Frank H. Thomas

Dated: August 1, 1980.

Gerald D. Seinwill,

Deputy Director.

[FR Doc. 80-23834 Filed 8-6-80; 8:45 am]

BILLING CODE 8401-01-M

Schedule Awarding SES Bonuses

AGENCY: U.S. Water Resources Council.

SUBJECT: Notice of schedule awarding SES bonuses.

ACTION: Notice.

DATE EFFECTIVE: August 1, 1980.

FOR FURTHER INFORMATION CONTACT: Ms. Phyllis A. Smith, Management Programs Division, U.S. Water Resources Council, 2120 L Street, NW., Washington, DC 20037, Phone: (202) 254-6448.

The Council has established the following schedule for awarding SES bonuses:

Process	Completion date
End of Rating Period	July 12, 1980.
Performance Appraisal	Aug. 1, 1980.
Assessment Conference	Aug. 11, 1980.
Performance Review Board	Aug. 14, 1980.
Compensation Decisions	Aug. 15, 1980.
Bonus Paid	Aug. 25, 1980.

Gerald D. Seinwill,

Deputy Director.

[FR Doc. 80-23833 Filed 8-6-80; 8:45 am]

BILLING CODE 8410-01-M

Sunshine Act Meetings

Federal Register
Vol. 45, No. 154
Thursday, August 7, 1980

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

CONTENTS

1

[M-287 Amdt 1, Aug. 1, 1980]

CIVIL AERONAUTICS BOARD.

Notice of addition and closure of items to the August 7, 1980 meeting.

TIME AND DATE: 9:30 a.m. (after regular scheduled Board meeting) August 7, 1980.

PLACE: Room 1012, 1825 Connecticut Avenue NW., Washington, D.C. 20428.

SUBJECT:

29. Docket 37730, Standard Foreign Fare Level Investigation (Instructions to staff) (OGC).

28. Docket 37951—Application of Pan American World Airways, Inc. for amendment of its certificate of public convenience and necessity for Route 132 to include Bombay, India (BIA).

STATUS: Closed.

PERSON TO CONTACT: Phyllis T. Kaylor, the Secretary (202) 673-5068.

[S-1497-80 Filed 8-5-80; 3:10 pm]

BILLING CODE 6320-01-M

2

COMMISSION ON CIVIL RIGHTS.

DATE AND TIME: August 5, 1980, 2 p.m.

PLACE: 1121 Vermont Avenue NW., Washington, D.C. 20425.

STATUS: Conference call meeting, open to public.

MATTER TO BE CONSIDERED: Proposal for Miami hearing.

PERSON TO CONTACT FOR FURTHER INFORMATION: Charles Rivera or Barbara Brooks, Press and Communications Division (202) 254-6697.

[S-1488 Filed 8-5-80; 10:33 am]

BILLING CODE 6335-01-M

3

FEDERAL COMMUNICATIONS COMMISSION.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 2 p.m., Thursday, July 31, 1980.

PLACE: Room 856, 1919 M Street NW., Washington, D.C.

STATUS: Open Commission meeting.

CHANGES IN THE MEETING: Deletion of an item.

Agenda, Item Number, and Subject

Broadcast—7—*Title:* Requests for the formation of a new Government-Industry Advisory Committee, and for the inauguration of an omnibus proceeding to facilitate a comprehensive approach to AM and FM matters now being considered in separate dockets, and for the inauguration of rule making to discontinue the threshold requirements of Section 73.37(e)(2) of the rules. *Summary:* The Commission will consider staff recommendations for action upon the foregoing requests.

Additional information concerning this item may be obtained from Edward Dooley, FCC Public Affairs Office, telephone number (202) 254-7674.

Issued: July 31, 1980.

[S-1496-80 Filed 8-5-80; 1:49 pm]

BILLING CODE 6712-01-M

4

FEDERAL DEPOSIT INSURANCE CORPORATION.

Notice of change in subject matter of agency meeting.

Pursuant to the provisions of subsection (e)(2) of the "Government in the Sunshine Act" (5 U.S.C. 552b(e)(2)), notice is hereby given that at its open meeting held at 2:00 p.m. on Monday, August 4, 1980, the Board of Directors of the Federal Deposit Insurance Corporation determined, on motion of Chairman Irvine H. Sprague, seconded by Mr. Paul M. Homan, acting in the place and stead of Director John G. Heimann (Comptroller of the Currency), that Corporation business required the withdrawal from the agenda for consideration at the meeting, on less than seven days' notice to the public, of Item No. V.3, an appeal, pursuant to the Freedom of Information Act, from the Corporation's earlier denial of a request for records.

The Board further determined, by the same majority vote, that no earlier notice of the change in the subject matter of the meeting was practicable.

Dated: August 4, 1980.

Federal Deposit Insurance Corporation.

Hoyle L. Robinson,

Executive Secretary.

[S-1491-80 Filed 8-5-80; 11:51 am]

BILLING CODE 6714-01-M

5

FEDERAL DEPOSIT INSURANCE CORPORATION.

Notice of changes in subject matter of agency meeting.

Pursuant to the provisions of subsection (e)(2) of the "Government in the Sunshine Act" (5 U.S.C. 552b(e)(2)), notice is hereby given that at its closed meeting held at 2:30 p.m. on Monday, August 4, 1980, the Corporation's Board of Directors determined, on motion of Chairman Irvine H. Sprague, seconded by Mr. Paul M. Homan, acting in the place and stead of Director John G. Heimann (Comptroller of the Currency), that Corporation business required the addition to the agenda for consideration at the meeting, on less than seven days' notice to the public, of the following matters:

Application of The Bank of Miami, Miami, Florida, an insured State nonmember bank, for consent to merge, under its charter and title, with Interamerican Bank of Miami, Miami, Florida, and for consent to establish the three offices of Interamerican Bank of Miami as branches of the resultant bank.

An appeal, pursuant to the Freedom of Information Act, from the Corporation's earlier denial of a request for records.

The Board further determined, by that same majority vote, that no earlier notice of these changes in the subject matter of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsections (c)(6), (c)(8), and (c)(9)(A)(ii) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(6), (c)(8), and (c)(9)(A)(ii)).

Dated: August 4, 1980.

Federal Deposit Insurance Corporation.
Hoyle L. Robinson,
Executive Secretary.
[S-1492-80 Filed 8-5-80; 11:51 am]
BILLING CODE 6714-01-M

6

FEDERAL DEPOSIT INSURANCE CORPORATION.

Notice of agency meeting.

Pursuant to the provisions to the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is here given that at 2:30 p.m. on Monday, August 11, 1980, the Federal Deposite Insurance Corporation's Board of Directors will meet in closed session, by vote of the Board of Directors pursuant to sections 552b(c)(2), (c)(4), (c)(6), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10), of Title 5, United States Code, to consider the following matters:

Application for Federal deposit insurance:

Manatee Community Bank, a proposed new bank, to be located at 1700 59th Street West, Bradenton, Florida, for Federal deposit insurance.

Recommendations regarding the liquidation of a bank's assets acquired by the Corporation in its capacity as receiver, liquidator, or liquidating agent of those assets:

Case No. 44,405-SR—Bank of Lake Helen, Lake Helen, Florida.
Case No. 44,414-SR—Bank of Lake Helen, Lake Helen, Florida.
Memorandum re: American City Bank and Trust Company, National Association, Milwaukee, Wisconsin.

Recommendations with respect to the initiation, termination, or conduct of administrative enforcement proceedings (cease-and-desist proceedings, termination-of-insurance proceedings, suspension or removal proceedings, or assessment of civil money penalties) against certain insured banks or officers, directors, employees, agents, or other persons participating in the conduct of the affairs thereof:

Names of persons and names and locations of banks authorized to be exempt from disclsoure pursuant to the provisions of subsections (c)(6), (c)(8), and (c)(9)(A)(ii) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(6), (c)(8), and (c)(9)(A)(ii)).

Personnel actions regarding appointments, promotions, administrative pay increases, reassignments, retirements, separations, removals, etc.:

Names of employees authorized to be exempt from disclosure pursuant to the provisions of subsection (c)(2) and (c)(6) of the "Government in the Sunshine Act" (5 U.S.C. 552b(c)(2) and (c)(6)).

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550-17th Street, N.W., Washington, D.C.

Requests for information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 389-4425.

Dated: August 4, 1980.
Federal Deposit Insurance Corporation.
Hoyle L. Robinson,
Executive Secretary.
[S-1493-80 Filed 8-5-80; 11:51 am]
BILLING CODE 6714-01-M

7

FEDERAL DEPOSIT INSURANCE CORPORATION.

Notice of agency meeting.

Pursuant to the provisions to the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is here given that the Federal Deposit Insurance Corporation's Board of Directors will meet in open session at 2:00 p.m. on Monday, August 11, 1980, to consider the following matters:

Disposition of minutes of previous meetings.

Memorandum and Resolution re: Banco Credito y Ahorro Ponceno, Ponce, Puerto Rico.

Memorandum and Resolution re: City and County Bank of Campbell County, Jellico, Tennessee—Resolutions appointing officers and directors of Campbell County Leasing Company.

Memorandum and Resolution re: Delegation of Authority to Suspend Time Deposit Withdrawal Penalties for Disaster Areas.

Reports of committees and officers:

Minutes of the actions approved by the Committee on Liquidations, Loans and Purchases of Assets pursuant to authority delegated by the Board of Directors.
Reports of the Division of Bank Supervision with respect to applications or requests approved by him and the various Regional Directors pursuant to authority delegated by the Board of Directors.
Report of the Controller on the termination of the liquidation of The Cedar Vale National Bank, Cedar Vale, Kansas.
Report of the Controller regarding the Corporation's securities portfolio inventory as of June 30, 1980.
Reports of the Office of Corporate Audits regarding the inventory of Gateway National Bank of Chicago, Chicago, Illinois.
Report of the Office of Corporate Aduits regard the inventory of Guaranty Bank & Trust Company, Chicago, Illinois.

The meeting will be held in the Board Room on the sixth floor of the FDIC Building located at 550-17th Street, N.W., Washington, D.C.

Requests for information concerning the meeting may be directed to Mr. Hoyle L. Robinson, Executive Secretary of the Corporation, at (202) 389-4425.

Dated: August 4, 1980.
Federal Deposit Insurance Corporation.
Hoyle L. Robinson,
Executive Secretary.
[S-1494-80 Filed 8-5-80; 11:51 am]
BILLING CODE 6714-01-M

8

FEDERAL ENERGY REGULATORY COMMISSION.

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 45 FR 50035, July 28, 1980.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 10 a.m., July 30, 1980.

CHANGE IN THE MEETING: The following item has been added:

Item Number, Docket Number, and Company

ER-19, ER80-422, Central Vermont Public Service Commission.

Kenneth F. Plumb,
Secretary.
[S-1490-80 Filed 8-5-80; 10:55 am]
BILLING CODE 6450-85-M

9

FEDERAL MARITIME COMMISSION.

TIME AND DATE: 9 a.m., August 13, 1980.

PLACE: Hearing Room One, 1100 L Street NW., Washington, D.C. 20573.

STATUS: Parts of the meeting will be open to the public. The rest of the meeting will be closed to the public.

MATTERS TO BE CONSIDERED: Portions open to the public:

1. Monthly Report of actions taken pursuant to authority delegated to the Managing Director.

2. Agreements Nos. 8770-6 and 9988-5: Modification of the United Kingdom/U.S.A. Gulf Westbound Rate Agreement and the Continental/U.S. Gulf Freight Association, respectively to modify their membership provisions and Agreement No. 9984-12: Modification of the South Atlantic North Europe Rate Agreement to exclude certain service from its intermodal authority.

3. Consideration of Tariff Rule 26 (Control of Cargo)—West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Conference.

Portion closed to the public:

1. Docket No. 80-6: Specific Commodity Rates of Far Eastern Shipping Company in the Philippines/U.S. Pacific Coast Trade and U.S. Gulf/Australia Trade—Consideration of request of respondent for oral argument and possible consideration of the record.

CONTACT PERSON FOR MORE INFORMATION: Francis C. Hurney, Secretary, (202) 523–5725.

[S–1489–80 Filed 8–5–80: 10:33 am]

BILLING CODE 6730–01–M

10

SECURITIES AND EXCHANGE COMMISSION.

Notice is hereby given, pursuant to the provisions of the Government in the Sunshine Act, Pub. L. 94–409, that the Securities and Exchange Commission will hold the following meetings during the week of August 11, 1980, in Room 825, 500 North Capitol Street, Washington, D.C.

Closed meetings will be held on Tuesday, August 12, 1980, at 10:00 a.m., and on Wednesday, August 13, 1980, following the 10:00 a.m. open meeting. An open meeting will be held on Wednesday, August 13, 1980, at 10:00 a.m.

The Commissioners, their legal assistants, the Secretary of the Commission, and recording secretaries will attend the closed meetings. Certain staff members who are responsible for the calendared matters may be present.

The General Counsel of the Commission, or his designee, has certified that, in his opinion, the items to be considered at the closed meetings may be considered pursuant to one or more of the exemptions set forth in 5 U.S.C. 522B(c)(4)(8)(9)(A) and (10) and 17 CFR 200.402(a)(4)(8)(9)(i) and (10).

Commissioner Friedman, as Duty Officer, determined to hold the aforesaid meetings in closed session.

The subject matter of the closed meeting scheduled for Tuesday, August 12, 1980, at 10:00 a.m., will be:

Access to investigative files by Federal, State, or Self-Regulatory Authorities.
Litigation matter.
Freedom of Information Act appeal.
Formal order of investigation.
Subpoena enforcemnt action.
Institution and settlement of administrative proceedings of an enforcement nature.
Institution of administrative proceeding and injunctive action.
Institution of injunctive actions.
Institution of injunctive action and access to investigative files by Federal, State, or Self-Regulatory Authorities.
Opinion.
Administrative proceeding of an enforcement nature.
Freedom of Information Act appeals and requests for Confidential Treatment.
Personnel security matter.

The subject matter of the closed meeting scheduled for Wednesday, August 13, 1980, following the 10:00 a.m. open meeting, will be:

Institution of injunction actions.

The subject matter of the open meeting scheduled for Wednesday, August 13, 1980, at 10:00 a.m., will be:

1. Consideration of whether to grant the application of Joel L. Halpern to become associated with Donald Sheldon & Co., Inc., a registered broker-dealer, as a registered representative. For further information, please contact David P. Tennant at (202) 272–2945.

2. Consideration of whether to affirm action, taken by the Duty Officer, granting Professor Thomas K. McCraw, Graduate School of Business Administration, Harvard University, access to Commission minutes from 1933 to 1940 and correspondence of Commissioners Landis and Douglas. For further information, please contact Shirley Hollis at (202) 272–2600.

3. Consideration of whether to adopt amendments to Regulation S–K and certain forms and rules under the Securities Act of 1933 and the Securities Exchange Act of 1934 relating to the filing of exhibits to certain frequently used forms. For further information, please contact Joseph G. Connolly, Jr. at (202) 272–3097.

4. Consideration of whether to grant the request of Randolph Phillips, pursuant to the Government in the Sunshine Act, for a copy of an official Commission minute dated June 18, 1980. For further information, please contact Myrna Siegel at (202) 272–2430.

5. Consideration of whether to adopt a rule setting forth procedures for determining requests for confidential treatment under the Freedom of Information Act. For further information, please contact Harlan W. Penn at (202) 272–2454.

6. Consideration of whether to propose for public comment a rule under the Public Utility Holding Company Act of 1935 (the "Act") which, if adopted, would exempt certain non-utility subsidiaries of registered holding companies from the duties, obligations, and liabilities imposed under the 1935 Act on a subsidiary company, if no more than 50% of the voting securities or other voting interests of any such company are owned, directly or indirectly, by any one or more registered holding companies. For further information, please contact Grant G. Guthrie at (202) 523–5156.

At times changes in Commission priorities require alterations in the scheduling of meeting items. For further information and to ascertain what, if any, matters have been added, deleted or postponed, please contact: Paul Lowenstein at (202) 272–2092.

Dated: August 4, 1980.

[S–1495–80 Filed 8–5–80: 12:36 pm]

BILLING CODE 8010–01–M

federal register

Thursday
August 7, 1980

Part II

Environmental Protection Agency

Pesticide Programs; Rebuttable Presumption Against Registration (RPAR) Proceedings and Hearings Under Section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 162 and 164

[FRL 1491-6; OPP 60004]

Pesticide Programs; Rules Governing Rebuttable Presumption Against Registration (RPAR) Proceedings; Rules of Practice Governing Hearings Under Section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)

AGENCY: Environmental Protection Agency.

ACTION: Proposed rules.

SUMMARY: These proposed rules amend Part 162 of Title 40 of the Code of Federal Regulations by establishing a new Subpart which comprehensively revises the procedures for the issuance of notices of intent to deny or cancel registration or to change classification of pesticides uses.[1] The proposed rules also amend the title of Subpart A of Part 162 and redesignate and consolidate some of its existing sections, add definitions to Subpart A, and establish a new Subpart C of Part 162 by redesignating and consolidating other existing sections.

These proposed rules also amend Part 164 of Title 40 of the Code of Federal Regulations by comprehensively revising the rules of practice governing hearings under section 6 of FIFRA.

DATE: Comments must be received on or before November 5, 1980.

ADDRESS: Send comments to: Federal Register Section, Program Support Division (TS-757), Office of Pesticides Programs, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. All comments should bear the identifying notation "OPP-60004." All written comments will be available for public inspection from 8:30 a.m. to 4:00 p.m., Monday through Friday.

It should be noted that since these regulations are procedural in nature, the Agency is not required to promulgate them through notice-and-comment rulemaking. However, because of the importance of these procedural reforms, the Agency has determined in its discretion to publish them in proposed form and to solicit comment on them.

FOR FURTHER INFORMATION CONTACT:

David E. Menotti, Associate General Counsel for Pesticides, Office of General Counsel (A-132), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 (202) 755-0794.

or

William F. Pedersen, Jr., Deputy General Counsel, Office of General Counsel (A-130), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, (202) 426-05058.

SUPPLEMENTARY INFORMATION:

I. Introduction

The Environmental Protection Agency is today proposing comprehensive revisions to the Rebuttable Presumption Against Registration ("RPAR") process set out in 40 CFR Part 162. The Agency also proposes to amend significantly the procedures specified in 40 CFR Part 164 for conducting adjudicatory hearings under Section 6 of the Federal Insecticide, Fungicide, and Rodenticide Act as amended ("FIFRA") (7 U.S.C. 136 et seq.).

The objective of the proposal is to make the Agency's procedures for identifying and assessing potential problem pesticides, and making and implementing regulatory decisions concerning them, more open, responsive and efficient. The fundamental theme of the proposal is to create an integrated system in which decisions about registration or cancellation of problem pesticides are made in the RPAR process (as revised to facilitate informed participation by interested parties at all stages), and in which adjudicatory hearings are utilized primarily to probe and challenge decisions reached in the RPAR process, after appropriate screening to identify disputed fact questions which can profitably be illuminated through the use of trial-type procedures.

This document has five parts. Part I ("Introduction") and Part V ("Additional Issues on Which Comment is Solicited") are relative short sections whose titles are self-explanatory. Part II ("Background") provides background information concerning the proposal, including a discussion of the relevant statutory provisions and case law, and the Agency's experience in administering the RPAR process since its creation in 1975. Part III discusses in detail the principal revisions to the RPAR process which are included in the proposal. As indicated above, these changes are designed to enhance public participation in the process. Among other ways, this is accomplished by changes requiring the Agency to specify what decisions made during the process are based on, and by providing opportunities for comment at critical stages. Most of the changes reflect the Agency's accumulated experience with the RPAR process over the almost five year since its creation; many of the changes reflected have been used in the RPAR process on an informal basis already.

Part IV discusses the changes to the rules of practice governing adjudicatory procedures under FIFRA section 6 which are included in the proposal. While the changes to the RPAR process as it has evolved over time which are included in the proposal are relatively minor, the changes to the rules of practice contained in the proposal are, by comparison, broad and sweeping. As is explained in more detail below, this is primarily because the Rules of Practice have never been modified to provide for adjudicatory hearings which would follow informal procedures like the RPAR process in which decisions concerning registration or cancellation of pesticide uses were in fact reached. Instead, the Rules of Practice currently in place were designed for a much different purpose, *i.e.*, to serve as the mechanism for gathering information, assessing that information, and making decisions concerning the cancellation or denial of registrations for pesticide uses. The new hearing regulations include measures to reduce the excessive and crippling length of these hearings by providing alternative methods for resolution of issues where a trial-type approach is not appropriate; by setting time limits for completion of the hearing stage; and by linking the RPAR process closely to the hearing provisions to create an integrated mechanism for reaching final decisions on registration or cancellation of a pesticide use. Finally, the proposed revisions to the Rules of Practice provide mechanisms to allow the Administrator to make the maximum appropriate use of the Agency's expertise in various fields when final decisions are rendered at the conclusion of adjudicatory proceedings under FIFRA section 6.

II. Background

A. The Origins of the RPAR Process

The standard governing the registration or cancellation of a pesticide use requires the Administrator to balance the risks associated with a pesticide use with the benefits which flow from that use. Thus, the Administrator is required to determine the various risks associated with a pesticide use, to determine the benefits which flow from that pesticide use, and

[1] On August 7, 1979, the Agency proposed Regulations for Registration of Pesticides by States to Meet Special Local Needs (44 FR 46414) to be designated as Subpart B. Those regulations will instead be designated as Subpart D when they are made final.

to permit those pesticide uses whose benefits appear to be greater than the associated risks. He is similarly required to prohibit those pesticide uses whose risks appear to be greater than the benefits associated with the pesticide use. The standard remains the same whether the Administrator is considering the initial registration of a new pesticide use, or the cancellation of an existing registered pesticide use. In either case, the ultimate question is whether the risk/benefit balance favors the risks or the benefits; if risks are greater, then cancellation or denial of registration for the pesticide use is required. On the other hand, if benefits are greater, then a new registration may be approved, or an existing registration may be allowed to remain undisturbed. Labeling, classification for restricted use, and other mechanisms are available to the Administrator as tools to reduce the risks associated with a pesticide use. In some circumstances, these measures may be employed to produce a risk/benefit balance with respect to a particular pesticide use which satisfied the standard for registration, in a situation where without such measures the pesticide use would not satisfy the standard for registration.

The fact that the ultimate standard controlling registration requires a balancing of risks and benefits has never been seriously disputed or controversial. However, it was only relatively recently that the statute itself clearly and explicitly reflected that the benefits of the use of a pesticide were to be considered in deciding whether or not to register or cancel the pesticide use. This explicit statutory recognition of the requirement to consider benefits, and the role of risk/benefit balancing in decisions to register or cancel, occurred in the 1972 amendments. The 1972 amendments accomplished a wholesale reenactment of the statute creating the federal pesticide regulatory program. Among other things, the standard governing registration and cancellation was re-formulated to provide that registration should be cancelled or denied if it appeared that the pesticide when used as directed or in accordance with widespread and commonly recognized practice "generally causes unreasonable adverse effects on the environment * * *." (FIFRA sections 3(c)(5), 6(b)). "Unreasonable adverse effects on the environment" was then defined to mean "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." (FIFRA section 2(bb)).

While the Administrator's authority to weigh risks and benefits in making registration or cancellation decisions prior to the 1972 amendments was never seriously doubted, the statutory tests governing registration nowhere expressly authorized such consideration. Instead, the various statutory rests appeared to require the Administrator to find that the pesticide was safe, i.e., that it posed no risks. Thus, in the statute which controlled immediately preceding the 1972 amendments, the Administrator was required to deny or cancel registrations for pesticides which were "misbranded" (7 U.S.C. 135b(c)(1979)). The pesticide was then defined to be misbranded in any of the following situations:

"If the labeling accompanying it does not contain directions for use which are necessary and if complied with adequate for the protection of the public * * *." (7 U.S.C. 135(Z)(2)(c)(1970))

"If the label does not contain a warning or caution statement which may be necessary and if complied with adequate to prevent injury to living man and other vertebrate animals, vegetation and invertebrate animals * * *." (7 U.S.C. 135(Z)(2)(d)(1970))

"If in the case of an insecticide, nematocide, fungicide or herbicide when used as directed or in accordance with commonly recognized practice it shall be injurious to living man or other vertebrate animals, or vegetation, except weeds, to which it is applied, or to the person applying such economic poison * * *." (7 U.S.C. 135(Z)(2)(g)(1970))

Thus, while the Administrator's authority to consider the benefits and the risks of pesticide uses in making registration decisions was not explicit prior to the 1972 amendments, his authority to do so was regarded as implicit, *Environmental Defense Fund v. Ruckelshaus*, 439 F.2d 584 (D.C. Cir., 1971), and strongly endorsed by at least one congressional subcommittee commenting on federal pesticide policy. (*Id.* at 594, fn. 36)

While the Administrator's authority to consider risks and benefits in finally deciding whether to register or cancel a pesticide use was never seriously challenged, there was considerable litigation under the version of the statute prior to the 1972 amendments concerning the *procedure* for assessing risks and benefits and reaching final regulatory decisions for those pesticide uses with respect to which some significant risks had been identified. The controversy concerned whether the Secretary could refuse to hold a cancellation hearing in situations where he identified significant risks associated with a pesticide use, or uses, but determined that the benefits associated with the pesticide use or uses in question exceeded these risks. In *EDF* v. *Ruckelshaus*, Chief Judge Bazelon of the D.C. Circuit gave what became the definitive answer to this question under the 1947 FIFRA, by announcing what came to be known as the "substantial question of safety doctrine."

EDF v. *Ruckelshaus* was one of a series of appellate opinions spawned by cancellation actions concerning the pesticide DDT. The Secretary of Agriculture had found that DDT posed significant risks to man and the environment, and had cancelled uses of DDT. However, with respect to a number of other uses, he had refused to issue cancellation notices on the basis that he had not yet concluded his study of the benefits of these uses. The court noted the authority of the Secretary to balance risks and benefits in making final cancellation decisions. However, it found that the Secretary's findings that DDT posed significant risks required the issuance of notices of intent to cancel to "trigger the administrative process" (*id.* at 593), and that any consideration of benefits information and the balancing of the benefits against the risks would have to occur in the cancellation hearing itself. Accordingly, the court issued a writ of mandamus requiring the Secretary to issue cancellation notices for the uses of DDT not covered by notices of intent to cancel already issued by the Secretary. (*id.* at 592).

EDF v. *Ruckelshaus* interpreted the statute prior to the 1972 amendments. Accordingly, after the enactment of comprehensive amendments to FIFRA in 1972, a question arose concerning whether the substantial-question-of-safety doctrine was still the law. Although the question was not altogether free from doubt, the Agency took the position that the substantial-question-of-safety doctrine had survived the 1972 amendments. The arguments in support of this position are developed at great length in the preamble to the regulations implementing the registration provisions of the 1972 amendments (40 FR 28242, July 3, 1975).

In its regulations implementing the registration provisions of the 1972 amendments, the Agency created the Rebuttable Presumption Against Registration (RPAR) process (40 CFR 162.11). The process at that stage in its evolution was designed primarily as a mechanism for identifying pesticide uses which might pose substantial questions of safety (which the regulations also termed a "rebuttable presumption against registration"), and providing for a relatively brief informal exchange between the Agency and interested persons on the question whether a

substantial question of safety in fact existed. If one was found to exist, i.e., if the presumption was found not to have been rebutted, the regulations required initiation of formal adjudicatory proceedings under FIFRA. Provision was made in the RPAR process for some consideration of benefits. However, it is important to note that benefits information was not relevant to rebutting a presumption against registration. Rather, the regulations provided for limited consideration of benefits information for the purpose of deciding what kind of cancellation proceeding should be initiated under FIFRA section 6—a proceeding initiated by an Agency notice of intent to cancel (a section 6(b)(1) hearing) or a proceeding initiated by a notice of intent to hold a hearing to determine whether or not a registration should be cancelled (a section 6(b)(2) hearing). In any event, the amount of time available for consideration of benefits information even for this purpose was extremely brief, and the clear thrust of the regulations was that the primary vehicle for assessing benefits information, and for that matter for making risk/benefit decisions, was to be an adjudicatory hearing.

B. The Administrator's 1975 Ad Hoc Review Panel and the 1975 Amendments to FIFRA.

The fundamental theme of the Agency's 1975 regulations implementing the registration provisions of the 1972 amendments was to continue the primary role of trial-type procedures in gathering information, assessing information ans making regulatory decisions on whether pesticide uses which pose some significant risk should be cancelled or denied initial registration. In the fall of 1975, however, only a few months after the promulgation of these regulations, procedural changes were accomplished by Congress and EPA which fundamentally altered the role of the adjudicatory hearing in pesticide decisionmaking.

The procedural changes instituted by the Agency resulted from an *ad hoc* review of Agency procedures for decisionmaking about problem pesticides which was directed by the Administrator personally. The *ad hoc* review panel made a number of recommendations for changes in Agency procedures. However, the central theme of these recommended changes was to de-emphasize the role of FIFRA adjudicatory hearings in decisionmaking about problem pesticides, and institute a system in which the Agency would make pesticide decisions prior to hearings, through procedures which maximize participation by all interested parties. The Administrator accepted the recommendations of the ad hoc review panel in a memorandum dated October 10, 1975.[2] While pointing out that he "remain[ed] convinced that our pesticide decisions have been sound," the Administrator accepted the fundamental conclusions of the ad hoc review panel concerning the need for a de-emphasis in the role of trial-type procedures in pesticide decisionmaking:

> "With regard to cancellation and suspension decisions, I believe that misconceptions by the public are attributable, in part, to our reliance on the adversary hearing process to ensure that all pertinent facts are brought out. While these procedures have been effective, they have inhibited full participation by the Office of Pesticide Programs in the decision process and have restricted effective public involvement in this aspect of the program. I have determined that the Agency should carry out a more open evaluation of risks and benefits in advance of decision to issue notices of intent to cancel or suspend. By involving interested parties and by soliciting external scientific and technical review of our data and analysis, as appropriate, we can ensure that our decisions continue to be based on the objective evaluation of all available data."

The key findings made by the Administrator in support of his decision to require procedural changes in the Agency's assessment of problem pesticides have continuing validity. First, it is clear that a system which is characterized by heavy reliance on trial-type procedures for decisionmaking inevitably inhibits participation by interested persons in the decisionmaking process. Trial-type procedures are the most time-consuming and expensive procedures which can be utilized. Accordingly, it is very easy to envision interested groups and individuals not participating, or participating in minimal ways, because of inability or unwillingness to go to the time, expense and inconvenience required to become a participant in the hearing. Moreover, the adversarial atmosphere inevitably generated by the use of trial-type procedures also inhibits participation. In the Agency's judgment, a substantial number of groups and individuals with information relevant to pesticide decisions will decline to participate in the decisionmaking process, if participation is understood to require a potentially unpleasant appearance at a trial. Finally, the use of trial-type procedures creates the impression that the Agency has made up its mind already about the fate of a given chemical; accordingly, many groups and individuals with relevant information may decline to participation simply in the belief that their participation would have no impact on the outcome of the proceeding.

The inhibiting effect of the use of trial-type procedures on participation by the Office of Pesticide Programs in the decisionmaking process is also worthy of further comment. In broad summary, the consequence of primary reliance on trial-type procedures for making decisions about problem pesticides is to emphasize the role of lawyers in the decisionmaking process, and to de-emphasize the role of program managers. This is primarily because it is inevitable that the group managing the decisionmaking process is necessarily going to have a great impact on the development of the record, and on the shape of the ultimate decision. In the course of a hearing, decisions must be made on an almost daily basis concerning what witnesses to call, what strategies to utilize in cross-examination, what motions to make, how to respond to motions filed by other parties, and the like. Each of these decisions inevitably involves choices of varying importance to the ultimate outcome. At the end of the hearing, massive briefs must be prepared, usually on extremely short notice. In many cases, key policy questions, often of first impression, must be addressed. Although procedures have been developed and utilized to ensure program involvement in key decisions arising during or at the conclusion of hearings, the sheer number of decisions which need to be made, and, in many cases, the extremely short deadlines under which decisions have to be made, inevitably inhibits full participation by the Agency's policy-making arm in the decision process.

Lastly, it is important to emphasize the significant inhibiting effect which the utilization of trial-type procedures for decisionmaking about problem pesticides had on the participation of other federal agencies, particularly the Department of Agriculture, in the decisionmaking process. A system utilizing trials for gathering and assessing information on the benefits of a pesticide use requires the Agency to use a courtroom for consultations with a sister federal agency with considerable expertise on benefits questions. The expense and inefficiency of trial-type

[2] In addition to accepting the recommendations of the *ad hoc* review panel in the October 10, 1975 memorandum, the Administrator also directed the creation of an action plan for the implementation of these recommendations. This action plan was prepared and submitted to the Administrator on December 9, 1975; it was accepted by the Administrator on December 17, 1975.

procedures, and the chilling effect which their use has on a free exchange of ideas, affect the Agency's relationship with another federal agency in the same way that these factors affect relationships within the private sector. Moreover, aside from the inhibiting effect which these procedures have on a free exchange of information on a particular problem chemical, a system which requires two agencies to deal with one another through their lawyers, in adversarial hearings, inevitably creates barriers of bitterness which inhibit cooperation and exchange of views on other matters important to successful accomplishment of both agencies' missions. Problems of both varieties have, unfortunately, affected the relationship between the Department of Agriculture and the Environmental Protection Agency in the past, and were attributable to a large extent on the reliance on trial-type procedures for decisionmaking about problem pesticides.

In summary, the Administrator's October 10, 1975 memorandum was a landmark in the history of the Agency's stewardship of the Federal pesticide control program. In it, the Administrator firmly committed the Agency to revise its procedures for decisionmaking about problem pesticides, in order to implement a system characterized by decisionmaking prior to hearings, using procedures which would maximize participation by all interested persons in the decisionmaking process, followed by hearings to challenge decisions reached prior to the hearing through such informal procedures.

Contemporaneous with the Agency's decision to de-emphasize trial-type procedures in pesticide decisionmaking, the Congress enacted changes to the statute which were based on the same fundamental theme. The changes to the statute became law on November 28, 1975 (Pub. L. 94–140, 89 Stat. 751). The changes require the Administrator to submit proposed cancellation actions under FIFRA section 6 for review prior to the initiation of trial-type hearings. The statutory changes require pre-hearing review by two separate entities. First, the Administrator is required to submit the proposed action, along with an analysis of its impact on the agricultural economy, to the Secretary of Agriculture for review. This submission must occur at least 60 days prior to making the action effective. (The action becomes effective when it is announced in such a way as to start the time periods running for registrants or other adversely affected persons to request hearings.) If the Secretary of Agriculture comments on the proposed action within 30 days, the Administrator is required to publish the comments of the Secretary, along with his responses to them, in the **Federal Register**, along with the notice activating the hearings rights of registrants and other adversely affected persons.

The second body to which the Administrator is required to submit proposed cancellation actions under FIFRA section 6 for prior review is a Scientific Advisory Panel (SAP), which the Administrator was required to establish pursuant to detailed procedures specified in FIFRA section 25(d). Referral of proposed cancellation actions to the Scientifc Advisory Panel is for the purpose of receiving comment "as to the impact on health and the environment of the action proposed * * *." The procedures governing the timing of submissions to the SAP and response to any comments received from the SAP are identical to the procedures governing review by the Department of Agriculture.

The central theme of the procedural changes required by the 1975 amendments is essentially similar to the theme embodied in the procedural reforms directed by the Administrator in the October 10, 1975 memorandum. That theme is that the Agency should make decisions about problem pesticides prior to initiating adjudicatory cancellation hearings under FIFRA section 6, and that formal hearings should be used as vehicle to challenge and test decisions so reached. Moreover, it is clear that in order to comply with the external review requirements imposed by the 1975 amendments, the Agency must look at *both* risks and benefits in a reasonably thorough way *prior* to cancellation hearings. Accordingly, the Agency regards the 1975 amendments as overruling the substantial-question-of-safety doctrine set forth in *EDF* v. *Ruckelshaus*, to the extent that that doctrine required the Agency to "trigger" the cancellation hearing process by issuing a cancellation notice upon a finding that substantial question of safety existed, and leave to the hearing itself the consideration of benefits of the use, and the proper balance which should be drawn between risks and benefits.

