

By the Commission.

**Steven W. Williams,**

*Secretary.*

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[EPA-R10-OAR-2006-1013; FRL-8275-8]

### Approval and Promulgation of Air Quality Implementation Plan; Alaska

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

**ACTION:** Proposed rule.

**SUMMARY:** EPA invites public comment on its proposal to approve numerous revisions to the State of Alaska Implementation Plan. The Commissioner of the Alaska Department of Environmental Conservation (ADEC) submitted two requests to EPA dated May 6, 2005 and June 30, 2006 to revise certain sections of ADEC's air quality regulations. The revisions were submitted in accordance with the requirements of section 110 of the Clean Air Act (hereinafter the Act or CAA). Although EPA proposes to approve most of the submitted revisions, EPA proposes not to approve in this rulemaking a number of submitted rule provisions which are inappropriate for EPA approval.

**DATES:** Written comments must be received on or before March 7, 2007.

**ADDRESSES:** Submit your comments, identified by Docket ID Number EPA-R10-OAR-2006-1013, by one of the following methods:

A. *www.regulations.gov.* Follow the on-line instructions for submitting comments.

B. *E-Mail:* [cunningham.roylene@epa.gov](mailto:cunningham.roylene@epa.gov).

C. *Mail:* Roylene A. Cunningham, EPA, Office of Air, Waste, and Toxics (AWT-107), 1200 Sixth Avenue, Seattle, Washington 98101.

D. *Hand Delivery:* EPA, Region 10 Mailroom, 9th Floor, 1200 Sixth Avenue, Seattle, Washington 98101. Attention: Roylene A. Cunningham, Office of Air, Waste, and Toxics (AWT-107). Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information.

**Instructions:** Direct your comments to Docket ID No. EPA-R10-OAR-2006-1013. EPA's policy is that all comments received will be included in the public docket without change and may be

made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://www.regulations.gov) Web site is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

**Docket:** All documents in the electronic docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, *i.e.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in [www.regulations.gov](http://www.regulations.gov) or in hard copy during normal business hours at the Office of Air, Waste and Toxics, EPA Region 10, 1200 Sixth Avenue, Seattle, Washington 98101. Copies of the State submittal are also available at the State of Alaska, Department of Environmental Conservation, 410 Willoughby Avenue, Ste 303, Juneau, Alaska 99811-1800.

**FOR FURTHER INFORMATION CONTACT:** Roylene A. Cunningham, (206) 553-0513, or by e-mail at [cunningham.roylene@epa.gov](mailto:cunningham.roylene@epa.gov).

**SUPPLEMENTARY INFORMATION:** Throughout this document, whenever "we", "us", or "our" is used, we mean the EPA. Information is organized as follows:

## Table of Contents

- I. Background of Submittal
- II. Summary of Action
  - A. Provisions Approved by EPA and Incorporated by Reference
    - 1. Documents, Procedures, and Methods Adopted by Reference
    - 2. Opacity Standards
    - 3. Nonroad Engines
    - 4. Ambient Analysis Methods
    - 5. Owner-Requested Limits
    - 6. Preapproved Emission Limits
    - 7. Prevention of Significant Deterioration (PSD) Permits
    - 8. Nonattainment Area Major Stationary Source Permits
    - 9. Source-Specific Minor Permits
    - 10. General Minor Permits
    - 11. Conclusion
  - B. Provisions Approved by EPA into the SIP, But Not Incorporated by Reference
  - C. Provisions Not Approved by EPA
    - 1. Provisions Not Related to Section 110 of the CAA
    - 2. Provisions Related to Clean Units and the Pollution Control Projects Exclusion
    - 3. Ambient Air Quality Analysis Methods (18 AAC 50.215(a)(3))
    - 4. Enforceable Test Methods (18 AAC 50.220(c)(2))
    - 5. Excess Emissions (18 AAC 50.240)
    - 6. Source Test Deadline (18 AAC 50.345(l))
    - 7. Standard Operating Permit Condition II (18 AAC 50.346(a))
    - 8. Electronic Applications (18 AAC 50.542(b)(2))
    - 9. Revisions to Minor Permits (18 AAC 50.546(b))
- III. Requested Sections to be Removed from the SIP
- IV. Geographic Scope of SIP Approval
- V. Statutory and Executive Order Reviews

## I. Background of Submittal

On May 6, 2005, the Commissioner of ADEC submitted a request to EPA to revise the Alaska SIP to include a completely revised version of the State of Alaska's Air Quality Regulation in 18 AAC 50. These changes became effective as a matter of State law on January 29, 2005.

On June 30, 2006 the Commissioner of ADEC submitted a request to EPA to revise the Alaska SIP to include additional revisions to 18 AAC 50. The revised portions reflected in this submittal include adoption by reference of updated EPA rules and changes to the portable oil and gas drill rig regulations. These changes became effective as a matter of State law on December 3, 2005. Included in the submittal was a request that EPA exclude from consideration for SIP approval the portions of 18 AAC 50 affected by the June 24, 2005, United States Court of Appeals, District of Columbia Circuit decision which vacated portions of EPA's new source review rules pertaining to clean units and pollution control projects.

## II. Summary of Action

### *A. Provisions Approved by EPA and Incorporated by Reference*

The following discussion provides an overview of ADEC's revised rules which EPA is proposing to incorporate by reference into the SIP, including a discussion of the key changes from the current SIP and EPA's evaluation of the changes. Note that any specific provisions or subparagraphs of ADEC's submittals which EPA is proposing not to approve are discussed in Section II.C. below.

The docket includes a technical support document which describes in more detail the substantive changes to ADEC's rules that have been submitted by Alaska as revisions to the SIP, EPA's evaluation of the changes, and the basis for EPA's action.

