

Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a "major rule" as defined by 5 U.S.C. § 804(2).

#### *Petitions for Judicial Review*

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by June 29, 1998. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of

such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Ozone, Reporting and recordkeeping requirements, Volatile organic compounds.

Dated: March 30, 1998.

**William Muszynski,**

*Acting Regional Administrator, Region 2.*

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

#### **PART 52—[AMENDED]**

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### **Subpart HH—New York**

2. Section 52.1670 is amended by adding new paragraph (c)(92) to read as follows:

#### **§ 52.1670 Identification of plan.**

\* \* \* \* \*

(c) \* \* \*

(92) Revisions to the New York State Implementation Plan (SIP) for ozone concerning the control of volatile organic compounds from Gasoline Dispensing Sites and Transport Vehicles, dated July 8, 1994, submitted by the New York State Department of Environmental Conservation (NYSDEC).

(i) Incorporation by reference:

(A) Amendments to Part 230 of title 6 of the New York Code of Rules and Regulations of the State of New York, entitled "Gasoline Dispensing Sites and Transport Vehicles," effective September 22, 1994.

(ii) Additional material:

(A) July 8, 1994, letter from Langdon Marsh, NYSDEC, to Jeanne Fox, EPA, requesting EPA approval of the amendments to Part 230.

3. In § 52.1679 the table is amended by revising the entry, for Part 230 to read as follows:

#### **§ 52.1679 EPA-approved New York State regulations.**

New York State regulation	State effective date	Latest EPA approval date	Comments
Part 230, Gasoline Dispensing Sites and Transport Vehicles .....	8/22/94	April 30, 1998.	

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#### **ENVIRONMENTAL PROTECTION AGENCY**

#### **40 CFR Part 52**

[PA058-4070; FRL-5997-8]

#### **Approval and Promulgation of Air Quality Implementation Plans; Pennsylvania; Disapproval of the NO<sub>x</sub> RACT Determination for Pennsylvania Power Company**

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

**ACTION:** Final rule.

**SUMMARY:** EPA is disapproving a State Implementation Plan (SIP) revision submitted by the Commonwealth of Pennsylvania. The intended effect of this action is to disapprove the nitrogen oxide (NO<sub>x</sub>) reasonably available control technology (RACT) determination submitted by the Pennsylvania Department of

Environmental Protection (PADEP for Pennsylvania Power Company—New Castle plant (PPNC), located in Lawrence County, Pennsylvania.

**DATES:** This final rule is effective on June 1, 1998.

**ADDRESSES:** Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air Protection Division, U.S. Environmental Protection Agency, Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107; Pennsylvania Department of Environmental Protection, Bureau of Air Quality, P.O. Box 8468, 400 Market Street, Harrisburg, Pennsylvania 17105.

**FOR FURTHER INFORMATION CONTACT:** Cynthia H. Stahl, (215) 566-2180, at the EPA Region III address above.

**SUPPLEMENTARY INFORMATION:** On August 18, 1997 (62 FR 43959), EPA published a notice of proposed rulemaking (NPR) for the Commonwealth of Pennsylvania. The NPR proposed disapproval of the NO<sub>x</sub> RACT determination for Pennsylvania Power's New Castle plant (PPNC), located in Lawrence County.

The formal SIP revision was submitted by Pennsylvania Department of Environmental Resources (now the Pennsylvania Department of Environmental Protection or PADEP) on April 19, 1995. EPA is now taking final action to disapprove the RACT determination submitted by PADEP for PPNC. This action is being taken under section 110 of the Clean Air Act.

#### **I. Background**

On April 9, 1996 EPA originally published a direct final rulemaking approving this RACT determination. Opportunity for public comment was provided, however, and on May 8, 1996, the New York Department of Environmental Conservation (NYDEC) submitted a letter stating that it intended to adversely comment on EPA's proposed approval of PADEP's RACT determination for PPNC. Because of New York's letter of intent, the direct final action converted to a proposed action in accordance with established Federal rulemaking procedures. On June 11, 1996, EPA published a notice

withdrawing the effective date of the original direct final rule for Pennsylvania Power—New Castle, among other facilities. (61 FR 29483).

