or greater than 1 microgram per cubic meter (24-hour average).

(iv) In reference to the predicted ambient impact that the emissions from a proposed major source or major modification will have for purposes of determining compliance with the national ambient air quality standards, concentrations which exceed any of the following:

| Pollutant | Averaging time | Significant impact |
|---|---|---|
| $SO_2$ | Annual | 1.0 µg/m$^3$. |
| | 24–Hour | 5.0 µg/m$^3$. |
| | 3–Hour | 25.0 µg/m$^3$. |
| PM–10 | Annual | 1.0 µg/m$^3$. |
| | 24–Hour | 5.0 µg/m$^3$. |
| $NO_2$ | Annual | 1.0 µg/m$^3$. |
| CO | 8–Hour | 0.5 mg/m$^3$. |
| | 1–Hour | 2.0 mg/m$^3$. |

(v) In reference to the predicted ambient impact that emissions from a proposed major source or major modification will have for purposes of determining compliance with the maximum allowable increases in pollutant concentrations contained in paragraph (c) of this section, concentrations which exceed any of the following:

| Pollutant | Averaging time | Class I | Class II | Class III |
|---|---|---|---|---|
| | | Significant impact | Significant impact | Significant impact |
| $SO_2$ | Annual | 0.1 µg/m$^3$ | 1.0 µg/m$^3$ | 1.0 µg/m$^3$. |
| | 24-Hour | 0.2 µg/m$^3$ | 5.0 µg/m$^3$ | 5.0 µg/m$^3$. |
| | 3-Hour | 1.0 µg/m$^3$ | 25.0 µg/m$^3$ | 25.0 µg/m$^3$. |
| PM–10 | Annual | 0.2 µg/m$^3$ | 1.0 µg/m$^3$ | 1.0 µg/m$^3$. |
| | 24-Hour | 0.3 µg/m$^3$ | 5.0 µg/m$^3$ | 5.0 µg/m$^3$. |
| $NO_2$ | Annual | 0.1 µg/m$^3$ | 1.0 µg/m$^3$ | 1.0 µg/m$^3$. |

* * * * *

(27) *Indian Reservation* means all land within the limits of any Indian Reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation.

* * * * *

(32) *Pollution control project* means:

(i) Any activity or project undertaken at an existing emissions unit which, as its primary purpose, reduces emissions of air pollutants from such unit. Such activities or projects do not include the replacement of an existing emissions unit with a newer or different unit, or the reconstruction of an existing emissions unit, and are limited to any of the following:

(A) The installation of conventional or advanced flue gas desulfurization, or sorbent injection for $SO_2$;

(B) Electrostatic precipitators, baghouses, high efficiency multiclones, or scrubbers for particulate matter or other pollutants;

(C) Flue gas recirculation, low-$NO_X$ burners, selective non-catalytic reduction or selective catalytic reduction for $NO_X$;

(D) Regenerative thermal oxidizers, catalytic oxidizers, condensers, thermal incinerators, flares, or carbon absorbers for volatile organic compounds or hazardous air pollutants;

(E) Activities or projects undertaken to accommodate switching to an inherently less polluting fuel, including but not limited to, natural gas or coal reburning, or the cofiring of natural gas and other inherently less polluting fuels, for the purpose of controlling emissions, and including any activity that is necessary to accommodate switching to an inherently less polluting fuel;

(F) Pollution prevention projects which the Administrator has determined through a process consistent with § 51.161 of this chapter to be environmentally beneficial. Pollution prevention projects that may result in an unacceptable increased risk from the release of hazardous pollutants are not environmentally beneficial; and

(G) Installation of a technology, for purposes set forth in paragraph (b)(32) of this section, which is not listed in paragraphs (b)(32)(i) (A) through (E) of this section but meets the following:

(*1*) Its effectiveness in reducing emissions has been demonstrated in practice; and

(*2*) It is determined by the Administrator to be environmentally beneficial.

* * * * *

(39) *Federal Class I area* means any Federal lands within the United States either designated as Class I pursuant to section 162(a) of the Act (and which may not be redesignated) or redesignated as Class I pursuant to either paragraph (g) of this section or § 51.166(g) of this chapter.

(40) *Federal official* means the Federal official charged with direct responsibility for management of any lands within a Federal Class I area.