#### 1. Documents, Procedures, and Methods Adopted by Reference

ADEC revised 18 AAC 50.035(a) and (b) in order to update the dates of their adoption by reference of Federal law, as well as State and Federal guidance documents. Paragraph (c) is a new provision which allows ADEC to use a test method other than one listed in 18 AAC 50.035(c) for a source-specific limit imposed in a permit. ADEC has clarified that this provision does not authorize ADEC to change a test method that is established in a SIP limit or a Federal standard. EPA is approving 18 AAC 50.035(c) with that understanding.

#### 2. Opacity Standards

ADEC revised the opacity standard for most sources from a three minute aggregate to a six minute average. See 18 AAC 50.050 and 50.055. The numeric value of the standard remains 20%. EPA has previously approved the use of a six minute average opacity standard for several source categories in Alaska in order to coincide with opacity limits in the Federal NSPS. In these latest revisions, ADEC has amended 18 AAC 50.050(2) and 18 AAC 50.055 (1)–(3) to similarly adopt a six minute average for more source categories. As explained in more detail in the justification provided by ADEC, ADEC made this change in the form of the standard to address a defense to enforcement raised by industry with the three minute aggregate exception. ADEC further explained that, although there may be some limited situations in which the revised standard could be less stringent than the previous standard (when there is a plume that is both high in opacity and intermittent), in the large majority of cases, the new standard is more stringent. In the one circumstance where ADEC expects that

the three minute aggregate could be more stringent than the six minute average—soot blowing at coal fired power plants—ADEC has retained the opacity limit as an aggregate standard. Based on the information provided by ADEC, EPA concludes that changing the 20% opacity limit from a three minute exception to a six minute average in 18 AAC 50.050(2) and 18 AAC 50.055 (1)–(3) will continue to provide for attainment and maintenance of the NAAQS and other CAA standards and is thus approvable.

#### 3. Nonroad Engines

ADEC added 18 AAC 50.100 in January 1997 to address a change in the 1990 CAA by making clear that actual and potential emissions from nonroad engines are not considered when determining whether a stationary source is subject to construction or operating permit programs in Alaska.

#### 4. Ambient Analysis Methods

Section 50.215, renumbered from 18 AAC 50.510(a), sets forth requirements for air quality modeling and analysis. Paragraph (c) allows substitution or modification of an air quality model, provided the source performs and submits a comparative analysis using a protocol developed using a specified procedure, obtains ADEC approval of the comparative protocol, and, in the case of air quality analysis required by 18 AAC 50.306 (PSD), obtains EPA and ADEC approval of the substituted or modified model. Federal law, however, requires written approval from EPA for any substitution or modification of a model used for minor and major new source review, including major new source review in nonattainment areas (NNSR). See 40 CFR 51.160(f). ADEC has advised EPA that it erred in limiting the cross-reference in 18 AAC 50.215(c)(3) to 18 AAC 50.306 (PSD) and that ADEC fully intended to require and intends to obtain EPA approval of a model substitution or modification for minor NSR (18 AAC 50.502–560) and major NNSR (18 AAC 50.311). ADEC has provided written assurance that ADEC will not allow a model substitution or modification if an ambient air quality analysis is required by minor NSR (18 AAC 50.502–560) or major NNSR (18 AAC 50.311) without prior written approval from EPA and that it will correct this error in their next rulemaking. EPA is approving this provision on that basis.

#### 5. Owner-Requested Limits

ADEC proposes to include 18 AAC 50.225 in the SIP as a mechanism to establish source-specific federally-

enforceable limitations that restrict a source's allowable emissions or potential to emit air pollutants. EPA has issued criteria for determining when emission limits contained in non-title V operating permits and similar mechanisms are federally enforceable. See 54 FR 27274 (June 28, 1989). The criteria include approval of the State mechanism into the SIP, a legal obligation that the permittee adhere to the limits and other requirements, that the limits and other requirements be at least as stringent as any other applicable SIP or federally enforceable requirements, that the limits and other requirements be permanent, quantifiable, and otherwise enforceable as a practical matter, and that the limits and other requirements be issued subject to public participation.

Owner-requested limits issued under 18 AAC 50.225 are issued only after notice and opportunity for public comment and are contained in a letter approval. Each approval issued to a source must include specific monitoring, recordkeeping, and reporting requirements to ensure compliance with the approved limitations and specifically requires a statement that the owner/operator agrees to be bound by the terms of the approval. The owner/operator can request that the limit be revoked but only after the owner/operator obtains any permits that were avoided by virtue of the owner-requested limit. EPA finds that 18 AAC 50.225 is consistent with EPA guidance regarding Federally-enforceable operating limits and proposes to approve this section.

#### 6. Preapproved Emission Limits

ADEC proposes to include 18 AAC 50.230 [except subparagraph (d)], an exclusionary rule that sets preapproved limits for NO<sub>x</sub> emissions from diesel engines. EPA has recognized that, for certain classes of sources, such as fuel burning equipment, it is possible for States to establish enforceable emission limits that serve to limit potential to emit through exclusionary rules that apply to certain source categories. See Memorandum from JD. Kent Berry, Acting Director, Air Quality Management Division, Office of Air Quality Planning and Standards (OAQPS) entitled "Guidance for State Rules for Optional Federally-Enforceable Emissions Limits Based on Volatile Organic Compound Use," dated October 15, 1993; Memorandum from John Seitz, Director, OAQPS entitled "Approaches to Creating Federally-Enforceable Emission Limits," dated November 3, 1993; Memorandum from John Seitz, Director, OAQPS, entitled

“Potential To Emit Guidance for Specific Source Categories,” dated April 14, 1998. To be approvable, an exclusionary rule must be technically justified, require that the owner or operator specifically apply for coverage under the rule, require the applicant to comply with the limit in the rule, and provide that a violation of the rule is a violation of the SIP.

The preapproved limit for NO<sub>x</sub> emissions from diesel engines in ADEC’s exclusionary rule is based on the amount of diesel fuel used by a source during the year. ADEC has demonstrated that a facility that limits their diesel fuel consumption to below 330,900 gallons per year limits their potential to emit NO<sub>x</sub> to below 100 tons per year. To operate under the preapproved limit, a source must submit to ADEC a request to operate under a specific limit, and must provide the information required for that limit. After this notification, each source must follow specific monitoring, recordkeeping, and reporting requirements to ensure compliance with the limit. EPA has determined that 18 AAC 50.230 [except subparagraph (d)] is consistent with EPA guidance for exclusionary rules.