The NYDEC submitted adverse comments to EPA on June 28, 1996 in response to the converted proposed rulemaking notice published on April 9, 1996. The NYDEC stated that they disagreed with EPA's RACT determination for the boilers at PPNC and believe that there are technically and economically feasible controls for those boilers that should be determined to be RACT. As requested, EPA extended the comment period on its original April 9, 1996 proposed approval twice; the last time until August 2, 1996 (61 FR 29483 and 61 FR 37030). On July 15, 1996 and August 1, 1996, PPNC submitted comments to EPA addressing issues raised by NYDEC. On August 2, 1996, Pennsylvania DEP submitted comments to EPA stating that EPA should proceed with final approval of the PPNC RACT determination.

After considering all the comments submitted, EPA withdrew the proposed approval and instead, on August 18, 1997, proposed disapproval of the operating permit submitted by PADEP on April 19, 1995 intended to impose RACT for PPNC.

## II. Comments Received on the August 18, 1997 Proposed Disapproval

In response to the August 18, 1997 proposed disapproval of PADEP's RACT determination for PPNC, comments were received from NYDEC and Paul, Hastings, Janofsky & Walker LLP, attorneys for PPNC. NYDEC's comments fully supported EPA's proposed rulemaking action. The comments from Paul, Hastings, Janofsky & Walker LLP are summarized below.

*Comment 1*—EPA has not articulated its legal standard to make RACT determinations. Case-by-case RACT is not a legal standard.

*Response 1*—EPA articulated its rationale and the criteria by which the PPNC submittal was being judged in the August 18, 1997 NPR. EPA's policies regarding RACT and how RACT determinations are made were discussed in the NPR. Since EPA's definition of RACT allows for the consideration of source-specific factors (i.e. case-by-case) in the determination of RACT-specific applications of policy or guidance are described in the applicable NPR.

*Comment 2*—By stating that the proposed PPNC RACT limits are too high, EPA has used legal standards that have yet to be defined by regulation.

*Response 2*—EPA used, as a basis to support its statement, the monitoring data that was available for the PPNC

boilers. EPA and the Pennsylvania regulations define RACT as "the lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility" (December 9, 1976 memorandum from Roger Strelow, Assistant Administrator for Air and Waste Management, to EPA Regional Administrators and 25 Pa. Code, Subpart C Article III, Chapter 121). Since RACT is the lowest emission limit achievable considering technological and economic feasibility, it appeared to be unreasonable that the emission rates requested by PPNC for RACT were higher than those actually monitored at those boilers. It is unnecessary that a legal standard for RACT be established by regulation prior to an action on a case-by-case RACT determination proposal; the Clean Air Act contemplates establishing enforceable legal standards through notice and comment rulemaking such as that being conducted for case-by-case RACT proposals.

*Comment 3*—EPA has not promulgated a definition for RACT to be used in NO<sub>x</sub> determinations and cannot rely on Pennsylvania's definition of RACT since EPA had not approved it until August 12, 1997. EPA has misapplied the RACT definition in the Strelow Memorandum to the PPNC determination since the Strelow Memorandum is guidance for SIP approvals by EPA and not to make individual RACT determinations. The Strelow Memorandum recognized that individual RACT determinations would be made using future guidance. The RACT definition contained in the Strelow Memorandum was not issued by notice and comment rulemaking and therefore is not binding. Furthermore, EPA expanded this definition of RACT without notice and without record.