(41) *Air quality related value* means, for purposes of this section, visibility or a scenic, cultural, physical, biological, ecological, or recreational resource that may be affected by a change in air quality, as defined by the Federal Land Manager for Federal lands and as defined by the applicable State or Indian Governing Body for nonfederal lands.

(42) *Adverse impact on air quality related values* means, for purposes of this section, a deleterious effect on any air quality related value identified by a Federal Land Manager, resulting from emissions from a proposed major source or major modification, that interferes with the management, protection, preservation, or enjoyment of such air quality related values of a Federal Class I area. This determination shall be made on a case-by-case basis taking into account existing air quality conditions.

(43) *Demonstrated in practice* means, for the purposes of this section, any control technology that has been—

(i) Listed in or required by any of the following:

(A) The EPA's RACT/BACT/LAER Clearinghouse;

(B) A major source construction permit issued pursuant to either part C or D of title I of the Act;

(C) An emissions limitation contained in a federally-approved plan, excluding any emissions limitations established by permits issued pursuant to programs for non-major sources;

(D) A permit or standard under either section 111 or 112 of the Act; and

(E) The EPA's Alternative Control Techniques documents and Control Techniques Guidelines; or

(ii) Notwithstanding paragraph (b)(43)(i) of this section, installed and operating on an emissions unit (or units) which:

(A) Has operated at a minimum of 50 percent of design capacity for 6 months; and

(B) The pollution control efficiency performance has been verified with either:

(*1*) A performance test; or

(*2*) Performance data collected at the maximum design capacity of the emissions unit (or units) being controlled, or 90 percent or more of the control technology's designed specifications.

(44) *Pollution prevention* means any activity that through process changes, product reformulation or redesign, or substitution of less polluting raw materials, eliminates or reduces the release of air pollutants (including fugitive emissions) and other pollutants to the environment prior to recycling, treatment, or disposal; it does not mean recycling (other than certain ''in-process recycling'' practices), energy recovery, treatment, or disposal.

(45) *Plantwide applicability limit* means a plantwide federally enforceable emissions limitation established for a stationary source such that any subsequent physical or operational change resulting in plantwide emissions that remain less than the limit are excluded from preconstruction review under this section.

(46) *Plantwide applicability limit major modification* means, notwithstanding the requirements of paragraph (b)(2) of this section, any increase in the emissions rate, in tons per year, over the plantwide applicability limit. Any emissions increase of volatile organic compounds shall be considered an increase for.

(47)(i) *Nonroad engine* means, except as discussed in paragraph (b)(46)(ii) of this section, any internal combustion engine:

(A) In or on a piece of equipment that is self-propelled or that serves a dual purpose by both propelling itself and performing another function (such as garden tractors, off-highway mobile cranes and bulldozers);

(B) In or on a piece of equipment that is intended to be propelled while performing its function (such as lawnmowers and string trimmers); or

(C) That, by itself or in or on a piece of equipment, is portable or transportable, meaning designed to be and capable of being carried or moved from one location to another. Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform.

(ii) An internal combustion engine is not a nonroad engine if:

(A) The engine is used to propel a motor vehicle or a vehicle used solely for competition, or is subject to standards promulgated under section 202 of the Act;

(B) The engine is regulated by a Federal new source performance standard promulgated under section 111 of the Act; or

(C) The engine otherwise included in paragraph (b)(47)(i) of this section remains or will remain at a location for

more than 12 consecutive months, or a shorter period of time for an engine located at a seasonal source. A location is any single site at a building, structure, facility, or installation. Any engine (or engines) that replaces an engine at a location and that is intended to perform the same or similar function as the engine replaced will be included in calculating the consecutive time period. An engine located at a seasonal source is an engine that remains at a seasonal source during the full annual operating period of the seasonal source. For purposes of this paragraph (b)(47)(ii)(C), a seasonal source is a stationary source that remains in a single location on a permanent basis (i.e., at least 2 years) and that operates at that single location approximately three months (or more) each year. This paragraph (b)(47)(ii)(C) does not apply to an engine after the engine is removed from the location.

(48) *Nonroad vehicle* means a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.

(49) *Stationary internal combustion engine* means:

(i) Any internal combustion engine that is regulated by a Federal new source performance standard promulgated under section 111 of the Act; or

(ii) Any internal combustion engine that is none of the following: a nonroad engine, an engine used to propel a motor vehicle or a vehicle used solely for competition, or an engine subject to standards promulgated under section 202 of the Act.