C. Agency Experience in Running the RPAR Process from 1976 to the Present

In early 1976, a special organizational unit within the Agency's Office of Pesticide Programs was created to administer the RPAR process. This group was originally called the Office of Special Pesticide Review ("OSPR"). Recently, it has been renamed the Special Pesticide Review Division ("SPRD"). Since its creation, this group has been actively engaged in administering the RPAR process in accordance with the regulations set out at 40 CFR 162.11, the Administrator's directives implementing the pesticide decisionmaking reform proposals of the Ad Hoc Review Committee, and the amendments to FIFRA.

The activities of the Agency in implementing the RPAR process can best be summarized by briefly describing the various stages in the RPAR process, and listing the actions which have been taken at each stage.

The first stage in the process is the acceptance chemical as a candidate for the possible issuance of an RPAR. Approximately 190 chemicals have been nominated for RPAR candidate status by diverse groups of people including Agency employees, public interest groups, and Congressmen. Of these, approximately 55 have been accepted as candidate chemicals; approximately 86 have been rejected as candidate chemicals; and approximately 49 are currently pending determinations concerning acceptance or rejection as candidate chemicals.

Once a chemical has been accepted as a candidate, the next stage in the process involves deciding whether one or more risk criteria ("triggers") have been met. This stage generally involves collection of information bearing on the possible risk triggers, and the review of this information to determine whether a risk trigger has in fact been met. (This stage in the process also involves informal notification to registrants or applicants for registration that a pesticide has been accepted as an RPAR candidate, together with notification of the general nature of the Agency's concerns about the pesticide. Such notifications are typically followed by informal exchanges of information between the Agency and the registrant or applicant.)

In 36 cases, a decision was made to issue a notice of rebuttable presumption against registration for some or all uses of the chemical. The RPAR notices were each accompanied by a support document (called "Position Document No. 1") which sets forth the Agency's reasons for concluding that one or more risk criteria had been met and that issuance of an RPAR was warranted. These decisions to issue RPAR's were published in the **Federal Register** as follows: [3]

[3] In the case of one chemical, picloram, the Agency determined that no risk criterion had been met and that issuance of an RPAR was not warranted (41 FR 8824, March 1, 1976).

Amitraz 42 FR 18299 (April 6, 1977)
Benomyl 42 FR 61788 (December 6, 1977)
BHC (benzene hexachloride) 41 FR 46024 (October 19, 1976)
Cadmium 42 FR 56574 (October 26, 1977)
Calcium arsenate 43 FR 48267 (October 18, 1978)
Chlorobenzilate 41 FR 21517 (May 26, 1976)
Chloroform 41 FR 14588 (April 6, 1979)
Coal tar 43 FR 48154 (October 18, 1978)
Creosote 43 FR 48154 (October 18, 1978)
DBCP (dibromochloropropane) 42 FR 48026 (September 22, 1977)
Diallate 42 FR 27669 (May 31, 1977)
Dimethoate 42 FR 45806 (September 22, 1977)
EBDC (ethylenebisdithiocarbamates) 42 FR 40618 (August 10, 1977)
Endrin 41 FR 31316 (July 27, 1976)
EPN (ethyl p-nitcophenyl thionobenzenephosphonate) 44 FR 54384 (September 19, 1979)
Ethylene dibromide 42 FR 63134 (December 14, 1977)
Ethyleneoxide 43 FR 3800 (January 27, 1978)
Inorganic arsenicals 43 FR 63134 (October 18, 1978)
Kepone 41 FR 12333 (March 25, 1976)
Lead arsenate 43 FR 48267 (October 18, 1978)
Lindane 42 FR 9816 (February 18, 1977)
Maleic hydrazide 42 FR 56920 (October 28, 1977)
PCNB (pentachloronitcobenzene) 42 FR 61894 (December 7, 1977)
Pentachlorophenol 43 FR 48443 (October 18, 1978)
Pronamide 42 FR 32302 (June 24, 1977)
Silvex 43 FR 17116 (April 21, 1978)
Sodium arsenate 43 FR 48267 (October 18, 1978)
Sodium fluoroacetimide (1081) 41 FR 52792 (December 1, 1976)
Sodium fluoroacetate (1080) 41 FR 52792 (December 1, 1976)
Sodium pyroarsenate 43 FR 48267 (October 18, 1978)
Strychnine 42 FR 2714 (January 13, 1977)
Strychnine sulfate 42 FR 2714 (January 13, 1977)
2,4,5-T 43 FR 17116 (April 21, 1978)
2,4,5-TCP 42 FR 41268 (September 15, 1978)
Thiophonate methyl 42 FR 61970 (December 7, 1977)
Toxaphene 42 FR 26860 (May 27, 1977)

The next stage of the RPAR process involves the Agency's receipt of the information submitted by registrants, applicants for registration and other interested persons concerning the accuracy or sufficiency of the risk concerns and the benefits of the pesticide use or uses in question. After this information is assembled, the Agency critically reviews it and determines whether the presumption has been rebutted, and (if the determination is that the presumption has not been rebutted) whether the risks associated with the pesticide use in question are unreasonable. At this stage, in the event that the Agency determines that the presumption has not been rebutted, it also considers a number of regulatory options, which typically range in severity from unconditional cancellation to relatively minor changes in the terms and conditions of registration for a pesticide use. A key purpose for considering a range of options is to determine whether approaches short of full cancellation and total removal from the market can achieve exposure (and therefore risk) reductions which are sufficient to remedy the unreasonable adverse effect problem which the Agency has found to be presented by the pesticide use. The Agency announces its preliminary determinations in a Preliminary Notice of Determination, which is accompanied by a support document (called either "Position Document No. 2" or "Position Document No. 2–3").[4] If the Agency concludes in the Preliminary Notice of Determination that the presumption has not been rebutted and that some regulatory action is necessary, the Preliminary Notice of Determination will include a description of the regulatory actions which the Agency has decided to implement.

The Agency has issued the following Preliminary Notices of Determination, which were published in the **Federal Register** on the dates indicated:

Amitraz 44 FR 2678 (January 12, 1979)
Benomyl 44 FR 51166 (August 30, 1979)
Chlorobenzilate 43 FR 29824 (July 11, 1978)
Dimethoate 44 FR 66558 (November 19, 1979)
Endrin 43 FR 51132 (November 2, 1978)
Pronamide 44 FR 3083 (January 15, 1979)
Silvex 44 FR 41536 (July 17, 1979)
2,4,5–T 44 FR 41536 (July 17, 1979)
Thiophonate methyl 44 FR 58798 (October 11, 1979)
Trifluralin 44 FR 50911 (August 30, 1979)

The next stage in the process involves review of the Preliminary Notice of Determination by the Secretary of Agriculture, the FIFRA Scientific Advisory Panel, and interested members of the public.

Since the Scientific Advisory Panel is an advisory committee, its procedures are governed by the Federal Advisory Committee Act (5 U.S.C. Appendix section 1 et seq.). Among other things, the Federal Advisory Committee Act requires the committee to act in public sessions after appropriate notice, and to offer interested persons an opportunity to appear and to participate. Because of these procedural requirements, the Scientific Advisory Panel sessions are, in effect, informal hearings, at which presentations are made by the Agency and other interested persons. They typically involve a spirited give-and-take between panel members, Agency technical staff and scientists appearing on behalf of other interested persons. A transcript of the proceedings is taken and becomes a part of the public record of the RPAR proceeding. At the conclusion of the panel's deliberations, the panel typically prepares a report to the Agency containing its comments on the impact of the proposed action on health and the environment.

Since the Federal Advisory Committee Act does not apply to the Secretary of Agriculture's review of a Preliminary Notice of Determination, the procedures used by the Secretary are informal, and need not involve hearings or other opportunities for the formal presentation of views by persons outside the Department of Agriculture.

The Agency has adopted a policy of inviting comment from registrants, public interest groups and other interested members of the public at the same time that it solicits comments from the Scientific Advisory Panel and the Secretary of Agriculture. This policy has been adopted because it is consistent with the principal theme of the RPAR process, i.e., to facilitate the broadest possible public exchange of views on issues relevant to Agency decisionmaking concerning problem pesticides. The Agency has invited public comments through the publication of **Federal Register** notices and through other means; the time period for submission of public comments has generally been the same as the time period for submission of comments by the Secretary of Agriculture and the Scientific Advisory Panel.

The external review phase ends either with the submission of comments by the Scientific Advisory Panel, the Secretary of Agriculture, and/or interested members of the public, or by the expiration of time periods provided for comment (together with any extensions agreed upon) without the submission of comments. The Agency then reviews any comments which have been submitted, and decides whether to implement the regulatory action which was proposed, or to withdraw the proposal or modify it in some way. The Agency's determinations in this regard, and the reasons for them, are set forth in a Final Notice of Determination, and an accompanying position document (called "Position Document No. 4"). These documents are sent by registered mail to all registrants and applicants for registration, and published in the

[4] If the Agency concludes that the presumption has been rebutted, the Position Document will address risk issues only, and will be called "Position Document No. 2." If the Agency concludes that the presumption has not been rebutted, it generally proceeds to consider benefits issues and regulatory options, without stopping to prepare a separate position document on risk issues alone. Accordingly, in such cases (i.e., where the presumption is *not* rebutted) the position document is called "Position Document 2–3."

Federal Register. The Final Notice of Determination specifies the regulatory action which is being implemented, and provides notification to registrants and others concerning the hearing rights available under the statute, and what steps must be taken to perfect these hearing rights. (If the Agency has determined to initiate cancellation proceedings under section 6(b)(1) or section 6(b)(2) of FIFRA, the Final Notice of Determination is the document which effectuates this action.)

The Agency has issued the following Final Notices of Determination, which were published in the **Federal Register** on the dates indicated:

Amitraz 44 FR 32736 (June 7, 1979) 44 FR 59938 (October 17, 1979) (correction)
Chlorobenzilate 44 FR 9547 (February 13, 1979)
DBCP 43 FR 40911 (September 13, 1978) and 44 FR 65135 (November 9, 1979)
Endrin 44 FR 43631 (July 25, 1979)
Kepone 42 FR 18885 (April 11, 1977)
Pronamide 44 FR 61640 (October 26, 1979)
Silvex 44 FR 72316 (December 13, 1979)
2,4,5–T 44 FR 72316 (December 13, 1979)

(The Agency has also accepted voluntary cancellations of the following chemicals: acrylonitrile, aramite, arsenic trioxide, basic copper arsenate, benzac, BHC, chloranil, chlordecone, copper acetoarsenite, monuron, OMPA [acetamethylpyrophosphoramide], 10,10-oxbisphenoxarsine, phenarzinechloride, safrole, sodium arsenite, strobane and trysben.)

D. The 1978 Amendments to FIFRA

On September 30, 1978, the Federal Pesticide Act of 1978 was enacted and accomplished, for the third time in six years, significant amendments to FIFRA. Several provisions of the Federal Pesticide Act of 1978 are relevant to the RPAR process and the Agency's Rules of Practice for cancellation hearings. These provisions are as follows:

1. *Interim Administrative Review*—a. *FIFRA Section 3(c)(8).*—Section 6 of the Federal Pesticide Act of 1978 added new section 3(c)(8) to FIFRA, which provides as follows:

"*Interim Administrative Review.* Notwithstanding any other provision of this Act, the Administrator may not initiate a public interim administrative review process to develop a risk-benefit evaluation of the ingredients of a pesticide or any of its uses prior to initiating a formal action to cancel, suspend, or deny registration of such pesticide, required under this Act, unless such interim administrative process is based on a validated test or other significant evidence raising prudent concerns of unreasonable adverse risk to man or the environment. Notice of the definition of the terms 'validated test' and 'other significant evidence' as used herein shall be published by the Administrator in the Federal Register."

This section imposes requirements concerning the quality of the information which must be available to the Administrator to issue an RPAR. These requirements are similar to the requirements imposed in the 1975 regulations, to the effect that risk criteria must be met by:

"tests conducted with the animal species and pursuant to the test protocols specified in the Registration Guidelines, or by test results otherwise available. In making this determination, the Agency will take into consideration the type of effect, the statistical significance of the findings and whether the tests were conducted in accordance with the material requirements for valid tests as recognized by experts in the field." [40 CFR 162.11(a)(3)].

The requirement that the Agency publish a notice in the **Federal Register** defining the terms "validated tests" and "other significant evidence" was satisfied on February 14, 1979, by the publication of a notice titled "Proposed Definitions of 'Validated Tests' and 'Other Significant Evidence.'" (44 FR 9626, February 14, 1979.) This document provides that the definitions of these terms shall be the definitions given to them in the Conference Report on the Federal Pesticide Act of 1978 (S. Rep. No. 94–1188, 95th Cong., 2d Sess. 35 (1978)). Those definitions are as follows:

"The Administrator shall insure that the pesticide shall be subject to the RPAR process only on the basis of a validated test or other significant evidence (and not on the basis of unsubstantiated claims), and that the term 'validated test' be defined as a test conducted and evaluated in a manner consistent with accepted scientific procedures, and that the term 'other scientific evidence,' be defined as evidence that relates to the uses of a pesticide and their adverse risk to man or the environment. It is the intent of the conferees that 'other significant evidence' of risk means factually significant information and is not to include evidence based only on the misuse of a pesticide."

The Agency invited comments on these definitions by reminding interested persons that changes to the RPAR procedures were underway, and that comments on the definitions or other relevant matters would be welcome.

b. *RPAR Procedureal Guidance in the Conference Report.*—Section 3(c)(8) of FIFRA was originally proposed by Congressman Grassley, and became a part of the House version of what became the Federal Pesticide Act of 1978. The Senate version contained no comparable provision; in conference, the Senate Conferees deferred to the House on this matter.

In addition to agreeing to the inclusion of what became FIFRA section 3(c)(8) in the conference substitute, the Conferees agreed to the inclusion in the Conference Report of several paragraphs of procedural guidance concerning the RPAR process. (S. Rep. No. 95–1188, 95th Cong., 2d Sess. 35–36 (1978)). While the procedural guidance included in the Conference Report is not reflected in the statute, the Agency has decided as a policy matter to implement this procedural guidance to the extent practicable.

The first area addressed by the Conferees concerned early notice to registrants of the possibility that a pesticide may meet RPAR risk criteria, in order to facilitate an early exchange of views. In the view of the Conferees, this notification should be written, and should be a private communication between the Agency and the registrant.

As representatives of the Agency noted before the Conference Committee, the Agency has followed a practice in the past of notifying registrants by letters when a pesticide has been accepted as a candidate for the possible issuance of a rebuttable presumption against registration. Such leters have typically informed the registrant in general terms of the bases for the Agency's tentative conclusions that a pesticide may meet RPAR risk criteria. The letters have often been followed by both written and oral exchanges between the registrant and the Agency relating to the Agency's tentative risk concerns about the pesticide. Moreover, the Agency has typically made available the underlying data upon which its tentative risk concerns were based, to the extent these data were not protected from disclosure pursuant to FIFRA section 10.

In view of the practice which the Agency has developed of early notification to registrants of its tentative risk concerns, the Agency will have little difficulty in implementing the guidance of the Conferees in this regard. However, the Agency notes that it is probably not possible to conduct private written communications with registrants concerning this subject, since any documents prepared by the Agency would be subject to release to interested members of the public pursuant to the Freedom of Information Act.

The other subject addressed in the Conference Report concerned modifications to the RPAR process in situations where the Agency is convinced that exposure is insignificant. The Conferees' guidance in this area is primarily relevant to pesticides which meet the oncogenicity and mutagenicity risk triggers. These triggers do not take

exposure into account,[5] because it is generally recognized that these effects are effects with respect to which it is not possible to define a "threshold" below which it is unlikely that the effect would occur. In the view of the Conferees, if the Agency has information at the time that it is deciding whether to issue an RPAR which indicates that exposure is insignificant, it is wasteful to proceed with the normal RPAR procedures (which would require the Agency to issue an RPAR, and conclude at the end of the rebuttal period that the presumption had been rebutted, because exposure was insignificant). The conferees felt that in such situations the Agency should "rebut its own presumption."

The Agency agrees that this approach has merit in some situations, and, as discussed more fully below, has included in this proposal provisions authorizing use of abbreviated RPAR procedures (§ 162.29). Moreover, the Agency notes that it has recently announced an action in which it "rebutted its own presumption," by issuing a Preliminary Notice of Determination without first having issued a Notice of Rebuttable Presumption Against Registration. (44 FR 50911, August 30, 1979.)

2. *Conditional Registration.*—The Federal Pesticide Act of 1978 added a new section 3(c)(7) to FIFRA, authorizing the Agency to issue "conditional" registrations in certain circumstances, in addition to so-called "permanent" registrations under FIFRA section 3(c)(5). The considerations underlying the inclusion of this new section in the Act, and the manner in which the Agency intends to implement the section, are extensively developed in the preamble which accompanied the Agency's Interim Final Regulations implementing sections 3(c)(7) (A) and (B) 44 FR 27932, May 11, 1979).

In implementing the conditional registration provisions, the Agency decided not to utilize the RPAR process for purposes of making decisions concerning whether or not to grant conditional registrations. Accordingly, the implementing regulations amended 40 CFR 162.7 to provide, in effect, that conditional registrations could be approved under FIFRA sections 3(c)(7)(A) and (B) for chemicals which met RPAR risk criteria without resort to the RPAR process. A substitute process better designed to meet the needs of the conditional registration program was created in the implementing regulations. While the implementing regulations do not cover conditional registration actions under section 3(c)(7)(C), the preamble provides that decisions will be made under this section on a case-by-case basis. The implication is clear with respect to actions under section 3(c)(7)(C) that the RPAR process will not generally be utilized in taking action under this section.

There are sound reasons for excepting the conditional registration program from the RPAR process. Among other considerations, this decision reflects the fact that the RPAR process was designed to facilitate Agency decisionmaking about whether to grant new permanent registrations (or cancel existing registrations), by permitting in-depth public examination of any potential unreasonable adverse effects posed by such pesticides. Since the process is designed for making decisions which are expected to have lasting effect, the operation of the process requires considerable time and the expenditure of considerable resources by the Agency and participants in the private sector. Conditional registration decisions, on the other hand, are by definition decisions of less permanency, and procedures requiring smaller resource expenditures are therefore appropriate and in the public interest.

While the RPAR process will not be used for making decisions about whether to grant conditional registrations, the RPAR risk criteria will play important roles in the conditional registration program. Under section 3(c)(7)(B), the Agency may not approve a conditional amendment to permit an additional use of a currently registered pesticide if:

"the Administrator has issued a notice stating that such pesticide or ingredient thereof, meets or exceeds risk criteria associated in whole or in part with human dietary exposure enumerated in regulations issued under this Act, and during the pendency of such risk-benefit evaluation initiated by such notice if (i) the additional use of such pesticide involves a major food or feed crop, or (ii) the additional use of such pesticide involves a minor food or feed crop and the Administrator determines, with the concurrence of the Secretary of Agriculture, there is available an effective alternative pesticide that does not meet or exceed such risk criteria."

In effect, this complicated section prohibits the Agency from permitting use of a registered pesticide on additional major food or feed crops if the pesticide is subject to an outstanding RPAR (or a cancellation proceeding following an RPAR) based upon risk concerns associated with human dietary exposure to the pesticide. If the requested use involves a minor food or feed crop, the Agency cannot approve the use if the Agency and the Secretary of Agriculture agree that an alternative pesticide is available which does not meet or exceed RPAR risk criteria.

Finally, the RPAR risk criteria play an important role in the operation of FIFRA section 3(c)(7)(C). This section authorizes the Administrator to grant a conditional registration for pesticides including active ingredients not included in any currently registered pesticide, under certain limited conditions. However, the section goes on to provide expressly that one of the conditions shall be that the data "not meet or exceed risk criteria enumerated in regulations issued under this Act * * *." In effect, this provision means that the conditional registrations granted under this section on the condition that certain additional studies be done can be cancelled if these studies meet or exceed an RPAR risk criterion. Thus, for example, if a required chronic study is conducted which demonstrates that a pesticide conditionally registered under this section is oncogenic, then the pesticide would meet or exceed an RPAR risk criterion, and the conditional registration could be cancelled for that reason.

3. *Simplified Registration Procedures.*—The 1978 amendments added new section 3(c)(2)(C) to the Act, which requires the Administrator to "by regulation, prescribe simplified procedures for the registration of pesticides * * *."

The Agency intends to implement this provision by establishing a generic registration system, called the Registration Standards System. As presently conceived, the Registration Standards System will develop a document containing a comprehensive statement of the Agency's regulatory position on all pesticide products containing the same active ingredient(s). This document, or registration standard, will describe the data (including all limitations and deficiencies in the data) upon which the Agency's regulatory position is based, and the conditions

[5] The oncogenicity trigger, for example, provides that an RPAR shall arise if a pesticide ingredient, metabolite, or degradation product

"[i]nduces oncogenic effects in experimental mammalian species or in man as a result of oral, inhalation or dermal exposure * * *" [40 CFR 162.11(a)(3)(ii)(A)].

In contrast, the risk trigger for chronic effects other than oncogenicity or mutagenicity provides that an RPAR shall arise if a pesticide ingredient, metabolite or degradation product

"[p]roduces any other chronic or delayed toxic effect in test animals at any dosage up to a level, as determined by the Administrator, which is substantially higher than that to which humans can reasonably be anticipated to be exposed, taking into account ample margins of safety * * *" [40 CFR 162.11(a)(3)(ii)(B)].

which must be met to register (or reregister) a product under the standard. The Agency has described its plans for the Registration Standards System in detail in an Advanced Notice of Proposed Rulemaking ("ANPRM"), 44 FR 76311, December 26, 1979.

One of the Agency's goals is to merge the RPAR process with the Registration Standards System. Under such a system, the intensive review given to certain uses of a pesticide would occur as part of the review of all uses of any product containing that particular pesticide. However, merger of the RPAR process and the Registration Standards System would not affect either the thoroughness of the Agency's evaluation of RPAR chemicals, or the opportunities for public participation in the RPAR process. Many details of how and when the merger of the RPAR process and the Registration Standards System will occur have yet to be resolved. Persons interested in informing the Agency of their views on the merger question should do so by submitting comments in this rulemaking proceeding.

III. Proposed Changes to the RPAR Rules

This section discusses the significant aspects of the revised RPAR regulations which are being proposed. As indicated earlier, the changes which the Agency is proposing to these regulations will not make broad or sweeping changes in the program. Rather, this part of the proposal has as its central theme modification of the existing regulations to reflect the experience with the Agency has gathered over the past several years in running the RPAR process under the 1975 regulations. In addition, the proposal reflects the Agency's efforts to conform its rules to the changes in the Act since the 1975 regulations were promulgated, and to implement, to the extent practicable, the procedural guidance of the Conferees, as reflected in the Conference Report accompanying the 1978 amendments to FIFRA.

A. The Pesticide Use—the Basic Building Block

The regulation of pesticides involves decisions about whether specific *uses* of a pesticide are likely to pose unreasonable adverse effects on the environment. In making a decision about a pesticide use, the Administrator considers the biological and chemical characteristics of the compound. This information by itself, however, can only suggest potential problems. To focus the regulatory decision which must be made, the Administrator must have a great deal of practical information about such subjects as how the pesticide is applied, by whom and in what amounts, where and when it is applied, the purpose for which it is applied, and the importance of using the pesticide for this purpose. Information about these and other subjects is necessary to define what groups of people or what plant or animal species may be at risk and to what extent, and to assess the value of the pesticide as a tool for accomplishing a particular purpose. For registered pesticides, the basic starting point for analysis of these subjects is the regulatory restrictions currently in effect as reflected in the labeling of the pesticide and elsewhere. (For pesticides for which applications for registration are pending, the restrictions which have been proposed by the applicant serve the same purpose.) Taken together, the restrictions in effect (in the case of registered pesticides) or proposed (in the case of applications for registration) comprise the terms and conditions of registration or proposed terms and conditions of registration for the use; these restrictions define the legal limits on what can be done with the pesticide.

In addition to playing a central role in focusing regulatory decisionmaking about pesticide uses, the terms and conditions of registration shape the final decision about problem pesticide uses in another way. In the course of reaching a decision about a particular use of a pesticide, the Administrator often must consider whether exposure (and therefore risk) reductions can be achieved by imposing restrictions more stringent than those that exist or are proposed, but less stringent than the ultimate statutory remedy of full cancellation. This is because the Act provides the Administrator with a wide variety of tools for dealing with the situations where a particular pesticide use appears to pose unreasonable risks, including, in appropriate circumstances, imposition of additional restrictions to remedy unreasonable adverse effect problem.

Since the basic unit in pesticide decisionmaking is the pesticide use, and since the existing or proposed array of restrictions associated with a use (together with possible changes to these restrictions) are central in evaluating the registrability of the use, the proposed regulations include definitions for the terms "pesticide use" and "terms and conditions of registration" (§ 162.3(ss) and § 162.3(tt)). The proposed regulations are built around these defined terms, in order to insure that regulatory decisionmaking in the RPAR process remains focused on its basic objectives—identification and assessment of unreasonable adverse effect problems with particular pesticide uses, evaluation of the options available to the Administrator under the Act for resolving such problems, and the selection and implementation of a solution.

B. Criteria for Beginning RPAR Proceedings

1. Proposed § 162.22 incorporates the requirement imposed by new section 3(c)(8) of the Act that an RPAR not be initiated except in situations where the Administrator is persuaded that a risk criterion has been met, based upon a validated test or other significant evidence raising prudent concerns of unreasonable adverse risk to man or the environment. Definitions for the terms "validated test" and "other significant evidence" are included in the proposal (§ 162.3(ww) and § 162.3(xx)). These definitions are the same as the ones which were published in the **Federal Register** on February 14, 1979 (44 FR 9626).

2. The specific risk criteria included in the 1975 regulations are utilized again in the proposal, without change. There have been suggestions for changes in some of the risk criteria; however, the Agency working group on this topic felt that the question whether substantive changes should be made in the risk criteria should be left for consideration later, in another rulemaking proceeding. The Agency reached this conclusion because it felt that consideration of substantive changes in the risk criteria in this rulemaking proceeding could seriously delay the accomplishment of the Agency's primary objective for this rulemaking proceeding, which is to accomplish procedural changes to the RPAR rules and the Rules of Practice for cancellation proceedings.

3. The proposal does, however, add an additional basis for initiating an RPAR proceeding. (§ 162.21(a)(2)). This section provides, in effect, that the Administrator may issue an RPAR when a specific risk criteria is not met, but the Administrator otherwise determines that it is necessary to consider publicly whether a use poses a potential unreasonable adverse effect. This additional basis for initiating an RPAR proceeding has been included in order to better serve the fundamental objectives of the RPAR process.

The basic purpose of the RPAR process is to allow the Agency to conduct open and public debates concerning pesticide uses which may pose unreasonable adverse effects, and therefore warrant regulatory action. In the 1975 regulations, the Agency attempted to define as many situations

as it could where unreasonable adverse effects problems may be presented. However, in any effort of this sort it is inevitable that situations will arise later which are not anticipated, where the Agency feels that an unreasonable adverse effect may be presented. The solution to this problem adopted in the 1975 regulations was to permit the Agency in such situations to initiate cancellation proceedings, without prior resort to the RPAR process [*see*, 40 CFR 162.11(a)(6)]. In the Agency's judgment, this was not a sound solution. Where the Agency determines that it has risk concerns which warrant public consideration, it should not have to convene cancellation proceedings in order to consider these concerns. Instead, it should be able to deal with them through the RPAR process, in the same manner as it would use the RPAR process to address other risk concerns. Accordingly, the proposed regulations include a section which would allow the Agency to begin RPAR proceedings in situations where no specific risk criterion has been met, but the Agency nonetheless finds that a potential unreasonable adverse effect may be presented.

C. New FIFRA section 3(c)(8) and the procedural guidance of the Conferees

1. *New FIFRA section 3(c)(8).*—As discussed in Section II ("Background"), the Federal Pesticide Act of 1978 inserted a new section 3(c)(8) in FIFRA, which prohibits the Administrator from starting an RPAR unless it is based upon a validated test or other significant evidence raising prudent risk concerns about pesticide. Section 3(c)(8) also required the Administrator to publish notice of his definitions of the terms "validated test" and "other significant evidence" in the **Federal Register**. As discussed above, the Administrator published a **Federal Register** notice on February 14, 1979 (44 FR 9626) adopting as his definitions for the terms "validated test" and "other significant evidence" the definitions for these terms included in the conference report accompanying the Federal Pesticide Act of 1978. Moreover, the Administrator solicited comments concerning these definitions in that **Federal Register** notice. The present proposal repeats these definitions (§ 162.3(ww) and § 162.3(xx)).

2. *The Procedural Guidance of the conferees.*—As also discussed in Section II ("Background"), the conference report accompanying the Federal Pesticide Act of 1978 contained guidance to the Agency concerning procedures to be utilized in the RPAR process. While this guidance is not reflected in the statute, the Agency has nonetheless decided as a policy matter to implement it to the extent feasible. Accordingly, the proposed regulations include provisions concerning preliminary communications with registrants and applicants for registration prior to the beginning of an RPAR proceeding (§ 162.22) and concerning alternate, simplified procedures in situations where such simplified procedures appear to the Agency to be in the public interest (§ 162.29).

Proposed § 162.22 deals with the subject of preliminary, informal notification to registrants prior to the beginning of RPAR proceedings. In concept, this section builds upon current practice and the guidance of the Conferees, by generally requiring the Administrator to notify registrants at an early stage of the Agency's concerns about a pesticide. The proposed section also would require the Administrator to consider information received from registrants in deciding whether or not to begin an RPAR.

Several points should be made concerning proposed § 162.22 and the policy underlying it. First, its preliminary notification provisions envision that the Administrator would communicate to registrants in writing the *general* nature of the Agency's tentative concerns about a pesticide. This kind of notice should be contrasted with the detailed explanation of the Administrator's position which the proposed regulations require in RPAR decision documents, once it is determined to issue an RPAR (see proposed § 162.33). In the Agency's view, preliminary notification to registrants is designed primarily to facilitate exchange of views with respect to a preliminary position of the Agency, and to determine whether the position is generally within reasonable bounds. If the Agency determines that is is in fact within reasonable bounds, the RPAR process itself is the place for thorough explication of the Agency position and detailed and thorough presentation of positions by registrants and other interested persons in response to the Agency position.

Second, proposed § 162.22 provides that the period of time for preliminary exchanges of views between the registrant and the Agency should generally not exceed 90 days. The notification itself will specify the length of the response period (on a case-by-case basis), but the 90-day limit is in keeping with the overall theme that the preliminary notification phase should primarily consist of general and relatively informal exchanges. Moreover, it is consistent with the instructions from Senator Leahey in the floor debates in the Senate accompanying passage of the 1978 amendments to the effect that in conducting preliminary exchanges with registrants prior to public RPAR proceedings, the Agency should keep in mind the need for expedition, since time expended in private discussions with registrants about potential public health or environmental problems is inevitably time during which the public is deprived of notice of potential problems and an opportunity to participate in discussions about matters affecting them (123 Cong. Rec. 13,095 (1977)).

Proposed § 162.29 provides for the utilization of simplified RPAR procedures in situations where simplified procedures appear to be in the public interest. The discussion in the conference report concerning simplified procedures dealt solely with situations where the Agency was able to resolve its risk concerns prior to initiating an RPAR, because available exposure information established that exposure (and therefore risk) was minimal. In such situations, the conferees concluded that it would be wasteful to issue an RPAR since the question which would be answered in the rebuttal phase—whether the pesticide posed significant risk concerns—appeared to be resolvable without requiring the submission of exposure information by registrants as part of a rebuttal.

Proposed § 162.29 deals with this situation, and also provides authority for abbreviating the RPAR process in other situations where abbreviated procedures would be in the public interest. Specifically, it permits the Administrator to abbreviate the RPAR process and immediately issue a Preliminary Notice of Determination without previously having issued a Notice of Rebuttable Presumption Against Registration in any situation where he determines that the information in his possession on risks and/or benefits is complete and dispositive of the issues for resolution in the RPAR process, and he determines that no significant and novel policy questions are presented. However, the Administrator would be required to set out in any such Preliminary Notice of Determination the findings which he has made which warrant the use of abbreviated procedures.

Moreover, the general requirement for public comment on Preliminary Notices of Determination (in proposed § 162.30) would apply to a Preliminary Notice of Determination issued under this

proposed section. Accordingly, the primary goal of the RPAR process—public discussion about potential problem pesticides—would be fulfilled. If, in the public comment period, additional information is brought to the Administrator's attention which warrants a different conclusion than the one announced in the Preliminary Notice of Determination, the Administrator would have authority to take appropriate action. In such a situation, the Administrator could issue a revised Preliminary Notice of Determination, could begin a new RPAR proceeding by issuing a Notice of Rebuttable Presumption Against Registration, or could utilize the saving provision in proposed § 162.20 to fashion other procedures appropriate to the case at hand.

D. Rebuttal Criteria

Proposed § 162.25 sets forth the Agency's proposed revisions to the rebuttal criteria. As is the case with other provisions in the proposed RPAR regulations, the revisions to the rebuttal criteria reflect the experience which the Agency has gained in running the RPAR process under the 1975 regulations over the past almost five years. In the Agency's judgment, the revised rebuttal criteria are a significant improvement over the rebuttal criteria contained in the 1975 regulations, because the revised rebuttal criteria more accurately set forth the matters which the proponents of registration must establish in order to lay to rest the Agency's concerns about a pesticide use.

1. The proposal lists three separate standards for rebutting an RPAR. The first standard (§ 162.25 (a)(1) and (b)(1)) requires proponents of registration to establish that the Agency was wrong in concluding that a risk criterion had been met. For the most part, this rebuttal standard would be applicable to those situations where applicants or registrants desire to attack the Agency's assessment of the toxicology and other adverse effects data which supported the Agency's decision to issue an RPAR.

2. The second rebuttal standard (§ 162.25(a)(2) and (b)(2)) addresses the question of whether a risk of significant proportion is in fact posed by the pesticide use in question even assuming that a risk criterion has been met. There are two components in any risk analysis: (1) the likelihood that a compound will cause an effect in an organism, i.e., its toxic properties, and (2) the likelihood that a susceptible organism will be exposed to the compound in question. The proposed rebuttal standard requires the proponent of registration to establish that no significant risk would result from use of the pesticide in accordance with the terms and conditions of registration and widespread and commonly recognized practice, taking into account all factors relevant to assessing risk and pertinent to the risk concerns underlying the RPAR proceeding.

The proposed rebuttal standard articulates the major risk factors which proponents of registration would have to address in their rebuttals. For example, proponents of registration are required to take into account exposure to the pesticide ingredient, degradation product or metabolite of concern by all routes of exposure (including exposures resulting from the concentration, persistence or accrual of the pesticide ingredient, degradation product or metabolite in man or the environment). However, the rebuttal standard is carefully drawn in order not to exclude any factor which would be applicable in a given situation in the future. This is accomplished by including a paragraph requiring proponents of registration to address all factors relevant to assessing the risks posed by the pesticide use in question.

Applying this rebuttal standard will, of course, require the Agency to make decisions about whether the risks posed by a pesticide use are significant or not. In this regard, the Agency intends to continue to follow the approach it has taken in its previous RPAR decisions—to determine on a case-by-case basis whether the risks associated with a use are of sufficient magnitude to require the Agency to consider the social, economic and environmental benefits of the use, and to make a specific finding that the risks are not unreasonable, in light of the social, economic and environmental benefits of the use.

3. The last of the rebuttal standards requires proponents of registration to prove that the risks of the pesticide use are not unreasonable (§ 162.25(a)(3) and (b)(3)). The inclusion of this ground as a basis for rebuttal of a rebuttable presumption against registration is a significant addition to the rebuttal standards included in the 1975 regulations. In the 1975 regulations, the rebuttal standards solely addressed risk issues. Economic data and other information relevant to assessing the reasonableness of a risk posed by a pesticide use could be submitted by proponents of registration of the use; however, such information was not relevant to rebuttal of the presumption.

The 1975 regulations were structured in this way because the purpose of the RPAR process originally was to identify "substantial questions of safety" requiring the convening of cancellation proceedings pursuant to FIFRA § 6. As discussed in detail in Section II ("Background"), the fundamental changes in the law which occurred shortly after the promulgation of the 1975 regulations, and contemporaneous decisions made by the Administrator concerning how the PRAR process should function, have resulted in a situation where benefits information is always solicited in the RPAR process, and routinely considered in cases where the Agency's risk concerns were not resolved by the rebuttal submissions. Since information bearing on the reasonableness of any risk is now clearly relevant to determining what if any regulatory action should be taken at the conclusion of the RPAR process, the Agency is proposing to make the reasonableness of the risk a basis for rebuttal of the presumption.