*Response 3*—The Clean Air Act gave EPA authority to define RACT for all regulated pollutants, including NO<sub>x</sub>. EPA defined RACT in the Strelow memorandum dated December 9, 1997. In a **Federal Register** published on September 17, 1979 (44 FR 53761), EPA discussed the Clean Air Act statutory requirements including the definition of RACT and stated there that the Strelow memorandum was published in BNA Environmental Reporter, Current Developments, pp. 1210–12 (1976). EPA's definition of RACT is consistent with the statutory intent and Pennsylvania's definition of RACT is consistent with the Strelow memorandum. Congress expressly cites to EPA's RACT guidance and endorses it in section 182(a)(2)(4) as the

appropriate guide for state submittals. This guidance was published and made available to the public in the House Energy and Commerce Committee Reports, Rept. 101–490 Part 1 at page 235. Therefore, EPA's statutory authority to approve RACT determinations is clear. EPA has consistently applied the definition of RACT to the PPNC RACT submittal.

*Comment 4*—EPA is inappropriately using 1993 as a baseline and has not provided record support to use 1993 instead of 1990 as baseline.

*Response 4*—The commenter concludes that EPA has used 1993 as a baseline instead of 1990 and yet does not provide a discussion of the reason for this comment. EPA has not established any baseline year but rather has used emissions data that available for 1993 to illustrate the feasibility of achieving emission rates lower than those proposed by PPNC as RACT. These emission rates were achieved without the use of low-NO<sub>x</sub> burners or other add-on controls; leading to the conclusion that more stringent emission limitations that those proposed by the Company should be considered RACT.

*Comment 5*—EPA is using ad hoc reasons, such as averages of emissions data from similar sources, acid rain information, NO<sub>x</sub> Memorandum of Understanding (MOU) status, and Ozone Transport Assessment Group (OTAG), to support its RACT determination. EPA has not defined what a "similar boiler" is.

*Response 5*—The discussion in the EPA NPR regarding average emission rates achieved for boilers similar to PPNC, requirements under the acid rain program that the PPNC boilers agreed to, etc. were included in order to provide a context for EPA's proposed disapproval of the PPNC RACT submittal. The reasonableness of the proposed PPNC emission limits must be determined in the context of what other similar sources are able to achieve and what PPNC itself agreed to achieve in order to meet its other statutory obligations. NO<sub>x</sub> emissions are regulated by several programs but the control technology and methods to achieve NO<sub>x</sub> emission reductions are not limited to meeting the obligations in any one program. EPA also clarified the use of the term "similar boilers" by stating that the comparisons with similar boilers were made by size and type (dry-bottom, wall-fired, coal burning). The data used came from the acid rain database, which only includes those boilers subject to the acid rain requirements. The boilers subject to the acid rain requirements are utility units larger than 250 mmBTU/hr, rated heat

input. EPA's determination is also based on its recognition that there may be technical similarities that would facilitate the use of similar emission controls even among boilers of different sizes and types. The NPR makes clear the bases of comparison between PPNC's boilers and other combustion units.

*Comment 6*—In making the PPNC RACT determination now, EPA is retroactively applying criteria that did not exist when PPNC prepared its proposal, when PADEP conducted its review, or when EPA approved the PPNC RACT proposal.

*Response 6*—EPA's definition of RACT has been that contained in the Strelow memo since it was issued in the late 1970s and EPA has used that definition as the basis for its RACT rulemaking actions since that time. EPA's reliance on guidance documents is clearly stated in its proposed rulemaking actions that would result in binding enforceable requirements such as those in case-by-case RACT determinations. Interested parties are welcome to comment specifically on the RACT rulemaking actions as well as on the criteria that EPA used to conduct those rulemaking actions. Binding criteria do not have to exist prior to conducting a proposed rulemaking action. The criteria that EPA applies to all RACT proposals, including the PPNC proposal, is the definition of RACT, any guidance in the form of memos or guidance documents pertinent to the source category or source that is subject to the RACT requirement, and any specific data applicable to the source category or source that is subject to the RACT requirement. This has been EPA's criteria for RACT determinations since the statutory requirement was imposed. The source category or source specific guidance documents to be used are those that are available at the time the RACT determination is being evaluated and proposed. For example, the NO<sub>x</sub> Supplement to the Title I General Preamble published in the November 25, 1992 **Federal Register** re-states our practice for determining RACT and states that much of EPA's guidance for VOC RACT is also applicable to NO<sub>x</sub> RACT (57 FR 55620). In the case of PPNC, PADEP prepared its RACT proposal and supporting documents in the late summer and fall of 1994. The public hearing for the PPNC RACT proposal was held on November 17, 1994. EPA submitted comments for the record on December 5, 1994. EPA's comments regarding the PPNC RACT proposal included comments questioning the cost factors and asserting that, in general, the