* * * * *

(i) * * *

(8) * * *

(i) The emission increase of the pollutant from a new stationary source or the net emissions increase of the pollutant from a modification would cause, in any area, air quality impacts less than the following amounts:

(A) Carbon monoxide: 575 micrograms per cubic meter, 8-hour average;

(B) Nitrogen dioxide: 14 micrograms per cubic meter, annual average;

(C) Sulfur dioxide: 13 micrograms per cubic meter, 24-hour average;

(D) Ozone; [1]

(E) Particulate matter: 10 micrograms per cubic meter PM–10, 24-hour average;

(F) Lead: 0.1 micrograms per cubic meter, 3-month average;

(G) Fluorides: 0.25 micrograms per cubic meter, 24-hour average;

(H) Hydrogen sulfide: 0.2 micrograms per cubic meter, 1-hour average;

(I) Total reduced sulfur: 10 micrograms per cubic meter, 1-hour average;

(J) Reduced sulfur compounds: 10 micrograms per cubic meter, 1-hour average; or

* * * * *

(14) The requirements of this section do not apply to any stationary source with respect to each hazardous air pollutant listed pursuant to section 112 of the Act, as well as all pollutants that may be added to such list under the provisions of section 112(b)(2) of the Act. However, the applicable provisions of this section shall apply to any pollutant listed pursuant to sections 112(b)(1) or (b)(2) of the Act that is deleted from such list under the provisions of section 112(b)(3) of the Act. Any hazardous air pollutants listed in section 112 of the Act which are regulated as constituents or precursors of a more general pollutant listed under section 108 of the Act are still subject to the provisions of this section, notwithstanding section 112(b)(6) of the Act.

(j) * * *

(5)(i) In determining best available control technology:

(A) The applicant shall identify and evaluate all available and technically feasible control technology alternatives that have been demonstrated in practice pursuant to paragraph (b)(43)(i) of this section prior to the date on which the permit application is complete and pursuant to paragraph (b)(43)(ii) of this section 90 days prior to the date on which the permit application is complete;

(B) All control technology alternatives identified pursuant to paragraph (j)(5)(i)(A) of this section shall be ranked and evaluated in descending order of control effectiveness. The alternative providing the maximum degree of emissions reduction shall be established as best available control technology unless it is demonstrated to the satisfaction of the Administrator that, based upon technical considerations, or energy, environmental, and economic impacts and other costs, the maximum degree of emissions reduction is not achievable in that case. If the applicant identifies the technology providing the maximum degree of emissions reduction as the best available control technology, then the Administrator may waive the requirement to analyze or evaluate less effective control technologies. Otherwise, the next most stringent control technology shall then be evaluated in the same manner. Documentation supporting the demonstration shall be included in the public record pursuant to paragraph (q)(2) of this section.

(ii) The control technology alternatives considered in paragraph (j)(5)(i) of this section shall be based upon control technologies and methods for the same and similar source categories, i.e., those categories including sources that have similar emissions stream characteristics.

(iii) On or after the date that an application is complete pursuant to paragraph (n) of this section, the permit applicant will not be required to consider control technology alternatives identified through public comments that are in addition to those alternatives required under paragraph (j)(5)(i)(A) of this section, unless the Administrator determines that, based on information provided pursuant to paragraph (q)(2) of this section, the alternatives warrant further consideration by the applicant.

(iv) After the date on which the public comment period is closed for a permit issued pursuant to this section, the applicant for such permit will not be required to consider any control technology that has not been identified either prior to or during the public comment period.

(6) For determinations of best available control technology required under this section, the Administrator shall include the control technology information in the EPA's RACT/BACT/LAER Clearinghouse within 60 days after permit approval.

* * * * *

(n) *Complete application criteria.*

(1)(i) The Administrator shall determine that a permit application is complete or deficient based on the consideration of determinations, analyses and other information contained in the application, and adequacy thereof, as specified in paragraphs (n)(2) through (n)(5) of this section.

(ii) The Administrator shall notify each applicant, in accordance with procedures set forth in § 124.3(c) of this chapter, as to either the completeness of the application or any deficiency in the application or information submitted. In the event of such a deficiency, the date of receipt of the complete application shall be the date on which the Administrator received all required information.