#### 7. Prevention of Significant Deterioration (PSD) Permits

##### Overview of Major New Source Review Program

Parts C and D of title I of the CAA, 42 U.S.C. 7470–7515, set forth preconstruction review and permitting programs applicable to new and modified stationary sources of air pollutants regulated under the CAA, known as “major New Source Review” or “major NSR.” The major NSR programs of the CAA include a combination of air quality planning and air pollution control technology program requirements. States adopt major NSR programs as part of their SIP.

Part C of title I of the CAA, 42 U.S.C. 7470–7492, is the “Prevention of Significant Deterioration” or “PSD” program, which applies in areas that meet the NAAQS—“attainment” areas—as well as in areas for which there is insufficient information to determine whether the area meets the NAAQS—“unclassifiable” areas. Part D of title I of the CAA, 42 U.S.C. 7501–7515, is called the “Nonattainment New Source Review” or the “NNSR” program, which applies in areas that are not in attainment of the NAAQS—“nonattainment areas.” EPA regulations implementing these programs are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, appendix S.

On December 31, 2002, EPA published final rule changes to the PSD and NNSR programs. 67 FR 80186. On November 7, 2003, EPA published a notice of final action on the reconsideration of the December 31, 2002 final rule changes. 68 FR 63021. In that November 7th final action, EPA added the definition of “replacement unit,” and clarified an issue regarding plantwide applicability limitations (PALs). The December 31, 2002 and the November 7, 2003, final actions, are collectively referred to as the “2002 NSR Reform Rules.”

The 2002 NSR Reform Rules made changes to five areas of the NSR programs. In summary, the 2002 Rules: (1) Provide a new method for determining baseline actual emissions; (2) adopt an actual-to-projected-actual methodology for determining whether a major modification has occurred; (3) allow major stationary sources to comply with plant-wide applicability limits to avoid having a significant emissions increase that triggers the requirements of the major NSR program; (4) provide a new applicability provision for emissions units that are designated clean units; and (5) exclude pollution control projects from the definition of “physical change or change in the method of operation.”

After the 2002 NSR Reform Rules were finalized and effective (March 3, 2003), various petitioners challenged numerous aspects of the 2002 NSR Reform Rules, along with portions of EPA’s 1980 NSR Rules (45 FR 5276, August 7, 1980). On June 24, 2005, the DC Circuit Court issued a decision on the challenges to the 2002 NSR Reform Rules. See *New York v. United States*, 413 F.3d 3 (DC Cir. 2005). In summary, the DC Circuit Court vacated portions of the 2002 NSR Reform Rules pertaining to clean units and pollution control projects, remanded a portion of the rules regarding recordkeeping (40 CFR 52.21(r)(6) and 40 CFR 51.166(r)(6)), and either upheld or did not comment on the other provisions included as part of the 2002 NSR Reform Rules. EPA has not yet responded to the Court’s remand regarding the recordkeeping provisions.

The 2002 NSR Reform Rules require that State agencies adopt and submit revisions to their SIP permitting programs implementing the minimum program elements of the 2002 NSR Reform Rules no later than January 2, 2006.

##### Alaska’s PSD Submittal

Alaska’s PSD program was originally approved into the SIP by EPA on July 5, 1983, and has been revised several times. Newly revised 18 AAC 50.040(h)

and 18 AAC 50.306 implement ADEC’s current PSD program. ADEC revised their PSD rules to essentially incorporate by reference the PSD rules in 40 CFR 52.21, including the applicable provisions of the 2002 NSR Reform Rules, with a few exceptions. In general, ADEC chose to incorporate by reference the Federal PSD rules in 40 CFR 52.21 rather than the comparable provisions in 40 CFR 51.166, which set forth what is required in a State’s plan, because 40 CFR 52.21 is written to directly state the requirements of an owner or operator.

In some cases, ADEC did adopt provisions of 40 CFR 51.166 rather than the comparable provisions of 40 CFR 52.21 because 40 CFR 51.166 was a better fit for a SIP-approved PSD program. For example, ADEC adopted 51.166(q)(2) to describe the public participation procedures for PSD permits. The comparable provision in 40 CFR 52.21 refers to a large set of Federal administrative procedures in 40 CFR 124, which applies to water and other permits, and would be very cumbersome to try to adopt for Alaska’s purpose. ADEC also adopted 40 CFR 51.166(f), Exclusions from Increment Consumption, because these exclusions are not provided by 40 CFR 52.21, but they are allowed in a SIP-approved PSD program.

ADEC also made regulatory changes to clarify how certain provisions of 40 CFR 52.21 would be implemented by ADEC. For example, ADEC added text to 18 AAC 50.306 to clarify the term “administrator” should be read to mean the department in certain instances. ADEC also added provisions for permit content with respect to monitoring, recordkeeping, or reporting requirements. The language is similar to that in ADEC’s existing construction permit program and is intended to allow ADEC to put in conditions when they are necessary so that the applicant and ADEC can know whether operations comply with standards.

EPA is approving 18 AAC 50.040(h) and 18 AAC 50.306 as meeting the requirements for SIP-approved PSD programs in 40 CFR 51.166. ADEC’s revised rules address baseline actual emissions, actual-to-projected-actual applicability tests, and PALs and other currently applicable provisions of the 2002 NSR Reform Rules. ADEC has not submitted for SIP approval portions of the PSD rules that were recently vacated by the DC Circuit Court, including the clean unit provisions and the pollution control projects exclusion. As noted earlier, EPA has not yet responded to the DC Circuit Court’s remand of the recordkeeping provisions of EPA’s 2002

NSR Reform Rules. Alaska's rule contains recordkeeping requirements that are essentially the same as the remanded Federal rule. While final action by EPA with regard to the remand may require EPA to take further action on this portion of Alaska's rules, at this time, the rules are the same as existing Federal law.