information in the package did not support the conclusions arrived at by PPNC. The record is clear that EPA has consistently maintained its position on this RACT proposal since it was first proposed at the state level. The use of the federal definition of RACT even where such a definition has not been specifically approved into a state's SIP ensures that consistent criteria are applied in imposing RACT requirements.

*Comment 7*—EPA cannot use PPNC's acid rain permit limits or Pennsylvania's participation in the Ozone Transport Commission (OTC) NO<sub>x</sub> MOU as criteria to determine whether PPNC's proposal is RACT.

*Response 7*—EPA did not use PPNC's acid rain permit limits or Pennsylvania's participation in the OTC NO<sub>x</sub> MOU as criteria to determine whether PPNC's proposal is RACT. Instead, EPA applied criteria using the definition of RACT, information from available, appropriate guidance documents, and available information regarding PPNC's boilers. The test of reasonableness in the definition of RACT warrants investigating the availability of controls and the ability to meet other emission limitations among similar sources. EPA's evaluation of the PPNC RACT proposal investigated all relevant information that would indicate technical and economic feasibility of achieving lower emission limits as required by the definition of RACT. See also Response 6.

*Comment 8*—EPA is using different criteria documents than required to be used such as those used in the approval of three NO<sub>x</sub> RACT determinations for sources in New York (September 23, 1997, 62 FR 49617). None of the documents referenced by EPA in the PPNC docket are listed in the March 1996 NO<sub>x</sub> Policy Documents for the Clean Air Act of 1990 (EPA-452/R-96-005). EPA has not provided record support to explain its deviation from not using the policy documents listed in EPA-452/R-96-005.

*Response 8*—The criteria documents in the PPNC RACT docket are those that were determined to be relevant to the evaluation of the types of boilers at PPNC. The three NO<sub>x</sub> RACT determinations referred to by the commenter pertained to NO<sub>x</sub> sources unlike those at PPNC. These New York NO<sub>x</sub> sources are the University of Rochester, with two non-utility oil-fired boilers (90 mmBTU/hr and 122 mmBTU/hr rated capacity), Morton International, Incorporated, with one gas-fired boilers smaller than 100 mmBTU/hr rated capacity and Algonquin Gas Transmission Company

with four gas-fired internal combustion engines. It is to be expected that the documents used to evaluate the New York sources would be different than those used to evaluate the five coal-fired utility boilers at PPNC. As stated by PPNC, the rated capacity of the PPNC boilers are 119 mmBTU/hr (35 MW), 164 mmBTU/hr (48 MW), 335 mmBTU/hr (98MW), 335mmBTU/hr (98MW), and 468 mmBTU/hr (137 MW). The documents listed in the March 1996 EPA document (EPA-452/R-96-005) are those related to ozone policy. EPA's Introduction to the March 1996 document does not purport to exhaustively list all applicable or relevant NO<sub>x</sub> RACT guidance. Indeed, it states that it includes, along with the NO<sub>x</sub> Supplement to the General Preamble, "several other guidelines and policy memorandum" (sic). These items include primarily documents regarding SIP attainment demonstrations, section 182(f) NO<sub>x</sub> waivers, emissions trading, fuel switching, compliance schedules, de minimis values for gas turbines and internal combustion engines, NO<sub>x</sub> substitution in air quality plans, conformity, and new source review—issues that do not pertain to the PPNC RACT submittal. The relevant documents in the March 1996 list that pertained to PPNC were used and included in the PPNC docket along with other relevant and appropriate pieces of information. No applicable regulation, policy or guidance limits EPA's consideration in evaluating RACT submittals to only those documents that are contained in the March 1996 EPA document list. Consequently, EPA's use of criteria documents in the evaluation of the PPNC RACT submittal were appropriate.