(2) Information necessary to determine a permit application complete shall include:

* * * * *

[1] No *de minimis* air quality level is provided for ozone. However, any net increase of 100 tons per year or more of VOC subject to PSD would be required to perform an ambient impact analysis, including the gathering of ambient air quality data.

(iii) (A) A detailed description of the system of continuous emissions reduction which the applicant has submitted in a permit application for a source or modification, to qualify either as best available control technology, or for an undemonstrated technology waiver in accordance with paragraph (s) of this section; and

(B) All information used or consulted by the applicant in recommending a system of continuous emissions reduction as either the best available control technology or an approvable undemonstrated technology.

(iv) Information and data used to perform all required analyses or determinations under paragraphs (o), (p), (r), (v) and (x) of this section, as applicable.

(3) Upon request of the Administrator, the owner or operator shall provide any information and data used to perform all required analyses or determinations under paragraphs (k), (l) and (m) of this section.

(4) An application shall not be considered complete unless the permit application has been registered on the applicable EPA electronic bulletin board. To register, at a minimum, the following must be provided:

(i) Name and type of source;

(ii) Nature of proposed project, i.e., new facility or modification;

(iii) Proposed location of the source in State/county (including Universal Transverse Mercator coordinates) and the distance between the source and each Class I area within 250 kilometers;

(iv) Anticipated allowable emissions, or increase in emissions rate, for each affected air pollutant regulated under the Act;

(v) Source contact mailing address and telephone number, and

(vi) The agency responsible for issuing the permit.

(5) Prior to making a completeness determination, the Administrator shall provide for any Federal Land Manager review and coordination required under paragraph (p)(5) of this section.

* * * * *

(p) *Sources potentially impacting Federal Class I areas.*

(1) *Protection of air quality related values.* * * *

(2) *General requirements.*

(i) *Notification of potential impacts on a Federal Class I area and requirement for impact assessment.*

(A) Where the Federal Official, Federal Land Manager, the Administrator, the Governor of an adjacent State, or the governing body of an adjacent Indian Tribe containing a Federal Class I area, files, prior to the date a completeness determination is made pursuant to paragraph (n)(1) of this section, a written notice alleging that emissions of a particular pollutant from a proposed major source or major modification may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change on affected air quality related values identified in the area by the Federal Land Manager, a permit shall not be issued unless the owner or operator of such source:

(*1*) Demonstrates to the satisfaction of the Administrator that emissions will not cause or contribute to ambient pollutant concentrations in the Federal Class I area which violate the maximum allowable increases over baseline concentrations; and

(*2*) Provides an analysis of the potential impacts on air quality related values at the Federal Class I area.

(B) A permit otherwise prohibited under paragraph (p)(2)(i)(A)(*1*) of this section may be issued in accordance with the variance provisions in paragraphs (p)(8) through (p)(11) of this section.

(ii) *Available information on air quality related values and analytical methods.* The Federal Land Manager or Federal Official shall, upon request, provide to the owner or operator of a proposed major source or major modification that may have an adverse impact on air quality related values in a Federal Class I area all available information about such values and methods to analyze potential impacts.

(iii) *Consultation with Federal Land Manager.* The Administrator shall provide for consultation and coordination with the Federal Land Manager including the procedures contained in paragraphs (p)(3) through (p)(6) of this section.

(3) *Pre-application coordination.* For a proposed major source or major modification within 100 kilometers of a Federal Class I area:

(i) The affected Federal Land Manager shall be notified within 30 days from receipt by the Administrator of advance notification of a permit application; and

(ii) The affected Federal Land Manager shall be given reasonable notice and an opportunity to participate in pre-application meetings with the applicant.

(4) *Permit application coordination.* (i) The Federal Land Manager of any Federal Class I area within 100 kilometers of a proposed major source or major modification shall be provided with a copy of the permit application and other relevant information, and

(ii) The Federal Land Manager shall be provided with a copy of a permit application requested within 7 days from the date information about such application is registered on the applicable EPA electronic bulletin board (in accordance with paragraph (n)(4) of this section).