#### 8. Nonattainment Area Major Stationary Source Permits

Alaska's major NNSR program was originally approved into the SIP by EPA on July 5, 1983, and has been revised several times. Newly revised 18 AAC 40.040(i) and 18 AAC 50.311 implement the major NNSR program in Alaska. ADEC revised their major NNSR program to essentially incorporate by reference the provisions set forth in 40 CFR 51.165, including the 2002 NSR Reform Rules that were not vacated by the Court. Portions of 40 CFR 51.165 simply refers to relevant provisions in sections 172 and 173 of the CAA, including offsetting emissions and lowest achievable emission rates. Rather than adopting the language in the CAA statute by reference, 18 AAC 50.311 includes the text of the relevant statutory language.

Similar to the PSD program in 18 AAC 50.306, ADEC also added provisions for permit content with respect to monitoring, recordkeeping, or reporting requirements. The language is similar to that in ADEC's existing construction permit program and is intended to allow ADEC to put in conditions when they are necessary so that the applicant and ADEC can know whether operations comply with standards.

EPA is approving 18 AAC 40.040(i) and 18 AAC 50.311 as meeting the requirements for SIP-approved major NNSR programs in 40 CFR 51.165 and 40 CFR part 51, appendix S. ADEC's revised rules address baseline actual emissions, actual-to-projected-actual applicability tests, and PALs and other currently applicable provisions of the 2002 NSR Reform Rules. ADEC specifically did not submit portions of the NNSR rules that were recently vacated by the DC Circuit Court, including the clean unit provisions and the pollution control projects exclusion. As noted earlier, EPA has not yet responded to the DC Circuit Court's remand of the recordkeeping provisions of EPA's 2002 NSR Reform Rules. Alaska's rule contains recordkeeping requirements that are essentially the same as the remanded Federal rule. While final action by EPA with regard to the remand may require EPA to take further action on this portion of Alaska's

rules, at this time the rules are the same as existing Federal law.

#### 9. Source-Specific Minor Permits

EPA regulations require all SIPs to contain legally enforceable procedures to ensure that construction or modification of a stationary source will not cause a violation of a NAAQS or any applicable portions of the control strategy. 40 CFR 51.160(a). For major stationary sources and major modifications to major stationary sources, the PSD and major NNSR programs satisfy this requirement. States are also required to have new source review programs for minor sources meeting the requirements of 40 CFR 51.160–51.164.

Alaska's minor NSR program was originally approved into the SIP by EPA on July 5, 1983, and has been revised several times. In the SIP submission before EPA, ADEC has substantially revised its minor NSR program. Under ADEC's revised program, ADEC has expanded the categories of minor sources that must obtain a permit prior to construction or modification. Section 50.502 specifies source categories and size thresholds that need a permit. Certain stationary sources—regardless of emission rate—must obtain a minor permit before construction or relocation and, if the source is not required to obtain a title V permit, before operation. In addition, a minor permit is required for construction of a new stationary source with a potential to emit greater than the following size thresholds: 15 TPY PM-10; 40 TPY of nitrogen oxides (NO<sub>x</sub>); 40 TPY of sulfur dioxides (SO<sub>x</sub>); 0.6 TPY of lead; 100 TPY of carbon monoxide (CO) within 10 kilometers of a nonattainment area. Other provisions govern when a source needs a minor permit for construction or relocation of a Portable Oil and Gas Operation or an emission unit with a rated capacity of 10 million BTU or more per hour in a sulfur dioxide special protection area.

ADEC has also established thresholds for determining when a source needs a minor permit before a modification. A minor permit is required prior to a modification if (1) the stationary source already has a potential to emit more than the emission thresholds for construction of new minor sources requiring permits, and (2) the modification would cause an increase greater than 10 tpy of PM-10, 10 tpy of NO<sub>x</sub>, 10 tpy of SO<sub>x</sub>, or 100 tpy of CO. In applying the modification provisions, the owner or operator may choose either a potential emissions or actual emission test, with certain limitations. Finally, Section 50.508 allows ADEC to issue a

minor permit if requested by the owner or operator under certain circumstances.

Section 50.542 sets forth the procedures for permit review and issuance. ADEC now has two administrative procedures for issuing source-specific minor permits—a fast track procedure and a procedure that has a full 30-day public comment period. For both procedures, ADEC's revised rules change the method of public notice. Instead of publishing the notice in a newspaper, ADEC now posts the notice on the State "Online Public Notice System" website. ADEC still sends the notice by mail or e-mail to anyone who requests to be on the State's distribution list. EPA regulations require that public notice of minor NSR permits be given by prominent advertisement in the area affected by the source, and do not require that public notice be given in a newspaper. See 40 CFR 51.161(b)(3).

Under the fast track procedures of 18 AAC 50.542(b), ADEC gives the public 15 days to request a 30-day public comment period for certain types of permits (i.e., 18 AAC 50.502) that meet specific requirements as defined in the rule. The department issues the permit within 30 days of receiving a complete application unless someone requests a public comment period or ADEC determines the project would be predicted to violate an ambient air quality standard. Other types of permits specified in the rule have a 30-day public comment period, even if no one requests one.

Section 50.542 also contains criteria for approval and denial of minor permits. Importantly, ADEC is required to deny an application for a minor permit if ADEC determines construction or operation of the source would violate an emission limit in ADEC's rules or a NAAQS. The rule contains additional criteria for approval and denial of minor permits for sources in certain locations (e.g., Port of Anchorage) and certain types of minor permits (e.g., PAL permit, owner requested limit).