*Comment 9*—The proposed action does not cite any delegation of authority to the Regional Administrator to sign SIP actions. Based on Table 1, 54 FR 2221 (Jan. 19, 1989), only the Administrator can sign SIP actions that deviate from national policy and the proposed disapproval of the PPNC SIP submittal relies on criteria that significantly deviate from national policy.

*Response 9*—Delegation 7-10 provides the authority for Regional Administrators "[t]o propose or take final action on any State implementation plan under section 110 of the Clean Air Act." EPA's Directives System contains the definitive statements of EPA's organization \* \* \* and delegations of authority. 40 CFR 1.5(b). The Directives System is the official statement of authority that has been delegated and EPA is not required to identify the specific delegation of

authority in each action the Agency takes. The current delegation, approved by the Administrator on May 6, 1997, places two limitations on the delegation.<sup>1</sup> The first limitation applies only to final actions. The second provides that the delegation does not apply where the action establishes an alternative interpretation from an established EPA policy where the alternative interpretation has not been reviewed through the Agency's consistency process. As explained above, EPA's proposed action for PPNC is not based on an alternative interpretation from an established EPA policy.

*Comment 10*—EPA has used a significantly different approach in the PPNC RACT proposal evaluation than used in other EPA RACT determinations. For example, the EPA approval of International Paper—Hammermill Division (Lockhaven) allowed an emission limit based on a 30 day running average that included a “buffer” as a way to account for the limited emission data available and did not require the installation of add-on controls.

*Response 10*—EPA's approach in evaluating all RACT determinations is consistent in that the same definition of RACT is used. However, under long-standing EPA policy and guidance, the determination of RACT allows for the consideration of source-specific variables and as such, can result in different conclusions as to what RACT is for different sources. The circumstances at International Paper—Hammermill Division (Lockhaven) and the information provided by PADEP and the Company in support of the RACT proposal warranted granting the particular RACT determination in that instance. The PADEP's submittal for PPNC does not contain information supporting its proposed RACT determination. Consequently, EPA approved the International Paper RACT and proposed to disapprove the PPNC RACT submittal.

*Comment 11*—EPA did not consider the full PPNC NO<sub>x</sub> RACT proposal in deciding to propose disapproval. EPA

did not obtain from PADEP the full proposal with its appendices that were submitted by PPNC to PADEP.

*Response 11*—EPA evaluated the PPNC NO<sub>x</sub> RACT submittal using all the information submitted by PADEP and that submitted during the comment periods in June-August 1996 and in August 1997. If either PADEP or PPNC believed that EPA did not originally consider documents critical to its RACT proposal, it had an opportunity to submit any of these documents and comments in response to the proposed rulemaking notices. Furthermore, EPA expects RACT SIP submittals to include all documents relied on by the state in making its decision to propose RACT. If PADEP did not submit information to EPA, the presumption is that that information was not relied on in its decision making. Whether or not documents are submitted with each Pennsylvania RACT submittal is an issue between the source and the Commonwealth. EPA's final rulemaking action considers all information submitted with the April 19, 1995 PADEP submittal and during the relevant comment periods.

*Comment 12*—EPA improperly viewed the PPNC proposal as a “no controls” proposal. Since late 1993, PPNC has installed and experimented with two separate computerized combustion optimization systems in the PPNC unit 5 boiler resulting in a 50% emission reduction from 1990 levels. PPNC has used this information from unit 5 on units 3 and 4, resulting in comparable emission reductions.