The rebuttal standard concerning the reasonableness of the risk posed by a pesticide use directs proponents of registration of a pesticide use to demonstrate two things. First, they must establish that the benefits of the use outweigh the risks which are associated with it. Secondly, they must establish that the risk cannot be reduced further by modifications to the terms and conditions of registration without costs which are unreasonable in light of the risk reductions which could be achieved. The Agency has required that both conditions be satisfied because it has consistently taken the position that a risk may be unreasonable *either* because the level of risk is not justified by the benefits which derive from having the chemical available as a tool to society, *or* because the risks which are posed by the use are higher than they need to be, in light of available risk reduction possibilities.

E. Consequences of not Rebutting an RPAR

The purpose of the RPAR process is to identify unreasonable adverse effect problems, and to make decisions about the appropriate regulatory response. Accordingly, the rebuttal standards have been designed so that if a rebuttal attempt is successful (i.e., proponents of registration establish that one or more of the rebuttal standards have been satisfied), it will follow that there is no unreasonable adverse effect problem requiring a regulatory response. On the other hand, if the proponents of registration fail to establish that one of the rebuttal standards has been met in full, it follows that an unreasonable adverse effect problem requiring some regulatory response has been identified.

Proposed § 162.26 is designed to set forth the consequences of failures to

successfully rebut a rebuttable presumption against registration. The concept underlying proposed § 162.26 is relatively simple. If an unreasonable adverse effect problem has been demonstrated, and the Administrator has not found that the problem can be remedied by changes to the terms or conditions of registration of the pesticide use, the Agency will initiate proceedings to cancel the pesticide use unconditionally or, in the case of uses for which applications for registration are pending, to deny registration for the pesticide use. On the other hand, if it appears to the Administrator that an unreasonable adverse effect exists, but that the problem can be adequately remedied by specific changes to the terms and conditions of registration, then the Agency will take appropriate action to implement those changes to the terms and conditions of registration. Finally, if the Administrator determines that there is uncertainty surrounding any issue relevant to determining whether or not the presumption should be considered to have been successfully rebutted, or whether an unreasonable adverse effect problem can be remedied by changes to the terms and conditions of registration, the Agency will take appropriate action to initiate cancellation or change in classification proceedings under § 6(b)(2) of FIFRA.

With respect to pesticide uses which pose unreasonable adverse effect problems which may be remedied by changes to the terms and conditions of registration, the proposal provides merely that the Agency shall initiate appropriate action to implement the changes to the terms or conditions of registration which it has determined are necessary. In drafting this part of the proposal, the Agency considered but rejected an approach which would have set forth much more precise instructions concerning the type of administrative proceeding which should be used to implement specific kinds of changes to the terms and conditions of registration which the Agency had decided upon. This approach was rejected primarily because the statute provides the Administrator with a number of mechanisms for accomplishing changes to the terms and conditions of registration, and in some instances more than one statutory proceeding is available for accomplishing a given change.

For example, initial classification decisions can be accomplished either through conditional concellation actions under FIFRA section 6(b)(1) [see, *e.g.*, 44 FR 9547 (February 13, 1979) (chlorobenzilate)], or through rulemaking proceedings under existing § 162.30. Moreover, in many instances, the Administrator will decide to impose a number of changes in the terms and conditions of registration, requiring the use of several statutory procedures simulaneously. For example, the Administrator could decide to change the directions for use of a particular pesticide use, by a conditional cancellation action under FIFA section 6(b)(1), and at the same time to initially classify the pesticide use for restricted use and impose an "other regulatory restriction" through a rulemaking proceeding under FIFRA section 3(d)(1)(C)(ii).

In short, it did not appear possible to provide meaningful and clear instructions concerning which statutory procedures should be utilized to accomplish particular changes to the terms and conditions of registration, in light of the complexities of the statute and the number of factors bearing on the use of particular statutory tools in actual cases. Accoringly, the Agency selected the option of prescribing the outcome—effectuation of changes to the terms and conditions of registration. The proposal then leaves to the Administrator on a case-by-case basis the selection of appropriate statutory procedures for accomplishing those changes to the terms and conditions of registration.

The proposal also gives the Administrator the flexibility to utilize the statutory option of initiating cancellation or change in classification proceedings under section 6(b)(2) rather than under section 6(b)(1). Under the statute, a section 6(b)(2) hearing is "open-ended" in the sense that it commences without a specific proposal to cancel a pesticide use, but instead is called "to determine whether or not" cancellation or change in classification is necessary. However, although a section 6(b)(2) hearing begins without the Agency's having taken a position on the ultimate regulatory questions at issue, it can still result in the issuance after its completion of unconditional or conditional cancellation orders if the record generated supports that result. Similarly, it may culminate in a determination that existing terms and conditions of registration are adequate and that no modifications or further regulatory actions are necessary.

The proposal directs the Administrator to make the choice between section 6(b)(1) proceedings and section 6(b)(2) proceedings on the basis of his evaluation, after reviewing the administrative record, of the extent to which formal evidentiary proceedings are likely to change his final decision regarding the uses at issue. If he concludes that the administrative record appears to establish that regulatory action should be taken and that formal proceedings are not likely to change that determination, he will issue a section 6(b)(1) notice. The regulatory actions proposed in that notice will then become final unless a person adversely affected requests a formal hearing. If he concludes that the administrative record fails to resolve certain questions which could be answered in a decisionally significant way by formal proceedings, he will issue a section 6(b)(2) notice requiring those issued to be explored in an adjudicatory hearing. Such hearing will then automatically be held; even if no one else participates, an agency trial staff will be named, and will make a record on the issues designated. Finally, if the administrator determines that no regulatory action is called for, he will state that position in his final Notice of Determination. No further regulatory proceedings will be held, but his decision will be subject to review in a United States Court of Appeals under section 16(b) of FIFRA.

The Agency's purpose in proposing these distinctions is to make the standards for use of section 6(b)(1) and section 6(b)(2) notices parallel the reforms being made to the hearing procedures in Part 164.

The centerpiece of those reforms, described in detail below, is a set of "screening tests" that will be applied in hearings following a section 6(b)(1) notice to establish the extent to which introduction of additional evidence, cross-examination, and the referral of issues to the National Academy of Sciences will be permitted. The broad purpose of these tests is to ensure that formal hearings are focussed on the types of issues they are best qualified to address, and do not expend time and resources on matters which have little prospect of being further clarified or achieving decisional significance.

Against this background, issuance of a section 6(b)(1) notice places a burden on those who request hearings to show that the screening tests have been satisfied and that further proceedings are justified. The Agency anticipates that in many cases the tests will be satisfied at least in part. In these cases the effect of issuance of the section 6(b)(1) notice will be to trigger party efforts to meet the screening tests, thus resulting in a more focussed hearing than would otherwise have resulted. And, in cases where no hearing is requested, or further proceedings are not justified, issuance of a section 6(b)(1) notice allows the Agency to implement without hearings

the decision it reached when it issued the section 6(b)(1) notice.

In other cases, however, the Agency may become convinced before the end of the RPAR process that these secreening tests have been satisfied. In such cases it would serve no purpose to require parties to argue for a result which the Agency had already accepted. It is in these circumstances that section 6(b)(2) notices providing for an automatic hearing will be issued. To preserve consistency in the operation of these regulations, the tests for issuing a section 6(b)(2) notice closely parallel the tests for screening requests for further proceedings received in 6(b)(1) hearings.

Two additional points should be made concerning the interplay of this provision with the proposed changes to Part 164. First, the Agency interprets the term "adversely affected"—as used in the context of standing to request a hearing in response to section 6(b)(1) notices—to include ony persons who want to prevent proposed actions from becoming effective, and to litigate with the Agency an unreasonable adverse effects problem. The term does not include persons who believe that the Agency did not go far enough and who therefore want the Agency to take actions more restrictive than those proposed in the section 6(b)(1) notice.

Accordingly, the proposal would afford this latter class of persons an opportunity to demonstrate to the Administrator—during the RPAR process—that an action which he has proposed is inadequate, based on a showing that the RPAR has failed to satisfactorily resolve substantial factual issues which could have a significant impact on the final regulatory outcome. This showing would most likely be made by such a person during the public comment period (under proposed § 162.28) on a Preliminary Notice of Determination which proposed the action claimed to be inadequate, or during SAP consideration of that notice. If the Administrator then made the requisite findings described above, the Final Notice of Determination would initiate section 6(b)(2) [6] hearings on the issues to be resolved concerning the pesticide use at stake.

[6] It is conceivable that the Administrator could determine that certain minimum actions are warranted in any event (e.g., specific modifications to the terms and conditions of registration), and that the only uncertainty concerns whether *additional* restrictions or modifications are necessary. In those circumstances, the Final Notice of Determination could propose certain actions under section 6(b)(1)—which would take effect by operation of law if no requests for a hearing were received—and could also initiate a section 6(b)(2) hearing on specified issues in order to decide whether the more restrictive actions were necessary.

Second, the proposed "screening stage" of the Part 164 regulations would not apply to the issues specified in a section 6(b)(2) notice. As explained more fully below, the purpose of screening issues before the presentation of evidence commences in a formal evidentiary public hearing is to streamline the hearing to eliminate issues which are not genuinely in dispute, which are not significant to the decision, or which may be better resolved on the basis of official notice of accumulated Agency expertise. A person requesting further proceedings on a section 6(b)(1) notice would be required to show that the issues which he wants to explore meet these criteria; he would also be required to show why the issues were not satisfactorily resolved in the RPAR process.[7]

But in deciding to initiate section 6(b)(2) proceedings on a particular issue, the Administrator necessarily would have already decided that the factual uncertainty was not satisfactorily resolved in the RPAR process, and that the uncertainty was of ultimate decisional significance—in other words, that it was an issue which could and should be profitably explored in an adjudicatory context. Accordingly, the proposed Part 164 regulations provide for an automatic "pass-through" of the issues specified by the Administrator in a section 6(b)(2) notice. This is accomplished by limiting the application of the screening process to requests for further proceedings in response to section 6(b)(1) notices, and by not including any parallel screening process for issues designated by the Administrator in a section 6(b)(2) notice.

F. Review of Preliminary Notices of Determination

Proposed § 162.30 deals with review by the Scientific Advisory Panel (SAP) and the Secretary of Agriculture (USDA) of Preliminary Notices of Determination by requiring their referral to those bodies for review and comment. The proposal also provides for the solicitation of comments from interested members of the public concerning Preliminary Notices of Determination.

The Act only requires the Agency to forward proposed cancellation actions (under FIFRA section 6) and proposed and final regulations (under FIFRA section 25) for review by the SAP and by USDA. Accordingly, the Agency has no obligation to refer decisions not to initiate cancellation actions, or decisions to deny registration, which result from the RPAR process. However, the Agency clearly has discretion to refer additional matters to the SAP and to USDA and to request comments; moreover, the Agency believes that it would be useful to have the views of the SAP and USDA on all decisions which are reached at the conclusion of the RPAR process, and not just those decisions which involve the initiation of cancellation actions, or proposed or final regulations. Accordingly, the proposal provides for referral of all Preliminary Notices of Determination to the SAP and USDA for comment.

The proposal also calls for the solicitation of comments from interested members of the public concerning Preliminary Notices of Determination. In this regard, the proposal restates the Agency's longstanding practice of soliciting public comment on RPAR decisions, at the same time that comment is solicited from the SAP and USDA. The Agency adopted this practice because, in its view, it was consistent with the broad aim of the RPAR process of maximizing public participation in Agency decisionmaking concerning problem chemicals. This rationale has, of course, continuing validity. Moreover, since meetings of the SAP must be open anyway under the Federal Advisory Committee Act, this practice simply extends an opportunity for public comment to those who might lack the time or resources to attend and participate in that meeting of the SAP.

The proposal establishes a flexible approach toward the establishment of deadlines for the submission of comments by the SAP, USDA, and interested members of the public, which is designed to eliminate some of the problems which the Agency has experienced to date in running this aspect of the RPAR process. First, the proposal requires the Administrator to establish a deadline for the submission of comments by the SAP and USDA. The proposal provides that the deadline shall not be less than thirty days from the date of referral of the Preliminary Notice of Determination, unless the SAP and USDA agree to a shorter period. However, the proposal provides no fixed maximum period for comment.

This approach reflects the Agency's interpretation of the deadline aspects of the referral provisions in FIFRA as imposing minimum periods which cannot be altered except with the concurrence of the SAP or USDA. At the same time, however, it is the Agency's view that the law does not prohibit it

[7] In the case of requests to introduce new material, he would have to show good cause for not including the material in the RPAR administrative record; in the case of requests for cross-examination, he would have to show why the examination of the issue in the RPAR process has not provided adequate clarification.

from extending the comment periods beyond this thirty day minimum, in appropriate circumstances. In fact, it has been the Agency's practice to allow for longer comment periods in appropriatae circumstances. For example, the Agency has frequently extended to the SAP more than thirty days to submit comments, in order to accommodate the inevitable scheduling problems which it faces. The scheduling problems arise both because the SAP is not continually in session, but rather schedules meetings periodically, and also because of the public notice requirements which it must adhere to in scheduling meetings. These public notice requirements arise under the Federal Advisory Committee Act which requires advisory committees like the SAP to give reasonable public notice of scheduled meetings, and to afford interested persons an opportunity to attend and present views.[8] Scheduling problems brought on by satisfying the public notice requirement, and the need for scheduling meetings on a periodic basis have made it practically impossible to require the SAP to submit comments within thirty days. Accordingly, the proposal adopts a common sense, flexible approach to scheduling deadlines which the Agency believes will work well in practice.

The proposal also provides for establishing a deadline for the submission of public comments which is earlier than the deadline for submission of comments by the SAP and by USDA. This is in order to permit the public comments to be considered by the SAP and USDA in the process of formulating their comments for the Agency on a specific proposal. Thus, proposed § 162.30 provides that the working record for the final position document shall be made available to the SAP and USDA; proposed § 162.34 provides that the working records shall include any comments submitted to the Agency in accordance with the instructions of the Administrator.

The Agency envisions that in implementing proposed § 162.30 it will select a deadline for the submission of public comments which is also in advance of the planned date for the SAP public meeting at which the Preliminary Notice of Determination is to be considered. This would be accomplished through close coordination with the Executive Secretary for the SAP. Of course, interested persons desiring to appear and make oral presentations before the SAP would still be permitted to do so; and the administrative record for the Final Notice of Determination will include the transcript of the SAP public meeting.

G. Final Notices of Determination

Proposed § 162.31 provides for the issuance of a Preliminary Notice of Determination to conclude an RPAR proceeding. The concept behind this section is relatively simple: the Agency will assimilate the comments which are received in accordance with the Act and the instructions of the Administrator, and make such changes in the Preliminary Notice of Determination as are appropriate in light of these comments and the Agency's analysis of them. In effect, the Preliminary Notice of Determination is a re-play of the Preliminary Notice of Determination, with one significant change—the record has been augmented by the comments received on the Preliminary Notice of Determination from the SAP, USDA, and interested members of the public.

The proposal provides that the Agency will issue a Final Notice of Determination in all situations where it has issued a Preliminary Notice of Determination, with two exceptions. The first exception is in cases where the Preliminary Notice of Determination announced a decision that a presumption had been rebutted on risk grounds, *i.e.*, either because the Agency had erred in issuing the RPAR notice in the first place (§ 162.25(a)(1) and (b)(1)) or because no significant risks would result from the pesticide use, when used in accordance with the existing (or the proposed) terms and conditions of registration and widespread and commonly recognized practice. (§ 162.25(a)(2) and (b)(2)). The proposal provides for the issuance of a revised Preliminary Notice of Determination in a situation where the Agency determines, based upon public comment or the comments of the SAP or the Secretary of Agriculture, to withdraw such a determination and substitute a determination that the presumption has not been rebutted. This is because in such situations the Agency will typically not have considered the benefits of the pesticide use, or whether any risks associated with the pesticide use are unreasonable, because consideration of such issues would have been irrelevant. Accordingly, the RPAR proceeding has to be rerouted back to the Preliminary Notice of Determination stage, in order to permit consideration of issues which have become relevant because of the Agency's decision that the presumption has *not* been rebutted on risk grounds.

The proposal also calls for the issuance of a revised Preliminary Notice of Determination instead of a Final Notice of Determination in a situation where the Agency selects a regulatory option which is not within the range of regulatory options considered and discussed in the first Preliminary Notice of Determination. The Agency expects this will rarely occur. However, in situations where it does occur, the Agency's view is that the underlying purpose of the requirements for referring proposed cancellation actions to the SAP and USDA—that is, to obtain the views of the SAP and USDA on the risk and benefit impacts of proposed regulatory actions—require, in effect, a re-cycling of the RPAR proceeding back through those bodies. The Agency's standard practice in Preliminary Notices of Determination, however, is not to discuss a single regulatory option, but rather to discuss a range of regulatory options which the Agency has considered, from which the final decision is selected. It is the Agency's view that all of the options which are considered and discussed in detail in the documents which are referred to the SAP and USDA for review and comment are in fact before the SAP and USDA for consideration. Moreover, in practice, the SAP and USDA appear to have taken a view of their roles in commenting on Preliminary Notices of Determination which is consistent with the Agency's position on this matter.

In any event, the Agency thinks that it would be foolish and inconsistent with the Congressional purpose behind these review provisions to re-refer a matter to the SAP or USDA in a situation where the Agency decides, based upon comments received during the review process, to select an option which is within the range of options discussed and considered in the Preliminary Notice of Determination. Such a re-referral policy would serve no useful purpose. It is obvious that Congress intended the referral provisions to be taken seriously and expected that the Agency would sometimes change its actions as a result of comments received during the comment periods; however, it is also clear the Congress did not intent the referral provisions to paralyze the Agency by becoming an endless merry-go-round of purposeless activity. Accordingly, the Agency intends only to re-refer RPAR proceedings to the SAP and USDA when such a re-referral is necessary to serve the purposes of the referral provisions—i.e., in those situations where the regulatory option finally selected is outside the range of options considered and discussed in the Preliminary Notice of Determination.

[8] Agency and Office of Management and Budget guidance generally requires the notice period to be at least 60 days. (Exec. Order No. 12,044, 43 Fed. Reg. 12,661 (1978)).

H. Administrative Records and Standards for Decision Documents and Comments

Section 162.34 of the proposal requires clearly defined administrative records for each RPAR decision document. In addition, the section requires the establishment of working records for pending decisions on chemicals for which RPAR proceedings are in progress. The proposal then provides for public access to the administrative records to the maximum extent permitted by law.

Establishment of clearly defined administrative records for Agency decisions has been suggested in recent years both for agencies generally and for this Agency specifically. Pedersen, *Formal Records and Informal Rulemaking*, 85 Yale L.J. 38 (1975); Verkuil, *A Study of Informal Adjudication Procedures*, 43 U. Chi. L. Rev. 739, 790 (1976). The Food and Drug Administration has adopted regulations requiring "records" for virtually every decision it makes. 42 Fed. Reg. 4680 (January 25, 1977).

Two complementary themes underly the call for clearly defined records: the desire to make agencies more accountable for their actions by clearly identifying the underlying information upon which the decision is based, and a desire to improve the quality of agency decisionmaking in the first instance by insuring that it is as rational and orderly as possible.

While the existing RPAR regulations do not require the maintenance of administrative records, the Agency has adopted informally a practice of maintaining reasonably well defined administrative records for RPAR proceedings. Accordingly, the requirements which are reflected in the proposal for maintenance of administrative records do not constitute significant or dramatic departures from current practice. Instead, they restate and in some respects refine and improve administrative practices which the Agency has adopted in the course of administering the RPAR process over the past several years.

Two kinds of administrative records are required to be maintained by the proposal. First of all, the Agency would be required to maintain records for RPAR decisions which it has announced. These records would include the information which the Agency relied upon in making the decisions which it announced in an RPAR decision document; the information would be available to individuals desiring to participate in the RPAR process by fully understanding the information upon which the Agency has acted. The record would be compiled no later than the time the decision in question is announced, and the documents in it would not change except as the result of further separate stages of the RPAR process.

The proposal also provides for the maintenance of another kind of administrative record, called a "working administrative record." A "working administrative record," in essence, contains documents which will be considered by the Agency in making its next decision on a chemical which is in the RPAR process. This record may change from day to day, even within a single stage of the RPAR process, as new material is added to it. The requirement for maintaining working records in addition to records for completed RPAR decision documents was included in order to maximize public participation in RPAR decisionmaking as it unfolds through the various steps in the RPAR process. The Agency felt that it was desirable to make it possible for participants in the RPAR process to keep as current as possible on the information which is being submitted to the Agency, and on the completed staff analyses created by the Agency in the course of an RPAR proceeding.

Thus, for example, an individual preparing a rebuttal submission in response to an RPAR notice would be entitled to review the administrative record for the Notice of RPAR. In addition, the working record for the preliminary Notice of Determination would also be available for the individual to consult. By consulting the working record, the interested person would be kept reasonably abreast of information developed and submitted by other participants in the process, and staff analyses which had been completed by the Agency on issues which were relevant to the issues to be decided in the Preliminary Notice of Determination. By becoming familiar with the record for the Notice or RPAR, and by keeping current on additions to the working record for the Preliminary Notice of Determination, a participant in the process can effectively and efficiently marshal its resources and energies towards preparing the most effective presentation possible on behalf of the interests it is attempting to represent.

It is also hoped that by providing for Agency inclusion of completed staff analyses in the working record, that participants in the process will find it less necessary to expend their time and the time of Agency staff personnel in constant telephonic and written communications with project managers concerning the progress of Agency staff analyses of relevant issues, and requesting copies of completed projects. It is the Agency's hope that the frequency of such contacts will diminish with the provision of a mechanism for the inclusion of completed projects in the working record from time to time as they become available.

While the Agency is requiring the maintenance of working records in order to maximize public participation, it does not intend to sacrific orderly and efficient decisionmaking in the process. Specifically, the Agency intends to require rigid adherence to the comment periods which it has allowed for submission of comments during the process. Thus, if a completed staff analysis on an issue is put in the working record after the expiration of the deadline for comments on that issue, the Agency will not regard this action as tantamount to reopening the comment period on that particular issue. Instead, the Agency will be giving participants in the process advance knowledge of positions which it has tentatively reached, and which will affect the next decision to be made in the process. The time to comment on the next decision, however, is *after* the decision is announced, and in accordance with the instructions for submission of comments which are to accompany that decision. Attempts to "jump the gun" by submitting comments at an earlier time will generally result in the comments being returned to the submitter or commenter without consideration.

Proposed § 162.33 also includes some general standards for Agency decision documents, and for rebuttal submissions and comments. The purpose of these general standards is to insure that the overall goals of the RPAR process—informed, open, public decisionmaking about problem pesticides—are realized. Accordingly, the Agency has imposed on itself general requirements to disclose all relevant information, and to provide resonable explanations for the positions which it is taking. In imposing, in effect, the same requirements on participants in the process, the Agency is really underscoring the obvious—attempts to influence rational debate inevitably reach their own level. Informed and carefully put together submissions warrant and receive careful attention, while conclusory, poorly thought out submissions receive little weight.

I. Supplemental Notices of RPAR

Proposed § 162.24 provides for the use in appropriate circumstances of a

Supplemental Notice of Rebuttable Presumption Against Registration. This section addresses a problem which has occasionally occurred in the Agency's administration of the RPAR process: the situation where the Agency discovers that an additional risk criterion has been met after the issuance of a Notice of Rebuttable Presumption Against Registration. Proposed § 162.24 sets out a practical way of dealing with this problem. Specifically, it gives the Administrator two options: he may issue a Supplemental Notice of RPAR, or he may deal with the additional risk criterion in the Preliminary Notice of Determination, and provide time for comment on the additional risk criterion (and his response to it) after the Preliminary Notice of Determination has been issued.

The Administrator is given discretion to select either option, but generally speaking, the point in time in the process when the additional risk criterion comes to the Agency's attention will determine which option is selected. Thus, if the additional risk criterion comes to the Agency's attention shortly before the Agency is prepared to issue a Preliminary Notice of Determination, the Administrator would probably select the option of dealing with the risk criterion in the Preliminary Notice of Determination without issuing a Supplemental Notice of RPAR. On the other hand, if the additional risk criterion comes to the Agency's attention much earlier, it would be preferable to issue a Supplemental Notice of RPAR. In either, case, the Administrator would be balancing the need for orderly and expeditious conduct of the RPAR with the desirability of providing early notice to registrants and other interested persons of the full compass of his risk concerns respecting the pesticide uses which are subject to RPAR proceedings. It should be noted, however, that in the event that the Administrator selects the option of not publishing a Supplemental Notice of RPAR, the overall objective of the process of providing opportunities for public comment would be achieved, since full opportunity for comment on the additional risk criterion would be afforded after the Preliminary Notice of Determination had been issued.

The concepts reflected in proposed § 162.24 have been tested in actual practice. In the RPAR proceeding concerning the pesticide chlorobenzilate, for example, the Agency discovered an additional risk criterion—testicular atrophy—shortly before the publication of a Preliminary Notice of Determination. (43 FR 29824, July 11, 1978.) In this situation, the Agency chose to deal with the risk criterion initially in the Preliminary Notice of Determination, and to afford opportunities to comment on it prior to the Final Notice of Determination.

J. Dealines for RPAR Decision Documents

The 1975 regulations allow registrants 45 days to submit rebuttal information, with the possibility of a 60-day extension (§ 162.11(a)(1)(i)). They further provide 150 days for the preparation of a benefits analysis, and 180 days for the issuance of a Notice of Determination by the Administrator. (§ 162.11(a)(5)).

This scheme of deadlines has proven to be unworkable. The proposal includes a new system which has flexibility as its dominant theme. In this regard, proposed § 162.23 provides that a Notice of RPAR shall include a notification of the dealine which the Administrator has imposed for the issuance of a Preliminary Notice of Determination in that particular proceeding. In selecting a deadline, the proposal provides that the Administrator will take into account the many factors which are peculiar to a given proceeding which are relevant to settling a deadline, including the number and complexity of the issues which must be addressed and the extent to which expeditious conclusion of the RPAR proceeding is in the public interest. Proposed § 162.28, concerning Preliminary Notices of Determination, contains a similar provision requiring the establishment of reasonable deadlines for submission of information and comments and the issuance of a final Notice of Determination. Finally, as discussed earlier, the parts of the proposal dealing with deadlines for review by the SAP and USDA are drafted to provide flexibility to establish deadlines appropriate to the circumstances of a proceeding.

K. Federal Register Notices

The proposal provides for the publication of **Federal Register** notices at all major decision points in the RPAR process. Although the 1975 regulations do not require publication of **Federal Register** notices, the Agency has always followed the practice of publishing them. Accordingly, in this regard the proposal restates current practice. The proposal also specifies standardized formats for each **Federal Register** notice which is required, including provisions for specific guiadance to registrants and other intersted persons, in order to assist them in understanding the notice and in deciding what action to take in response to it. Again, for the most part, the format requirements included in the proposal restate current practice.

L. Saving Provision

Proposed § 162.20 provides that the Agency will generally utilize the RPAR process for making decisions about whether or not to initiate cancellation or denial proceedings concerning a problem pesticide use. However, proposed § 162.20 includes an important saving provision, to the effect that the Agency reserves authority to utilize modified procedures or other procedures in appropriate circumstances where the Agency determines that it would be in the public interest to do so. One situation in which the Agency envisions it will utilize other procedures to initiate a cancellation proceeding is where it is necessary to initiate cancellation proceedings in order to issue a suspension order. Under section 6(c) of FIFRA, the Agency may not issue a suspension order unless cancellation proceedings concerning the pesticide are already in progress, or are commenced at the same time that the suspension order is issued. In situations where the Agency finds it necessary to issue a suspension order, and a cancellation proceeding is not in progress already, it would be contrary to the public interest to delay the commencement of a cancellation proceeding by using the RPAR process. Accordingly, in such situations the Agency would use the authority it has reserved in proposed § 162.20 to commence cancellation proceedings without prior resort to the RPAR process.

M. Voluntary Cancellation and Withdrawal of Application

The proposal also provides that a registrant or applicant may petition the Administrator at any time to voluntarily cancel the registration of a pesticide use or to withdraw an application for registration of a pesticide use. It is important to note, however, that the Administrator has full discretion to either grant or deny such a petition in situations where the pesticide use is subject to an RPAR or a cancellation or denial proceeding and that he may elect to deny the petition and proceed in accordance with Parts 162 and 164.

N. Procedures for Denial of Registration

Although the statutory provision governing the procedures and time-frames for the denial of an application for registration (section 3(c)(6)) differs somewhat from the provision governing cancellations of registered pesticide uses (section 6(b)), the proposal treats both actions in a uniform procedural

fashion consistent with the statutory provisions.

Specifically, section 3(c)(6) of the Act directs that if the Administrator determines that an application for registration of a pesticide use cannot be approved because the pesticide use fails to meet the statutory criteria for registration, he shall so notify the applicant and provide him 30 days within which to correct the deficiencies. If the applicant fails to correct them, the Administrator then "may refuse to register the pesticide," in which case the applicant must *again* be so notified, and a notice of the denial of registration must be published in the federal register. At that point, the applicant has "the same remedies as provided for in section"—under which the applicant has *another* 30 days within which to make "the necessary corrections, if possible," or to request a hearing.

Under the proposal, the section 3(c)(6) notification that the statutory criteria for registration had not been met will be set forth in a Preliminary Notice of Determination. Applicants and other interested persons will then be invited to comment upon the bases (factual or otherwise) which support that determination; and the matte will be referred to the SAP and USDA for their consideration and comments. The Administrator would then consider all significant comments received from the applicant, USDA, SAP, or other interested persons, and would set forth his responses to them together with his final determination concerning granting or denial of registration in a Final Notice of Determination. At that point, the applicant would have the "remedies as provided for in section 6"—that is, the opportunity to either make "the necessary corrections, if possible" in accordance with the instructions set forth in the Final Notice of Determination, or to request a formal evidentiary public hearing.

It is important to understand, however, that if the applicant fails to take either of these actions in response to the Final Notice of Determination within the statutory 30-day period, the denial of registration will become final and effective—the Agency will *not* provide a "second" 30-day period for making corrections. This position is premised on the fact that the applicant will already have had its comment opportunity under section 3(c)(6), because the applicant will have had the chance to comment on the Preliminary Notice of Determination.

IV. Proposed Changes to Rules of Practice for Hearings (Part 164)

A. Background to the Proposal

1. *Statutory Changes.*—Since 1964, FIFRA has allowed pesticides to be removed from the market through formal agency hearings conforming to 5 U.S.C. secs. 554, 556 and 557. (Before that, court action was required).

These hearing requirements have not been directly amended since 1972. Since then, however, changes to other provisions of the statute have significantly altered the context in which they are set, and the functions that such a hearing should logically be expected to serve.

As discussed above, under both the 1964 and 1972 versions of FIFRA, EPA was required to begin the formal hearing process whenever information raised a "substantial question of safety" regarding a pesticide use, without waiting to consider benefits or the balance of risks and benefits. The hearing under this test would virtually have to begin before the questions relevant to a final decision had been deeply analyzed, and would itself be the primary vehicle for probing and balancing the relevant factors, and for generating the record for final decision.

Since 1975, however, Congress has required that in most circumstances the full range of questions relevant to final action be addressed, and an agency position formed, before a notice of intent to cancel is issued regarding a pesticide use.[9] In 1975 Congress required EPA to refer proposed pesticide use cancellations to two expert bodies, one to examine risks primarily and the other to examine benefits primarily. EPA then had to consider and respond to the views of these two bodies before taking final action. Congress thus overruled the "substantial question of safety" doctrine and required EPA to consider (and document) the full range of statutorily relevant factors before a hearing could begin. In 1978 Congress further specified the factors the agency should consider, and the procedure it should follow, before beginning the formal hearing process.

These changes should assure that pesticide uses come to formal hearing accompanied by a substantial background of fact, analysis, and discussion addressing the questions which are crucial under the statute. The issues should already be focussed and most of the material for their final resolution should already be on hand.

[9] This procedure is not required for cancellation notices issued in connection with a suspension action, or for cancellations for failure to comply with certain narrowly specified legal tests.

It would be unacceptably inefficient to conduct formal hearings as though the RPAR stages which generated this background had never taken place. That would mean that the work of these preliminary stages would have to be fully reconstructed from the ground up through the time-consuming formal mechanisms of an adjudicatory hearing. Such duplication of effort, particularly at a time of general concern for expedition and economy, has no place in a rational administrative process.

Yet the existing rules contain no mechanisms to prevent such a result. Since they were written to implement the "substantial question of safety" doctrine, they contain no references to any pre-existing stages of agency review of a pesticide use, and no procedures to take account of the results reached in those stages.

Accordingly, one major purpose of the changes to Part 164 is to ensure that the formal hearing takes the results of the RPAR process as a starting point, accepts the RPAR results in cases where the particular procedures of formal hearings would not be likely to change them, and devotes its energies to the types of questions which formal procedures are particularly qualified to address.

2. *The Nature of the Cancellation Decision.*—Pesticide use cancellations, we believe, rank among the most intricate policy decisions in the Federal government as measured by the number, varying nature, interdependence, and complexity of the issues involved. Considering risks, questions can arise concerning the impact on non-target species and their inter-relationship, the dispersion and persistence of the pesticide in the environment and certain parts of it, the conduct of animal feeding studies, the meaning of those studies for human health, arguments about and projections from other data concerning possible human health risks, and finally on what the upper and lower boundaries of any risks may be and how firmly they are established. Considering benefits, questions can be raised about the extent of use, the crops involved, the availability and effectiveness of substitutes both now and in the future, the value of non-agricultural uses, and the range of the probable economic impacts of banning or restricting some or all of the uses at issues in the light of all these factors.

All these factors are explicitly made relevant by the statute, which provides for cancelling any pesticide use that "generally causes unreasonable adverse effects on the environment" and then defines "unreasonable adverse effects

on the environment" in these encompassing terms:

> The term "unreasonable adverse effects on the environment" means any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of any pesticide. FIFRA sec. 2(bb).

Factual certainty even on individual factors in the required balancing analysis will rarely be attainable. Indeed, answers to some questions—like projecting cancer risk to man from animal studies, or projecting the future economic impact of present actions—are beyond our capacity to answer precisely in the current state of medical and economic science.[10] In addition, when so many factors must be considered, it is inevitable that the data available to address at least some of them will be less than fully satisfactory even in cases where it might theoretically be provided. Yet, under the statute, EPA must consider the full range of logically relevant factors—whether known, partly known, unknown, or unknowable—both as to risks and benefits in making a final decision either to cancel an old pesticide use or to register a new one.

Decisions of this nature cannot efficiently be made through complete reliance on the court-room type proceedings traditionally associated with formal hearings. To sort through all the issues involved using cross-examination can result in crippling delays, while the sheer weight of material introduced may lead participants to lose sight of the forest for the trees. And in many cases, there may be a sharp limit to the ability of cross-examination to clarify the issues. The issues may be issues of policy (such as how much risk of human health damage to accept) or, though factual, may be resolvable only through advances in the general state of knowledge, or through additional studies, not through clarification of the opinions of individual witnesses.

Often, in grappling with such issues, providing professional advice to the decisionmaker is more useful than providing him with a cold record. Indeed, if the Administrator of EPA were not free to consult staffers with expert knowledge of and experience with the highly technical and complex issues often involved in pesticide use cancellations, and were restricted to grappling with the record himself, with perhaps the assistance of one or two law clerks, his decision could hardly claim to be based on the expert knowledge and judgment which Congress expects when it assigns problems to an agency.

Accordingly, a second major purpose of these regulations is to provide expert assistance and advice to the Administrator and then allow him to use it, not just to analyze the record after the hearing is over, but to structure the questions to be addressed at the hearing. The Administrator, with such assistance, should be able to determine which policy questions are most significant and most in need of further probing, which factual issues are reasonable candidates for clarification through cross-examination, and which, by contrast, cannot be answered with more certainty by such methods. This approach should result in more structured proceedings than would the alternative of leaving the form of the hearing entirely to the discretion of a single Administrative Law Judge, who as a practical matter cannot be expert in all the technical questions involved and who will have no familiarity with the discussion of those questions during the various stages of RPAR proceedings. This approach seeks to ensure that the virtues of having technical issues addressed by technically expert groups, a practice Congress has required prior to issuance of cancellation notices are not lost at the formal hearing stage, and are not denied to the Administrator of EPA when he makes the final decision.