Section 50.544 sets forth the content requirements for minor permits, including identifying information, conditions necessary to ensure compliance with any requirement in Alaska's statute or regulations for stationary sources classified under 18 AAC 50.502, and conditions necessary to ensure compliance with the NAAQS and certain other sections for stationary sources requiring minor permits due to the amount of their emissions. This section also requires an owner or operator to provide a periodic affirmation as to whether their original application and minor permit accurately

describe their stationary source and whether any changes may have been made that would trigger the requirement for a new permit.

EPA has reviewed 18 AAC 50.502 to 50.546, ADEC's provisions for the issuance of minor permits, and finds them to be consistent with the requirements for minor NSR permits in 40 CFR 50.160–50.164.

#### 10. General Minor Permits

18 AAC 50.560 authorizes ADEC to issue general minor permits to allow the construction or operation of a category of stationary sources that involve the same or similar types of operation, involve the same type of emissions, and are subject to similar air quality control requirements. In issuing a general minor permit, ADEC will evaluate what permit conditions are necessary to assure compliance with each ambient standard or control strategy for that category of stationary source. An owner or operator would then have the choice of obtaining a source-specific permit or applying for coverage under the general minor permit. See 18 AAC 50.502(d). A general minor permit is subject to public notice and comment when initially issued by ADEC, but not when an individual source applies for coverage. The rule authorizes ADEC to issue general minor permits that require a source applying for coverage to receive specific approval from ADEC before being authorized to construct or operate under the general permit, as well as general minor permits that authorize a source to construct or operate upon ADEC's receipt of an application for coverage. The general minor permit will specify whether the source must wait for ADEC approval before constructing or operating under the general minor permit.

ADEC will issue an application or notification form with each general minor permit, which will specify the information an applicant must provide to be covered under the general minor permit. This information must include identifying information, information necessary to show the stationary source qualifies for coverage under the general permit, identification of all equipment covered by the general minor permit, and a certification by the applicant that the stationary source is capable of complying with all permit requirements.

The rule also specifies the content of general minor permits. Importantly, general minor permits must meet the same permit content requirements of minor permits under 18 AAC 50.544, including terms and conditions to ensure that stationary sources constructing and operating under the general minor permit will not cause or

contribute to a violation of the NAAQS. General minor permits can accommodate portable sources, but permittees must notify ADEC of any change to a location not identified in the permit application.

EPA has reviewed 18 AAC 50.560, ADEC's provision for the issuance of general minor permits, and finds it to be consistent with the requirements for minor NSR permits in 40 CFR 50.160–50.164.

#### 11. Conclusion

As described in more detail above and in the technical support document, EPA has determined that the following sections of Alaska's regulations are consistent with the requirements of title I of the CAA and proposes to approve them as part of the SIP and incorporate them by reference into Federal law:

18 AAC 50.080 Ice Fog Standards; State effective January 18, 1997;

18 AAC 50.025 Visibility and Other Special Protection Areas; 18 AAC 50.070 Marine Vessel Visible Emission Standards, State effective June 21, 1998;

18 AAC 50.050 Incinerator Emission Standards, State effective May 3, 2002;

18 AAC 50.005 Purpose of Chapter; 18 AAC 50.010 Ambient Air Quality Standards [except (7) and (8)]; 18 AAC 50.015 Air Quality Designations, Classifications, and Control Regions; 18 AAC 50.020 Baseline Dates and Maximum Allowable Increases, 18 AAC 50.045 Prohibitions; 18 AAC 50.055 Industrial Processes and Fuel-Burning Equipment [except (d)(2)(B)]; 18 AAC 50.100 Nonroad Engines; 18 AAC 50.200 Information Requests; 18 AAC 50.201 Ambient Air Quality Investigation; 18 AAC 50.205 Certification; 18 AAC 50.215 Ambient Air Quality Analysis Methods [except (a)(3)]; 18 AAC 50.220 Enforceable Test Methods [except (c)(2)]; 18 AAC 50.245 Air Episodes and Advisories; 18 AAC 50.250 Procedures and Criteria for Revising Air Quality Classifications; 18 AAC 50.301 Permit Continuity; 18 AAC 50.302 Construction Permits; 18 AAC 50.306 Prevention of Significant Deterioration (PSD) Permits [except (b)(2) and (b)(3)]; 18 AAC 50.311 Nonattainment Area Major Stationary Source Permits; 18 AAC 50.345 Construction and Operating Permits: Standard Permit Conditions [except (b), (c)(3), and (l)]; 18 AAC 50.508 Minor Permits Requested by the Owner or Operator [except (1) and (2)]; 18 AAC 50.546 Minor Permits: Revisions [except (b)]; 18 AAC 50.560 General Minor Permits; 18 AAC 50.900 Small Business, State effective October 1, 2004;

18 AAC 50.542 Minor Permit: Review and Issuance [except (b)(2), (f)(4), (f)(5),

and (g)(1) but only with respect to clean units and pollution control projects], State effective December 1, 2004;

18 AAC 50.225 Owner-Requested Limits; 18 AAC 50.230 Preapproved Emission Limits [except (d)]; 18 AAC 50.544 Minor Permits: Content [except (e)], State effective January 29, 2005;

18 AAC 50.035 Documents, Procedures, and Methods Adopted By Reference [except (b)(4)]; 18 AAC 50.040 Federal Standards Adopted by Reference [except (a), (b), (c), (d), (e), (g), (h)(17), (h)(18), (h)(19), (i)(7), (i)(8), (i)(9), and (j)]; 18 AAC 50.502 Minor Permits for Air Quality Protection [except (g)(1) and (g)(2)]; 18 AAC 50.540 Minor Permit: Application [except (f) and (g)]; 18 AAC 50.990 Definitions [except (21), and (77)], State effective December 3, 2005.

#### *B. Provisions Approved by EPA Into the SIP, But Not Incorporated by Reference*

EPA is proposing to approve the following section as part of the SIP, but not to incorporate it by reference into Federal law: 18 AAC 50.030 State Air Quality Control Plan, State effective October 1, 2004. This provision does not regulate air emissions, but rather, describes general authorities such as procedural and enforcement authorities. Incorporation by reference of such provisions into Federal law is unnecessary and could potentially conflict with EPA's independent authorities. Therefore, EPA is proposing to not incorporate by reference 18 AAC 50.030 into the SIP and to remove the previous version of this regulation from Alaska's incorporation by reference section of the Alaska SIP, as follows: 18 AAC 50.030 State Air Quality Control Plan, State effective September 21, 2001.