*Response 12*—EPA evaluated the PPNC proposal on the basis of whether the proposal would result in a RACT level of emissions. RACT is defined by EPA and PADEP as the lowest achievable emission limit considering technical and economic feasibility. The emission limits proposed by PADEP and PPNC are higher than those that were currently monitored at the facility at the time the RACT proposal was being developed. The PADEP's April 19, 1995 submittal to EPA intended to impose RACT for PPNC did not mention a computerized combustion optimization system through an enforceable permit. Subsequent to the April 19, 1995 submittal, PADEP mentioned the use of a computerized combustion optimization system at PPNC. On further investigation, EPA found that this system was bought, installed and tested using Department of Energy funds and did not require the use of capital

funds at PPNC. If the combustion optimization system is an available emission control option to reduce NO<sub>x</sub> emissions, the PPNC submittal should have compared the sustainable emission reductions that can be achieved by such a combustion optimization system with those sustainable emission reductions that can be achieved by other more conventional controls such as low—NO<sub>x</sub> burners or selective catalytic reduction (SCR) along with economic considerations. Even if a proper RACT evaluation were done to support a conclusion that RACT may not require add-on controls, the emission limits in the April 19, 1995 RACT submittal for PPNC would not be approval because they are substantially less stringent than the actual measured data. The PPNC cost analysis for conventional NO<sub>x</sub> controls uses figures that appear to be unrealistic and unsupported by fact. The cost figures provided by PPNC, when compared in context with cost figures for similar boilers, appear to be significantly higher than other figures without adequate justification. Consequently, EPA has determined that the PPNC RACT proposal has not adequately demonstrated that add-on controls are economically infeasible.

*Comment 13*—EPA has improperly used the lack of official EPA approval of the PADEP Guidance Document on Reasonably Available Control Technology for Sources of NO<sub>x</sub> Emissions to support its proposed disapproval.

*Response 13*—EPA clearly stated in the August 18, 1997 NPR regarding the proposed PPNC disapproval that the PADEP Guidance Document on Reasonably Available Control Technology for Sources of NO<sub>x</sub> Emissions was not part of the April 19, 1995 submittal nor any other PADEP submittal requesting EPA approval and that, therefore, EPA was not relying on this guidance document in proposing disapproval of the PPNC RACT submittal. EPA included a discussion of this document only because PPNC made comments in response to EPA's withdrawal of its initial notice of approval (June 11, 1996) claiming that PADEP had relied on this document. However, PPNC's claims in this regard cannot be considered by EPA where PADEP has not identified this document as a basis for its submittal.

Furthermore, as stated in the NPR for EPA's action on Pennsylvania's VOC and NO<sub>x</sub> RACT regulation, Chapter

<sup>1</sup> The commenter's citation to Table 1 is obsolete. Under the previous version of delegation 7–10, the Agency created three tables which identified separate processes for SIP actions. The Regional Administrators were delegated authority to sign actions on tables 2 and 3, with the Administrator retaining sole authority to sign actions on Table 1. Subject to two limitations, the Regional Administrators have been delegated authority to sign all SIP actions.

129.91 through 129.95, the Pennsylvania RACT guidance document has never been submitted to EPA for approval into the Pennsylvania SIP (62 FR 43134, August 12, 1997).

*Comment 14*—EPA's refusal to consider any options other than add-on controls is unsupportable. EPA regulations, guidance, relevant case law and EPA's definition of RACT contemplates and supports the use of methods other than add-on controls.

*Response 14*—RACT requirements do not necessarily always have to include add-on controls. EPA has made many RACT determinations that provide for control methods that do not include add-on controls. These RACT determinations were supported by technical and economic data. A RACT analysis requires that all control options be evaluated for technical and economic feasibility and the potential emission reductions from each of these options compared. Therefore, the commenter is mistaken in concluding that because EPA has proposed to disapprove the PPNC RACT proposal which does not propose any add-on controls, EPA has refused to consider other non-add-on control options. EPA's evaluation of the PPNC submittal merely analyzes the information submitted and available that are relevant to PPNC and concludes that the PPNC proposal is unsupported by the relevant information.

*Comment 15*—EPA has inappropriately included Ohio Edison Company in its consideration of costs on PPNC. EPA should consider only PPNC's resources and not those of other companies with which PPNC has a relationship. "Reasonably available" requires that cost-effectiveness is determined only on a facility basis.