B. The Proposed Amendments

1. *General.*—In proposing comprehensive changes to the formal hearing procedures in Part 164, EPA is trying to better adapt these procedures both to the statutory changes during the past eight years, and to the nature of the decision they are used to make. The solution, discussed below, consists both of explicit measures to fuse the RPAR process and the formal hearing process into a single over-all proceeding, and of reforms to the procedures for conducting the formal hearing itself. The basic approach of the proposed rules is to resolve disputed questions in the least procedurally burdensome way permissible under the governing statutes. To achieve this, questions will be sifted through successive procedures of increasing formality, beginning with an exchange of written documents during RPAR and ending with formal cross-examination with only those questions that cannot be resolved by the less burdensome approaches passing on to the more formal stages.

2. *Coordinating the RPAR Proceedings and the Formal Hearing.*—The proposed rules contain two major reforms to coordinate RPAR proceedings with a formal hearing.

First, they provide, in section 164.52(b)(4), that no evidentiary material may be placed before the Agency in a formal hearing that was not previously presented for consideration during RPAR, unless "good cause" is shown for the failure to present it. The regulation goes on to provide that:

> "Good cause" means either that the material was not available at the stage of the RPAR process at which it should have been presented, or that the material is of such a nature that it can only be presented meaningfully in a trial-type hearing.

EPA belives that the recent amendments to FIFRA demonstrate that Congress intended EPA to fully consider the entire range of issues relevant to a pesticide use before making any final decision whether or not to issue a notice of intent to cancel or deny registration. It will not be possible to achieve that purpose if interested persons are free to withhold relevant information without good cause until the formal hearing stage. In addition, such a practice would ensure that any issues raised by the new material would have to be considered entirely through the complex procedures of a formal hearing, without any chance for being focused or resolved by the relatively flexible procedures of RPAR. Inefficiency and delay would be bound to result from such a practice.

Second, the regulations provide in section 164.31 that the administrative record of the RPAR proceeding will automatically be introduced into evidence at the hearing and may not be stricken. This will make sure that the presiding officer and other decisionmakers are familiar with the prior course of the proceeding and the extent to which issues were raised and clarified during it, and will allow these persons to frame the course of subsequent proceedings accordingly.

It will also provide a store of factual material for use by the decisionmakers. EPA anticipates that in many cases the evidentiary value of items in the RPAR record will be clear from the face of that record, given the many opportunities for rebuttal and analysis which the RPAR process provides. However, one of the major purposes of the formal hearing is of course to provide an opportunity for cross-examination and the regulations explicitly provide that parties are free to contest the factual portions of the administrative record in the hearing, and to argue that portions of it should not be given weight unless sponsored by a witness who will be available for cross-examination. If the Administrator

[10] For further discussion of this point, see McGarity, "Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions Regulating Carcinogens in EPA and OSHA", 67 Geo. L. J. 729, 731–47 (1979).

or Presiding Officer grants such a request for a sponsoring witness, and the witness is not provided, the Presiding Officer may reduce the factual weight he gives to that piece of the administrative record accordingly.

3. *Changes to the Hearing Process Directly.*—The keystone of the changes made directly to the hearing procedures by this proposal (as opposed to changes made to relate it to the RPAR process) is the screening mechanism set forth in §§ 164.50 through 164.56. Though screening mechanisms for hearing issues have been adopted by a number of different agencies in recent years (most notably the Food and Drug Administration) several features of this proposal are new and warrant preamble discussion.

a. *General Approach.*—FDA's approach to screening issues is to apply a series of tests to determine whether a hearing will be granted at all, before the hearing has formally begun. See 41 FR 5170–6–51710, 51721–22 (Nov. 23, 1976). Courts have upheld this general approach, but have often required the agency to meet a high standard before denying the hearing. Since the Food, Drug and Cosmetic Act on its face requires a formal hearing before making certain decisions, it is certainly understandable that courts have restricted the agency's power to dispense with it in this manner.

In EPA's view, the FDA approach rests on a overly rigid conception of what a formal hearing must consist of. Nothing in the Administrative Procedure Act requires such hearings to consist exclusively of courtroom presentation of oral testimony and cross-examination of witnesses. These were certainly meant to be part of the record-building process, but the Presiding Officer and the agency were also meant to have discretion to mix these procedures with others to achieve the ultimate statutory goal—the provision of an adequate and adequately tested record for final decision. That general authority takes on additional weight in the FIFRA context because the statute now requires the formal hearing to be preceded in most cases by an informal sifting of the issues such as that which is accomplished in the RPAR process.

Accordingly, the proposed regulations provide, in § 164.32, for a formal hearing to be granted relatively automatically upon the filing of a timely request satisfying minimal requirements. Only *after* the hearing has begun will the issues be further sifted and detailed decisions made as to the future course of the proceedings.

b. *Screening Procedure.*—At present Presiding Officers of course have broad powers to structure the course of a formal proceeding through prehearing orders or through rulings during the course of the hearing. To some extent the screening criteria proposed here simply formalize and define the standards that should be applied in doing that.

The regulations, however, also depart from that pattern in an attempt to remedy one central defect of formal proceedings for making decisions such as those involved in pesticide use cancellations. That is lack of any provision for scientific advice to the decisionmaker. As discussed above, it is inefficient, and contrary to the purposes for which administrative agencies are established, to require the Administrator or the Presiding Officer, as laymen, to grapple with the full range of issues involved in a cancellation without any opportunity for informal consultation with technical experts.

Unfortunately, where Presiding Officers are concerned, a strong argument can be made that providing such advice is improper. 5 U.S.C. 554(d)(1) forbids a Presiding Officer to "consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate". The Supreme Court in dictum has indicated that this language should be given a literal reading. See *Butz* v. *Economu*, 98 S. Ct. 2894, 2915 (1978).

Accordingly, though arguments on the other side can be made, EPA has elected at present not take the legal risk of making informal expert advice available to Presiding Officers.

Instead, EPA has provided, in § 164.55, for providing expert advice to the Administrator when *he* makes decisions regarding cancellation of a pesticide use. This practice is unquestionably legal. 5 U.S.C. 554(d)(1) does not apply to agency heads, and, as the United States Court of Appeals for the First Circuit has stated, to shut agency experts out of the final decision would run:

> counter to the purposes of the administrative agencies which exist, in part, to enable government to focus broad ranges of talent on particular multidimensional problems. The Administrator is charged with making highly technical decisions in fields far beyond his individual expertise. "The strength [of the administrative process] lies in staff work organized in such a way that the appropriate specialization is brought to bear upon each aspect of a single decision, the synthesis being provided by the men at the top." 2 K. Davis, Administrative Law Treatise 84 (1958).

Seacoast Anti-Pollution League v. Costle, 572 F.2d 872 881 (1978). EPA believes that as a practical matter the absence of such advice probably increases the pressure on the Administrator to accept the views of agency trial staff by denying him the technical equipment with which to challenge it.

Many agencies provide staff advice to their heads to assist in writing final decisions after adjudicatory hearings. The novelty in these regulations is that the technical staff named to advise the Administrator will also be used to help structure the course of the hearing. EPA believes it will clearly be more efficient for the Administrator and his expert advisors to indicate in advance of a courtroom presentation on the basis of party submissions and the administrative record where further issues need to be addressed and what proceedings will be useful than to allow the hearing to proceed in ignorance of these basic views. Accordingly, the regulations provide in § 164.55 that the Presiding Officer may certify the task of framing the course of an adjudicatory hearing to the Administrator who in turn will act with the assistance of such a panel, and that if the Presiding Officer frames the course of the hearing himself, the result may be taken to the Administrator through an interlocutory appeal as of right. EPA anticipates that this same panel would be kept in existence throughout the hearing to deal with other issues as they arose and to advise on the final decisions.

C. *The Screening Tests*

A formal hearing in connection with the cancellation of a pesticide use can consist of one or more of three types of component procedures. These are: (i) presentation of direct evidence in addition to the administrative record, (ii) cross-examination of witnesses; and (iii) referral of issues of scientific fact to the National Academy of Sciences. The proposed regulations provide separate tests for screening requests for each of these possible types of further proceedings. They are contained in §§ 164.52 (additional evidence), 164.53 (cross-examination) and 164.54 (referral to the National Academy of Sciences).

Three criteria are common to each test. They are that the party requesting the further proceedings show that: (i) a genuine and substantial question of fact is involved; (ii) the proceedings at issue are likely to resolve the issue; and (iii) the resolution of the issue one way or another has the potential to change the change the outcome of the proceeding.

These criteria are designed to ensure that trial-stage proceedings held as part of a formal hearing serve the central function of a trial stage—to clarify disputed issues of material fact. There is no purpose in holding trial proceedings

that have no reasonable change of serving that end. This is true even in cases where substantial factual uncertainty does indeed exist, but trial proceedings will not reduce it. In those cases, the uncertainties must simply be presented to the decisionmaker for resolution as a matter of policy or expert judgment (accompanied, of course, by appropriate briefs from the parties.

These three criteria are taken directly from the "summary judgment" criteria of the Food and Drug Administration. They are further discussed in various preambles to FDA regulations, see 40 FR 40698–407010 (September 3, 1975); 41 FR 51708–51711 (November 23, 1976), and in a recent law review article, see Ames & McCracken, *Framing Regulatory Standards to Avoid Formal Adjudication: The FDA as a Case Study*, 64 Calif. L. Rev. 14–49 (1976).

A fourth criterion common to all three tests—that the matter not be one of which "official notice" can be taken—is discussed in the next section.

Finally, requests to introduce further direct evidence must, as stated above, demonstrate why that evidence was not introduced as part of the RPAR record. Similarly, requests to refer issues of scientific fact to the National Academy of Sciences must show why those issues were not adequately addressed by an independent scientific group in being referred to a Scientific Advisory Panel during the RPAR process. Both these tests aim to ensure that the formal hearing does not duplicate jobs which should have been done earlier.

d. *"Official Notice".*—A central feature of this proposal is its use of "official notice" as a tool for setting limits to the courtroom nature of formal APA hearings. Because the approach is new, it will be discussed in some detail.

5 U.S.C. sec. 556(e) provides that "When an agency decision [after a formal hearing] rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary."

This language on its face demonstrates that in some cases—those in which "official notice" is proper—an agency may rest its decision on facts which have not gone through the full record-building procedures characteristics of a formal hearing. Otherwise the sentence would add nothing to the powers contained in other APA provisions which generally authorize an agency to make decisions provided it observes such procedures. Accordingly, the "opportunity to show the contrary" mentioned in this provision must mean something less than the otherwise applicable scope of rights to cross-examine witnesses and present testimony.

This provision must also be read in the light of four other factors.

First, the rules of "judicial notice" in court proceedings, on which the APA provision was modelled in part, provided a considerable degree of latitute for taking "official notice." Rule 201 of the Federal Rules of Evidence, which now governs the matter, only provides for judicial notice of "adjudicative facts." The reason, stated in the Advisory Committee's Note, is that courts may take notice of "legislative" facts—those relevant to general policy decisions—without affording parties any rebuttal opportunities at all of the sort Rule 201 provides. See K. Davis, Administrative Law of the Seventies, sec. 15.00–1 (1976).

Second, the definition of a fact as "legislative"—the type that may be noticed without process under the Rule 201 test—is not static, but varies with the nature of the proceeding. "Legislative" facts are supposed to be those that help tribunals decide questions of law or policy or discretion; it follows that the more heavily a decision involves these elements, the more each of the facts that goes into making it is likely to be classified as "legislative." Indeed, Professor Davis has recently stated that *all* facts in a notice-and-comment rulemaking are legislative by definition because the main purpose of such a proceeding is to determine the content of law or policy. See 2 K. Davis, Administrative Law Treatise, sec. 6.17 at 529 (2d. ed. 1978). This approach would support classification of the great majority of facts in a cancellation proceeding as "legislative".

Third, even within the sphere of "adjudicative" facts subject to the rebuttal requirements of the official notice rule, agencies probably have greater power to take official notice than do courts. Even formal administrative proceedings, after all, are meant to be less rigid than court proceedings, while agencies are created in large measure to be storehouses of information and to apply it in an expeditious and flexible manner to proceedings before them. According to the Attorney General's Manual on the Administrative Procedure Act (pp. 79–80), Congress in the APA meant to adopt the 1941 recommendations of the Attorney General's Committee on Administrative Procedure and allow agencies to take official notice of "all matters as to which the agency by reason of its function is presumed to be expert, such as technical or scientific facts within its specialized knowledge." See the Final Report of the Attorney General's Committee Administrative Procedure pp. 71–73 (1941).

Agency official notice rules since then have often provided for taking official notice of such specialized matters, and this result has been endorsed by such commentators as Professor Davis and Professor Nathanson. See K. Davis, Administrative Law of the Seventies sec. 15.00–7 (1976); Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review under the Administrative Procedure Act and Other Federal Statutes*, 75 Colum. L. Rev. 721, 738, 761 (1975).

Finally, as noted above, the agency and the Presiding Officer have inherent power, through evidentiary rulings and pretrial conferences, to structure the course of a proceeding quite apart from any "official notice" rule so as to generate a good record at the least procedural cost, and this concern is underlined in the case of FIFRA by the fact that a stage of informal review precedes the hearing in FIFRA cases.

Each of these four principles could probably be pushed to the point where it gave results contrary to the basic purpose of Congress in enacting FIFRA. But EPA believes that they can also each be applied in a way that furthers both that intent, and decisionmaking procedures under which issues are resolved by the most appropriate methods, without resort to highly formal methods of generating a record except where those methods are necessary.

EPA therefore proposes to apply these principles by requiring each person seeking further proceedings in the form of introducing additional evidence, cross-examination, or referral of an issue to the National Academy of Sciences, to show that the factual questions concerned are not ones of which official notice can be taken. The regulations provide a full opportunity to document any such showing.

The Presiding Officer (on the panel) will then rule on the request. "Official notice" will be taken of those matters, and only those matters, which the panel members, on review of the administrative record, conclude already have been established one way or another by that record and are not legitimately in dispute.

Under this approach the "opportunity to show the contrary" provided by the statute would be furnished both before and after official notice was proposed to be taken. It would be furnished before that tentative decision during the various stages of the RPAR process, and after it through the opportunity to comment on and contest the tentative

conclusions of the Presiding Officer or the panel before they become final.

"Offical notice" as the term is used here, becomes in effect a synthetic concept drawn from several different fields of administrative law. It is a principle which could be justified either as "official notice" under 5 U.S.C. sec. 556(e), on the basis that the facts at issue were "legislative", as part of the general authority of the agency to structure a hearing, or as an implementation of the special characteristics of FIFRA. Under each approach, however, EPA's intention would be the same—to set for hearing only those factual issues which seem open to decisionally significantly elucidation through the type of formal proceeding requested.

EPA anticipates that under this approach, requests for cross-examination will be granted far more readily than requests to introduce additional evidence or refer matters to the NAS. Cross-examination is, after all, the procedure for which formal hearings are particularly well adapted, while there is no reason why the other two procedures could not be performed just as well in the RPAR process.

Even where cross-examination is involved, however, it is very possible that in many cases requests for further proceedings may be denied. Courts have increasingly expressed skepticism as to whether cross-examination is the best methods of establishing the facts where scientific or technical questions are involved, or where large numbers of economic factors must be weighed, and many law review articles have seconded these conclusions. Pesticides cancellation hearings, of course, can be expected to involve such factors predominantly, and EPA intends to apply the tests for cross-examination in the light of that fact.

C. Secondary Features

The discussion above has outlined the two main purposes of the revisions to Part 164—to splice the RPAR process into the formal hearing procedures and to modernize and streamline the conduct of those hearings.

In addition, several other significant changes have been made in these regulations, which are set out below.

1. *Implementation of Use-Specific and Registration-Specific Cancellation Actions.*—Under FIFRA, pesticide products are registered and regulated on the basis of the uses for which the products are intended, and registration decisions, classification decisions, and cancellation decisions are all taken on the basis of specific uses. This use-specific approach to decisionmaking is embodied in § 3 of FIFRA as well as in the registration and RPAR provisions of Part 162, and reflects the fact that a single registration is comprised of severable, independent components, each relating to a different registered pesticide use. It is the Agency's position that since cancellation and denial decisions focus on specific individual components (uses) of specific registrations, a particular pesticide use of a product or application may be cancelled or denied under section 6 or section 3 of FIFRA without affecting the status of other pesticide uses of the same registered product or application. At the same time, a request for a hearing relating to one pesticide use of a product or application which is proposed to be cancelled or denied has no legal effect with respect to other pesticide uses which are also proposed to be cancelled or denied; the other pesticide uses will be cancelled or denied by operation of law unless a request is received which specifically relates to them.

On a related matter, it is the Agency's general practice to issue a single section 6(b)(1) (or section 3(c)(6)) notice to initiate cancellation (or denial) actions with respect to the affected pesticide uses of *all* pesticide products containing the active ingredient which is under consideration; each such pesticide product is identified in the notice by registration number or application file symbol. It is important to emphasize, however, that despite this consolidation into a single notice, separate cancellation and denial actions are being initiated with respect to the affected pesticide uses of *each* identified registration and application, and all of these cancellation and denial actions are legally independent of one another.

In other words, each affected pesticide use of each registration or application subject to the notice will be separately cancelled or denied by operation of law at the end of a specified 30-day period unless within that period certain actions (such as a request for a hearing) are taken with respect to *that specific* pesticide use of *that specific* registration or application. It is the Agency's position that a request for a hearing relating to a pesticide use of one registration or application will *not* be effective with respect to that same pesticide use of another (unidentified) registration or application, even if it is held by the same registrant or applicant.

Proposed § 164.20 formalizes this use-specific and registration-specific approach to implementation of cancellation and denial actions by requiring each request for a hearing under Section 6(b)(1) or Section 3(c)(6) to specifically identify both the pesticide registration number(s) or the application file symbol(s) *and* the particular pesticide use(s) of the particular registration(s) or application(s) as to which a hearing is being requested. If a particular pesticide use of a particular registration or application is not specified in any request for a hearing, the actions proposed in the notice relating to *that* pesticide use of *that* registration or application will become final and effective at the end of the specified 30-day period, notwithstanding that a hearing might have been requested with respect to other pesticide uses of the same registration or application or with respect to the same pesticide use of other registrations or applications.

These requirements of particularity and specific identification of pesticide uses and of registration numbers or application file symbols apply to *all* requests for hearings, including requests from adversely affected persons other than registrants. Moreover, the regulations explicitly provide that any request for a hearing which fails to specifically identify both a particular pesticide use and a registration number of application file symbol will be denied. The basis of such a denial would be that such a request would lack the requisite particularity under Section 6(b) of FIFRA for preventing specific proposed cancellation or denial actions from taking effect by operation of law.

This requirement does *not* apply, however, to requests to participate in a Section 6(b)(2) hearing under proposed § 164.23. Unlike the cancellation and denial actions proposed in Section 6(b)(1) or Section 3(c)(6) notices—which become final and effective at the end of 30 days unless corrections are made or a hearing is requested—a notice of hearing under Section 6(b)(2) is not a "self-executing" cancellation action. That is, a Section 6(b)(2) notice does nothing more than convey a hearing on certain issues specified by the Administrator; *at the conclusion* of that hearing, a final order of cancellation can be issued for any of the pesticide uses subject to the notice. Because hearing requests under Section 6(b)(2) do not prevent any action from taking effect automatically, there is no need for the hearing request to specify the actions which are stayed by it. Accordingly, identification of specific pesticide uses, including registration numbers or application file symbols, is not required by the proposal for Section 6(b)(2) hearings.

Instead, the proposal requires Section 6(b)(2) hearing requests to contain an exposition of the person's position on the factual, legal, and policy questions which he believes to be involved with respect to *each* of the issues specified by the Administrator in the notice. This requirement should not be construed, however, as allowing persons to expand the scope of the issues to be considered in the hearing beyond those specified by the Administrator. As explained earlier, the proper time to request such an expansion of issues is during the RPAR process—typically, in the comment period following issuance of a Preliminary Notice of Determination. Accordingly, the Agency has determined *not* to provide any mechanisms in Part 164 for motions to enlarge the issues in Section 6(b)(2) hearings beyond those specified by the Administrator in the Section 6(b)(2) notice.

2. *Status of Registered Pesticide Uses Following Issuance of Notice of Intent to Cancel.*—The regulations also set forth the Agency's approach to the issue of the status of registered pesticide uses as to which hearings have been timely and properly requested. It is clear that under Section 6(b) of FIFRA, the proposed cancellation of a particular registered pesticide use of a particular registration shall not become final and effective if a request for a hearing on that pesticide use is timely and properly made by any person adversely affected by the Section 6(b)(1) notice; such pesticide use will be lawfully registered until the conclusion of the hearing. A somewhat unique situation arises, however, when *only* a person *other* than the registrant (such as a user group) requests a hearing with respect to a particular registered pesticide use of a particular registration. This situation is most likely to occur in the case of so-called "minor" uses, where a registrant does not desire to defend its registration for a particular use, but a user group does want to defend it.

If the registrant is willing to market the product for the minor use if it is successfully defended by the user group, it is consistent with the purposes of FIFRA to allow the user group to defend the continued registration of the particular pesticide use in a hearing. On the other hand a registrant may decide that it is no longer interested in maintaining its license for a particular use in effect, and that it affirmatively wishes to relinquish its license for that particular use. There is no provision in FIFRA which requires a registrant to maintain in effect a registration for any particular pesticide use. Indeed, section 6(a)(1) of FIFRA, which provides for routine administrative cancellations after five years, states that only the registrant—or an interested person *with the concurrence of the registrant*—may request that a registration be continued in effect. If the registrant chooses to allow a registration to lapse, a user group is powerless to overrule that decision. Further, even if a registration is effective, the manufacturer has the sole discretion to determine whether or not to manufacture and distribute the product under its license. In light of these factors, it would generally not make any sense for the Agency and user groups to engage in a protracted hearing concerning the continued registration of a pesticide use which the registrant affirmatively wishes to discontinue. The proposed regulations (under Part 162) therefore provide that the registrant may *at any time* petition the Administrator to voluntarily cancel any registered pesticide use of its registration. This provision will apply even if a request for a hearing has been filed in accordance with Part 164 by an adversely affected person other than the registrant.[11] If a petition to voluntarily cancel registration for a pesticide use is accepted in such a situation, no section 6(b) hearing will be held on the pesticide use. See *McGill v. EPA*, 593 F.2d 631 (5th Cir. 1979).

The regulations also deal with the consequences of a request for a hearing in the somewhat more complicated context of a conditional cancellation or a conditional denial. As explained more fully elsewhere in this preamble, the Administrator may decide at the conclusion of an RPAR that a particular pesticide use will meet the requirements of FIFRA only if specific modifications to its terms and conditions of registration (or proposed terms and conditions of registration), as directed by the Administrator, are accomplished. In those situations, the notice which the Administrator would issue under section 6(b)(1) or section 3(c)(6) of FIFRA would provide that a particular pesticide use of a particular registration or application will be cancelled or denied unless the specific modifications to the terms and conditions of registration (or proposed terms and conditions of application) are accomplished.

However, section 6(b) of FIFRA provides that the actions proposed in a section 6(b)(1) notice of intent to cancel shall become final and effective at the end of a specified 30-day period unless *within that time:*

> "either (i) the registrant makes the necessary corrections, if possible, or (ii) a request for a hearing is made by a person adversely affected by the notice."

Accordingly, the Agency has determined that the modifications to the terms and conditions of registration (or proposed terms and conditions of registration) prescribed in a conditional cancellation or conditional denial notice must be accomplished *during* the statutory 30-day period. In other words, unless within the 30-day period either the "necessary corrections" (modifications to the terms and conditions of registration) are accomplished *or* a request for a hearing is made by a qualified person, the affected pesticide use of the affected registration or application will be finally cancelled or denied as a matter of law at the expiration of the 30 days.

The proposed regulations also lay to rest several issues which may arise when the Administrator issues conditional cancellation or conditional denial notices. First, a registrant may not itself unilaterally amend the terms and conditions of its registration; it must apply to the Agency for such amendments, and such amendments are not effective unless and until they are approved by the Agency in accordance with the provisions of Part 162. Moreover, the Agency process for consideration and approval of such applications for amended registration may extend well beyond the statutory 30-day period. Accordingly, the Agency has determined that the registrant shall be deemed to have made the "necessary corrections" within the applicable 30-day period, for the purposes of stopping the effectiveness of the proposed cancellation actions, if within that period it submits an application for amended registration which, if granted, would accomplish the specified modifications to the terms and conditions of registration.

The proposal also deals with the situation where the registrant responds to a section 6(b)(1) conditional cancellation notice by submitting the application for amended registration, and another party adversely affected by the notice, such as a user group, requests a hearing.[12] Although section 6(b) contemplates that *either* of these actions will prevent the cancellation

[11] The proposed regulations under Part 162 similarly provide that applicants may at any time petition the Administrator to withdraw an application for registration. The analysis above is equally applicable to that situation, especially since interested persons other than the applicant may request a hearing on a denial under § 3(c)(6) of FIFRA only "with the concurrence of the applicant."

[12] The parallel situation is not likely to occur in the denial context, since only "interested persons *with the concurrence of the applicant*" may request hearings to challenge denial decisions under section 3(c)(6).

action from becoming effective, the statute is silent on the consequences of *both* conditions being satisfied, each by a different party. The fundamental theme of section 6(b)(1) provides the answer to this problem of statutory interpretation. As pointed out earlier, section 6(b)(1) allows the Agency to act without hearings; hearing requests under this section operate to stop actions from taking effect, until the conclusion of a trial to test whether the action proposed is necessary. If a hearing request were submitted by a registrant, the Agency's proposed changes in terms or conditions of registration would not become effective, and a hearing would be held. In the Agency's view, the statute was intended to operate the same way if an adversely affected person other than a registrant requests a hearing, regardless of the action taken by the registrant. The fact that a registrant is willing to go along with the changes has no more bearing on the action *stopping* nature of a third party hearing request than a registrant's silence would have. In either case, the proposed changes in the terms or conditions of registration do not take effect until the conclusion of the hearing, and the proposed regulations so provide.

3. *Timeliness of requests for hearings.*—Proposed section 164.20 provides that the timeliness of requests for hearings by *all* non-registrants and non-applicants in response to Notices of Action (i.e., notices of intent to cancel or change classification and notices of intent to deny registration) will be determined *exclusively* by the date of publication of the notice in the **Federal Register.** In the case of registrants and applicants *only,* the proposal provides that the timeliness may be determined instead by the date of receipt of the notice when such receipt occurs *after* the publication in the **Federal Register.** This interpretation of section 6(b) of the Act has been previously upheld by the Administrator in the case of a request for a hearing on the conditional cancellation of the citrus uses of the pesticide chlorobenzilate, and the proposal merely embodies that decision (*Final Decision,* FIFRA Docket Nos. 411, et al., August 20, 1979).

In this regard, prior to 1972 only registrants could request a cancellation hearing. The version of FIFRA then in effect only required that a notice of cancellation be sent to the registrant, and the timeliness of a request for a hearing was determined by the date of service of the notice. In 1972, however, FIFRA was amended to provide in section 6(b) that a notice of intent to cancel "shall be sent to the registrant and made public"; section 6(b) also provides that unless a hearing is requested (or necessary corrections made), the action initiated by a section 6(b)(1) notice "shall become final and effective at the end of 30 days from receipt by the registrant, or publication, of [the notice], whichever occurs later."

Thus, when the 1972 amendments expanded the class of persons who could request a hearing to include non-registrants, they continued in effect the requirement that a notice of intent to cancel be sent directly to a registrant, since the registrant's identity is known to the Administrator. They also provide that the date of *receipt* of the notice (instead of *service* of the notice) would determine the timeliness of a registrant's request for a hearing.

At the same time however, the amendments did *not* require the notice to be sent to non-registrants, since the number and identity of all persons with an interest in the continued registration of a pesticide could not generally be known or readily ascertained by the Administrator. Instead, Congress provided for publication of the section 6(b)(1) notice to inform the general public of the pendency of the cancellation action so that non-registrants who wanted to stop it from taking effect could do so by requesting a hearing.

By providing for publication, Congress achieved two objectives. First, it provided a mechanism for non-registrants to learn of pending cancellations so that they would not have to rely exclusively on communications with informed registrants. Since the very purpose of expanding the class of persons who could request a hearing was to allow non-registrants to defend a registration when the registrant chose not to, the provision for publication facilitated the ability of non-registrants to act independently of registrants. Second, and more significantly, the date of publication of a section 6(b)(1) notice provide a single, neutral, objective benchmark for determining the time that *all* non-registrants are put on constructive notice that a cancellation action is pending and will take effect unless stopped by a request for a hearing.

By including the phrase "whichever occurs later" to qualify the phrase "from receipt by the registrant, or publication," Congress merely intended to extend a grace period to a registrant in circumstances where it receives its copy of the notice prior to the pulication of the notice; it did *not* intend to measure the 30-day period for the entire class of non-registrants from the *latest* date of receipt by some registrant. Accordingly, the proposal provides *all* non-registrants (and non-applicants) 30 days from the date of publication of the Notice of Action within which to request a hearing. The provision for an alternative date for determining timeliness will *only* apply to registrants and applicants who receive their individual copies of the notice after the date of pulication in the **Federal Register.**

4. *Time Limits for Completing Hearings.*—The Agency believes the current state of affairs—where the cancellation hearings that have been held have typically taken over three years from start to finish—cannot be reconciled with any reasonable concept of administrative procedure.

Deadlines for the completion of these proceedings have been recommended by the National Academy of Sciences. National Academy of Sciences, Decisionmaking for Regulating Chemicals in the Environment, p. 30 (1975).

Accordingly, the regulations contain such a provision. Of course, no such deadline could properly be imposed if it would unduly abridge a person's right to clarify factual issues that were legitimately in controversy. The screening process described above, therefore, is an indispensable complement to any establishment of deadlines, since it aims at making sure that hearing time is used more efficiently than it often has been in the past. If the screening process works as it should, and if presiding officers and participants act in the knowledge that the time available to them is not unlimited, the Agency believes substantial economies in time and effort can be realized without any sacrifice in quality of results.

5. *Judicial Review.*—Section 164.90 provides that decisions concerning a pesticide cancellation made while screening requests for further participation shall be reviewed in the Circuit Court of Appeals as provided in Section 16(b) of FIFRA.

That section provides for Court of Appeals review of "any order issued by the Administrator following a public hearing." Even if this language meant a formal evidentiary public hearing as provided in 5 U.S.C. 554, 556 and 557, the Agency believes that § 164.90 would accurately state the law. The screening of requests for further participation is a means of implementing those statutory provisions for hearings.

However, it is clear that the reference to "public hearing" does not mean such formal adjudicatory hearings exclusively. During the 1975 consideration of FIFRA amendments, various changes to the language quoted

were considered. In the end, the conferees decided to leave the section as it was, and added the following legislative history:

"It is the intent of the conferees, however, that an adequate reviewable record be developed by the Environmental Protection Agency in each of its public hearing although such hearings need not necessarily be adjudicatory in nature." H.R. Rep. No. 94–668, 94th Cong., 1st. Sess. 6 (1975).

The reference to the record here echoes the 1972 Senate Report (p. 13).

The clear implication of this language that Court of Appeals review should follow any hearing at which an adequate record for review is developed also expresses the holding of the only courts to consider the question. *State of Louisiana v. Train*, 392 F. Supp. 564 (W.D. La. 1975), *aff'd*, 514 F.2d 1070 (5th Cir. 1975).

It is the Agency's position that the RPAR process set forth in the proposed revisions to Part 162—with its multiple opportunities for public input and with its requirements of carefully articulated decisions based on specifically identified records—together with the requirements of Part 164 for screening requests for further proceedings, together comprise the requisite "public hearing" for purposes of judicial review.

6. *Presentation of Evidence.*—These rules contain three reforms to the way evidence is presented at a formal adjudicatory public hearing which are designed to promote efficiency and reduce hearing time.

First, the filing of all exhibits, and of substantially all direct testimony by all parties in written form will be required (§ 164.61). In addition, the regulations contemplate that hearings will be divided into distinct stages (for example, a risk stage and a benefits stage) and that the exhibits and testimony relating to each stage will be introduced early in each stage. Use of written direct testimony has been the rule in previous cancellation hearings, and has resulted in substantial time savings. The Agency believes that it has authority to require filing of written direct testimony in cancellation hearings in cases where no showing can be made that elucidation of the issues involved depends on oral presentation. *See* 41 FR 51716–17 (Nov. 23, 1976). The regulations proposed today allow oral direct testimony if such a showing can be made.

Second, these regulations provide, § 164.62, for an initial screening of direct evidence to enforce comformity with the Hearing Order which determines the scope of the hearing. This will ensure that the hearing is run in conformity with the principles laid down for its conduct by the Administrator. At the same time, the Agency recognizes that new evidence may become available after a particular stage of a hearing has been completed (or after the time for filing evidence for a particular stage has expired) that is relevant to the issues involved in the proceeding. Accordingly, the same provision, § 164.62, also provides that such evidence may be admitted at a later stage upon a showing that it could not reasonably have been made available, or its relevance could not reasonably have been foreseen, at an earlier stage.

Finally, some provisions for control of excess cross-examination are made, though in general decisions here are left to the discretion of the Presiding Officer. The Conference Report and Order of the hearing conference will set a detailed schedule for all oral proceedings (§ 164.60), and in drawing it up the Presiding Officer is directed to consider alternatives to oral cross-examination if the issues could be more economically clarified by using them. It should also be noted in this regard that the proposal specifically contemplates that more than one hearing conference will be held. Hearing conferences are valuable opportunities to dispose of procedural and other matters, and both the parties and the Presiding Officer should view the hearing conference as an indispensable tool for expediting the hearing.

The general discovery provisions in the present regulations have been eliminated. This is not intended to result in any lesser degree of disclosure by parties to the hearing. Rather, the obligation to make disclosure has in effect been shifted forward to Part 162 proceedings by § 164.52.

7. *Burden of Proof.*—Section 164.3 restates the accepted view that the ultimate burden of persuasion always rests on the proponent of registration of a pesticide use. (*See*, e.g., *Environmental Defense Fund v. Environmental Protection Agency*, 548 F.2d 998 (1976), cert. denied, 431 U.S. 925 (1977).) It also states that the burden of producing evidence beyond the RPAR record shall be specified by the Presiding Officer. This provision does not rest on any legal conclusion as to where that burden rests in the abstract, which the Agency in any event would find to be of limited usefulness. Rather, it recognizes that the Presiding Officer will be working from the prior administrative record and documents based on it. Against that background, he will be able to discern where the areas of factual dispute lie, and on which party it is most fair to place the burden of clarifying them.

8. *Alternative Forms of Public Hearing.*—Under FIFRA, a person adversely affected by a notice of intent to cancel has the right to request a formal evidentiary public hearing as provided by these regulations. Given the variety of different types of questions and patterns of questions that may arise, however, it may be that all parties will be able to agree that some alternative approach will best fit their needs. Indeed, such alternative forms have been increasingly used under other statutes in recent years, and have been favorably mentioned in various contexts. For example, there has been repeated discussion of proposals for a "science court" which proponents believe could clarify technical issues in a more efficient and less adversarial way by adopting some of the mechanisms of scientific investigation rather than those designed for trial of issues of adjudicatory fact.

Accordingly, § 164.24 has been included to allow the parties to select such an alternative form if they wish, and to provide some guidance as to what the permissible choices are.

The section provides that persons with a right to request a formal hearing under FIFRA may instead elect to have the proceeding conducted under the rules of practice that apply to rulemakings under section 6 of the Toxic Substances Control Act, or in the form of a one-day proceeding before the Administrator personally, or before a panel of mutually acceptable persons not employed by EPA.

The Toxic Substances Control Act, 15 U.S.C. 2601 et seq., allows EPA to regulate problem chemicals other than pesticides. The factural and policy issues raised by these chemicals may often be very similar to those that arise in the pesticide context.[13] Under that statute, decisions involving such chemicals may be taken through "hybrid rulemaking" procedures rather than through a formal hearing.