#### *C. Provisions Not Approved by EPA*

EPA is proposing not to approve certain provisions of ADEC's regulations, either because EPA believes such provisions are inconsistent with the requirements of the CAA or because ADEC has requested EPA not to approve such provisions into the SIP.

#### *1. Provisions Not Related to Section 110 of the CAA*

EPA is not approving the following provisions because they are not related to the criteria pollutants regulated under section 110 of the CAA: 18 AAC 50.010(7) and (8); 18 AAC 50.035(b)(4); 18 AAC 50.040(a), (b), (c), (d), (e), (g), and (j); 18 AAC 50.055(d)(2)(B); 18 AAC 50.316; and 18 AAC 50.345(b) and (c)(3).

## 2. Provisions Related to Clean Units and the Pollution Control Projects Exclusion

At ADEC's request, we are not incorporating or approving into the SIP portions of the Federal 2002 Major NSR Reform Rules that were recently vacated by the DC Circuit Court relating to the clean unit provisions and the pollution control projects exclusion. These provisions include: 18 AAC 50.040(h)(17), (h)(18), (h)(19), (i)(7), (i)(8), and (i)(9); 18 AAC 50.306 (b)(2) and (b)(3); 18 AAC 50.502(g)(1) and (g)(2); 18 AAC 50.508(1) and (2); 18 AAC 50.509; 18 AAC 50.540(f) and (g); 18 AAC 50.542(f)(4), (f)(5), and, with respect to the reference to clean units and pollution control projects only, (g)(1); and 18 AAC 50.544(e); and 18 AAC 50.990(21) and (77).

## 3. Ambient Air Quality Analysis Methods (18 AAC 50.215(a)(3))

18 AAC 50.215 sets forth requirements for air quality monitoring and analysis. Paragraphs (a)(1) and (a)(2) specify the procedures for obtaining air monitoring data, but paragraph (a)(3) authorizes ADEC to approve any alternative method that ADEC determines is "representative, accurate, verifiable, capable of replication." In essence, this paragraph allows ADEC to modify requirements relied on to attain and maintain the NAAQS without going through a SIP revision. As such, it is not approvable.

Section 110(i) of the CAA specifically precludes States from changing the requirements of the SIP except through SIP revisions approved by EPA. SIP revisions will be approved by EPA only if they meet all requirements of section 110 of the CAA and the implementing regulations at 40 CFR part 51. See CAA section 110(l); 40 CFR 51.104. Section 51.104(d) specifically states that in order for a variance to be considered for approval as a SIP revision, the State must submit it in accordance with the requirements of 40 CFR 51.104, which includes the public notice, comment and hearing provisions of 40 CFR 51.102.

The SIP revision requirements may be satisfied if the director's discretion is constrained by sufficiently specific, objective, and replicable criteria to determine if the alternative method will, in fact, be at least as effective as the required methods in terms of emission rates and ambient impacts. In this case, although the rule states that the alternative must be "representative, accurate, verifiable, capable of replication," the rule does not contain procedures for ensuring that is the case.

Therefore, it is not appropriate for EPA to approve this provision into the SIP.

## 4. Enforceable Test Methods (18 AAC 50.220(c)(2))

Paragraph 50.220(c)(1) specifies reference test methods to be used in source tests to determine compliance with applicable requirements. Paragraph (c)(2) authorizes ADEC to approve the use of an alternative method using the procedure specified in 40 CFR part 63, appendix A, method 301. In essence, paragraph (c)(2) authorizes ADEC to issue variances from regulatory requirements, including SIP, NSPS, and NESHAP requirements. EPA approved this provision into the SIP on November 18, 1998 [63 FR 63983]. ADEC made minor changes to 18 AAC 50.220 and has submitted the entire provision for inclusion in the SIP.

EPA believes that it erred when it approved this subparagraph as part of the SIP. As an initial matter, ADEC does not have authority to approve alternatives to NSPS and NESHAP standards except to the extent EPA has delegated that authority to ADEC. EPA does not delegate to States authority to approve "major changes" to test methods for NSPS and NESHAP standards. In addition, as discussed above, section 110(i) of the CAA specifically precludes States from changing the requirements of the SIP except through SIP revisions approved by EPA, and SIP revisions will be approved by EPA only if they meet all requirements of section 110 of the CAA and the implementing regulations at 40 CFR part 51. See CAA section 110(l); 40 CFR 51.104. Section 51.104(d) specifically states that in order for a variance to be considered for approval as a SIP revision, the State must submit it in accordance with the requirements of 40 CFR 51.104, which includes the public notice, comment and hearing provisions of 40 CFR 51.102.

Paragraph (c)(2) does not meet all of the requirements of section 110 of the CAA, such as ensuring attainment and maintenance of the NAAQS. As discussed above, SIP revision requirements may be satisfied if the director's discretion is constrained by sufficiently specific, objective, and replicable criteria to determine if the alternative method will, in fact, be at least as effective as the required methods in terms of emission rates and ambient impacts. In this case, although paragraph (c)(2) requires that ADEC use the procedure in 40 CFR part 63, appendix A, method 301 in evaluating whether to approve an alternative method, EPA does not believe that the procedures in method 301 are

sufficiently replicable so as to adequately constrain ADEC's discretion. In addition, there is nothing in this provision that would require alternatives to test methods required in a permit to be approved through appropriate revision procedures. For these reasons, it is not appropriate for EPA to approve this provision into the SIP.