*Response 15*—EPA's analysis of the PPNC RACT submittal did not name particular companies or parent companies as specifically responsible for the costs of PPNC. The cost figures as provided by PPNC are out-of-line with those obtained from other sources, including sources under the acid rain program, for similarly sized and typed boilers, resulting in EPA's conclusion that the PPNC RACT proposal submitted by PADEP is not adequately substantiated and supported to justify the emission requirements being requested.

*Comment 16*—EPA has failed to give proper deference to PADEP's decision to approve the PPNC proposal as RACT. EPA cannot substitute its judgment for the State's determination because EPA believes more stringent air quality controls are achievable.

*Response 16*—Although the State has the initial obligation to determine the

appropriate control requirements for sources, EPA is required to review the submission and to approve or disapprove it as complying with the applicable statutory requirements.

These requirements include the general requirements of section 110(a)(2) and, in this case, the statutory requirements that the control technology is "RACT" for PPNC. While EPA will consider the record for the State's determination, there is no statutory obligation for EPA to defer to the State. To the contrary, the statutory requirement that EPA review and take rulemaking action on the State's submission demonstrates that Congress did not intend for EPA to "rubber stamp" State determinations.

*Comment 17*—EPA has acted arbitrarily and capriciously in proposing to disapprove the PPNC RACT proposal. EPA has denied PPNC a meaningful opportunity to comment based on each of the reasons above. Consequently, until EPA can resolve the above comments, EPA should suspend this rulemaking and ultimately consider approval of the PPNC RACT proposal or re-propose the disapproval including legal and factual rationale.

*Response 17*—EPA's proposed rulemaking action is clear and deliberate in setting forth the legal and factual reasons supporting the proposed disapproval. PPNC and all other interested parties were given ample opportunity to submit comments and supporting information. EPA has addressed every comment made in the commenter's letter and has considered all relevant pieces of information. In conducting this rulemaking action, EPA met its obligations to consider all comments made in response to the proposed rulemaking action. Proceeding to final rulemaking is not predicated on negotiating an acceptable resolution with the parties that submitted comments. EPA concludes that its consideration and review of all submitted information and its rationale supports a disapproval of the PPNC RACT proposal submitted on April 19, 1995.

### III. Final Action

EPA is disapproving the Pennsylvania Power New Castle plant NO<sub>x</sub> RACT proposal submitted by PADEP on April 19, 1995 as a requested revision to the Pennsylvania SIP.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic,

and environmental factors and in relation to relevant statutory and regulatory requirements.

### IV. Administrative Requirements

#### A. Executive Order 12866

This regulatory action has been submitted to the Office of Management and Budget (OMB) for E.O. 12866 review.

#### B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000. This action only affects one source, Pennsylvania Power Company—New Castle plant (PPNC). PPNC is not a small entity. Therefore, EPA certifies that this disapproval action does not have a significant impact on small entities.

SIP approvals under sections 110 and 301, and subchapter I, part D of the CAA do not create any new requirements but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP approval does not impose any new requirements, EPA certifies that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship the CAA, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co. v. U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

#### C. Unfunded Mandates

Under Section 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to private sector, of \$100 million or more. Under Section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA

to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the approval action being promulgated does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

#### *D. Submission to Congress and the General Accounting Office*

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. Section 804, however, exempts from section 801 the following types of rules: rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding today's action under section 801 because this is a rule of particular applicability, applying only to Pennsylvania Power—New Castle plant, located in Lawrence County.

#### *E. Petitions for Judicial Review*

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action pertaining to the disapproval of PADEP's NO<sub>x</sub> RACT proposal for Pennsylvania Power New Castle must be filed in the United States Court of Appeals for the appropriate circuit by June 29, 1998. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

#### **List of Subjects in 40 CFR Part 52**

Environmental protection, Air pollution control, Intergovernmental relations, Nitrogen dioxide, Ozone,

Reporting and recordkeeping requirements.