EPA believes that the TSCA procedures will not result in any sacrifice in quality of decisions as compared to the FIFRA procedures, and are almost certain to be vastly shorter and cheaper than formal hearings. (TSCA section 6 rulemakings to date have averaged less than one year from start to finish, while FIFRA hearings have averaged more than three years.) Accordingly, EPA proposes to allow FIFRA hearings to be governed by these

[13] The similarity between FIFRA and TSCA has been recognized by members of the separate committees concerned with the two statutes. Legislative history of the Toxic Substances Control Act (Committee Print, House Committee on Interstate and Foreign Commerce), pp. 231–233 (1976) (dialogue of Sens. Allen, Talmadge, and Tunney).

procedures if those with a right to request them consent.

The second option—a hearing before the Administrator personally—recognizes that in some cases, predominantly those involving major policy choices, the parties may conclude that an opportunity to address personally the final decisionmaker—the Administrator—is what matters most to them. To date it has not been the practice for the Administrator to even hear oral argument personally in FIFRA proceedings, and, given the press of his other duties, this pattern is certainly understandable. However, if the Administrator knew that by devoting a day to hearing the contentions of the parties in a FIFRA proceeding, he could substantially reduce the burden of formal proceedings that would otherwise have to be borne by other parts of the Agency, the incentive for him to make the time available would obviously be greater. Accordingly, the regulations make this option available also.

The third alternative—a hearing before a panel of mutually acceptable persons—corresponds to the format generally suggested for a "Science Court." These suggestions often assume that the panel members would be scientists expert in the field. Though the EPA proposal is certainly consistent with that approach, it could encompass any panel of mutually acceptable persons, not one consisting of scientists only.

The regulations do not attempt to specify in elaborate detail the procedures for these latter two alternative types of public hearing. By their nature, they are somewhat experimental and the procedures may have to be worked out, at least during the first few tries, on a case-by-case basis. However, the regulations do provide for full publicity to be given in each case to the procedures that have actually been agreed on. This will safeguard the right of the public to know of and participate in alternative hearing forms as it could participate in the traditional form of public hearing.

The regulations also provide that any alternative form of public hearing must be approved by the Administrator.

D. *Suspension Prodecures.*—Section 6(c) of FIFRA allows the Administrator to suspend the registration of a pesticide—that is, to forbid temporarily its distribution, sale and use by abbreviated procedures—where he determines that an "imminent hazard" would result from its use. An "imminent hazard" exists where a pesticide would have unreasonable adverse effects on the environment during the time required for the completion of cancellation proceedings.

The statute makes suspension decisions subject to the same hearing rights as cancellation decisions, except that the time limits are shorter and the Presiding Officer need not be an Administrative Law Judge.

Most provisions of the regulations for suspension proceedings in Subpart C of Part 164 follow the procedures laid down for cancellation proceedings with whatever changes are necessary to accommodate the much tighter timetable and the preliminary nature of the decision.

As one such change, the stage of screening requests for further participation has been eliminated. It would be hard to reconcile such a stage with the very short timetables for decision specified in the statute. In addition, the usefulness of this stage really depends on the whole course of proceedings under Part 162 having been completed, and in many instances of suspension this will not be the case.

In addition, these regulations provide that a panel of agency employees with expert knowledge of or responsibility for the subject area of the proceeding may be named to preside at a suspension hearing either instead of or in cooperation with an Administrative Law Judge. The direct participation of such experts will make it easier for the Agency to assess the evidence and the issues, particularly under time pressure, and should lead to better final decisions through the principle of the division of labor. The Agency believes Congress had the possibility of some such approach in mind when it specified in section 6(c) of FIFRA that the person presiding over a suspension hearing need not be a certified Administrative Law Judge.

E. Implementation of Final Cancellations and Suspensions and Existing Stocks Problems

The proposal includes a provision (§ 164.140) requiring the preparation of a Notification of Cancellation after cancellation actions under section 6(b) have become final, either by operation of law or at the conclusion of hearings under Part 164. This Notification would be sent to all registrants of pesticide uses affected by the final cancellation action, and would be published in the Federal Register.

The Notification of Cancellation is designed to deal with certain "housekeeping" matters. Once a cancellation action has become effective, registrants need to know what actions are required of them in order to bring their pesticide products into compliance with it. For example, registrants need to know such things as whether, how and when they should submit amended product labeling to the Agency, and what practices the Agency will allow (in appropriate circumstances) for modifying the labeling of pesticide products currently in commerce (e.g., whether "stickering" of the labels of such products will be permitted, and whether obliteration of portions of the label will be permitted.) In the past, the Agency generally has sent instructions to registrants on these matters; accordingly, the Notification of Cancellation provision in the proposal in large measure codifies current practice.

The proposal also provides for a similar Notification of Suspension after suspension actions have become final (§ 163.142). With respect to implementation of suspension actions, however, it should be noted that any labeling and other changes required to comply with final suspension orders have validity only for the duration of the cancellation proceedings concerning the pesticide use in question. At the conclusion of cancellation proceedings, the Agency may impose different requirements, or may decide to permit registration for the use to continue without any changes to the terms and conditions of registration which existed at the beginning of the suspension and cancellation proceedings. Because suspension orders are limited in duration and effect, the Agency has always permitted registrants to make changes necessary to comply with suspension orders on an interim basis, and without prejudice to their right to contest the necessity for these changes in cancellation proceedings. This practice will, of course, not change.

The provisions in the proposal regarding existing stocks of products not in compliance with final cancellations or suspensions mark a departure from current Agency practice. In the past, the Agency has resolved in the cancellation or suspension proceedings whether and to what extent to permit the sale and use of existing stocks of pesticide products which do not comply with the cancellation or suspension action. This approach has not worked well, primarily because it is not possible to develop a record concerning the disposition of existing stocks of cancelled or suspended pesticides before it is known what pesticide uses are in fact going to be cancelled or suspended—which, of course, cannot be known until the end of the proceeding. In light of this problem, it is not surprising that the Agency's decisions concerning existing stocks have twice been overturned on appeal,

because the records supporting these orders were wholly inadequate. *Environmental Defense Fund v. Environmental Protection Agency*, 548 F.2d 908 (D.C. Cir. 1976), *cert. denied*, 431 U.S. 925 (1977)); *Environmental Defense Fund v. Environmental Protection Agency*, 510 F.2d 1292 (D.C. Cir. 1975).

For cancellation proceedings, the proposal resolves this problem by providing for a *separate* proceeding, after a cancellation action under Part 164 has become effective, to deal with existing stocks problems (§ 164.141). Under the proposal, the Notification of Cancellation would include a discussion of the legal status of existing stocks of pesticide products which are not in compliance with the final cancellation action, together with the Agency's determination concerning the continued distribution, sale or other movement in commerce, and use, of such existing stocks. The Notification of Cancellation would then inform registrants and other interested persons that if they disagree with the Agency's determination, they may petition the Agency to modify it, and would specify where, how and when such petitions must be filed, and the information which must be included in them. The proposal then requires the Agency to dispose of such existing stocks petitions by promulgating a regulation, after complying with the procedural requirements applicable to rulemaking under FIFRA and the Administrative Procedure Act.[14]

The proposal does not provide for a separate proceeding to deal with existing stocks problems after final suspension orders. There are several reasons for not permitting separate existing stocks proceedings after suspensions. First, a suspension order is of limited duration and effect, and is intended in part to resolve whether existing stocks of products registered for a particular pesticide use should be sold or used while cancellation proceedings are in progress. Second, because suspensions are temporary, and last only until the conclusion of cancellation proceedings, existing stocks questions generally can be deferred until the conclusion of cancellation proceeding. Third, because the question of permission to use existing stocks is so closely intertwined with the merits of a suspension order, any provision allowing petitions to permit use of existing stocks of suspended pesticides would in effect allow petitions to modify the suspension order. The Agency already has procedures for petitions for modification of suspension orders (See 40 CFR Part 164, Subpart D). In the Agency's view, petitions for relief from suspension orders should continue to be governed by those procedures.

[14] FIFRA does not impose any procedural requirements governing the disposition of petitions to allow sale or use of cancelled or suspended pesticides. See FIFRA, §§ 6(a)(1), 15(b)(2). Accordingly, the procedural requirements applicable to existing stocks matters are those in the Administrative Procedure Act ("APA"). In the Agency's view, these matters are rulemaking matters within the purview of § 4 of the APA [5 U.S.C. § 553 (1976 edition)].

V. Questions on Which Comment is Particularly Requested

A. How should cancellation hearings not following an RPAR be handled?

As discussed above, the revised Part 164 procedures proposed today are specifically designed to graft together the increasingly important stage of decisionmaking through informal procedures in the RPAR process and the examination and testing of those decisions in a formal hearing.

EPA anticipates that the great majority of regulatory actions involving pesticides which pose unreasonable adverse effect problems will be made through the RPAR process followed by a hearing opportunity as described above. Under the statute, however, there are two major types of actions which may lead to a formal hearing and yet which may not or will not have been preceded by the full range of RPAR procedures. These are discussed below.

1. Cancellation in Connection With Suspension.—Suspension of the registration of a pesticide use, as explained above, is a preliminary remedy similar to a preliminary injunction. It is designed to be invoked rapidly when new information or new interpretations of old information, raises serious concerns about registrability of a pesticide use. Because of the nature of the procedure, it is quite likely that, if invoked, it will be invoked rapidly, and quite possibly before an RPAR proceeding concerning the pesticide use at issue has been completed. Yet the statute also provides that the Administrator may not issue a suspension order for a pesticide use without at the same time also initiating cancellation proceedings for the pesticide use at issue. The question then arises how to conduct a cancellation hearing on that pesticide use if one is requested.

Several possible solutions to this problem are suggested by past Agency practice. The first is to stay any hearing on the cancellation action until after final agency action on the suspension. (See e.g., the Agency's cancellation hearings on heptachlor/chlordane (FIFRA Docket Nos. 336 et al.) and aldrin/dieldrin (FIFRA Docket Nos. 145 et al.)) Without such a stay, the Agency would be conducting two hearings on closely related issues simultaneously, with all the duplication of effort that would require from all parties.

The second is to stay the cancellation hearing until the suspension hearing is over and then to automatically introduce the record of the suspension proceeding into evidence in the cancellation hearing. (See, e.g., the Agency cancellation hearing on heptachlor/chlordane (FIFRA Docket Nos. 336 et al.)) Such an approach provides the cancellation proceeding with a running start on at least some of the issues it will have to face. Indeed, the case for automatic introduction of the suspension record is stronger than the case, discussed above, for automatic introduction of the administrative record. Introducing the suspension record serves the same purposes as introducing the administrative record, while the suspension record has also been subject to examination in a prior evidentiary hearing.

The third possibility is to stay cancellation hearings when a notice of cancellation is issued in connection with a suspension, pending completion of RPAR proceedings on the use in question. Such RPAR proceedings would serve a purpose analogous to discovery in civil litigation. At the conclusion of the RPAR proceeding, the Administrator could (if appropriate) narrow or broaden the scope of the cancellation proceeding. This approach has been used by the Agency already in connection with its suspension of some uses of the pesticide DBCP (42 FR 57545, November 3, 1977). It proved acceptable to all sides, and allowed the issues involved in cancellation to be addressed in the flexible, informal RPAR setting before moving on to the rigidity and expense of formal proceedings.

The Agency recognizes that there are a number of alternatives available in connection with the second and the third possible solution. One would be to start the cancellation hearing at any time after the final suspension decision, without waiting for any RPAR or RPAR-type proceedings, but to retain the formal screening of issues before any new presentation of evidence or cross-examination. The screening could proceed on the basis of the suspension record, plus the submissions of the parties.

Another would be to start the hearing, once again, any time after suspension proceedings were over, but to move directly to the hearing conference, and to provide for screeing of issues in a

somewhat less structured fashion at the discretion of the Presiding Officer.

The Agency specifically invites comments on the approaches to this problem discussed above, and on any other approaches that might be utilized.

On a related matter, the Agency also solicits comments on the issue of whether a suspension order may be supported by a notice under section 6(b)(2) of the Act. Although section 6(c)(1) read literally requires the Administrator to issue a notice under section 6(b)(1) in order to support a suspension order, it is clear that Congress' concern in enacting section 6(c)(1) was only that proceedings which could result in cancellation of a pesticide use be initiated or in progress before that pesticide use was suspended (because suspension was only intended as an interim remedy *pending* such cancellation proceedings). See S. Rep. No. 92–838 (SUPPLEMENTAL REPORT), 92d Cong., 2d Sess. 47 (1972); S. Rep. No. 92–1540, 92d Cong., 2d Sess. 32 (1972). Since a hearing under section 6(b)(2) is a cancellation hearing in the fullest sense, and since it may culminate in an order of conditional or unconditional cancellation of any pesticide use subject to it, the Agency believes that such a hearing may serve as the predicate for issuance of a suspension order. Accordingly, the Agency specifically invites comments on this question.

2. *Cancellation Without Weighing of Risks and Benefits.*—Both cancellation or denial following RPAR, and cancellation in connection with suspension under the statute, must be based on a weighing of the risks of pesticide uses against their benefits, and on a final judgment by the Administrator as to whether the risks of each pesticide use at issue in the proceeding are unreasonable.

The statute also provides for cancellation or denial of registration on other grounds. Specifically, it allows cancellation under section 6(e) for failure to comply with the conditions on which conditional registration was granted under section 3(c)(7), cancellation under section 3(c)(1)(D) for failure to comply with the terms of data-sharing requirements, and cancellation under section 6(b) if it appears that a pesticide's labeling or other material required to be submitted does not comply with the provisions of the Act. With respect to denials, the Administrator may deny registration under section 3(c)(6) if the pesticide's composition is not such as to warrant the proposed claims for it (section 3(c)(5)(A)), or if the pesticide's labeling or other material required to be submitted does not comply with the requirements of the Act (section 3(c)(5)(B)). Finally, the Act provides for "suspension" under section 3(c)(2)(B)(iv) for failure to enter into data-sharing arrangements. Unlike suspension under section 6(c), suspension under section 3(c)(2)(B)(iv) is not analogous to a preliminary injunction, and there is no requirement for instituting cancellation proceedings under section 6 in conjunction with suspension proceedings under section 3(c)(2)(B)(iv).

As discussed in detail above, the revisions to the formal hearing rules proposed today are designed to create a unified procedural system under which large, technically complex policy decisions are made in the RPAR process and challenged and refined in formal hearings thereafter. Since the types of cancellation and denial proceedings described above would not follow RPAR proceedings, the rules of practice set out in the proposal would not be appropriate for them.

The Agency specifically solicits comment on the question of what rules should govern these "other" kinds of cancellation proceedings. One proposal which may have merit is to use the consolidated civil penalty regulations which the Agency recently has promulgated for these hearings. [See 45 FR 24360 (April 9, 1980).] The Agency specifically invites comment on the feasibility of this approach. If the Agency decides to adopt that approach, the necessary revisions to the consolidated civil penalty regulations will be promulgated directly without an intervening reproposal.

B. Briefing in Suspension Hearings

Suspension hearings are required by statute to be expedited proceedings, and, as a result, the time available for briefing is extraordinarily short. The Presiding Officer must recommend findings and conclusions to the Administrator within "ten days from the conclusion of the presentation of evidence" and the Administrator then has seven days to render a final order. Parties must await the conclusion of the presentation of evidence before they can prepare final briefs for the Presiding Officer, and must await the Presiding Officer's recommended decision before they can prepare briefs to the Administrator; the briefing schedules which result from this timetable subject the parties to excrutiating time pressures to create briefs which synthesize a highly technical record. Because of the compressed schedules, simultaneous briefing is a necessity, and almost no time is available for reply briefs.

The Agency believes that the past practice of briefing in suspension hearings, which has been continued in the proposal, may unnecessarily subject parties to an overwhelming burden to create a document which may come too late in the process to have any impact at all. Accordingly, we are specifically soliciting comments concerning alternative methods of advocacy in expedited hearings. In particular, we have two ideas under consideration, although we invite commenters to suggest other alternatives.

The first idea would be to eliminate the requirement of final written briefs, and replace it with an oral argument on the record before the Presiding Officer (and then before the Administrator) somewhat akin to the English system of advocacy. This alternative would relieve the parties from the crushing burden of creating extensive written briefs at the conclusion of suspension proceedings. Moreover, an on-the-record colloquy between the Presiding Officer and the parties, or even between the parties themselves, may sharpen the focus of the controversy much more efficiently than written presentations.

The second idea would be to give the Presiding Officer the discretion to require interim briefs at the conclusion of various stages of the hearing. Under this approach, parties would brief the issues involved at each stage as it was completed, so that only the final stage (and the overall decision urged) would require briefing at the "conclusion of the presentation of evidence." This would have the additional beneficial effect of having issues briefed while they are still fresh in everyone's minds, and would provide them to the Presiding Officer *before* he undertakes the arduous task of preparing his final decision covering all stages and all issues involved in the proceeding.

C. Subpart D

This proposal does not affect the existing regulations under Subpart D of Part 164, which govern petitions to reconsider previous cancellation or suspension orders, to allow use of a pesticide at a site and on a pest for which registration has been finally cancelled or suspended. Subpart D provides generally that reconsideration of a previous cancellation or suspension order is warranted only if the applicant presents substantial new evidence which may materially affect the prior order and which was not available to the Administrator at the time of that order, *and* such evidence could not, through the exercise of due diligence, have been discovered by the parties to the cancellation or suspension

proceeding prior to the issuance of the final order (40 CFR 164.131).

The Agency believes that Subpart D is based on sound policy considerations, but invites comments on any amendments, revisions, additions or deletions which might be made to those regulations consistent with other changes being proposed today.

D. Discovery

As explained earlier, the proposal eliminates the formal discovery procedures of the present regulations, since the obligation to make disclosure has in effect been shifted to the RPAR process. However, the Agency solicits comments as to whether any provision should be made allowing use of particular discovery devices, or some combination of discovery devices, after the initiation of formal proceedings under Section 6(b). Such comments should contain specific proposals for such discovery and explain why provision for such discovery in the rules of practice would further the Agency's overall procedural reform objectives.

E. Applicability of revised rules to RPAR proceedings and cancellation proceedings currently in progress.

As indicated in Part II above, the Agency currently has a number of RPAR proceedings in progress. In addition, there currently are two cancellation hearings in progress. The Agency solicits comment on whether, to what extent, and under what conditions it should make the revised RPAR rules applicable to ongoing RPAR proceedings and the revised Rules of Practice applicable to ongoing cancellation proceedings.

EPA presently intends to make these rules applicable to all RPAR proceedings in progress on the date the rules become effective, and to any hearings arising out of those RPARs. Those hearings will comprise the vast bulk of the formal proceedings under FIFRA for the next several years, and it would be unacceptably inefficient for the reasons discussed above to conduct them under rules that gave no formal recognition to the role of the RPAR process. Since the RPAR process is already conducted in essential conformity with the proposed requirements, no unfairness will result from such a step, particularly if EPA provides, as it currently intends to, a comment period during which interested persons can point out any inconsistencies between the actual form of an RPAR record and the form it would have under the proposed regulations, and EPA can correct them.

Note.—The Agency has determined that this document does not contain a major proposal requiring preparation of an economic impact analysis under Executive Orders 11821 and 11949 and OMB Circular A-107

Regulatory Analysis

Executive Order 12044 requires preparation of a Regulatory Analysis for major regulations and standardized development procedures for all significant regulations. In EPA's final report implementing the Order (44 FR 30988) we identified several categories of regulatory actions which we defined as "specialized" and not subject to the uniform procedural requirements. I have determined that this proposal is administrative and procedural in nature and does not significantly alter the stringency, compliance costs, or benefits of the pesticide regulatory program. I have therefore classified this proposal as a "specialized regulation."

Compliance With FIFRA Section 25

As required by FIFRA Section 25, copies of this proposed regulation were provided to the Department of Agriculture ("USDA"), the FIFRA Scientific Advisory Panel ("SAP"), the Committee on Agriculture of the House of Representatives, and the Committee of Agriculture, Nutrition and Forestry of the Senate on May 19, 1980. Notice of transmittal of a copy of this proposed regulation to the USDA was published in the **Federal Register**, as required by FIFRA Section 25(a)(2)(D). [See 45 FR 38087 (June 6, 1980).] USDA elected not to exercise its right to submit written comments within the prescribed period. However, EPA and USDA will consult informally during the course of this rulemaking proceeding. The SAP elected not to exercise its right to submit written comments during the prescribed period.

This notice of proposed rulemaking is issued under authority of section 25 of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. 136w.

Dated: July 30, 1980.

Douglas M. Costle,

Administrator.

PART 162—REGULATIONS FOR THE ENFORCEMENT OF THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

(1) It is proposed to revise 40 CFR Part 162 by:

Subpart A—[Amended]

(a) Amending the title of Subpart A to read "Registration and Reregistration Procedures" and by redesignating or deleting the existing sections (and amending the table of sections accordingly) as follows:

Present Section and New Section
162.11(a)(b)—Deleted
162.12—162.11
162.13—162.12
162.14—162.13
162.15—162.14
162.16—162.15
162.17—162.16
162.21—162.17
162.22—162.18
162.23—162.19

(b) Amending § 162.3 to add the following paragraphs (ss), (tt), (uu), (vv), (ww), (xx), and (yy):

§ 162.3 Definitions.

* * * * *

(ss) The term "pesticide use" means a use of a pesticide (described in terms of the target pest, the application site, and other applicable identifying factors) which is included in the labeling of a pesticide product which is registered, or for which an application for registration is pending, and the terms and conditions of registration or the proposed terms and conditions of registration for the use.

(tt) The term "terms and conditions of registration" means the terms and conditions governing lawful sale, distribution and use which were approved in conjunction with registration, including the approved labeling, the use classification, the composition, and the packaging.

(uu) The term "proposed terms and conditions of registration" means the terms and conditions of registration proposed by an applicant for registration in an application for registration.

(vv) The term "RPAR" means rebuttable presumption against registration.

(ww) The term "validated test" means a test conducted and evaluated in a manner consistent with accepted scientific procedures.

(xx) The term "other significant evidence" means evidence that relates to the uses of a pesticide and their adverse risk to man or the environment.

(yy) The term "Scientific Advisory Panel" means the FIFRA Scientific Advisory Panel established by the Administrator pursuant to Section 25(d) of the Act.

(c) Establishing a new Subpart C entitled "Classification of Pesticide Uses" to consist of §§ 162.40 through 162.42, by redesignating existing sections of Part 162 (and changing all references in those sections accordingly) as follows:

Present Section and New Section
162.11(c), (d)—162.40
162.30—162.41
162.31—162.42

The Table of Sections is also proposed to be amended accordingly to add the following:

Subpart C—*Classification of Pesticide Uses*

Sec.
162.40 Use classification criteria.
12.41 Optional procedures for classification of pesticide uses by regulation.
162.42 Pesticide use classification.

Because redesignation of present § 162.11(c) and (d) as new § 162.40 involves extensive renumbering of paragraphs and subparagraphs, the text of new § 162.40 is set out below. *No changes other than changes in the numbering of paragraphs and subparagraphs have been made in these provisions.*

§ 162.40 Use classification criteria.

(a) *Classification criteria for new registrations.* Except as provided in paragraph (d) of this section, a specific use(s) of a pesticide product not previously registered shall be classified for general use if each of the applicable criteria set forth in paragraph (a)(1)(a)(3) of this section is met. Otherwise, the product use(s) shall be classified for restricted use unless a review of the labeling pursuant to paragraph (c) of this section indicates that the product use may be classified for general use or the benefits from unrestricted use of the pesticide outweigh the risks of unrestricted use of the pesticide. Each of the separate criteria as set forth below must be applied for the product use(s) to be classified unless the formulation, packaging, or method of use of the product can reasonably be expected to eliminate the route of exposure. New data submitted to support classification must conform to the specifications of the Registration Guidelines.

(1) *Domestic applications.* A pesticide use(s) intended for domestic application will be a candidate for general use classification if the pesticide formulation:

(i) Has an acute dermal LD_{50} greater than 2,000 mg/kg;

(ii) Has an inhalation LC_{50} greater than 2 mg/liter;

(iii) Causes no corneal opacity, or causes eye irritation reversible within 7 days or less;

(iv) Causes no more than moderate skin irritation within 72 hours;

(v) Has an acute oral LD_{50} greater than 1.5 g/kg for the formulation as diluted for use; and

(vi) Causes, under conditions of label use or widespread and commonly recognized practice of use, only minor or no discernible subacute, chronic, or delayed effects on man or other nontarget organisms from single or multiple exposures to the product ingredient(s), their metabolite(s), or degradation product(s).

(2) *Nondomestic applications.* A pesticide use(s) intended for nondomestic application will be a candidate for general use classification if the pesticide formulation:

(i) Has an acute dermal LD_{50} greater than 200 mg/kg;

(ii) Has an acute dermal LD_{50} greater than 16 g/kg for the formulation as diluted for use as a mist or spray;

(iii) Has an inhalation LD_{50} greater than 0.2 mg/liter;

(iv) Is not corrosive to the eye or causes corneal opacity reversible within 7 days;

(v) Is not corrosive to the skin and causes no more than severe skin irritation within 72 hours; and

(vi) Causes under conditions of label use, or widespread and commonly recognized practice of use, only minor or no discernible subacute, chronic, or delayed toxic effects on man or other nontarget organisms, from single or multiple exposures to the product ingredient(s), their metabolite(s), or degradation product(s).

(3) *Outdoor applications.* A pesticide use(s) intended for outdoor application will be a candidate for general use classification if it meets the applicable set of criteria set forth immediately above for either domestic or nondomestic application, as appropriate, and if the pesticide:

(i) Occurs as a residue immediately following application in or on the feed of a mammalian species representative of the species likely to be exposed to such feed in amounts equivalent to the average daily intake of such representative species, at levels less than ⅛ the acute LD_{50} measured in mammalian test animals as specified in the Registration Guidelines.

(ii) Occurs as a residue immediately following application in or on the feed of an avian species representative of the species likely to be exposed to such feed in amounts equivalent to the average daily intake of such representative species, at levels less than ⅛ the subacute dietary LC_{50} measured in avian test animals as specified in the Registration Guidelines.

(iii) Results in a maximum calculated concentration following direct application to a 6-inch layer of water less than $\frac{1}{10}$ the acute LC_{50} for aquatic organisms representative of the organisms likely to be exposed as measured in test animals as specified in the Registration Guidelines.

(iv) The pesticide causes, under conditions of label use, or widespread and commonly recognized practice of use, only minor or no discernible adverse effects on the physiology, growth, population levels, or reproduction rates of nontarget organisms, resulting from exposure to the product ingredients, their metabolites, or degradation products, whether due to direct application or otherwise resulting from application, such as through volatilization, drift, leaching or lateral movement in soil.

(b) *Classification criteria for previously registered products.* All pesticide products registered by this agency prior to October 21, 1974 have been assigned a Toxicity Category [see § 162.10(h)(1)]. Unless the applicant for reregistration submits or has submitted the toxicity data on the product use(s) required in paragraph (a) of this section, the existing Toxicity Category determinations shall be used to establish whether the pesticide use(s) is a candidate for general or restricted use classification. Except as provided in paragraph (d) of this section, specific use(s) of a product shall be classified for general use if the applicable criteria set forth in paragraph (b)(1)–(b)(3) of this section are met. Otherwise, the product use shall be classified for restricted use unless a review of the labeling pursuant to paragraph (c) of this section indicates that the use may be classified for general use or the benefits from unrestricted use of the pesticide outweigh the risks of unrestricted use of the pesticide. Each of the separate criteria as set forth below must be applied for the product use(s) to be classified unless the formulation, packaging, or method of use of the product can reasonably be expected to eliminate the route of exposure.

(1) *Domestic applications.* A pesticide use(s) intended for domestic application shall be a candidate for general use classification if the pesticide formulation:

(i) Does not meet the criteria of Toxicity Category I or II; and

(ii) Causes, under conditions of label use, or widespread and commonly recognized practice of use, minor or no discernible subacute, chronic, or delayed effects on man or other nontarget organisms from single or multiple exposures to the product ingredients, their metabolites, or degradation products.

(2) *Nondomestic applications.* A pesticide use(s) intended for nondomestic application shall be a

candidate for general use classification if the pesticide formulation:

(i) Does not meet the criteria of Toxicity Category I; and

(ii) Causes, under conditions of label use, or widespread and commonly recognized practice of use, only minor or no discernible subacute, chronic, or delayed toxic effects on man or other nontarget organisms from single or multiple exposures to the product ingredients, their metabolites, or degradation products.

(3) *Outdoor applications.* A pesticide use(s) intended for outdoor application will be a candidate for general use classification if it meets the applicable set of criteria set forth immediately above for either domestic or nondomestic application as appropriate, and if the pesticide:

(i) Occurs as a residue immediately following application in or on the feed of a mammalian species representative of the species likely to be exposed to such feed in amounts equivalent to the average daily intake of such representative species, at levels less than ⅕ the acute oral LD_{50} measured in mammalian test animals as specified in the Registration Guidelines.

(ii) Occurs as a residue immediately following application in or on the feed of an avian species representative of the species likely to be exposed to such feed in amounts equivalent to the average daily intake of such representative species, at levels less than ⅕ the subacute dietary LC_{50} measured in avian test animals as specified in the Registration Guidelines.

(iii) Results in a maximum calculated concentration following direct application to a 6-inch layer of water less than ⅒ the acute LC_{50} for aquatic organisms representative of the organisms likely to be exposed as measured in test animals as specified in the Registration Guidelines.

(iv) The pesticide causes, under conditions of label use, or widespread and commonly recognized practice of use, only minor or no discernible adverse effects on the physiology, growth, population levels, or reproduction rates of nontarget organisms, resulting from exposure to the product ingredients, their metabolites, or degradation products, whether due to direct application or otherwise resulting from the application, such as through volatilization, drift, leaching or lateral movement in soil.

(c) *Adequacy of label and labeling.* The directions, warnings, and cautions for any product use(s) not meeting the criteria set forth in paragraphs (a) and (b) of this section shall be further evaluated according to the criteria set forth below to determine the adequacy of the label or labeling to prevent unreasonable adverse effects on man or the environment. If these criteria are met, the labeling for the affected uses will be considered adequate to prevent unreasonable adverse effects on the environment without further regulatory restrictions, and the affected uses will be classified for general use. The criteria for evaluating labeling adequacy are as follows:

(1) To follow label directions, the user of a pesticide product would not have to perform complex operations or procedures requiring specialized training and/or experience;

(2) Failure to follow the use directions in any minor way would result in minor or no discernible adverse effects;

(3) Widespread and commonly recognized practices of use would not nullify label directions relative to prevention of unreasonable adverse effects on man and the environment;

(4) The directions do not call for specialized apparatus, protective equipment or material unless they would be expected to be available to the general public;

(5) Following directions for use would result in only minor or no discernible adverse effects of a delayed or indirect nature, such as through bioaccumulation, persistence, or pesticide movement from the original application site, on nontarget organisms.

(d) *Other Hazards.* Any product use(s) which meets the general use criteria of paragraph (a), (b), or (c) of this section shall nonetheless be classified for restricted use if the Agency determines that based on human toxicological data (including epideminological studies), use history, accident data, monitoring data, or such other evidence as the Administrator identifies the product use(s) may pose a serious hazard to man or the environment which can reasonably be prevented by classification for restricted use.

(e) *Other regulatory restrictions.* Any product use(s) classified for restricted use under the provisions above may be limited to use by or under the direct supervision of a certified applicator. The Administrator may additionally or alternatively impose other restrictions by regulation. Such regulatory restrictions may include, but not limited to, seasonal or regional limitations, limitation of use to approved pest management programs, or a requirement for monitoring or residue levels after use, and may be utilized to reduce human health and environmental hazards associated with persistent, bioaccumulative, or mobile, or highly toxic pesticides. Any such regulation shall be reviewable in the appropriate Court of Appeals upon petition of a person adversely affected filed within 60 days of the publication of such regulation in final form.

(f) *Change in classification from general to restricted use.* (1) *Determination and notification.* If the Administrator determines that a change in classification of any pesticide product use(s) from general to restricted use in necessary to prevent unreasonable adverse effects on man or the environment he shall, be certified mail, notify the registrant of such pesticide of such determination at least 30 days before reclassifying, and shall publish notice of the proposed reclassification in the **Federal Register.**

(2) *Appeal rights.* Within 30 days following publication of the notice in the **Federal Register,** the registrant or a person adversely affected by the notice may request a hearing as provided for in section 6(b) of the Act and Part 164 of these regulations.

(d) Establishing a new Subpart B entitled "Rules Governing Rebuttable Presumption Against Registration (RPAR) Proceedings" consisting of §§ 162.20 through 162.34 to read as follows:

Subpart B—Rules Governing Rebuttable Presumption Against Registration (RPAR) Proceedings

Sec.

Authority: Section 25 of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. § 136w.

Subpart B—Rules Governing Rebuttable Presumption Against Registration (RPAR) Proceedings

§ 162.20 Overview; alternate procedures.

This Subpart sets forth substantive standards and procedures for the

Rebuttable Presumption Against Registration ("RPAR") process. These procedures are the ones which the Agency generally will utilize in determining whether to cancel or deny registration for a pesticide use on the basis that the pesticide use causes unreasonable adverse effects on the environment. The Agency expressly reserves authority in particular cases to modify these procedures or utilize other procedures (including initiation or cancellation or denial proceedings without prior resort to the RPAR process), if it determines that modified procedures or other procedures are in the public interest.

§ 162.21 Rebuttable presumption against registration; criteria for issuance.

(a) An RPAR with respect to a pesticide use shall arise upon a determination by the Administrator that:

(1) A pesticide ingredient, metabolite or degradation product meets any risk criterion set out in paragraph (b) of this section, as indicated by (i) validated test(s) or (ii) other significant evidence; or

(2) A pesticide ingredient, metabolite or degradation product otherwise appears to pose a risk to man or the environment of sufficient magnitude, as indicated by (i) validated test(s) or (ii) other significant evidence, to require the Agency to make specific findings that the use offers offsetting social, economic or environmental benefits.

(b) *Risk criteria. (1) Acute toxicity. (i) Hazard to humans and domestic animals.* (A) Has an acute dermal LD_{50} of 40 mg/kg or less as formulated;

(B) Has an acute dermal LD_{50} of 6 g/kg or less as diluted for use in the form of a mist or spray; or

(C) Has an inhalation LC_{50} of 0.04 mg/liter or less as formulated.

(ii) *Hazard to wildlife.* (A) Occurs as a residue immediately following application in or on the feed of a mammalian species representative of the species likely to be exposed to such feed in amounts equivalent to the average daily intake of such representative species, at levels equal to or greater than the acute oral LD_{50} measured in mammalian test animals as specified in the Registration Guidelines.

(B) Occurs as a residue immediately following application in or on avian feed of an avian species, representative of the species likely to be explosed to such feed in amounts equivalent to the average daily intake of such representative species, at levels equal to or greater than the subacute dietary LC_{50} measured in avian test animals as specified in the Registration Guidelines.

(C) Results in a maximum calculated concentration following direct application to a 6-inch layer of water more than ½ the acute LC_{50} for aquatic organisms representative of the organisms likely to be exposed as measured on test animals specified in the Registration Guidelines.

(2) *Chronic toxicity.* (i) Induces oncogenic effects in experimental mammalian species or in man as a result or oral, inhalation or dermal exposure; or induces mutagenic effects, as determined by multitest evidence.

(ii) Produces any other chronic or delayed toxic effect in test animals at any dosage up to a level, as determined by the Administrator, which is substantially higher than that to which humans can reasonably be anticipated to be exposed, taking into account ample margins of safety; or

(iii) Can reasonably be anticipated to result in significant local, regional, or national population reductions in nontarget organisms, or fatality to members of endangered species.

(3) *Lack of Emergency Treatments.* Has no known antidotal, palliative, or first aid treatments for amelioration of toxic effects in man resulting form a single exposure.

§ 162.22 Preliminary notification to registrant(s) and applicant(s) for registration.

(a) If it appears to the Administrator that an RPAR may have arisen with respect to a pesticide use, he shall notify the registrant(s) or applicant(s) in writing of the general nature of his concerns and the bases for them, and shall offer them an opportunity to respond. The time limit for submitting a response shall generally not exceed ninety (90) days.