Section 110(k)(6) of the CAA authorizes EPA, upon a determination that EPA's action approving, disapproving or promulgating any State implementation plan or plan revision (or any part thereof) was in error, to revise such action as appropriate in the same manner as the approval, disapproval or promulgation. In making such a correction, EPA must provide such determination and the basis therefore to the State and the public. EPA is by this proposal notifying ADEC and the public that EPA is removing 18 AAC 50.220(c)(2) from the SIP and from incorporation by reference into Federal law. It is important to emphasize that if ADEC approves the use of alternative methods in reliance on 18 AAC 50.220(c)(2) as an alternative to an ADEC regulation or permit that has been approved as part of the SIP, EPA is not precluded from enforcing the Federally-approved SIP limit against the source. The granting of an alternative method of compliance by ADEC to a SIP requirement does not change the Federally-enforceable SIP requirement for that source unless and until the alternative has been approved by EPA.

## 5. Excess Emissions (18 AAC 50.240)

EPA's interpretation of the CAA for State excess emission provisions is set forth in, among other documents, Memorandum from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Monitoring, and Robert Perciasepe, Assistant Administrator for Air and Radiation, to the Regional Administrators, entitled "State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown" (September 20, 1999) (1999 Excess Emissions Policy). That policy indicates that because excess emissions might aggravate air quality so as to prevent attainment and maintenance of the NAAQS or jeopardize the PSD increments, all periods of excess emissions are considered violations of applicable emission limitations. However, the 1999 Excess Emission Policy recognizes that in certain circumstances, States and EPA have enforcement discretion to refrain from taking enforcement action for excess emissions. In addition, the policy also indicates that States can

include in their SIPs provisions that would, in the context of an enforcement action for excess emissions, excuse a source from penalties (but not injunctive relief) if the source can demonstrate it meets certain objective criteria. This is in essence a limited affirmative defense to a penalty action. Finally, the Policy states that EPA does not intend to approve SIP revisions that would recognize a State director's decision to bar EPA's or citizen's ability to enforce applicable requirements.

Although ADEC has made only minor changes to 18 AAC 50.240 since it was approved by EPA in 1998, approval of the minor changes could be interpreted to imply that EPA believed 18 AAC 50.240 was consistent with the requirements of the CAA. EPA has reviewed 18 AAC 50.240, however, and does not believe it is consistent with EPA's interpretation of the CAA regarding the types of affirmative defense provisions we can approve into SIPs for several reasons. First, an affirmative defense to a penalty action is not appropriate where a single source or small group of sources has the potential to cause an exceedance of the NAAQS or PSD increments. See 1999 Excess Emissions Policy, pp. 2–3, Attachment pp. 3 and 5. The Alaska regulation does not contain provisions to address this criterion. Second, an affirmative defense for excess emissions due to certain unavoidable events cannot extend to State law provisions that derive from Federally promulgated performance standards or emission limits, such as NSPS or NESHAP standards and does not extend to PSD permits unless the excess emissions were accounted for in the modeling and in the BACT determination. Alaska's excess emission rule does not appear to be so limited in scope. Third, Alaska's excess emissions rule does not sufficiently address all of the criteria for ensuring that excess emissions due to startup, shutdown, and malfunction are truly unavoidable and limited to the maximum extent possible in duration and impact on air quality. See 1999 Excess Emissions Policy, Attachment pp. 3–6. Although a State need not adopt the precise language of the 1999 Excess Emissions Policy, State excess emission provisions must address the essential elements of the criteria in the policy to be consistent with the CAA. Fourth, 18 AAC 50.240(e) provides an affirmative defense for excess emissions due to scheduled maintenance provided certain criteria are met. This is inappropriate under the CAA because sources should be able to schedule maintenance that might otherwise lead to excess emissions to

coincide with maintenance of production equipment or other facility shutdowns. In this regard, it is important to note that the 1999 Excess Emissions Policy does not discuss allowing an affirmative defense for excess emissions during maintenance activities. This omission was intentional and based on EPA's interpretation of the CAA that any excess emissions during maintenance activities should be addressed only through the exercise of enforcement discretion and not through the provision of an affirmative defense to penalties. Finally, 18 AAC 50.240 does not make clear that ADEC's decision that the criteria for obtaining the affirmative defense from penalty are met is not binding on EPA or citizens. See 1999 Excess Emission Policy, p. 3, Attachment p. 2. In summary, although ADEC has made only minor changes to 18 AAC 50.240, EPA is not approving the changes because to do so would imply that EPA believes that 18 AAC 50.240 meets CAA requirements for SIP excess emission provisions.

#### 6. Source Test Deadline (18 AAC 50.345(l))

Paragraph (l) is a standard permit condition that gives ADEC discretion to approve a request from the permittee to delay a source test deadline established by ADEC. Importantly, this provision does not give ADEC authority to extend source test deadlines established in requirements promulgated by EPA, such as NSPS or NESHAPS. In addition, EPA is not aware of any Alaska SIP provisions that impose a requirement to conduct a source test within a specified period of time so this provision appears to be limited to source test deadlines established in permits issued by ADEC. EPA does not believe it can approve this provision, however, because it would give ADEC unbounded discretion to change the source testing requirements of a federally-enforceable permit without revising the permit

#### 7. Standard Operating Permit Condition II (18 AAC 50.346(a))

This paragraph incorporates Standard Operating Permit Condition II, which contains standard monitoring conditions for 18 AAC 50.110 Air Pollution Prohibited, a rule prohibiting emissions detrimental to human health or welfare, animal or plant life, or property, or which would unreasonably interfere with the enjoyment of life or property. EPA does not believe it is appropriate to approve 18 AAC 50.346(a) into the SIP because it only requires corrective action after the permittee or ADEC determines a violation has occurred. EPA does not

believe requiring corrective action after a violation has occurred can be construed as monitoring that reasonably assures compliance with the underlying applicable requirement. To the extent a SIP requirement includes monitoring, the monitoring must be sufficient to reasonably assure compliance with the requirement.