Dated: April 8, 1998.

**W. Michael McCabe,**

*Regional Administrator, Region III.*

Chapter I, title 40, of the Code of Federal Regulations is amended as follows:

#### **PART 52—[AMENDED]**

1. The authority citation for part 52 continues to read as follows:

**Authority:** 42 U.S.C. 7401 *et seq.*

#### **Subpart NN—Pennsylvania**

2. Section 52.2023 is amended by adding paragraph (e) to read as follows:

#### **§ 52.2023 Approval status.**

\* \* \* \* \*

(e) Disapproval of the April 19, 1995 NO<sub>x</sub> RACT proposal for Pennsylvania Power Company—New Castle plant located in Lawrence County, Pennsylvania.

\* \* \* \* \*

[FR Doc. 98-11507 Filed 4-29-98; 8:45 am]

BILLING CODE 6560-50-M

#### **ENVIRONMENTAL PROTECTION AGENCY**

#### **40 CFR Part 272**

[FRL-6003-4]

#### **Oklahoma: Final Authorization and Incorporation by Reference of State Hazardous Waste Management Program**

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

**ACTION:** Immediate final rule.

**SUMMARY:** Oklahoma has revised its hazardous waste program under the Resource Conservation and Recovery Act (RCRA). With respect to today's document, Oklahoma has made conforming changes to make its regulations internally consistent relative to the revisions made for the above listed authorizations. Oklahoma has also changed its regulations to make them more consistent with the Federal requirements. The EPA has reviewed Oklahoma's changes to its program and has made a decision, subject to public review and comment, that Oklahoma's hazardous waste program revisions satisfy all of the requirements necessary to qualify for final authorization. Unless adverse written comments are received during the review and comment period on the parallel proposed rule also in today's **Federal Register** (FR) notice,

EPA's decision to approve Oklahoma's hazardous waste program revisions will take effect as provided below. Oklahoma's program revisions are available for public review and comment.

The EPA uses part 272 of Title 40 Code of Federal Regulations (CFR) to provide notice of the authorization status of State programs, and to incorporate by reference those provisions of the State statutes and regulations that are part of the authorized State program. Thus, EPA intends to revise and incorporate by reference the Oklahoma authorized State program in 40 CFR part 272. The purpose of this action is to incorporate by reference into CFR currently authorized State hazardous waste program in Oklahoma. This document incorporates by reference provisions of State hazardous waste statutes and regulations and clarifies which of these provisions are included in the authorized and Federally enforceable program.

**DATES:** Final authorization for Oklahoma's program revisions shall be effective July 14, 1998 without further notice unless EPA, receives relevant adverse comment on the parallel notice of proposed rulemaking. Should the agency receive such comments, it will publish a notice informing the public that this rule did not take effect. All comments on Oklahoma's program revisions must be received by close of business June 1, 1998. The incorporation by reference of certain Oklahoma statutes and regulations was approved by the Director of the Federal Register as of July 14, 1998 in accordance with 5 U.S.C. 552(a) and 1 CFR part 51.

**ADDRESSES:** Copies of Oklahoma's program revisions and materials EPA used in evaluating the revisions are available for copying from 8:30 a.m. to 4:00 p.m. Monday through Friday at the following addresses: State of Oklahoma Department of Environmental Quality, 1000 Northeast Tenth Street, Oklahoma City, Oklahoma 73117-1212, Phone number: (405) 271-5338; or EPA Region 6 Library, 12th Floor, 1445 Ross Avenue, Dallas, Texas 75202-2733, Phone number: (214) 665-6444. Written comments referring to Docket Number OK98-1 should be sent to Alima Patterson, Region 6 Authorization Coordinator, Grants and Authorization Section (6PD-G), Multimedia Planning and Permitting Division, EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202-2733, Phone number: (214) 665-8533.

**FOR FURTHER INFORMATION CONTACT:** Alima Patterson, Region 6 Authorization