(5) *Completeness determination coordination.* Prior to making the completeness determination under paragraph (n)(1) of this section, the Administrator shall:

(i) Ensure that the applicant has provided any analysis required pursuant to paragraph (p)(2)(i) of this section;

(ii) Give the Federal Land Manager 30 days from receipt of an application to review the application, where the Federal Land Manager has received such application pursuant to paragraph (p)(4) of this section;

(iii) Consider any comments provided by the Federal Land Manager within the time period under paragraph (p)(5)(ii) of this section; and

(iv) Consult with the Federal Land Manager about any inconsistency between the determination by the Administrator and the Federal Land Manager's recommendations.

(6) *Preliminary and final permit determination—No Class I increment violation.* Where the Administrator has determined that the emissions from the proposed major source or major modification will not cause or contribute to ambient pollutant concentrations in the Federal Class I area which violate the maximum allowable increases over baseline concentrations:

(i) The Administrator shall not issue a preliminary permit determination until the Federal Land Manager has been given at least 60 days (from the date of issuance of the completeness determination required under paragraph (n)(1) of this section that the permit is complete) to submit a demonstration that a proposed major source or major modification will have an adverse impact on air quality related values.

(ii) If the Administrator agrees with the Federal Land Manager's demonstration under paragraph (p)(6)(i) of this section, the Administrator shall propose to deny the permit.

(iii) If the Administrator is not satisfied with the Federal Land Manager's demonstration under paragraph (p)(6)(i) of this section, the Administrator shall consult with the Federal Land Manager, reference the Federal Land Manager's demonstration and the Administrator's proposed rejection of the demonstration in the public notice announcing the preliminary permit determination, and provide an explanation in writing (for inclusion in the public record along

with the Federal Land Manager's demonstration) of the reasons for proposing to reject the Federal Land Manager's demonstration. The Administrator's written explanation shall address, at a minimum, the following:

(A) The basis for any disagreement with the data and analyses contained in the Federal Land Manager's demonstration of adverse impact on air quality related values;

(B) Any conclusions the Administrator reaches, about whether the projected impacts of the proposed source's emissions will have an adverse impact on air quality related values, that are inconsistent with the conclusions reached in the demonstration submitted by the Federal Land Manager; and

(C) Any measures undertaken to mitigate the potential adverse impacts of proposed emissions increases, including the estimated effect of any mitigation.

(iv) In the final permit determination, the Administrator shall address any comments made by the Federal Land Manager concerning the Administrator's preliminary determination.

(7) *Mitigation of adverse impacts.* The Administrator may issue a permit for a proposed major source or major modification that would otherwise be denied a permit under paragraph (p)(6) of this section, if the Administrator determines, in consultation with the Federal Land Manager, that the source has mitigated its adverse impact on air quality related values. The owner or operator of a proposed major source or major modification may mitigate an adverse impact by obtaining enforceable and permanent emissions reductions of sufficient amount and in such location that the reductions will offset the change in air quality in the Federal Class I area that would have resulted from the proposed source.

* * * * *

(q) *Public participation.*

(1) The Administrator shall follow the applicable procedures of part 124 of this chapter in processing applications under this section. The Administrator shall follow the procedures at § 51.166(q) of this chapter to the extent that the procedures of part 124 of this chapter do not apply.

(2) The following information must be submitted with any new control technology alternatives recommended by the public for the Administrator to consider in determining best available control technology pursuant to paragraph (j)(5) of this section:

(i) Name and location of the source utilizing the control technology;

(ii) Manufacturer, type and model of pollution control device;

(iii) Date installed and date operational;

(iv) Performance requirements specified under applicable permits, implementation plans or Federal standards; and

(v) Available test or performance data or identification of source of additional information.

(3)(i) After any cut-off date established in accordance with paragraph (j)(5)(iii) of this section, the Administrator shall notify a permit applicant within 10 working days from the date of receipt of a public comment concerning any control technology alternatives that the Administrator determines to warrant further consideration by the applicant; and

(ii) The Administrator shall make available in the public record all information that was submitted with public comment regarding control technology alternatives and provide the basis for its decision to either require or not require the permit applicant to further consider such control technology alternatives.

* * * * *

(v) *Undemonstrated technology or application waiver.*

(1) An owner or operator of a proposed major stationary source or major modification may satisfy the requirements of paragraph (j) of this section through the use of an undemonstrated technology or application as set forth in this section. The owner or operator shall provide to the Administrator a written request for approval of an undemonstrated technology or application as part of the permit application.