(b) The Administrator shall consider any information submitted in response to a notification under this section in determining whether to issue a Notice of Rebuttable Presumption Against Registration under § 162.23, or a Preliminary Notice of Determination under § 162.28, as appropriate.

§ 162.23 Notice of rebuttable presumption against registration.

(a) Except as provided in § 162.29, the Administrator shall announce his determination that an RPAR has arisen with respect to a pesticide use in a Notice of Rebuttable Presumption Against Registration ("Notice of RPAR"). The Notice of RPAR shall be published in the Federal Register, and sent by certified mail to each registrant and applicant for registration of the pesticide use or uses subject to the Notice of RPAR.

(b) The Notice of RPAR shall include the following:

(1) Identification of the pesticide use or uses as to which an RPAR has arisen;

(2) For each pesticide use, identification of each risk criterion which has been met;

(3) With respect to each risk criterion which has been met, a discussion which satisfies the requirements of § 162.33 of the Agency's reasons for so concluding;

(4) The name, address and telephone number of the Project Manager or other person within the Agency who should be contacted for information concerning the RPAR;

(5) The location of the administrative records for the RPAR proceedings (see § 162.34) and the times during which the administrative records will be available for inspection and copying;

(6) An invitation to all registrants and applicants for registration of pesticide uses subject to a Notice of RPAR, and all other interested persons, to submit information relevant to determining whether any rebuttal criterion in § 162.25 has been satisfied;

(7) A statement that proponents of registration of pesticide uses subject to a Notice of RPAR have an affirmative burden of proving that one or more of the rebuttal criteria have been satisfied, and that failure to satisfy this burden will result in initiation of proceedings to cancel or deny registration, or modify the terms and conditions of registration or proposed terms and conditions of registration, as appropriate;

(8) The deadline for submission of rebuttal information and the date on which the Agency contemplates that it will announce its preliminary deteminations by issuance of a Preliminary Notice of Determination under § 162.28. In selecting these dates, the Agency shall take into consideration the facts unique to each RPAR proceeding which are relevent to scheduling, including the number and complexity of the issues which must be addressed, and the extent to which expeditious conclusion of the RPAR proceeding is in the public interest.

§ 162.24 Supplemental notice of RPAR.

(a) Subject to paragraph (b), if the Administrator determines that an additional risk criterion has been met for a pesticide use after the publication of a Notice of RPAR with respect to that pesticide use, he shall prepare a Supplemental Notice of RPAR with respect to the additional risk criterion. The Supplemental Notice of RPAR shall contain the information specified in § 162.23, and shall be published and distributed as provided in § 162.23. The Administrator shall afford registrants,

applicants for registration and other interested persons sufficient time to submit information in rebuttal of the additional risk criterion.

(b) If the Administrator determines that an additional risk criterion has been met for a pesticide use after publication of Notice of RPAR with respect to that pesticide use, he may elect not to publish a Supplemental Notice of RPAR if he determines it is in the public interest not to do so. In such situations, the Administrator shall address the additional risk criterion in the Preliminay Notice of Determination, and make such determinations as are appropriate based upon information which is available to the Agency. The Administrator shall afford registrants, applicants for registration and other interested risk criterion addressed in this fashion, by providing additional time for comment on the Preliminary Notice of Determination.

§ 162.25 Criteria for rebuttal of an RPAR.

(a) *Registered pesticide uses.* Registrants and other interested persons may rebut an RPAR with respect to a registered pesticide use by sustaining the affirmative burden of proving that one of the following rebuttal criteria has been satisfed for each risk criterion which has been met by the pesticide use:

(1) The determination by the Agency that the pesticide use meets the risk criterion was in error.

(2) When used in accordance with its terms and conditions of registration and with widespread and commonly recognized practice, the pesticide use will not pose any significant risk to man or to any plant or animal species of concern with respect to any adverse effect caused by the pesticide ingredient, degradation product or metabolite, taking into account:

(i) Exposure to the pesticide ingredient, degradation product or metabolite by all routes of exposure (including exposure resulting from the concentration, persistence or accrual of the pesticide ingredient, degradation product or metabolite in man or the environment);

(ii) The potency of the pesticide ingredient, degradation product or metabolite; and

(iii) All other factors relevant to assessing the risks posed by he pesticide ingredient, degradation product, or metabolite.

(3) The risks posed by the pesticide use are not unreasonable, when used in accordance with its terms and conditions of registration and with widespread and commonly recognized practice, taking into account the economic, social and environmental costs and benefits of the pesticide use. In order to establish that risks are not unreasonable under this paragraph, the registrant or other interested person must prove:

(i) That the benefits of the pesticide use are greater than the risks of the pesticide use; and

(ii) That the risks cannot be reduced, by modifications to the terms and conditions of registration, without costs which are unreasonable in light of the risk reductions which would be achieved.

(b) *Pesticide uses for which applications for registration are pending.* Applicants for registration and other interested persons may rebut an RPAR with respect to a pesticide use for which an application for registration is pending by sustaining the affirmative burden of proving that one of the following rebuttal criteria has been satisfied for each risk criterion which has been met by the pesticide use:

(1) The determination by the Agency that the pesticide use meets the risk criterion was in error.

(2) When used in accordance with its proposed terms and conditions of registration and with widespread and commonly recognized practice, the pesticide use will not pose any significant risk to man or to any plant or animal species of concern with respect to any adverse effect caused by the pesticide ingredient, degradation product or metabolite, taking into account:

(i) Exposure to the pesticide ingredient, degradation product or metabolite by all routes of exposure (including exposure resulting from the concentration, persistence or accrual of the pesticide ingredient, degradation product or metabolite in man or the environment);

(ii) The potency of the pesticide ingredient, degradation product or metabolite; and

(iii) All other factors relevant to assessing the risks posed by the pesticide ingredient, degradation product, or metabolite.

(3) The risks posed by the pesticide use are not unreasonable, when used in accordance with its proposed terms and conditions of registration and with widespread and commonly recognized practice, taking into account the economic, social and environmental costs and benefits of the pesticide use. In order to establish tht risks are not unreasonable under this paragraph, the applicant for registration or other interested person must prove:

(i) That the benefits of the pesticide use are greater than the risks of the pesticide use; and

(ii) That the risks cannot be reduced, by modifications to the proposed terms and conditions of registration, without costs which are unreasonable in light of the risk reductions which would be achieved.

§ 162.26 Agency action if an RPAR is not rebutted.

(a) Subject to paragraphs (b) and (c) of this section, if the Administrator determines that an RPAR with respect to a pesticide use has not been rebutted, he shall take appropriate action to cancel or deny unconditionally the registration of the pesticide use.

(b) If the Administrator determines that an RPAR with respect to a pesticide use has not been rebuted, and also determines that specific modifications to the terms and conditions of registration or proposed terms and conditions of registration of the pesticide use will remedy the unreasonable adverse effect problem posed by the pesticide use, he shall take appropriate action to implement those specific modifications to the terms and conditions of registration or proposed terms and conditions of registration.

(c) If the Administrator determines that an RPAR with respect to a registered pesticide use has not been rebutted, and also determines that there is factual uncertainty regarding any issue under consideration in the RPAR proceedings (including, but not limited to, determinations whether rebuttal criteria have been satisfied or whether modifications to the terms and conditions of registration will remedy an unreasonable adverse effect problem), he shall take appropriate action to initiate cancellation or change in classification proceedings under section 6(b)(2) of the Act, if he finds that:

(1) There is a genuine and substantial factual uncertainty to be resolved;

(2) The factual uncertainty may not properly be resolved on the basis of official notice of matters within the expert knowledge of the Agency;

(3) The factual uncertainty is capable of being resolved or substantially reduced through use of adjudicatory, trial-type proceedings; and

(4) Resolution or reduction of the factual uncertainty would have a significant impact on the final regulatory action taken with respect to the registered pesticide use.

§ 162.27 Informal public hearings.

(a) At any time prior to the issuance of a Preliminary Notice of Determination under § 162.28, the Administrator may

conduct an informal public hearing to gather relevant information or otherwise assist Agency decision-making.

(b) The Administrator shall announce a decision to hold an informal public hearing under this section by publishing a notice in the **Federal Register**, which shall contain the following information:

(1) The time, date, and place of the hearing;

(2) A brief description of the procedures to be followed in the hearings, including the procedures governed participation in the hearing by registrants, applicants for registration, and other interested persons; and

(3) A statement of the issues to be considered at the hearing.

(c) A verbatim transcript of the hearing shall be prepared, which shall become part of the administrative records under § 162.34.

§ 162.28 Preliminary notice of determination.

(a) The Administrator shall announce his determination whether or not an RPAR has been rebutted in a Preliminary Notice of Determination. The Preliminary Notice of Determination shall be published in the **Federal Register** and sent by certified mail to each registrant and applicant for registration of the pesticide use or uses subject to the Notice of RPAR.

(b) The Preliminary Notice of Determination shall include the following:

(1) With respect to each risk criterion found to have been met for any pesticide use, a determination whether registrants, applicants for registration or other interested persons have rebutted the RPAR by proving that any of the rebuttal criteria set forth in § 162.25 have been satisfied, accompanied by a discussion which satisfies the requirements of § 162.33 of the reasons for the determination.

(2) With respect to each pesticide use for which a determination is reached that an RPAR has not been rebutted, a clear statement of the regulatory action which the agency intends to initiate with respect to the pesticide use in question under § 162.26, accompanied by a discussion which satisfies the requirements of § 162.33 of the reasons for initiating that regulatory action.

(3) With respect to each registered pesticide use for which the Administrator announces (i) an intention to cancel registration, (ii) an intention to cancel registration unless modifications to the terms and conditions of registration are accomplished in accordance with the directions of the Administrator, (iii) an intention to change the classifications from general use to restricted use, or (iv) an intention to hold a hearing to determine whether or not its registration should be cancelled or its classification changed, an analysis of the impact of the proposed action on production and prices of agricultural commodities, retail food prices, and otherwise on the agricultural economy.

(4) Notification to registrants, applicants for registration and other interested persons:

(i) that the Preliminary Notice of Determination will be referred to the Secretary of Agriculture and the Scientific Advisory Panel for review and comment, in accordance with the Act and these regulations;

(ii) that comments from registrants, applicants for registration and other interested persons may be submitted, provided that they are submitted in accordance with instructions for submission of comments included in the Preliminary Notice of Determination;

(iii) that the Administrator will consider any comments from the Scientific Advisory Panel, the Secretary of Agriculture, or interested members of the public which are submitted in accordance with the requirements of the Act and the instructions of the Administrator, and may change in whole or in part the actions announced in the Preliminary Notice of Determination in response to such comments; and

(iv) that the Administrator will announce his response to such comments in a Final Notice of Determination under § 162.31.

(5) Instructions to registrants, applicants for registration and other interested persons on how to submit comments (including the deadline for submission of comments).

(6) The location of the administrative records (see § 162.34) and the times during which the administrative records will be available for inspection and copying.

(7) The date on which the Agency contemplates it will announce its final determinations by issuance of a Final Notice of Determination under § 162.31. In selecting this date, the Agency shall take into consideration all relevant factors, including the number and complexity of issues to be addressed, and the extent to which expeditious conclusion of the RPAR proceeding is in the public interest.

§ 162.29 Alternative procedure for issuance of preliminary notice of determination.

(a) The Administrator may issue a Preliminary Notice of Determination with respect to a pesticide use, without having first issued a Notice of RPAR, if he determines that:

(1) One or more risk criteria in § 162.21 have been met;

(2) The information upon which to base a Preliminary Notice of Determination is unlikely to be significantly augmented by issuance of a Notice of RPAR because:

(i) The facts relevant to assessing the risks and (when applicable) the benefits of the pesticide use are generally known; and

(ii) The assessment of the risks and (when applicable) the assessment of the benefits of the pesticide use and the balancing of risks and benefits does not require resolution of significant and novel questions of policy; and

(3) It is in the public interest to abbreviate the RPAR process by issuing a Preliminary Notice of Determination without first having issued a Notice of RPAR.

(b) If the Administrator determines to issue a Preliminary Notice of Determination without first having issued a Notice of RPAR, he shall announce his determinations in a Preliminary Notice of Determination, which shall be published in the **Federal Register** and sent by certified mail to each registrant and applicant for registration of the pesticide use or uses subject to the Preliminary Notice of Determination.

(c) The Preliminary Notice of Determination shall include the following:

(1) For each pesticide use subject to it, the items required to be included in a Notice of RPAR under § 162.23(b)(1)–(5);

(2) For each pesticide use subject to it, the items required to be included in a Preliminary Notice of Determination under § 162.28(b); and

(3) The Administrator's findings under paragraph (a).

§ 162.30 Review of preliminary notice of determination; deadlines for comments.

(a) The Administrator shall refer any Preliminary Notice of Determination to the Secretary of Agriculture and to the Scientific Advisory Panel for review and comment and shall make available to them the Administrative Record for the Preliminary Notice of Determination, and the Working Administrative Record for the Final Notice of Determination (see § 162.34).

(b) The Administrator shall establish deadlines for the submission of comments by the Scientific Advisory Panel and the Secretary of Agriculture which are appropriate under the circumstances. These deadlines shall be later than the deadline for submission of

public comments under paragraph (c), and shall not be less than 30 days from the date of referral of the Preliminary Notice of Determination (unless a shorter deadline has been agreed upon). In establishing appropriate deadlines, the Administrator shall take into account such factors as:

(1) The need for the Sceintific Advisory Panel to schedule a public meeting under the Federal Advisory Committee Act, and to provide reasonable notice of the time of the meeting and the matters to be considered in the meeting; and

(2) The need for ending the RPAR proceedings expeditously.

(c) The Administrator shall establish a deadline for submission of public comments which is appropriate under the circumstances, taking into account such matters as:

(1) Other opportunities for public comment which have been extended;

(2) Whether § 162.24(b) or § 162.29 has been utilized; and

(3) The need for ending the RPAR proceedings expeditiously.

§ 162.31 Final notice of determination.

(a) Subject to paragraph (c), the Administrator shall prepare a Final Notice of Determination after conclusion of the comment periods on a Preliminary Notice of Determination. The Final Notice of Determination shall be published in the **Federal Register** and sent by certified mail to registrants and applicants for registration of pesticide uses subject to the Preliminary Notice of Determination.

(b) The Final Notice of Determination shall include the following:

(1) For each pesticide use subject to the Preliminary Notice of Determination, the determinations and discussions of reasons required by § 162.28(b)(1) and (2);

(2) Any comments submitted by the Secretary of Agriculture or the Scientific Advisory Panel in accordance with the Act and the instructions of the Administrator, and the responses of the Administrator to these comments;

(3) The reponse of the Administrator to any significant public comments submitted in accordance with the instructions of the Administrator; and

(4) Instructions to registrants, applicants for registration, and other interested persons concerning the procedures which will be used to implement any regulatory action which the Administrator has decided upon, including instructions concerning how to request hearings, if hearings are available as of right under the Act, or have been made available by the Administrator under the Act.

(c) The Administrator shall issue a revised Preliminary Notice of Determination with respect to a pesticide use subject to an RPAR, instead of a Final Notice of Determination, in the following circumstances:

(1) When the Administrator determines to withdraw a preliminary determination under § 162.28(b)(1) that an RPAR has been rebutted under § 162.25(a)(1), (a)(2), (b)(1) or (b)(2), and to substitute a determination that the RPAR has not been rebutted; or

(2) When the Administrator determines to implement a regulatory action different from the regulatory action proposed in the Preliminary Notice of Determination, and the Administrator further determines that the regulatory action in question is not within the range of regulatory options discussed in the Preliminary Notice of Determination, or otherwise placed before the Secretary of Agriculture and the Scientific Advisory Panel.

§ 162.32 Voluntary cancellation and withdrawal of application.

(a) A registrant may at any time petition the Administrator to voluntarily cancel the registration of a pesticide use. If the pesticide use is subject to an RPAR or a cancellation proceeding, or is under consideration for an RPAR or a cancellation proceeding, the Administrator may, in his discretion, either grant or deny the petition for voluntary cancellation of the pesticide use.

(b) In the event that the Administrator grants a petition for voluntary cancellation of a pesticide use, he may permit the sale, distribution or other movement in commerce, and/or the use of pesticide products affected by the cancellation action, to such an extent, under such conditions, and for such uses as he may specify if he determines that such sale, distribution or other movement in commerce, and/or use is not inconsistent with the purposes of the Act, and will not have unreasonable adverse effects on the environment.

(c) An applicant for registration may at any time petition the Administrator to withdraw an application for registration of a pesticide use. If the pesticide use is subject to an RPAR or a denial proceeding, or is under consideration for an RPAR or a denial proceeding, the Administrator may, in his discretion, either grant or deny the petition for withdrawal of the application.

§ 162.33 General standards for documents in RPAR proceedings.

(a) Each Notice of RPAR, Supplemental Notice of RPAR, Preliminary Notice of Determination and Final Notice of Determination shall contain a concise and organized discussion of the relevant and significant issues of fact, law and policy. For each such issue, the discussion shall fully disclose the facts and other matters pertaining to a decision, state how the issue has been decided, and explain the reasons for the decision. Citations to necessary supporting materials shall be provided.

(b) Rebuttals and comments submitted to the Agency in an RPAR proceeding shall be given weight to the extent that they satisfy the general standards of paragraph (a) of this section for RPAR decision documents.

§ 162.34 Administrative records.

(a) *Contents of administrative records.* (1) *Notices of RPAR and supplemental notices of RPAR.* The Administrative Record for a Notice of RPAR and a Supplemental Notice of RPAR shall consist of the following documents:

(i) The Notice of RPAR or Supplemental Notice of RPAR and the documents referred to in that notice;

(ii) Any preliminary notification letter sent to a registrant or applicant for registration under § 162.22, and all documents referred to in the letter;

(iii) Any written response to a preliminary notification letter under § 162.22;

(iv) The transcript of any hearing held under § 162.27; and

(v) Any other document designated by the Administrator.

(2) *Preliminary notices of determination.* The Administrative Record for a Preliminary Notice of Determination shall consist of the following documents:

(i) The Administrative Record for the Notice of RPAR or Supplemental Notice of RPAR, if any;

(ii) The Preliminary Notice of Determination, and the documents referred to in that notice;

(iii) Each written response to the Notice of RPAR or Supplemental Notice of RPAR submitted in accordance with the Act and the instructions of the Administrator;

(iv) The transcript of any hearing held under § 162.27; and

(v) Any other document designated by the Administrator.

(3) *Final notices of determination.* The Administrative Record for a Final Notice of Determination shall consist of the following documents:

(i) The Administrative Record for the Preliminary Notice of Determination;

(ii) The Final Notice of Determination, and the documents referred to in that notice;

(iii) Any written response to the Preliminary Notice of Determination from the Secretary of Agriculture submitted in accordance with the Act and the instructions of the Administrator;

(iv) Any written response to the Preliminary Notice of Determination from the Scientific Advisory Panel submitted in accordance with the Act and the instructions of the Administrator;

(v) The transcript of any meetings of the Scientific Advisory Panel at which the Preliminary Notice of Determination was considered;

(vi) Any other written response to the Preliminary Notice of Determination submitted in accordance with the instructions of the Administrator; and

(vii) Any other document designated by the Administrator.

(b) *Working administrative records for pending decisions.* After issuing a Notice of RPAR, a Supplemental Notice of RPAR, or a Preliminary Notice of Determination, the Administrator shall maintain a Working Administrative Record for the next RPAR decision document. The Working Administrative Record shall consist of the following documents:

(1) Each written response to the preceding RPAR decision document which was submitted in accordance with the Act and the instructions of the Administrator;

(2) The transcript of any hearing held under § 162.27 after the issuance of the preceding RPAR decision document;

(3) Any document designated by the Administrator which was prepared by Agency staff specifically in connection with the next RPAR decision document; and

(4) Any other document designated by the Administrator.

(c) *Access to administrative records and working administrative records.* (1) Subject to paragraph (c)(2), Administrative Records and Working Administrative Records shall be available for public inspection during the normal business hours of the Agency, at a place or places designated by the Administrator.

(2) Information contained in Administrative Records and Working Administrative Records which is a trade secret or otherwise subject to the provisions of § 10 of the Act shall not be disclosed to the public, except in accordance with Section 10 of the Act and the regulations of the Agency implementing that section.

(2) It is proposed to amend 40 CFR Part 164 by revising the Part title and revising Subparts A, B, and C and adding Subpart E to read as follows:

PART 164—RULES OF PRACTICE GOVERNING HEARINGS UNDER SECTION 6 OF THE FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

Subpart A—General

Secs.

Supbart B—Formal Hearings Under Section 6(b) of FIFRA

Requests for a Hearing

Commencement of a Formal Evidentiary Public Hearing

Presiding Officer

Focussing the Issues

Further Proceedings

Record

Initial and Final Decisions

Judicial Review

Subpart C—General Rules of Practice for Expedited Hearings

* * * * *

Subpart E—Implementation of Final Cancellations and Suspensions; Disposition of Existing Stocks of Cancelled Pesticides

Appendix A—Memorandum of Understanding

Authority: Section 25 of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. § 136w.

Subpart A—General

§ 164.1 Scope and applicability of this part.

Subpart B governs formal evidentiary public hearings under the Federal Insecticide, Fungicide and Rodenticide Act, as amended, arising out of refusals to register, cancellations of registrations, changes in classification, and Section 6(b)(2) hearings, which follow RPAR review under Part 162. It does not govern formal evidentiary public hearings arising out of such actions

which do not follow RPAR review under Part 162, in which cases the applicable procedures shall be specified by the Administrator in the notices initiating such actions. Subpart C governs formal evidentiary public hearings arising out of proposed suspensions of registrations under the Act. Subpart D governs proceedings to consider applications to modify previous cancellation or suspension orders. Subpart E governs proceedings to determine the disposition of existing stocks of pesticide products whose registrations have been unconditionally cancelled or suspended under the Act.

§ 164.2 Definitions.

(a) As used in this Part, the following terms shall have the following meanings:

(1) "Act" means the Federal Insecticide, Fungicide, and Rodenticide Act, as amended.

(2) "Administrative record" means the administrative record for a Final Notice of Determination as defined in § 162.34.

(3) "Administrator" means the Administrator of the Environmental Protection Agency, or any officer or employee thereof to whom authority has been delegated to act for the Administrator.

(4) "Adversely affected" means a person with an interest in preventing the implementation of a proposed cancellation or change in classification action on the ground that the action is not necessary to remedy unreasonable adverse effects on the environment.

(5) "Agency" means the Environmental Protection Agency.

(6) "Agency trial staff" means the Agency trial staff designated under § 164.12.

(7) "Conditionally cancel" or "conditionally deny" means to cancel or deny unless specific modifications to the terms and conditions of registration of the proposed terms and conditions of registration are accomplished.

(8) "Hearing Clerk" means the Hearing Clerk, Environmental Protection Agency, Washington, D.C. 20460.

(9) "Judicial officer" means a judicial officer designated as follows:

(i) The Administrator may designate one or more judicial officers, one of whom may be Chief Judicial Officer. As work requires, a judicial officer may be designated to act for purposes of a particular case. All prior designations of judicial officers shall stay in force until further notice.

(ii) A judicial officer shall be a permanent or temporary employee or officer of the Agency who may perform other duties for the Agency. In any case in which he serves as judicial officer, such person shall not have performed investigative or prosecutorial functions for the Agency in that or a factually related case.

(10) "Notice of section 6(b)(2) hearing" means notice of intent to hold a hearing under section 6(b)(2) of the Act to determine whether or not the registration of a pesticide use should be cancelled or its classification changed.

(11) "Notice of Action" means a notice of intent to cancel the registration or to change the classification of a pesticide use or uses, or a notice of intent to deny registration of a pesticide use or uses.

(12) "Party" means a party to a formal evidentiary public hearing under Subpart B or Subpart C.

(13) "Person" means an individual, partnership, association, corporation, state or federal agency, or any organized group or persons whether incorporated or not.

(14) "Pesticide use" means a use of a pesticide (described in terms of the target pest, the application site, and other applicable identifying factors) which is included in the labeling of a pesticide product which is registered, or for which an application for registration is pending, and the terms and conditions of registration or the proposed terms and conditions of registration for the use.

(15) "Presiding Officer" has the meaning in Subpart B given in § 164.40, and the meaning in Subpart C given in § 164.104.

(16) "RPAR" means rebuttable presumption against registration. (See § 162.20 *et seq.*)

(17) "Terms and conditions of registration" means the terms and conditions governing lawful sale, distribution and use which were approved in conjunction with registration, including the approved labeling, the use classification, the composition and the packaging.

(b) Words in the singular form shall be deemed to include the plural, words in the masculine form shall be deemed to include the feminine, and vice versa, as the context may require.

(c) Terms defined in the Act and not explicitly defined herein are used with the meanings given in the Act.

§ 164.3 Burden of proof.

At all stages of proceedings under this Part 164, the ultimate burden of persuasion shall rest with the proponent(s) of registration of a pesticide use. The burden of producing evidence shall be specified in the Conference Report and Order issued under § 164.60.

§ 164.4 Computation of time.

(a) In computing the expiration of any deadline prescribed or allowed by these rules, the day of the act, event, or default from which the deadline begins to run shall not be included. Saturdays, Sundays, and legal holidays shall be included in computing the running of the deadline, except that when the deadline expires on a Saturday, Sunday, or legal holiday, the deadline shall be extended to include the next following business day.

(b) Subject to the limitations of § 164.64, any deadline established by the Presiding Officer in the course of a formal evidentiary public hearing, and deadlines for responses to motions under § 164.7, may be extended by the Presiding Officer on motion for good cause shown, which motion may be made ex parte if made before the expiration of the deadline. Any other deadline established by or under this Part may be extended by the Administrator upon application in writing for good cause shown.

(c) The statutory deadlines established by the Act cannot be extended by the Presiding Office or the Administrator under any circumstances.

§ 164.5 Filing and service of submissions.

(a) All submissions, including pleadings, relating to a formal evidentiary public hearing shall be filed with the Hearing Clerk.

(b) A copy of each such submission other than papers commencing a proceeding shall be served by the person making the submission upon each other active party to the proceeding, and, when appropriate, on parties who have elected limited participation.

(c) Service under this section shall be accomplished by mailing or personal delivery.

(d) All submissions under this section shall be accompanied by a signed certification stating the extent to which the submission has been served on each active party.

(e) Each document filed, other than papers commencing a proceeding, shall contain the FIFRA docket number of the proceeding.

(f) In addition to copies served on all other active parties, each party shall file an original and two copies of all documents with the Hearing Clerk.

(g) Inactive parties need not be served with any documents other than briefs. Parties with limited participation need only be served with documents which relate to the area of their participation.

§ 164.6 Filing and service by mail.

(a) Whenever a party has the right or is required to do some act within a prescribed period of time after the service of a notice or other document upon him, and the notice or other document is served upon him by mail, 3 days shall be added to the prescribed period; *provided,* that such additional time after service by mail shall not apply in the case of filing initial requests for hearings, in which cases the date of receipt of the Notice of Action shall be controlling.

(b) If filing is accomplished by mail addressed to the Hearing Clerk, filing shall be deemed timely if the papers are post-marked on the due date; *provided,* that this paragraph shall not apply to filings requesting a formal evidentiary public hearing under § 164.20, filings requesting participation in section 6(b)(2) hearings under § 164.23, filings requesting intervention in hearings under § 164.34, and filings requesting and expedited hearing under § 164.101, which filings shall be timely only if they are received by the Hearing Clerk on or before the due date.

§ 164.7 Motions.

(a) Any party may make a motion to the Presiding Officer with respect to any matter relating to the hearing. All motions shall be in writing except motions made in the course of an oral hearing before the Presiding Officer and ex parte motions for extensions of time under § 164.4.

(b) Within 10 days after service of any such motion, which may be shortened or extended by the Presiding Officer for good cause shown, any party to the hearing may file a response to the motion.

§ 164.8 Subpoenas; fees of witnesses.

(a) In proceedings under Subpart B, the attendance of witnesses or the production of documentary evidence may, by subpoena, be required at any designated place of hearing. Subpoenas may be issued by the Presiding Officer upon his own initiative or upon a showing by a party that the attendance of the witness or the documentary evidence sought for hearing is relevant and material to the issues involved in the hearing. No subpoena shall be issued unless the person to whom it will be directed is first given an opportunity to contest the propriety or scope of the subpoena before the Presiding Officer. The Presiding Officer shall be guided by the principles of the Federal Rules of Civil Procedure in making any order for the protection of a witness or the contents of the documents produced.

(b) Subpoenas for the production of documentary evidence, unless issued by the Presiding Officer upon his own initiative, shall be issued only upon a written motion. Such motion shall specify, as exactly as possible, the documents desired.

(c) Subpoenas shall be served as provided by the Federal Rules of Civil Procedure.

(d) Witnesses summoned before the Presiding Officer shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. Fees shall be paid by the party at whose instance the witness is summoned.

§ 164.9 Official transcript.

(a) Any oral testimony given at a formal evidentiary public hearing shall be reported verbatim. The Presiding Officer shall make provision for a stenographic record of the testimony and for at least three copies of the transcript.

(b) One copy of such transcript shall be placed on public display in the Office of the Hearing Clerk upon receipt, where it may be reviewed by any interested person.

(c) Any person desiring a copy of the transcript of the testimony taken at the hearing or of any part thereof shall be entitled to the same upon application to the official reporter and payment of the costs thereof.

§ 164.10 Consolidation.

The Chief Administrative Law Judge, by motion or on his own initiative, may consolidate two or more proceedings whenever it appears that this will expedite or simplify consideration of the issues. Consolidation shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred.

§ 164.11 Enforcement of Rules of Practice and of proper standards of conduct.

(a) The Presiding Officer may either bar any party from further participation in the hearing, or render a decision against a party on some or all of the issues involved, for:

(1) Failure to file the material required by § 164.61 in the form required by that section; or

(2) Failure to comply with the Conference Report and Order, or with any procedural order made during the hearing.

(b) The Presiding Officer may bar any individual appearing as counsel or in a representative capacity for a party from further participation in the hearing for disrespectful, disorderly or contumacious language or conduct, continued use of dilatory tactics, or refusal to adhere to reasonable standards of orderly and ethical conduct.

(c) Interlocutory review of any decision rendered against a party on the merits under paragraph (a) of this section shall be available within 10 days of the decision. Interlocutory review of a bar on further participation issued under paragraph (b) of this section shall be available only as specified in § 164.67.

§ 164.12 Separation of functions; ex parte communications.

(a) No later than the date of issuance of a Notice of Hearing under § 164.32 or § 164.33, the Administrator shall designate:

(1) The Agency employees who will be available to serve on or assist an advisory panel under § 164.55; and

(2) The Agency employees who will be available to perform investigative or prosecuting functions for the Agency in that hearing. An Agency trial staff shall promptly be designated from among such employees.

(b) No agency employee may be named or serve in both capacities described in paragraphs (a)(1) and (a)(2) of this section.

(c) Upon issuance of a Notice of Hearing, no person designated under paragraph (a)(2) of this section and no subordinate of such a person shall participate or advise in any decision arising out of issuance of that Notice of Hearing except as witness or counsel in public proceedings. all employees of the Agency (including all panel members named under § 164.55) other than persons designated under paragraph (a)(2) of this section, and persons subordinate to persons so designated, shall be available to advise the Administrator on any of his functions relating to the hearing and final decision.

(d) Between the date of issuance of a Notice of Hearing and the date of the Administrator's final decision, communication with respect to the matters involved in the hearing shall be restricted as follows:

(1) No person designated under paragraph (a)(2) of this section, no subordinate of such a person, and no person outside the agency shall have any ex parte communication, orally or in writing, with the Presiding Officer, the Judicial Officer, the Administrator, or any person who may reasonably be expected to advise the Administrator, with respect to the merit of the proceeding. The only such communications with such persons shall be public communication, as witness or counsel, in accordance with the applicable provisions of this Part.

(2) Any written communications in violation of this section shall immediately be filed with the Hearing Clerk and served on the parties, who may then file responses within the time permitted for responses to motions under § 164.7.

(3) Any oral communication in violation of this section shall immediately be recorded in a memorandum and filed with the Hearing Clerk as a part of the hearing record. Any person, including any representative of any party to a hearing, who is involved in any such oral communication shall be made available for formal cross-examination in the hearing with respect to the substance of that conversation. Rebuttal testimony pertinent to any such oral communication shall be permitted. Any cross-examination and rebuttal testimony shall be transribed and filed as part of the hearing record.

Subpart B—Formal Hearings Under Section 6(b) of FIFRA Requests for a Hearing

§ 164.20 Requests for a formal hearing following a Notice of Action.

(a) The following persons may request a formal evidentiary public hearing following a Notice of Action issued under Part 162:

(1) In the case of a notice of intent to cancel, the registrant or other person adversely affected by the notice;

(2) In the case of a notice of intent to change classification, the registrant or other interested person with the concurrence of the registrant;

(3) In the case of a notice of intent to deny registration, the applicant or other interested person with the concurrence of the applicant.

(b) Any such request shall be submitted to the Hearing Clerk and shall be deemed timely if it is received on or before the 30th day after publication of the Notice of Action in the **Federal Register** (or, in the case of a registrant or applicant, the 30th day after receipt of the Notice of Action, if that occurs later).

(c) Such requests shall specifically identify:

(1) The identity and interest of the person requesting the hearing;

(2) The registration number(s) or application file symbol(s) of the pesticide product(s) as to which a hearing is requested; and

(3) Each specific pesticide use of the pesticide product(s) identified under paragraph (c)(2) of this section as to which a hearing is requested. Each such pesticide use must be described in such a manner as to sufficiently identify its characteristics, and to comply with any requirements concerning specification of pesticide uses contained in the Notice of Action.

§ 164.21 Consequences of failure to identify specific pesticide uses.

(a) Any request under § 164.20 which does not specifically identify a registration number or application file symbol and a particular pesticide use (or uses) of each identified registration number or application file symbol shall be denied.

(b) Any pesticide use subject to a Notice of Action which is not specifically identified in one or more timely requests for a hearing under § 164.20 (or as to which an application for amended registration or an amended application for registration is not timely submitted under § 164.22) shall be deemed to have been cancelled or denied or its classification changed by operation of law at the expiration of the applicable statutory 30-day period.

(c) Any cancellation or denial or change in classification of a pesticide use shall not of itself affect the status of other pesticide uses with the same registration number or application file symbol.

§ 164.22 Effect of requests for hearings on the status of registered pesticide uses.

(a) Any registered pesticide use subject to a Notice of Action as to which a timely request for a hearing is filed in accordance with § 164.20 shall remain registered with its existing classification unless the Administrator:

(1) Issues a final order cancelling the registration or changing the classification of such pesticide use pursuant to these Rules, or

(2) Grants a petition for voluntary cancellation of such pesticide use.

(b) The following rules apply to pesticide uses which have been conditionally cancelled (or conditionally denied) in a Notice of Action:

(1) A conditionally cancelled (or conditionally denied) pesticide use shall be deemed to have been cancelled (or denied) by operation of law at the expiration of the applicable statutory 30-day period unless within that time either:

(i) The registrant (or applicant) makes the necessary corrections in accordance with paragraph (b)(2) of this section; or

(ii) A request for a hearing is made in accordance with the requirements of this Part by a person specified in § 164.20(a)(1) (or § 164.20(a)(3)).

(2) The registrant (or applicant) shall be deemed to have made the necessary corrections if it submits an application for amended registration (or an amended application for registration) which if granted would accomplish the modifications to the terms and conditions of registration (or proposed terms and conditions of registration) directed by the Administrator in the Notice of Action.

(3) In the event that the conditions of paragraphs (b)(1)(i) and (b)(1)(ii) of this section are both satisfied, the application for amended registration (or amended application for registration) submitted under paragraph (b)(2) of this section shall not be acted upon until the conclusion of the hearing.

§ 164.23 Requests to participate in a section 6(b)(2) hearing.

(a) Any interested person may request to participate in a section 6(b)(2) hearing.

(b) Any such request shall be submitted to the Hearing Clerk and shall be accepted for filing if it is received on or before the 30th day after the publication of the notice of section 6(b)(2) hearing in the **Federal Register.**

(c) Such requests shall set forth the identity and interest of the person and, with respect to each issue specified by the Administrator in the notice of section 6(b)(2) hearing, an exposition of the person's position on the factual, legal, and policy questions alleged to be involved, together with a designation of the factual areas to be explored and the hearing time estimated to be necessary for that exploration.