#### 8. Electronic Applications (18 AAC 50.542(b)(2))

This subparagraph allows ADEC to require the owner/operator to submit their permit applications online. ADEC did not submit the appropriate documentation for us to evaluate the approvability of Alaska's Online System with respect to EPA's Cross-Media Electronic Reporting Rule (CROMERR). See 70 FR 59848 (October 13, 2005). Therefore, EPA is not approving paragraph (b)(2) to allow for electronic submissions.

#### 9. Revisions to Minor Permits (18 AAC 50.546(b))

This subparagraph authorizes ADEC to revise "non-substantive elements of a minor permit without further administrative procedures." The regulation, however, does not describe what type of changes will be considered "non-substantive." Although it may be appropriate to allow some class of permit changes to be made administratively, this provision does not adequately describe the class of changes. Therefore, EPA does not believe this provision is sufficiently enforceable to meet the basic enforceability requirements for SIPs.

### III. Requested Sections to be Removed from the SIP

Alaska has requested that EPA remove certain provisions from the SIP because they have been previously repealed by ADEC or because they are not required elements of a SIP under title I of the CAA.

The following sections have been repealed by ADEC and the substantive requirements of these sections have been included in new and revised sections, which EPA is proposing to approve: 18 AAC 50.090 Ice Fog Limitations, State effective May 26, 1972; 18 AAC 50.300 Permit to Operate and 18 AAC 50.400 Application Review & Issuance of Permit to Operate, State effective July 21, 1991 and April 23, 1994; 18 AAC 50.520 Emissions and Ambient Monitoring, State effective July 21, 1991; 18 AAC 50.530 Circumvention, State effective June 7, 1987; 18 AAC 50.310 Revocation or Suspension of Permit, State effective May 4, 1980; 18 AAC 50.600



Reclassification Procedures & Criteria, State effective November 1, 1982; 18 AAC 50.620 State Air Quality Control Plan, State effective January 4, 1995; and 18 AAC 50.900 Definitions, State effective July 21, 1991 and January 4, 1995.

Removal of these now-repealed sections from the SIP does not make the SIP less stringent because the substantive provisions of these sections are included elsewhere in ADEC's regulations and are being submitted for inclusion into the SIP. Therefore, EPA is approving removal of these sections from the SIP.

ADEC has also requested that EPA remove the following fee-related provisions from the SIP: 18 AAC 50.400 Permit Administration Fees, 18 AAC 50.420 Billing Procedures, and 18 AAC 50.430 Appeal Procedures, State effective January 18, 1997. These provisions establish fees for issuance of permits and permit-related actions. State fee provisions that are not economic incentive programs and are not designed to replace or relax a SIP emission limit are generally not appropriate for inclusion into the SIP. While it is appropriate for States to implement fee provisions, for example, to recover costs for issuing permits, it is generally not appropriate to make State fee collection federally enforceable. Therefore, EPA is removing from the SIP 18 AAC 50.400 Permit Administration Fees, 18 AAC 50.420 Billing Procedures, and 18 AAC 50.430 Appeal Procedures.

#### IV. Geographic Scope of SIP Approval

EPA's approval of the SIP does not extend to sources or activities located in Indian Country, as defined in 18 U.S.C. 1151. EPA will continue to implement the CAA in Indian Country in Alaska because ADEC has not adequately demonstrated authority over sources and activities located within the exterior boundaries of the Annette Island Reserve and other areas of Indian Country in Alaska.

#### V. Statutory and Executive Order Reviews

Under Executive Order 12866 (58 FR 51735, October 4, 1993), this action is not a "significant regulatory action" and therefore is not subject to review by the Office of Management and Budget. For this reason, this action is also not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001). This action merely approves State law as meeting Federal requirements and imposes no additional requirements beyond those imposed by

State law. Accordingly, the Administrator certifies that this rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). Because this rule approves pre-existing requirements under State law and does not impose any additional enforceable duty beyond that required by State law, it does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Pub. L. 104-4).

The rule also does not have Tribal implications because it will not have a substantial direct effect on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

This action also does not have Federalism implications because it does not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This action merely proposes to approve a State rule implementing a Federal Requirement, and does not alter the relationship or the distribution of power and responsibilities established in the CAA. This rule also is not subject to Executive Order 13045 "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant.

In reviewing SIP submissions, EPA's role is to approve submissions provided that they meet the criteria of the CAA. In this context, in the absence of a prior existing requirement for the State to use voluntary consensus standards (VCS), EPA has no authority to disapprove a SIP submission for failure to use VCS. It would thus be inconsistent with applicable law for EPA to use VCS in place of a SIP submission that otherwise satisfies the provisions of the CAA. Thus the requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*).

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

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: January 26, 2007.

**Julie Hagensen,**

*Acting Regional Administrator, Region 10.*

[FR Doc. E7-1802 Filed 2-2-07; 8:45 am]

BILLING CODE 6560-50-P

## DEPARTMENT OF HOMELAND SECURITY

### Federal Emergency Management Agency

#### 44 CFR Part 67

[Docket No. FEMA-B-7704]

#### Proposed Flood Elevation Determinations

**AGENCY:** Federal Emergency Management Agency, DHS.

**ACTION:** Proposed rule.

**SUMMARY:** Technical information or comments are requested on the proposed Base (1% annual chance) Flood Elevations (BFEs) and proposed BFEs modifications for the communities listed below. The BFEs are the basis for the floodplain management measures that the community is required either to adopt or to show evidence of being already in effect in order to qualify or remain qualified for participation in the National Flood Insurance Program (NFIP).

**DATES:** The comment period is ninety (90) days following the second publication of this proposed rule in a newspaper of local circulation in each community.

**ADDRESSES:** The proposed BFEs for each community are available for inspection at the office of the Chief Executive Officer of each community. The respective addresses are listed in the table below.

**FOR FURTHER INFORMATION CONTACT:** William R. Blanton, Jr., Engineering Management Section, Mitigation Division, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472, (202) 646-3151.

**SUPPLEMENTARY INFORMATION:** The Federal Emergency Management Agency (FEMA) proposes to make determinations of BFEs and modified