(2) The Administrator may approve a system of undemonstrated technology or application for a particular source or modification if:

* * * * *

(4) If the Administrator withdraws approval of a system of undemonstrated technology or application, the owner or operator shall bring the affected emissions unit(s) into compliance with the reference best available control technology emissions limit within 18 months from the date of withdrawal.

(5) The Administrator shall include, as a minimum, the following information in a waiver issued pursuant to paragraph (v) of this section:

(i) The undemonstrated technology or application's emissions control performance objective and the applicable reference best available control technology emissions limit;

(ii) The marginal and gross failure emissions limits as defined by the Administrator on a case-by-case basis; and

(iii) Identification and classification of potential failure modes and associated contingency measures.

(6) If, by the date established in paragraph (v)(2)(ii) of this section, the undemonstrated technology or application does not achieve the permitted emissions limit, but actual emissions are equal to or less than the best available control technology emissions limit referenced in the permit, the Administrator shall:

(i) Issue a final permit with the emissions limit equal to the undemonstrated technology or application's consistently achieved actual emissions rate; and

(ii) Report the final permit limits to the EPA's RACT/BACT/LAER Clearinghouse as a demonstrated control technology.

(7) If, by the date established in paragraph (v)(2)(ii) of this section, the actual emissions from the undemonstrated technology or application constitute marginal failure the owner or operator may petition the Administrator to permit the undemonstrated technology or application to operate at its actual emissions limit. Accordingly, the Administrator shall either:

(i) Approve the petition and proceed in accordance with paragraphs (v)(6) (i) and (ii) of this section; or

(ii) Disapprove the petition and require the owner or operator to comply with paragraph (v)(4) of this section.

(8) If, at any time prior to or on the date established in paragraph (v)(2)(ii) of this section, the actual emissions from the undemonstrated technology or application constitute gross failure:

(i) The Administrator shall withdraw approval pursuant to paragraph (v)(4) of this section; and

(ii) The owner or operator shall mitigate all emissions increases above the applicable reference best available control technology emissions limit by reducing actual emissions.

(9) The Administrator shall limit the number of waivers granted to the number necessary to ascertain whether or not such system complies with sections 111(j)(1)(A)(ii) and (iii) of the Act.

* * * * *

(x) *Plantwide applicability limit.*

(1) *Applicability.* The owner or operator of an existing major stationary source may request the Administrator to approve a plantwide applicability limit for any one or more pollutants, and the Administrator may approve a plantwide applicability limit for an existing major stationary source, in accordance with paragraphs (x)(2) through (x)(5) of this section.

(2) *Procedure.* A plantwide applicability limit for an existing major stationary source may be established only through a procedure consistent with § 51.161 of this chapter, and with at least 30 days allowed for public notice and opportunity for comment.

(3) *Emissions limitations and conditions.*

(i) A plantwide applicability limit shall be established based on either:

(A) Plantwide actual emissions (not to exceed current allowable emissions), including a reasonable operating margin, less than the applicable significant emissions rate; or

(B) Source-wide limits on annual emissions established in a permit issued within the immediately preceding 5 years under regulations approved pursuant to § 51.165 of this part, where the source-wide emissions limits were completely offset and relied upon in an approved State attainment demonstration plan.

(ii) Any plantwide applicability limit emissions limitations shall be achievable through application of production processes or available methods, systems, and techniques including, but not limited to, emissions control equipment, fuel cleaning or treatment, fuel combustion techniques, substitution of less polluting materials, or limits on production that represent normal source operations.

(iii) Specific terms and conditions that assure the practical enforceability of plantwide applicability limit emissions limitations shall be contained in a federally enforceable permit applicable to the source.

(iv) The emissions limitations and conditions established for a plantwide applicability limit shall not relieve any owner or operator of the responsibility to comply fully with any applicable control technology requirements.

(4) *Plantwide applicability limit modifications.*

(i) Notwithstanding paragraphs (b)(2) and (b)(3) of this section (the definitions for major modification and net emissions increase), any physical or operational change consistent with plantwide applicability limit terms and conditions and paragraph (b)(3)(vi)(C) of this section shall not constitute a major modification for the pollutants covered by the plantwide applicability limits. All decreases in emissions shall have approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change;

(ii) Requirements equivalent to those contained in paragraphs (j) through (r) of this section shall apply to any plantwide applicability limit major modification as if it were a major modification, except that in lieu of paragraph (j)(3) of this section, a plantwide applicability limit major modification shall apply best available control technology for each pollutant subject to regulation under the Act if an emissions increase above the plantwide applicability limit would occur; and

(iii) The best available control technology requirement applies to each emissions unit that contributes to the emissions increase above the plantwide applicability limit.