§ 164.24 Requests for alternative form of public hearing.

(a) A person who has the right to request a formal evidentiary public hearing under this Subpart B may waive that opportunity and in lieu thereof request one of the following alternative forms of public hearing:

(1) A hearing before a panel of Agency employees under the same procedures used to implement section 6 of the Toxic Substances Control Act. (These procedures are detailed at 40 CFR Part 750.)

(2) A hearing not to exceed one day in length before the Administrator personally to consider certain designated issues.

(3) A hearing before a panel of non-Agency employees acceptable both to the Agency and to the persons requesting the hearing, using such procedures as the panel may designate.

(b) Any such request shall be:

(1) Submitted in writing to the Hearing Clerk at any time prior to publication of the Scheduling Order under § 164.51, and

(2)(i) In lieu of a request for a formal evidentiary public hearing under this Subpart B; or

(ii) If submitted after or with a request for a formal evidentiary public hearing under this Subpart B, in the form of a waiver of the right to such a hearing conditioned upon acceptance of the request for an alternative form of public hearing. Upon acceptance by the Adminstrator, such a waiver becomes binding and can thereafter be withdrawn only by waiving the right to any form of a hearing unless the Administrator for good cause determines otherwise.

(c) Where more than one person who has the right to request a formal evidentiary public hearing has done so under § 164.20, an alternative form of hearing may be used only if all such persons concur and waive their right to a formal evidentiary public hearing under this Subpart B. It shall not be necessary to obtain the concurrence or waiver of any other person, including persons who have intervened or moved to intervene under § 164.34.

(d) The Administrator shall determine whether an alternative form of public hearing shall be used, and if so, which alternative will be acceptable to him, after considering the requests submitted and the appropriateness of the alternative forms of public hearing for the resolution of the issues raised in the objections. A determination by the Administrator that an alternative form of public hearing is acceptable becomes binding upon him unless for good cause he determines otherwise.

(e) The Administrator shall publish in the **Federal Register** a Notice of Hearing announcing an alternative form of public hearing under this section, setting forth the following information:

(1) A statement of the provisions of the Notice of Action which are the subject of the alternative form of public hearing;

(2) The time, date, and place of the hearing, or a statement that such information will be published in a subsequent **Federal Register** notice;

(3) The names of the parties to the alternative form of public hearing;

(4) The time within which requests to intervene must be filed;

(5) A statement that final Agency action with respect to registration for any pesticide use(s) for which an alternative form of public hearing has been granted will be stayed pending the completion of the hearing;

(6) A brief description of the type of hearing granted and the procedures to be followed;

(7) A statement of the issues to be considered at the alternative form of public hearing. The statement of the issues determines the scope of the public hearing; and

(8) A schedule for the hearing up to and including issuance of the initial decision or a statement that such information will be published in a subsequent **Federal Register** notice.

(f) Any initial decision issued after a hearing held under this section shall be based on a record which shall consist of:

(1) The adminstrative record;

(2) The request(s) for an alternative form of public hearing submitted under this section and all related documents;

(3) The **Federal Register** notice under paragraph (e) ruling on such request(s); and

(4) The transcript of the hearing and any exhibits admitted as part of the hearing record.

Commencement of a Formal Evidentiary Public Hearing

§ 164.30 Beginning of a hearing.

A formal evidentiary public hearing begins with the publication of a Notice of Hearing in the **Federal Register.**

§ 164.31 Transfer of adminstrative record.

Prior to the publication in the **Federal Register** of any Notice of Hearing under § 164.32 or § 164.33, the administrative record on which that notice was based shall be transferred to the Hearing Clerk. This record shall automatically be entered in evidence at the hearing.

§ 164.32 Notice of Hearing after a Notice of Action.

(a) If one or more hearing requests are received from persons specified in § 164.20(a), the Chief Administrative Law Judge shall issue and publish in the **Federal Register** a Notice of Hearing.

(b) Any issue as to whether a hearing request was timely or whether it complied with the requirements of § 164.20, shall be decided by the Presiding Officer before he conducts any other proceedings under this Part.

(c) The Notice of Hearing shall contain:

(1) The designation of the Presiding Officer to conduct the hearing or a statement that the Presiding Officer will be designated in a subsequent notice;

(2) The time within which requests to intervene must be filed; and

(3) A statement that no final order will be issued cancelling or denying registration or changing the classification of any pesticide use as to which a formal evidentiary public hearing has been convened until that hearing is concluded (or until a petition for voluntary cancellation or withdrawal of application is granted by the Administrator).

§ 164.33 Notice of Hearing after a notice of section 6(b)(2) hearing.

(a) After the time for requesting participation in a section 6(b)(2) hearing under § 164.23 has expired, the Chief Administrative Law Judge shall issue and publish in the **Federal Register** a Notice of Hearing.

(b) The Notice of Hearing shall contain:

(1) A reiteration of the issues which the Administrator determined would be explored in the hearing;

(2) A list of each person who responded to the notice of section 6(b)(2) hearing and a statement of his position and interest with respect to each issue under paragraph (b)(1) of this section;

(3) The designation of the Presiding Officer to conduct the hearing or a statement that the Presiding Officer will be designated in a subsequent notice;

(4) The time within which requests to intervene must be filed;

(5) The time within which requests to refer questions to the National Academy of Sciences under § 164.54 must be filed, and a statement that all such requests will be considered by the Presiding Officer rather than by a panel;

(6) A statement that the Notice of Hearing determines the scope of the proceedings and the matters as to which the development of evidence will be permitted;

(7) A statement that at the conclusion of the hearing, the Administrator shall take such action as he may consider justified by the record, including, but not limited to, conditional or unconditional cancellation of the pesticide use(s) subject to the notice of section 6(b)(2) hearing.

§ 164.34 Requests to intervene in a hearing.

(a) Any person may file a motion to intervene in a hearing within 30 days after the Notice of Hearing is published in the **Federal Register.**

(b) Each such motion shall set forth:

(1) The position and interest of the movant in the proceeding;

(2) A statement of the factual, legal and policy issues to be raised;

(3) Where appropriate, a statement as to why the movant believes that its interest will not be fairly and adequately represented by the existing parties; and

(4) A summary of the evidence to be introduced.

(c) The Presiding Officer shall grant such a motion timely filed, subject to later restriction of participation in the hearing under §§ 164.50 through 164.66, whenever he determines that the movant will substantially assist in the

resolution of the issues described in the Notice of Hearing.

(d) Any motion to intervene filed after 30 days after publication of the Notice of Hearing in the **Federal Register** shall contain, in addition to the information required by paragraph (b) of this section, a statement of good cause for failure to file earlier. The granting of such motions is discretionary with the Presiding Officer, but only upon a finding that extraordinary circumstances justify the granting of the motion, and only upon the condition that the movant shall be bound by any rules or conditions for the hearing previously specified or agreed upon by the parties to the hearing.

(e) Persons who have been granted intervention in a hearing under this section are parties with the full status of the original parties, except that a determination under § 164.24 to use an alternative form of public hearing may be made without their concurrence or waiver.

(f) Persons who are not parties may file a brief amicus curiae by leave of the Presiding Officer granted on motion. Unless all parties otherwise consent, an amicus curiae shall file its brief within the time allowed the party whose position the brief will support.

§ 164.35 Parties and appearances.

(a) The parties to a formal evidentiary public hearing are the Assistant Administrator for Pesticides and Toxic Substances, represented by Agency trial staff, any person who has properly filed a request for such a hearing under § 164.20, any person who has properly filed a request to participate in such a hearing under § 164.23, and any person who has been granted intervention under § 164.34.

(b) Parties may appear in person or by counsel or other representative. Persons who appear as counsel or in a representative capacity must file a notice of appearance with the Hearing Clerk and must conform to the standards of ethical conduct required of practitioners before the courts of the United States.

§ 164.36 Active and inactive parties.

(a) Each person requesting a hearing under § 164.20, requesting to participate under § 164.23, or requesting to intervene under § 164.34 shall state in the request whether active, inactive or limited participation status is elected. The Presiding Officer at any time before the issuance of the Conference Report and Order under § 164.60 may afford all parties an opportunity to change status.

(b) Any person who fails to explicitly request active status at any time when a choice of status is required shall be classified as inactive.

(c) An inactive party has the right to file briefs in a proceeding and to appeal any initial decision to the Administrator and any final decision to court. Inactive parties need not be served with any of the evidence or motions in the proceeding.

(d) Parties electing limited participation shall designate the portions of the proceedings in which they intend to actively participate, and need only be served with documents relating to those portions. As to the remaining portions, they shall have the same rights as an inactive party under paragraph (c) of this section.

(e) A party is bound by its choice of inactive status or limited participation unless either:

(1) the Presiding Officer affords all parties an opportunity to change status under paragraph (a) of this section; or

(2) the Presiding Officer upon motion grants the party's application to change status.

Presiding Officer

§ 164.40 Presiding Officer.

A Presiding Officer shall preside over every formal evidentiary public hearing held under this Subpart B. The Presiding Officer shall be an Administrative Law Judge qualified under 5 U.S.C. 3105.

§ 164.41 Commencement of functions.

The functions of the Presiding Officer shall commence upon designation and shall terminate upon the filing of the initial decision under § 164.80.

§ 164.42 Authority of Presiding Officer.

The Presiding Officer shall have the authority and duty to conduct a fair and expeditious hearing and to maintain order. The Presiding Officer shall have all powers necessary to these ends, including but not limited to the power to:

(a) Take any action necessary to carry out his duties under this Part;

(b) Hold conferences to settle or simplify the issues in the hearing or to consider other matters that may facilitate the expeditious disposition of the hearing;

(c) Administer oaths and affirmations;

(d) Issue subpoenas under section 6(d) of the Act;

(e) Regulate the course of the hearing and govern the conduct of participants therein;

(f) Rule on, admit, exclude or limit evidence;

(g) Dispose of procedural requests or similar matters;

(h) Rule on motions for summary decision in accordance with § 164.66;

(i) Make rulings to enforce proper standards of conduct under § 164.11; and

(j) Take any action permitted to the Presiding Officer as authorized by this Subpart B or in conformance with law for the maintenance of order at the hearing and for the expeditious, fair and impartial conduct of the proceeding.

§ 164.43 Disqualification of Presiding Officer.

(a) Any party may, by motion made to the Presiding Officer, request that the Presiding Officer disqualify himself and withdraw from the hearing. The Presiding Officer shall rule upon any such motion and shall promptly certify the motion and his ruling thereon to the Administrator for interlocutory review.

(b) A Presiding Officer shall withdraw from any hearing in which he deems himself disqualified for any reason.

§ 164.44 Unavailability of Presiding Officer.

(a) In the event that the Presiding Officer is unable to act for any reason whatsoever, the powers and duties to be performed by him in connection with any hearing shall be assigned to another Presiding Officer by the Chief Administrative Law Judge. Such substitution shall have no effect on any aspect of the hearing, except as the new Presiding Officer may order under the provisions of this Subpart B.

(b) Any motion predicated upon such substitution shall be made within 10 days thereafter.

Focusing the Issues

§ 164.50 Scheduling Order.

(a) Within 60 days after publication under § 164.32 of a Notice of Hearing after a Notice of Action, the Presiding Officer shall issue a Scheduling Order which shall specify:

(1) The time within which the parties shall submit requests for further proceedings under § 164.51; and

(2) The time for ruling on those requests under § 164.55.

(b) The Presiding Officer in his discretion may receive submissions from the parties and meet with the parties before issuing any Scheduling Order.

§ 164.51 Requests for further proceedings after a Notice of Action.

(a) Within the time specified in the Scheduling Order issued under § 164.50, each party shall submit its request for further proceedings. Each request for further proceedings shall contain:

(1) Specific objections to the Notice of Action, including expositions of the factual, legal and policy questions alleged to be at issue and their relevance to the basic decision to be

made, together with a designation of the factual areas to be explored and the hearing time estimated to be necessary for that exploration;

(2) To the extent the party wishes to introduce additional evidence, a description of the evidence conforming to the standards of § 164.52, together with an explanation of why the substantive standards of that section have been met;

(3) To the extent the party wishes to engage in formal cross-examination, a description of the subjects to be covered conforming to the standards of § 164.53, together with an explanation of why the substantive standards of that section have been met; and

(4) To the extent the party wishes certain questions to be referred to a Committee of the National Academy of Sciences for consideration, a description of the questions conforming to the requirements of § 164.54 together with an explanation of why the substantive standards of that section have been met.

(b) Parties shall have thirty days to comment on each others' request for futher proceedings, and to amend their own requests in light of requests filed by others.

§ 164.52 Standards for introducing additional evidence.

(a) Any request to introduce additional evidence at a hearing shall contain a detailed description of the evidence to be introduced and an explanation of why the standards of paragraph (b) of this section have been met. A copy of any report, article, survey, letter of comment, or other written document which is to be introduced or otherwise relied upon shall be submitted or designated from the administrative record. The request shall specifically indicate whether oral presentation of the material in question is desired.

(b) A request to present additional evidence shall be granted only to the extent that the person who wishes to present it has shown that all of the following are true:

(1) There is a genuine and substantial issue of fact for resolution.

(2) The factual issue is not one which may properly be decided on the basis of official notice of matters within the expert knowledge of the Agency.

(3) The factual issue is capable of being resolved by available and specifically identified reliable evidence. A request will not be granted on the basis of mere allegations or denials or general description of positions and contentions.

(4) Good cause existed for not presenting the material in question to the Agency for inclusion in the administrative record. "Good cause" means either that the material was not available at the stage of the RPAR process at which it should have been presented, or that the material is of such a nature that it can only be presented meaningfully in a trial-type hearing.

(5) The material in question if accepted as valid would be adequate to justify resolution of the factual issue in the way sought by the person. A request will be denied to the extent the Administrator concludes that, even assuming the truth and accuracy of all of the data and information sought to be introduced, they are insufficient to justify the factual determination urged.

(6) Resolution of the factual issue in the way sought by the person is adequate to justify granting some or all of the relief sought by that person. A request will not be granted to the extent the Administrator concludes that his action would be the same even if the factual issue were resolved in the way sought.

§ 164.53 Requests for cross-examination.

(a) Any request to cross-examine at a hearing shall state with particularly the subject(s) to be covered, and shall also contain an explanation of why the standards set forth in paragraph (b) of this section have been met. A request for cross-examination may consist of or contain a request that a sponsoring witness be provided for a portion or portion of the administrative record.

(b) A request for cross-examination shall be granted only to the extent that the person requesting cross-examination shows that each of the following is true:

(1) There is a genuine and substantial issue of fact for resolution. Cross-examination will not be granted on questions of law or policy.

(2) The factual issue is not one which may properly be decided on the basis of official notice of matters within the expert knowledge of the Agency.

(3) The requested cross-examination is likely to result in resolution or substantial clarification of the factual issue. Explanations of why this condition has been met shall state why the examination of the issue in the RPAR process has not provided adequate clarification, why it is likely that the area of uncertainty can be significantly reduced by cross-examination, and why cross-examination is the most efficient method of clarifying the factual issue when compared with other methods such as the submission of additional evidence or informal conferences.

(4) Resolution of the factual issue in the way sought by the person is adequate to justify some or all of the relief sought by the person. Cross-examination will not be granted to the extent that the Administrator concludes that his action would be the same even if the factual issue were resolved in the way sought.

§ 164.54 Requests for referring questions to the National Academy of Sciences.

(a) Any request to refer questions of scientific fact to a Committee of the National Academy of Sciences shall state with particularity the questions to be referred, and shall also contain an explanation of why the standards set forth in paragraph (b) of this section have been met.

(b) A request for the referral of questions of scientific fact to the National Academy of Sciences shall be granted only to the extent that the person requesting it shows that each of the following is true:

(1) There is a genuine and substantial question of scientific fact to be resolved by such referral. Referrals of questions of policy or law will not be allowed.

(2) The factual question is not one which may properly be decided on the basis of official notice of matters within the expert knowledge of the Agency.

(3) The requested referral is likely to result in resolution or substantial clarification of the factual question. Explanations of why this condition has been met shall state why the examination of the question in the RPAR process (including the referral of issues to the Scientific Advisory Panel under Section 25(d) of the Act) has not provided adequate clarification, and why it is likely that the area of uncertainty can be substantially reduced by referral to a Committee of the National Academy of Sciences in light of the prior referral to the Scientific Advisory Panel.

(4) Resolution of the factual question in the way sought by the person is adequate to justify some or all of the relief sought by the person. A referral will not be granted to the extent that the Administrator concludes that his action would be the same even if the factual question were resolved in the way sought.

§ 164.55 Procedurs for consideration of requests for futher proceedings.

(a) Upon receipt of requests for further proceedings under § 164.51 the Presiding Officer shall either proceed to evaluate them himself or shall certify the matter to the Administrator. Proceedings under this section shall be completed within 120 days after the deadline for filing requests for further proceedings.

(b) If the Presiding Officer certifies the matter to the Administrator, the Administrator shall designate a panel of Agency employees from among the persons named under § 164.12(a)(1) to consider the extent to which the request meets the standards of § 164.51. Notice of the designation of the panel, and the names of the panel members, shall be filed with the Hearing Clerk and served on all parties.

(c) The panel shall consider any Notice of Action, any requests for a hearing, the Notice of Hearing, all requests for futher proceedings, all comments on those requests, and the administrative record. The panel may hold a hearing to receive the views of the persons who requested further proceedings. The panel in it discretion may also hold public hearings or issue public requests for additional information to assist its consideration of the questions involved. A verbatim transcript shall be made of all hearings held under this paragraph.

(d) Based on its consideration, the panel shall issue a draft Hearing Order specifying:

(1) The extent to which requests to introduce additional evidence, cross-examine, and refer questions to the National Academy of Sciences have been granted;

(2) The extent to which requests have been denied, together with a detailed statement explaining why the regulatory standards for granting such requests were not met; and

(3) A target date for the issuance of the initial decision by the Presiding Officer, together with a statement as to why completion of the hearing within that time is practicable.

(e) The panel's draft Hearing Order shall be filed with the Hearing Clerk and served on all parties to the hearing who shall then have thirty days from the date of service to file comments on it with the Hearing Clerk.

(f) Within thirty days after the expiration of the comment period on the panel's draft Hearing Order, the Administrator shall issue a final Hearing Order which shall be filed with the Hearing Clerk and served on all parties. The Administrator in his discretion may call for oral argument during this thirty day period on any question presented.

(g) If the Presiding Officer elects to consider the requests for further proceedings himself, he shall consider any Notice of Action, any request for a hearing, the Notice of Hearing, all requests for further proceedings, all comments on those requests, and the administrative record. he may also hold a hearing to receive the views of the persons who requested further proceedings, and a verbatim transcript of that hearing shall be made. Based on his consideration, the Presiding Officer shall issue a Hearing Order specifying the information set forth in paragraph (d) of this section.

(h) The Presiding Officer shall file the Hearing Order with the Hearing Clerk and shall serve it on all parties, who may then obtain interlocutory review by the Administrator within 10 days of service. Upon such interlocutory review, the Administrator shall have full power to reconsider any finding or determination by the Presiding Officer. He may designate a panel of Agency employees from among the persons named under § 164.12(a)(1) to assist and advise him in his review, and may in his discretion schedule oral argument on any question presented. As the result of his review, the Administrator may affirm the Presiding Officer's Hearing Order, or may issue a revised Hearing Order which shall explain in detail the basis for all revisions to the Presiding Officer's Hearing Order.

(i) The Administrator's decision either affirming or revising the Hearing Order shall be filed with the Hearing Clerk and served on all parties.

(j) The final Hearing Order determines the scope of the further proceedings and the matters as to which the development of evidence will be permitted.

(k) If the Administrator in the Hearing Order completely denies all requests for further proceedings with respect to any pesticide use subject to a Notice of Action, he shall simultaneously issue a final order implementing the action proposed in the Notice of Action with respect to that pesticide use.

Further Proceedings

§ 164.60 Hearing conference.

(a) Subject to paragraph (d), of this section, the Presiding Officer shall hold a hearing conference in each § 6(b)(2) hearing and in each case in which further proceedings have been granted under this Subpart B. The conference shall be scheduled by filing a PreConference Order with the Hearing Clerk directing the parties or their counsel to appear at a specified time and place, and specifying the purpose of the hearing conference and the matters to be resolved at it. More than one such conference may be held.

(b) The Presiding Officer may conduct a hearing conference for the following purposes:

(1) To divide the further proceedings into discrete stages (for example, a risk stage and a benefits stage), each of which shall be completed separately under this subpart;

(2) To set forth the manner of and the deadline(s) for the filing of the parties' direct cases under § 164.61;

(3) To consider or rule on motions to strike or limit portions of a party's direct case under § 164.62, *provided,* that no document contained in the administrative record may be stricken. If a request under § 164.53 for a sponsoring witness for a portion or portions of the administrative record has been granted, and no witness is provided, the presiding officer may reduce the weight to be afforded the appropriate portion or portions of the administrative record as a factual statement accordingly;

(4) To consider or rule on motions for oral direct testimony submitted as required by § 164.61. To the extent such a motion is denied, the Presiding Officer shall order the prompt filing of the testimony involved in written format;

(5) To consider or rule on motions for the issuance of subpoenas under § 164.8;

(6) To identify the most appropriate techniques for the development, if necessary, of additional evidence on issues in controversy and the manner and sequence in which they shall be used;

(7) To group participants with substantially similar interests for the purposes of eliminating duplicative or repetitive development of the evidence, for the purpose of making and arguing motions and objections, including motions for summary decision, and/or for the purpose of filing briefs or presenting oral argument;

(8) To set the time and place for beginning the presentation of evidence, and the schedule for conducting the hearing. The schedule shall include the sequence in which witnesses will be presented, and the amount of time, if any, for the oral cross-examination of the witnesses. In passing on requests for oral cross-examination, the Presiding Officer shall apply the standards set forth in § 164.53;

(9) In the case of section 6(b)(2) hearings, to set a target date for the issuance of the initial decision by the Presiding Officer;

(10) To consider and rule on requests submitted under § 164.64 for extending the time by which the initial decision is to be rendered; and

(11) To take any other steps to narrow or simplify the issues in controversy, and to consider such other matters and to take such other action as may aid in the expeditious disposition of the proceeding.

(c) All parties shall appear at any hearing conference fully prepared to discuss in detail and resolve all matters specified in the pre-conference order. All parties shall cooperate fully at all

stages of the proceeding to achieve the objective of a fair and expeditious hearing, through advance preparation for the hearing conference, including communications between the parties, and requests for information at the earliest possible time. The failure of any party to appear at the hearing conference or to raise any matters that could reasonably be anticipated and resolved at the hearing conference shall not be permitted to delay the progress of the hearing and shall constitute a waiver of the rights of the party with respect thereto, including all objections to the agreements reached, actions taken, or rulings issued by the Presiding Officer with regard thereto.

(d) Upon a finding on motion or on his own initiative that to hold a hearing conference would be unnecessary or inadvisable, the Presiding Officer may order that the hearing conference not be held. In these circumstances he may request the parties to correspond with him for the purpose of accomplishing any of the objectives set forth in this section. Such correspondence shall not be made a part of the record, but the Presiding Officer shall submit a written summary for the record if any action is taken as a result of it.

(e) No transcript of any hearing conference shall be made except to the extent that a request therefor by one of the parties is granted by the Presiding Officer or the Presiding Officer orders a transcript to be made on his own initiative. Any party whose request for a transcript is granted shall bear the cost of the taking of the transcript unless otherwise ordered by the Presiding Officer.

(f) The Presiding Officer shall prepare a written Conference Report and Order reciting the actions taken at a hearing conference and setting forth the schedule for further proceedings and the date for completing the hearing or the stage of the hearing covered by the Conference Report and Order. The Conference Report and Order shall also include a written statement of the areas of factual agreement and disagreement and of the methods and procedures to be used in developing the evidence and the respective duties of the parties in connection therewith. The Conference Report and Order shall be consistent with the Hearing Order issued under § 164.55. The Conference Report and Order shall control the subsequent course of the stage of the hearing which it addresses except to the extent it may be modified by the Presiding Officer for good cause shown.

§ 164.61. Filing of direct case and other information.

(a) Within the time specified in a Conference Report and Order, each party shall file the following information with the Hearing Clerk:

(1) A list of all witnesses whose testimony will be offered at that stage of the hearing, together with a full curriculum vitae in standard format for each witness.

(2) Either the direct testimony of each such witness in written form, or a statement that the testimony concerns matters of such particular fact that oral presentation of direct testimony is justified, together with a description of that testimony and a statement that a motion to permit oral direct testimony will be made. The written direct testimony of a witness may consist in whole or in part of identification of portions of the administrative record.

(3) All other documentary data and information on which the party wishes to rely.

(b) At the same time the material described in paragraph (a) of this section is filed with the Hearing Clerk, each party shall make available to all other parties (but shall not file with the Hearing Clerk) all prior written statements by the persons who have been identified as witnesses, which shall include articles, written statements signed or adopted, and any recording or transcription of any oral statement made, if all of the following conditions are met:

(1) The statement is available without making request of the witness;

(2) The statement relates to the subject matter of the witness' testimony; and

(3) The statement was either made before the time the person agreed to become a witness or has been made publicly available by the witness.

(c) If any prior written statement required to be made available under paragraph (b) of this section has been published in the public literature, a party may comply with paragraph (b) of this section with respect to that statement by furnishing all other parties with a full citation to the public literature which identifies where the statement may be found.

§ 164.62 Ruling on direct case.

(a) The Presiding Officer, on motion, shall strike any portion of a party's direct case (other than material included in the administrative record) or limit the purpose for which it is received, to the extent he finds that the evidence presented is outside the scope of the Hearing Order (or the Notice of Hearing under § 164.33).

(b) Evidence not offered under § 164.61 may nevertheless be admitted at any later stage of the hearing upon a showing that it could not reasonably have been made available, or its relevance could not reasonably have been foreseen, at an earlier stage.

(c) The standards set forth in paragraph (a) of this section shall be applied in all rulings on motions to introduce evidence made throughout the hearing.

§ 164.63 Referral to the National Academy of Sciences.

(a) Not less than 30 days after a decision has been made to refer questions of scientific fact to a Committee of the National Academy of Sciences, the Presiding Officer shall formally refer these questions. The Committee shall report in writing to the Presiding Officer within 60 days after such referral on these questions of scientific fact and the report, its record and any other matter transmitted as provided for by the Administrator's agreement with the National Academy of Sciences shall be made public and considered as part of the hearing record.

Note.—The Memorandum of Understanding between the Agency and the National Academy of Sciences governing such referrals is reproduced as Appendix A.

(b) At any time before the hearing record is closed, a party may request by motion that questions of scientific fact not previously referred be referred, or that questions previously referred be amended or expanded. The Presiding Officer, upon such motion or on his own initiative, may refer such questions or amendments if he finds that good cause existed for the failure to request such referral within the time specified in the Scheduling Order and that the substantive standards of § 164.54 have been met.

§ 164.64 Time limits.

(a) The Presiding Officer may upon motion or his own initiative extend the target date for the issuance of the initial decision specified in the Hearing Order (or in the Conference Report and Order, in the case of Section 6(b)(2) hearings) to any extent up to sixty days total. Such motions may not be made ex parte.

(b) Extensions which, when considered together with prior extensions granted, would extend by more than sixty days the target date specified in the Hearing Order (or in the Conference Report and Order, in the case of Section 6 (b)(2) hearings) for issuance of the initial decision may only be granted by the Administrator. No request for such an extension originating with a party shall be considered by the

Administrator unless made by motion to the Presiding Officer and unless the Presiding Officer has recommended it be granted and has given supporting reasons. Requests for such an extension by the Presiding Officer on his own initiative shall also give supporting reasons. All parties to the proceeding shall have the right to file comments with the Administrator on the proposed extension. No hearing shall be delayed while a request for extension of the time for completing it is being considered.

§ 164.65 Evidence.

(a)(1) The administrative record shall automatically be admitted in evidence. All material filed or designated under § 164.61 or submitted at some later stage in accordance with § 164.62 shall automatically be admitted into evidence unless an objection as to its admissibility has been filed and sustained under § 164.62.

(2) Any written evidence excluded by the Presiding Officer as inadmissible shall remain a part of the hearing record, as an offer of proof, for purposes of judicial review.

(b) Oral testimony, whether on direct or on cross-examination, shall be admissible as evidence unless a party objects and the Presiding Officer excludes it as inadmissible. The Presiding Officer shall exclude oral evidence as inadmissible only on the following grounds:

(1) The oral evidence is irrelevant, immaterial, incompetent or repetitive;

(2) The oral evidence is outside the scope of further proceedings determined by the Hearing Order (or the Notice of Hearing under § 164.33); or

(3) Other good cause exists for its exclusion.

(c) An automatic exception to any evidentiary ruling of the Presiding Officer shall be entered on behalf of the party(s) to whom the ruling is adverse.

(d)(1) Whenever oral evidence is deemed inadmissible, the party offering such evidence may make an offer of proof, which shall be included in the transcript, and which shall consist of a brief statement describing the evidence excluded and the purpose for which it is offered.

(2) If the Administrator upon appeal determines that the Presiding Officer erred in excluding an item of oral evidence, and prejudice to a party resulted, the hearing may be reopened to permit the taking of such evidence, or, where appropriate, the administrator may evaluate the evidence and proceed to a final decision.

(e) If questions have been submitted under § 164.63 to a Committee of the National Academy of Sciences, the report of that Committee, other materials that may be required by the Administrator pursuant to the Memorandum of Understanding between the Agency and the National Academy of Sciences, and a list of witnesses and evidence relied on shall be received into evidence and made a part of the record of the hearing. Objections to any such material shall go to the evidentiary value of that material.

§ 164.66 Summary decision.

(a) Any party may, after commencement of the hearing, submit a motion with or without supporting affidavits for a summary decision in its favor with respect to any issue under consideration. Any other party may serve opposing affidavits or cross-move for summary decision. The Presiding Officer may, in his discretion, set the matter for argument and call for the submission of briefs.

(b) The Presiding Officer shall grant such motion if the objections, requests for hearing, other pleadings, affidavits, and any material filed in connection with the hearing, show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. The order granting such motion shall be filed with the Hearing Clerk and served on all parties.

(c) affidavits shall set forth such facts as would be admissible in evidence and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon mere allegations or denials or general descriptions of position and contentions. Its response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue of material fact for the hearing.

(d) If it appears from the affidavits of a party opposing the motion that it cannot, for sound reasons stated, present by affidavit facts essential to justify its opposition, the Presiding Officer may deny the motion for summary decision or may order a continuance to permit affidavits or additional evidence to be obtained or may make such order as is just.

(e) If on motion under this section a summary decision is not rendered upon the whole case or for all the relief requested, and development of evidentiary facts is found necessary, the Presiding Officer shall make an order specifying the facts that appear without substantial controversy and directing further evidentiary proceedings. The facts so specified shall be deemed established.

(f) Any party may obtain interlocutory review by the Administrator of an order of the Presiding Officer granting a motion for summary decision within 10 days of service.

§ 164.67 Interlocutory appeal.

(a) Except as provided in paragraph (b) of this section and in §164.11, §164.43, §164.55 and §164.66, no decision of the Presiding Officer shall be reviewed by the Administrator prior to review of the initial decision rendered under §164.80.

(b) The Presiding Officer may certify an order or ruling for interlocutory appeal to the Administrator if he finds that:

(1) The order or ruling involves an important question of law or policy about which there is substantial ground for difference of opinion; and

(2) Either:

(i) An immediate appeal from the order and ruling will materially advance the ultimate termination of the proceeding; or

(ii) Review after the final judgment is issued will be inadequate or ineffective.

The Presiding Officer shall issue such a certification upon a motion of a party made within 10 days of the order or ruling.

(c) If the Administrator determines that certification under paragraph (b) of this section was improvidently granted, or takes no action within thirty days of certification, the appeal shall be automatically dismissed.

(d) Any order or ruling not certified for interlocutory appeal by the Presiding Officer shall be the subject of interlocutory review by the Administrator only when he determines, upon motion of a party and in exceptional circumstances, that delaying review would be deleterious to vital public or private interests.

(e) Except in extraordinary circumstances, proceedings, shall not be stayed pending an interlocutory appeal. Any stay of more than 14 days must be approved by the Administrator.

(f) Ordinarily, any interlocutory appeal will be decided on the basis of the submissions made to the Presiding Officer in connection with the motion for certification, but the Administrator in his discretion may allow further briefs and oral argument.

§ 164.68 Briefs and argument.

(a) As soon as possible after the completion of the taking of evidence, the Presiding Officer shall announce a schedule for the filing of briefs. Briefs shall include a statement of position on

each issue, which shall be supported by specific and complete citations to the evidence, together with citations of points of law relied upon. Briefs may contain proposed findings of fact and conclusions of law.

(b) The Presiding Officer may permit the presentation of oral argument at his discretion and in such manner as he believes is both practicable and fair.

Record

§ 164.70 Availability of record.

The hearing record shall be available to the public, *provided*, that information which is a trade secret or otherwise subject to the provisions of section 10 of the Act shall not be disclosed to the public except in accordance with section 10 of the Act and the regulations of the Agency implementing that section.

§ 164.71 Correction of record.

After the close of the taking of evidence, the Presiding Officer shall allow witnesses, parties, and their counsel up to 30 days (or up to 45 days in unusual cases) in which to submit written proposed corrections of the transcript of any oral testimony taken at the hearings. The Presiding Officer shall thereafter allow witnesses, parties, and their counsel 5 additional days to comment upon any proposed correction to the transcript as are necessary to make it conform to the testimony.

Initial and Final Decisions

§ 164.80 Initial decision.

(a) Within the time specified in the Hearing Order (or in the Conference Report and Order, in the case of section 6(b)(2) hearings), as it may have been extended under § 164.64, the Presiding Officer shall prepare an initial decision. The initial decision shall contain:

(1) Findings of fact based on relevant, material, and reliable evidence of record;

(2) Conclusions of law;

(3) A full articulation of the reasons for the findings and conclusions, including a discussion of the significant factual and legal contentions made by any party; and

(4) An appropriate order supported by substantial evidence of record and based on the findings of fact and conclusions of law.

(b) The initial decision shall be filed with the Hearing Clerk and served on all parties.

(c) The initial decision shall become the decision of the Administrator by operation of law unless a party timely appeals under § 164.81 or unless the Administrator on his own initiative files a notice of review under § 164.81.

§ 164.81 Appeal from or review of initial decision.

(a) Any party may appeal an initial decision to the Administrator by filing exceptions to it with the Hearing Clerk and serving them on the other parties. Exceptions must be filed and served within twenty days of the service of the initial decision, unless that period is extended by the administrator under paragraph (d) of this section.

(b) Exceptions to the initial decision shall contain specific statements of alleged error in the findings of fact or conclusions of law with specific reference to those parts of the record on which the exceptions are based. If oral argument before the Administrator is desired, it shall be specifically requested in the exceptions.

(c) Any party may file a reply to any exceptions filed under paragraph (a) of this section. A reply shall be filed with the Hearing Clerk and served on the other parties within 10 days after the period for filing exceptions has expired, unless that period is extended by the Administrator under paragraph (d) of this section.

(d) The Administrator may extend the time for filing exceptions or replies to exceptions for good cause shown.

(e) After the filing of exceptions and replies, the Administrator shall determine whether he wishes to hear oral argument on the matter. If the Administrator decides to hear oral argument, the parties shall be informed of the date, time and place for such oral argument, the amount of time to be allowed each party, and the issues to be addressed.

(f) Within 10 days after the time for filing exceptions (including any extensions) has expired, the Administrator may file with the Hearing clerk, and serve on the parties, a notice that he will review the initial decision on his own initiative. The Administrator may invite the parties to file briefs or present oral argument on the matter. The time for filing briefs or presenting oral argument shall be specified in the notice of review or in a later notice.

§ 164.82 Decision by the Administrator on appeal from or review of initial decision.

(a) On appeal from or review of the initial decision, the Administrator shall have all the powers he would have in making the initial decision. On his own motion or the motion of any party, he may remand the proceeding to the Presiding Officer with specific directions (e.g., to receive further evidence relating to a particular issue) where he concludes that such action is necessary for a proper decision in the matter.

(b) The scope of the issues on appeal shall be the same as the scope of the issues at the formal evidentiary public hearing unless the Administrator specifies otherwise.