(5) *Plantwide applicability limit reevaluation.*

(i) The Administrator shall reevaluate the plantwide applicability limit emissions limitations pursuant to—

(A) Permit renewal and public notification procedures under part 70 or 71 of this chapter; or

(B) Another proceeding with public notice and opportunity for public comment.

(ii) As part of the reevaluation required under paragraph (x)(5)(i) of this section, the Administrator may reduce permitted emissions limitations or otherwise adjust (but not increase) permitted emissions limitations to reflect:

(A) Air quality concerns arising after the approval of the plantwide applicability limit;

(B) Changes at the source; or

(C) Other appropriate considerations.

(iii) The Administrator shall adjust the source's plantwide applicability limit emissions limitations to reflect new applicable requirements as they become effective.

* * * * *

4. Section 52.24 is revised to read as follows:

**§ 52.24 Statutory restriction on new sources.**

(a) Any area designated nonattainment pursuant to section 107(d) of the Act to which, immediately prior to the enactment of the Amendments to the Act of 1990 (November 15, 1990), a prohibition of construction or modification of major stationary sources was applied, shall retain that prohibition if such prohibition was applied by virtue of a finding of the Administrator that the State containing such an area:

(1) Failed to submit an implementation plan meeting the requirements of an approvable new source review permitting program; or

(2) Failed to submit an implementation plan that provided for timely attainment of the national ambient air quality standard for sulfur dioxide by December 31, 1982. This prohibition shall apply until the Administrator approves a plan for such area as meeting the applicable requirements of part D of title I of the Act as amended (NSR permitting requirements) or subpart 5 of part D of title I of the Act as amended (relating to attainment of the national ambient air quality standards for sulfur dioxide), as applicable.

(b) Permits to construct and operate as required by permit programs under section 172(c)(5) of the Act may not be issued for new or modified major stationary sources proposing to locate in nonattainment areas or areas in a transport region where the Administrator has determined that the applicable implementation plan is not being adequately implemented for the nonattainment area or transport region in which the proposed source is to be constructed or modified in accordance with the requirements of part D of title I of the Act.

(c) Whenever, on the basis of any information, the Administrator finds that a State is not in compliance with any requirement or prohibition of the Act relating to the construction of new sources or the modification of existing sources, the Administrator may issue an order under section 113(a)(5) of the Act prohibiting the construction or modification of any major stationary source in any area to which such requirement applies.

(d) The restrictions in paragraphs (a) and (b) of this section apply only to major stationary sources of emissions that cause or contribute to concentrations of the pollutant (or precursors, as applicable) for which the transport region or nonattainment area was designated such, and for which the applicable implementation plan is not being carried out in accordance with, or does not meet, the requirements of part D of title I of the Act.

(e) For any transport region or any area designated as nonattainment for any national ambient air quality standard, the restrictions in paragraphs (a) and (b) of this section shall apply to any major stationary source or major modification that would be major for the pollutant (or precursors, where applicable) for which the area is designated nonattainment or a transport region, if the stationary source or major modification would be constructed anywhere in the designated nonattainment area or transport region. A major stationary source or major modification that is major for volatile organic compounds is also major for ozone.

(f) The definitions in § 51.165(a) of this chapter shall apply under this section.

(g) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then:

(1) If the construction moratorium imposed pursuant to this section is still in effect for the nonattainment area or transport region in which the source or modification is located, then the permit may not be so revised; or

(2) If the construction moratorium is no longer in effect in that area, then the requirements of § 51.165(a) of this chapter shall apply to the source or modification as though construction had not yet commenced on the source or modification.

(h) This section does not apply to major stationary sources or major modifications locating in a clearly defined part of a nonattainment area or transport region (such as a political subdivision of a State), where the EPA finds that a plan which meets the requirements of part D of title I of the Act is in effect and is being implemented in that part.

[FR Doc. 96–17544 Filed 7–22–96; 8:45 am]

BILLING CODE 6560–50–P