(c) Within 90 days after filing of the initial decision, the Administrator shall issue his final decision based solely on the record. This final decision shall meet the requirements of § 164.80. The Administrator in preparing his final decision may consult with any Agency employee other than a member of the trial staff named under § 164.12 or a subordinate of a trial staff member. The Administrator may consult in this manner any member of an advisory panel named under section 164.55.

(d) The Administrator may adopt the initial decision as the final decision, in whole or in part.

(e) The final decision shall be filed with the Hearing Clerk and served on all parties.

§ 164.83 Reconsideration and stay of action.

Following publication of notice of the final decision, any party may petition the Administrator for reconsideration of part or all of such decision or for a stay of such decision under 5 U.S.C. 705.

Judicial Review

§ 164.90 Judicial review of final Agency action.

(a) The following are final Agency actions which are reviewable in a United States Court of Appeals under section 16(b) of the Act:

(1) Any final decision under § 164.82; and

(2) Any final order under § 164.55(k) implementing the action proposed in a Notice of Action following a denial of a request for further proceedings.

(b) Before requesting an order from a Court of Appeals for a stay of the effectiveness of a final order under § 164.82 or § 164.55(k), any person seeking judicial review shall first request the Agency to stay such action under 5 U.S.C. 705.

Subpart C—General Rules of Practices for Expedited Hearings

§ 164.100 Notification.

(a) Except as provided in § 164.111 (relating to emergencies), whenever the Administrator determines that action is necessary to prevent an imminent hazard during the time required for cancellation or change in classification proceedings, he shall notify the registrant of his intent to suspend the registration of the pesticide use at issue.

(b) Such notice shall include:

(1) Findings relating to the existing of an imminent hazard;

(2) Designation of an administrative records for suspension on which the findings in paragraph (b)(1) are based. This record shall be automatically entered into evidence at the expedited hearing. The notice shall also specify the location of the record, the hours it will be available for public inspection, and the name and office telephone number of the person in charge of it;

(3) Designation of an Agency trial staff, and of persons available to assist the Administrator in making a final decision, as specified in § 164.12;

(4) A time limit for completing any such expedited hearing; and

(5) A statement either (i) designating the person(s) to preside at any such expedited hearing or else (ii) stating that an Administrative Law Judge to be named by the Chief Administrative Law Judge will preside. In the latter case the Administrator may also designate Agency employees to sit with the presiding Administrative Law Judge as a panel.

(c) Any notice of intent to suspend shall either be personally served on the registratant or be sent to the registrant by registered or certified mail, return receipt requested. A copy shall also be filed with the Hearing Clerk.

§ 164.101 Request for expedited hearing.

(a) A registrant affected by a notice of intent to suspend may obtain an expedited hearing on the question of whether an immient hazard exists by filing a request in writing or by telegram with the Hearing Clerk. The request must be received by the Hearing Clerk within five days of the registrant's receipt of the notice of intent to suspend.

(b) At the time of filing a request for an expedited hearing, the registrant shall also file a document setting forth objections to the Administrator's notice of intent to suspend. This document shall conform to the requirements of § 164.20 to the maximum extent possible.

§ 164.102 Intervention.

(a) Any interested person may move to intervene at any time prior to the commencement of the presentation of evidence in an expedited hearing held under this Subpart C.

(b) Leave to intervene may be granted only if the motion to intervene indicates that the movant would introduce evidence pertinent to the issue of whether an imminent hazard exists and which would substantially assist the resolution of that issue. A motion for leave to intervene filed after the first hearing conference shall also contain a statement of good cause for failure to file earlier. Such motions may be granted only upon a finding that extraordinary circumstances justify the granting of the motion, and only upon the condition that the intervenor shall be bound by any rules or conditions for the expedited hearing previously specified or agreed upon by the parties to the expedited hearing.

(c) Any interested person who is denied permission to intervene under this section may file proposed findings and conclusions under § 164.109. Any person filing such documents under this paragraph shall be considered a party to the proceeding for all purposes of its further review.

(d) When an "emergency order" is issued under § 164.111, no person other than the Agency trial staff and the registrant shall participate in the expedited hearing except that any interested person may file proposed findings and conclusions under § 164.109. Any person filing under this paragraph shall be considered a party to the proceeding for all purposes of its further review.

§ 164.103 Time limits.

The time limit specified in the notice of intent to suspend for completing any expedited hearing under this Subpart C may be extended only by the Administrator upon the request of the Presiding Officer.

§ 164.104 Presiding Officer.

The Presiding Officer for a hearing under this subpart shall either meet the standards specified in § 164.40, or shall be a general or special Agency employee who is not part of the Agency trial staff named under § 164.12. More than one person having the qualifications specified in the preceding sentence may be named to sit as a panel in expedited suspension hearings. In such cases, one panel member shall be designated as Presiding Officer for purposes of these regulations. If an Administrative Law Judge is included on the panel, the Administrative Law Judge shall be the Presiding Officer.

§ 164.105 Beginning of expedited hearing.

The expedited hearing shall begin within 5 days after the filing with the Hearing Clerk of the last request for a hearing, by holding a hearing conference under § 164.106. Unless the Agency's trial staff and the registrant agree that it shall be held at a later time, it shall be held no later than 15 days after the issuance of the notice of intent to suspend. As soon as possible, the Presiding Officer shall publish in the Federal Register notice of such expedited hearing.

§ 164.106 Hearing conferences.

(a) The Presiding Officer may hold further hearing conferences in any case in which an expedited hearing has been granted under this Subpart C. Any conference shall be scheduled by filing a Pre-Conference Order with the Hearing Clerk directing the parties or their counsel to appear at a specified time and place, and specifying the purpose of the hearing conference and the matters to be resolved at it. More than one such hearing conference may be held.

(b) The Presiding Officer may conduct a hearing conference for the following purposes:

(1) To determine the extent to which the documents submitted by registrants or intervenors under § 164.101 and § 164.102 comply with the standards of § 164.20;

(2) To consider or rule on motions to intervene under § 164.102;

(3) To consider or rule on motions for oral direct testimony under § 164.107;

(4) To set a date by which all written direct testimony shall be filed, or a series of dates by which all written direct testimony related to specific designated stages of the expedited hearing shall be filed;

(5) To consider or rule on motions to strike or limit evidence as not within the scope of the issues raised by the notice of intent to suspend, or for other cause;

(6) To identify the most appropriate techniques for the development, if necessary, of additional evidence on issues in controversy and the manner and sequence in which they shall be used;

(7) To set the time and place for beginning the presentation of evidence at the expedited hearing, and the schedule for conducting it. The schedule shall include the sequence in which witnesses will be presented, and the amount of time, if any, for oral cross-examination of the witnesses. In passing on requests for oral cross-examination, the Presiding Officer shall consider whether the matters at issue could be more economically clarified in whole or in part by the required submission of additional direct evidence or by use of written cross-examination. The schedule shall also include a date by which the receipt and examination of evidence shall be concluded and intermediate dates where appropriate;

(8) To take any other steps to narrow or simplify the issues in controversy, and to consider such other matters and to take such other action as may aid in the expeditious disposition of the proceeding.

(c) All parties shall appear at any hearing conference fully prepared to discuss in detail and to resolve all matters specified in the Pre-Conference Order. All parties shall cooperate fully at all stages of the proceeding to achieve the objective of a fair, and expeditious hearing, through advance preparation for the hearing conference, including communications between parties and requests for information at the earliest possible time. The failure of any party to appear at a hearing conference or to raise any matters that could reasonably be anticipated and resolved at the hearing conference shall not be permitted to delay the progress of the expedited hearing and shall constitute a waiver of the rights of the party with respect thereto, including all objections to the agreements reached, actions taken, or rulings issued by the Presiding Officer with regard thereto.

(d) No transcript of any hearing conference shall be made except to the extent that a request therefor by one of the parties is granted by the Presiding Officer or the Presiding Officer orders a transcript to be made on his own initiative. Any party whose request for a transcript is requested shall bear the cost of the taking of the transcript unless otherwise ordered by the Presiding Officer.

(e) The Presiding Officer may prepare a written Conference Report and Order reciting the actions taken at the hearing conference and setting forth the schedule for the expedited hearing. This Conference Report and Order may include a written statement of the areas of factual agreement and disagreement and of the methods and procedures to be used in developing the evidence and the respective duties of the parties in connection therewith. Any such Conference Report and Order shall be consistent with the statement of issues in the notice of intent to suspend issued under § 164.100. Any such Conference Report and Order shall control the course of the proceeding except to the extent it may be modified by the Presiding Officer for good cause shown.

§ 164.107 Direct testimony.

(a) All direct testimony shall be submitted in writing except to the extent a motion for oral direct testimony has been made and granted.

(b) Motions for oral direct testimony shall be granted only upon a showing that the testimony concerns matters of such particular fact that oral presentation of direct testimony is justified.

(c) No later than the time the direct testimony of a witness is filed (or no later than three days before the scheduled appearance of a witness, if a motion to permit oral diect testimony has been granted) the party presenting that witness shall make available to all other parties (but shall not file with the Hearing Clerk):

(1) A full curriculum vitae for the witness;

(2) All prior written statements by the person who has been identified as a witness, which shall include articles, written statements signed or adopted, and any recording or transcription of any oral statement made, if all of the following conditions are met:

(i) The statement is available without making request of the witness;

(ii) The statement relates to the subject matter of the witness' testimony; and

(iii) The statement was either made before the time the person agreed to become a witness or has been made publicly available by the witness.

(d) If any prior written statement required to be made available under paragraph (c)(2) of this section has been published in the public literature, a party may comply with paragraph (c)(2) of this section with respect to that statement by furnishing all other parties with a full citation to the public literature which identifies where the statement may be found.

§ 164.108 Availability of record.

The expedited hearing record shall be available to the public, *provided*, that information which is a trade secret or otherwise subject to the provisions of section 10 of the Act shall not be disclosed to the public except in accordance with section 10 of the Act and the regulations of the agency implementing that section.

§ 164.109 Recommended findings and conclusions.

(a)(1) Within 4 days of the conclusion of the presentation of evidence, the parties may propose findings and conclusions to the Presiding Officer.

(2) Within 8 days of the conclusion of the presentation of evidence, the Presiding Officer shall submit to the parties his recommended findings and conclusions and a statement of the grounds on which they are based.

(3) Within 10 days of the conclusion of the presentation of evidence, the Presiding Officer shall submit to the Administrator his recommended findings and conclusions, together with the hearing record specified in § 164.108.

(4) Within 12 days of the conclusion of the presentation of evidence, the parties shall submit to the Administrator their objections to the Presiding Officer's recommended findings and conclusions accompanied by a written brief in support thereof.

(b) All proposed and recommended findings and conclusions under paragraph (a) of this section shall contain:

(1) Findings of fact based on relevant, material, and reliable evidence of record;

(2) Conclusions of law;

(3) A full articulation of the reasons for the findings and conclusions, including a discussion of the significant factual and legal contentions made by any party; and

(4) An appropriate recommended order supported by substantial evidence of record and based on the findings of fact and conclusions of law.

(c) The recommended findings and conclusions shall be filed with the Hearing Clerk and served on all parties.

§ 164.110 Final decision and order of suspension.

(a) Within 7 days of receipt of the record and of the Presiding Officer's recommended findings and conclusions, the Administrator shall issue a final decision and order. In making his decision, the Administrator shall have all the powers he would have in making the initial decision. On his own motion or the motion of any party, he may remand the proceeding to the Presiding Officer with specific directions (e.g., to receive further evidence relating to a particular issue) when he concludes that such action is necessary for a proper decision in the matter.

(b) The scope of the issues before the Administrator shall be the same as the scope of the issues at the expedited hearing.

(c) The Administrator's decision and order shall conform to the requirements of § 164.109(b). The Administrator may adopt the recommended findings and conclusions as the final decision and order, in whole or in part.

(d) The final decision and order shall be filed with the Hearing Clerk and served on all parties.

(e) Prior to, or together with, the issuance of an order of suspension, the Administrator shall initiate cancellation proceedings by issuing a notice of intent to cancel the registration or change the classification of the pesticide use(s) at issue, or by issuing a notice of section 6(b)(2) hearing with respect to the pesticide use(s) at issue.

§ 164.111 Emergency order.

(a) Whenever the Administrator determines that an emergency exists that does not permit him to hold an expedited hearing before suspension, he

may issue a suspension order in advance of notification to the registrant.

(b) The Administrator shall immediately notify the registrant of the suspension order. The registrant may then request an expedited hearing in accordance with § 164.101, but the suspension order shall remain in effect during the expedited hearing.

§ 164.112 Applicability of other sections.

The provisions of Subparts A and B (except § 164.8 and the provisions relating to referral of questions of scientific fact to a committee of the National Academy of Sciences) shall apply to proceedings under this Subpart C except where their application would be clearly inappropriate. § 164.71 shall apply except that two days, not thirty days, shall be allowed for the submission of proposed corrections.

Subpart E—Implementation of Final Cancellations and Suspensions; Disposition of Existing Stocks of Cancelled Pesticides

§ 164.140 Notification of cancellation.

(a) When a cancellation action becomes final by operation of law under Section 6(b) of the Act, or at the conclusion of a hearing under this Part, the Administrator shall publish in the **Federal Register** and send to each registrant of an affected pesticide product a Notification of Cancellation.

(b) The Notification of Cancellation shall include the following:

(1) With respect to each affected registered pesticide use, a description of the action which has become final.

(2) Where applicable, instructions on how to bring pesticide products into compliance with the cancellation action including, for example, instructions on implementation of required changes in labeling, packaging or other terms and conditions of registration.

(3) Notification of the conditions under which existing stocks of pesticide products which are not in compliance with the final cancellation action can be distributed, sold or otherwise moved in commerce, and/or used.

(4) Notification that registrants or other interested persons may petition the Administrator under this Subpart to modify his determination concerning distribution, sale or other movement in commerce, and/or use of existing stocks of pesticide products which are not in compliance with the final cancellation action, and instructions concerning the content and filing of such petitions.

(5) Where applicable, instructions for the disposal of existing stocks of pesticide products which are not in compliance with the final cancellation action.

§ 164.141 Petitions concerning existing stocks of pesticides subject to final cancellation actions.

(a) Registrants or other interested persons may petition the Administrator to modify his determination concerning the distribution, sale or other movement in commerce, and/or the use of existing stocks of pesticide products which are not in compliance with final cancellation actions under this Part.

(b) Petitions under this section shall contain the information required by and shall be filed in accordance with the instructions contained in the Notification of Cancellation under § 164.140.

(c) The Administrator shall by order promulgate a regulation disposing of a petition appropriately under Section 6(a)(1) of the Act, after having complied with the requirements of Section 25 of the Act and 5 U.S.C. 553.

§ 164.142 Notification of suspension.

(a) When a suspension action becomes final by operation of law under Section 6(c) of the Act, or at the conclusion of a hearing under this Part, the Administrator shall publish in the **Federal Register** and send to each registrant of an affected pesticide product a Notification of Suspension.

(b) The Notification of Suspension shall include the following:

(1) With respect to each affected registered pesticide use, a description of the action which has become final.

(2) Where applicable, instructions on how to bring pesticide products into compliance with the suspension action including, for example, instructions on implementation of required changes in labeling, packaging or other terms and conditions of registration.

(3) Notification whether and under what conditions existing stocks of pesticide products which are not in compliance with the final suspension action can be distributed, sold or otherwise moved in commerce, and/or used.

Appendix A—Memorandum of Understanding

The Administrator of the Environmental Protection Agency, on behalf of EPA, and the President of the National Academy of Sciences, on behalf of NAS, hereby enter into the following agreement regarding studies to be conducted by the Academy under contract between EPA and NAS.

1. The NAS in preparing any report called for by a contract between EPA and NAS which incorporates this memorandum by reference shall, in accordance with its established procedures as currently specified in Chapter 6 of the NAS document entitled "Nominations and Appointments to Assemblies and Commissions, Divisions, Offices and Boards, Committees and Sub-units of the National Research Council" dated October 1975, conduct a review for potential sources of bias of the members of any of its committees engaged in preparing such report. A record of this bias review shall be kept consisting at a minimum of the curriculum vitae of each member of the committee, the form "On Potential Sources of Bias" (as set forth in Appendix 3 to the above document) filed by each member of the committee, and a verbatim transcript or recording of the committee discussions of potential sources of bias required under Chapter 6 above. On request by the Administrator of EPA for information concerning possible bias or conflict of interest of a particular committee member (or members) described above, the NAS shall make available to the Administrator the record of the bias review for that committee member (or members). Such information provided to the Administrator of EPA by the NAS shall be treated by EPA as private information to be held in confidence and shall not be disclosed outside EPA except as authorized by the Administrator of EPA for good cause shown and with the consent of the committee member (or members) concerned. The NAS shall notify the EPA of any changes in the Academy's bias review procedures.

2. No later than 15 days after the release of any final report called for by a contract between EPA and NAS which incorporates this memorandum by reference, the NAS shall make available to the public and to EPA the record of its committee deliberations concerning that report to the extent provided in the document entitled "Policy on Public Access to Information Concerning Studies Conducted Under the Auspices of the National Academy of Sciences," adopted by the National Academy of Sciences, April 20, 1975.

3. The NAS shall also undertake to ensure that one or more members of a committee engaged in the preparation of a report referred to in paragraph 2 above will for a reasonable time make themselves available upon request at any EPA regulatory proceedings or Congressional hearings to which the report may be relevant to answer questions about the report and its record. The contract between EPA and NAS shall provide for reimbursement of staff, travel, and related expenses incurred by NAS for the purpose of such appearances.

P. Handler,

President, National Academy of Sciences.

Douglas Costle,

Administrator, Environmental Protection Agency.

[FR Doc. 80-23812 Filed 8-6-80; 8:45 am]

BILLING CODE 6560-01-M

federal register

Thursday
August 7, 1980

Part III

Environmental Protection Agency

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, and 124

[FRL 1538-2]

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency.

ACTION: Final rules.

SUMMARY: In response to the decision of the U.S. Court of Appeals for the D.C. Circuit in *Alabama Power Company* v. *Costle*, EPA is today amending its regulations for the prevention of significant deterioration of air quality, 40 CFR 51.24, 52.21. Today's amendments also include regulatory changes affecting new source review in nonattainment areas, including restrictions on major source growth (40 CFR 52.24) and requirements under EPA's Emission Offset Interpretative Ruling (40 CFR Part 51, Appendix S) and Section 173 of the Clean Air Act (40 CFR 51.18 (j)).

DATES: The regulatory amendments announced here come into effect on August 7, 1980. State Implementation Plan revisions meeting today's regulatory changes are to be submitted to EPA within nine months after this publication.

FOR FURTHER INFORMATION CONTACT: James B. Weigold, Standards Implementation Branch (MD-15), Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 919/541-5292.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline. A section entitled Summary of PSD Program has been added to provide a concise narrative overview of this program.

Outline

I. Summary of PSD Program

The purpose of this summary is to help those people who are unfamiliar with the PSD program gain an understanding of it. Because this summary seeks to condense the basic PSD rules, it may not precisely reflect the amendments announced in this notice. Should there be any apparent inconsistency between the summary and the remainder of the preamble and the regulations, the remaining preamble and the regulations shall govern.

A. PSD Allows Industrial Growth Within Specific Air Quality Goals

The basic goals of the prevention of significant air quality deterioration (PSD) regulations are (1) to ensure that economic growth will occur in harmony with the preservation of existing clean air resources to prevent the development of any new nonattainment problems; (2) to protect the public health and welfare from any adverse effect which might occur even at air pollution levels better than the national ambient air quality standards; and (3) to preserve, protect, and enhance the air quality in areas of special natural recreational, scenic, or historic value, such as national parks and wilderness areas.

States are required to develop SIP revisions for PSD pursuant to regulations published today. *See* 40 CFR 51.24, "Requirements for Preparation, Adoption and Submittal of Implementation Plans." If EPA approves the proposed PSD plan, the state can then implement its own program. In the absence of an approved state PSD plan, another portion of today's regulations will govern PSD review. *See* 40 CFR 52.21, "Approval and Promulgation of Implementation Plans." EPA will implement this regulation itself if the state does not submit an approvable PSD program of its own.

States can identify in their SIPs the local land use goals for each clean area through a system of area classifications. A "clean" area is one whose air quality is better than that required by the National Ambient Air Quality Standards. Each classification differs in the amount of growth it will permit before significant air quality deterioration would be deemed to occur. Significant deterioration is said to occur when the amount of new pollution would exceed the applicable maximum allowable increase ("increment"), the amount of which varies with the classification of the area. The reference point for determining air quality deterioration in an area is the baseline concentration, which is essentially the ambient concentration existing at the time of the first PSD permit application submittal affecting that area. To date, only PSD increments for sulfur dioxide and particulate matter have been established. Increments or alternatives

to increments are currently under investigation for the other criteria pollutants.

There are three types of area classifications. Class I areas have the smallest increments and thus allow only a small degree of air quality deterioration, while Class II areas can accommodate normal well-managed industrial growth. Class III designations have the largest increments and are appropriate for areas desiring a larger amount of development. In no case would the air quality of an area be allowed to deteriorate beyond the National Ambient Air Quality Standards. Except for certain wilderness areas and national parks, which are mandatory Class I areas, all clean areas of the country were initially designated as Class II. Flexibility exists under the Act to adjust most of these designations, except for those mandated by Congress.

The principal mechanism within the SIP to implement the objectives of the PSD program is the preconstruction review process. These provisions require that new major stationary sources and major modifications are carefully reviewed prior to construction to ensure compliance with the National Ambient Air Quality Standards, the applicable PSD air quality increments, and the requirements to apply the best available control technology on the project's pollutant emissions. In addition, proposed SIP relaxations which would limit further use of increment must be reviewed for their anticipated impact and not be approved if the applicable increment would be violated. The SIP must also contain PSD provisions for periodically reviewing all emissions increases, including those which occur outside the SIP revision and the new source review (NSR) process, and for restoring clean air when such increases cause violations of the applicable PSD increment. This corrective action may require additional controls on existing emissions sources which contribute to the problem.

B. Who is Subject to the Prevention of Significant Deterioration Regulations?

The requirements of today's PSD regulations apply to major stationary sources and major modifications which meet certain criteria concerning the geographic location, type of pollutants to be emitted, and timing of proposed construction. No source or modification subject to today's rules may be constructed without a permit which states that the stationary source or modification would meet all applicable PSD requirements. This section summarizes how PSD review as modified in response to *Alabama Power* will apply.

The primary criterion in determining PSD applicability is whether the proposed project is sufficiently large (in terms of its emissions) to be a major stationary source or major modification. Source size, for applicability purposes, is defined in terms of "potential to emit." "Potential to emit" means the capability at maximum design capacity to emit a pollutant after the application of all required air pollution control equipment and after taking into account all federally enforceable requirements restricting the type or amount of source operation. A "major stationary source" is any source type belonging to a list of 28 source categories which emits or has the potential to emit 100 tons per year or more of any pollutant subject to regulation under the Act, or any other source type which emits or has the potential to emit such pollutants in amounts equal to or greater than 250 tons per year. A stationary source generally includes all pollutant-emitting activities which belong to the same industrial grouping, are located on contiguous or adjacent properties, and are under common control. Pollutant activities which belong to the same major group as defined in a standard industrial classification scheme developed by the Office of Management and Budget are considered part of the same industrial grouping. (*See* SOURCE).

A "major modification" is generally a physical change in or a change in the method of operation of a major stationary source which would result in a significant net emissions increase in the emissions of any regulated pollutant. In determining if a proposed increase would cause a significant *net* increase to occur, several detailed calculations must be performed. First, the source owner must quantify the amount of the proposed emissions increase. This amount will generally be the potential to emit of the new or modified unit. Second, the owner must document and quantify all emissions increases and decreases that have occurred or will occur contemporaneously (generally within the past five years) and have not been evaluated as part of a PSD review. The value of each contemporaneous decrease and increase is generally determined by subtracting the old level of actual emissions from the new or revised one. Third, the proposed emissions changes and the unreviewed contemporaneous changes must then be totalled. Finally, if there is a resultant *net* emissions increase that is larger than certain values specified in the regulations, the modification is major and subject to PSD review.

Certain changes are exempted from the definition of major modification. These include: (1) routine maintenance, repair, and replacement; (2) use of an alternative fuel or raw material by revision of an order under sections (2)(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation); (3) use of an alternative fuel by reason of an order or rule under section 125 of the Clean Air Act; (4) use of an alternative fuel at a steam generating unit to the extent it is generated from municipal solid waste; (5) use of an alternative fuel which the source is capable of accommodating; and (6) an increase in the hours of operation, or the production rate. The last two exemptions can be used ony if the corresponding change is not prohibited by certain permit conditions established after January 6, 1975.

If a source or modification thus qualifies as major, its prospective location or existing location must also qualify as a PSD area, in order for PSD review to apply. A PSD area is one formally designated by the state as "attainment" or "unclassifiable" for *any* pollutant for which a national ambient air quality standard exists. This geographic applicability test does not take into account what new pollutant emissions caused the construction to be major. It looks simply at whether the source is major for any pollutant and will be located in a PSD area.

Once a source applicant has determined that proposed construction falls under PSD based on the above size and location tests, it must then assess whether the pollutants the project would emit are or are subject to PSD. If a new major stationary source emits pollutants for which the area it locates in is designated nonattainment, then the source is exempt from PSD review for those pollutants. These sources must, however, meet the applicable requirements of NSR for each nonattainment pollutant. Similarly, if a major modification to be constructed in a PSD area involves changes only for nonattainment pollutants then the source is not subject to PSD. These modifications must meet the appropriate nonattainment NSR under the SIP for the pollutant. Once the question of NSR jurisdiction is resolved, then the PSD review applies to all signficant emissions increases of regulated air pollutants. Specific numerical cutoffs which define what emissions increases are "significant" have been spelled out in the regulations. These pollutant-

specific cutoffs can exempt a source from PSD review for a particular pollutant, except where the proposed construction would adversely impact a Class I area.

If a proposed source or modification would be subject to PSD review based on size, location, and pollutants emitted, then its construction schedule must meet certain tests before the PSD rules promulgated today would apply. All major construction otherwise qualifying for PSD review would not need a PSD permit under these regulations if the proposed construction: (1) was subject to the old PSD rules, has submitted a complete application under these rules before today, and was or is subsequently approved to construct based on this application; or (2) was not subject to the old PSD rules, has received all federal, state, and local air permits needed before today and commences construction in a continuous fashion at the proposed site within a reasonable time.

Finally, the PSD regulations contain some specific exceptions for some forms of source construction. The requirements of today's regulations do not apply to any major stationary source or major modification that is: (1) a nonprofit health or educational institution (only if such exemption is requested by the governor); or (2) a portable source which has already received a PSD permit and proposes relocation.

C. What Must A Source or Modification Do To Obtain A PSD Permit?

1. It must apply the best available control technology.

Any major stationary source or major modification subject to PSD must conduct an analysis to ensure application of best available control technology (BACT). During each analysis, which will be done on a case-by-case basis, the reviewing authority will evaluate the energy, environmental, economic and other costs associated with each alternative technology, and the benefit of reduced emissions that the technology would bring. The reviewing authority will then specify an emissions limitation for the source that reflects the maximum degree of reduction achievable for each pollutant regulated under the Act. In no event can a technology be recommended which would not meet any applicable standard of performance under 40 CFR Parts 60 and 61.

In addition, if the reviewing authority determines that there is no economically reasonable or technologically feasible way to accurately measure the emissions, and hence to impose an enforceable emissions standard, it may require the source to use source design, alternative equipment, work practices or operational standards to reduce emissions of the pollutant to the maximum extent. For example, if an immense pile of uncovered coal emits coal dust into the atmosphere, it woud make little sense to impose an emission, standard, since measuring the amount of coal dust rising off the pile is nearly impossible. A much more direct approach to controlling emissions is, for example, requiring the owner to wet the coal pile daily. This type of standard or practice will be equivalent to an emissions limitation for purposes of the BACT requirement.

2. It must conduct an ambient air quality analysis.

Each PSD source or modification must perform an air quality analysis to demonstrate that its new pollutant emissions would not violate either the applicable NAAQS or the applicable PSD increment. This analysis ensures that the existing air quality is better than that required by national standards and that baseline air quality will not be degraded beyond the applicable PSD increment.

Each proposed major construction project subject to PSD must first assess the existing air quality for each regulated air pollutant that it emits in the affected area. This analysis requirement does not apply to pollutants for which the new emissions proposed by the applicant would cause insignificant ambient impacts. Today's PSD regulations define pollutant-specific impacts that are typically considered inconsequential and that can be exempted from analysis, unless existing air quality is poor or adverse impacts to a Class I area are in question. For pollutants for which a NAAQS exists, the applicant must provide ambient monitoring data that represent air quality levels in the year's period preceding the PSD application. Where no existing data are judged representative or adequate, then the source applicant must conduct its own monitoring program. This is often the case where the applicant will be establishing the baseline concentration for the affected area. Typically air quality dispersion modeling is used by applicants to support or extend the assessment made with gathered monitoring data. For pollutants for which there is no NAAQS, the required analysis will normally be based on dispersion modeling alone.

Source applicants who are subject to the ambient analysis requirement for sulfur dioxide or particulate matter must also perform an analysis to compute how much of the PSD increment remains available to them. In general the amount of increment that is available depends on certain changes in actual emission. First, actual emissions changes occurring after January 6, 1975 which are associated with physical changes or changes in the method of operation at a major stationary source can affect the available increment. Accordingly, cleanup adds to the available growth margin while new emissions diminish it. Second, all changes in emissions, including those from minor sources and other types of changes at major sources, affect the available increment provided they occur after the baseline date. The baseline date is essentially the time that the first PSD application affecting the area is filed.

Once the question of how much increment remains is resolved, then the applicant must demonstrate that his proposed new emissions would not exceed the remaining PSD increment. Where a proposed project would cause a new violation of the increment or contribute to an existing violation, it cannot be approved. Existing violations must be entirely corrected before PSD sources which affect the area can be approved.

3. It must analyze impacts to soils, vegetation, and visibility.

An applicant is required to analyze whether its proposed emissions increases would impair visibility, or impact on soils or vegetation. Not only must the applicant look at the direct effect of source emissions on these resources, but it also must consider the impacts from general commercial, residential, industrial and other growth associated with the proposed source or modification. The results of this analysis may be used to determine if the project would have an adverse impact on a Class I area.

4. It must not adversely impact a Class I area.

If the reviewing authority receives a PSD permit application for a source that could impact a Class I area, it will immediately notify the Federal Land Manager and the federal official charged with direct responsibility for managing these lands. These officials are responsible for protecting the air quality-related values in Class I areas and for consulting with the reviewing authority to determine whether any proposed construction will adversely affect such values. If the Federal Land Manager demonstrates that emissions from a proposed source or modification would impair air quality-related values, even though the emissions levels would not cause a violation of the allowable air quality increment, the Federal Land

Manager may recommend that the reviewing authority deny the permit.

5. Its application must undergo adequate public participation.

The regulations solicit and encourage participation by the general public, industry, and other affected persons impacted by the proposed major source or major modification. Specific public notice requirements and a public comment period are required before the PSD review agency takes final action on a PSD application. The public notice must indicate whether the reviewing authority proposed permit approval, denial, or conditional approval of a proposed major source or major modification. Consideration is given to all comments received provided they are relevant to the scope of the review. Where requested, or at its own discretion, the reviewing authority may conduct a public hearing to help clarify the issues and obtain additional information to assist in making a final permit decision.

6. It must start construction on time.

The source owner, once receiving a PSD permit, must start construction within a reasonable period of time (typically within 18 months of approval) and must stay on a continuous construction schedule. Normally, long delays will invalidate the permit.

II. Background

On August 7, 1977, the President signed the Clean Air Act Amendments of 1977 (1977 Amendments) into law. Those amendments established, in the form of Part C of Title I of the Clean Air Act (CAA), a set of requirements for the prevention of significant deterioration (PSD) of air quality in "clean air" areas. Sections 160–69, 42 U.S.C. 7470–79. The requirements for preconstruction review of new stationary sources and modifications in Part C follow the outline of the PSD regulations that EPA promulgated in 1974, but are more elaborate and in many ways more stringent. Part C also requires that each state implementation plan (SIP) contain the new PSD requirements.

In response to Part C, EPA promulgated two sets of PSD regulations on June 19, 1978. One set specified the minimum requirements that a PSD SIP revision would have to contain in order to warrant EPA approval. *See* 43 FR 26380 (codified at 40 CFR 51.24 (1979)) (hereinafter, the "1978 Part 51 regulations") The other set comprehensively amended the 1974 PSD regulations, incorporating into them the new Part C requirements. 43 FR 26388 (codified at 40 CFR 52.21 (1979)) (hereinafter, the "1978 Part 52 regulations"). EPA intended that, until it had approved a PSD SIP revision for a state, the permitting of new sources and modifications for PSD purposes would continue under the 1978 Part 52 regulations.

On June 18, 1979, the United States Court of Appeals for the District of Columbia Circuit issued a decision that upheld some of the substantive provisions of both the 1978 Part 51 and Part 52 regulations and overturned others. *Alabama Power Company v. Costle*, 13 ERC 1225. In its opinion, the court merely summarized its holdings, but promised to issue supplemental opinions after it had considered any petitions for reconsideration. In an order that accompanied the summary opinion, the court stayed the effect of its decision until it had issued the supplemental opinion. The purpose of that procedure, the court explained, was "to enable EPA to proceed as soon as possible to commence rulemaking or other proceedings necessary to promulgate those revisions in the PSD regulations required by [the court's] rulings * * *." *Id.* at 1227.

By a notice that appeared in the Federal Register for September 5, 1979, EPA began the process the court had in mind. 44 FR 51924. There EPA proposed various amendments to the PSD regulations that were to replace the provisions the court had held invalid, for instance, the definitions of "source," "modification," and "potential to emit." EPA also proposed amendments that were to add entirely new provisions to supplement the replacement provisions, for instance, the *de minimis* exemptions.

Prior to September, EPA had issued, also in response to the 1977 Amendments, various regulations and guidelines relating to the construction of new sources and modifications in and near "nonattainment" areas. In January 1979, the Agency revised its Emission Offset Interpretative Ruling ("Offset Ruling"), which now appears at 40 CFR Part 51, Appendix S (1979). Then, in April 1979, EPA issued a guideline entitled "General Preamble for Proposed Rulemaking on Approval of Plan Revisions for Nonattainment Areas." 44 FR 20372.[1] Finally, in July 1979, EPA issued an interpretative rule concerning certain statutory restrictions on new construction in nonattainment areas. 44 FR 38471 ("construction moratorium").[2] EPA also asked for comment on certain issues concerning new construction in such areas. 44 FR 38583.

In the September Federal Register notice, EPA also proposed various changes to those nonattainment regulations and guidelines. The purpose of those changes generally was to conform those regulations and guidelines to the decisions in *Alabama Power* concerning the statutory terms "source," "modification," and "potential to emit."

On September 18, 1979, EPA announced that it would hold public hearings on the September proposal on October 15 and 16 in Washington, D.C., and on October 18 and 19 in San Francisco. *See* 44 FR 54069. At the same time, the Agency set November 18 as the deadline for submitting information rebutting or supplementing any presentation at the hearings. Subsequently, EPA held the public hearings as scheduled.

On October 4, 1979, EPA announced various corrections to technical errors in the September proposal. 44 FR 57107. At the same time, it extended the period for submitting written comments until November 5, 1979. It added that it would hold the rulemaking docket open until November 18, 1979, not only for information rebutting or supplementing any presentation at the hearings, but also for information rebutting or supplementing any written comment.

On November 9, 1979, EPA announced that it had recently released for public comment a draft of a revision of the *Ambient Monitoring Guideline for Prevention of Significant Deterioration (PSD)* (OAQPS 1.2–096), which the Agency had originally published in May 1978. 44 FR 65084. EPA also announced that it would accept any written comments on the draft until December 10, 1979.

On December 14, 1979, the Court of Appeals handed down its final opinion in *Alabama Power*. 13 ERC 1993. Subsequently, in order to avoid the uncertainty and confusion that would occur in PSD permitting if the final opinion came into effect before EPA completed the rulemaking, EPA and many of the other parties to the litigation petitioned the court to keep the final opinion from coming into effect until June 2, 1980. On March 14, 1980, the court granted the request.

On May 30, 1980, EPA and other parties to the litigation again petitioned the court, requesting a further extension of time until July 18, 1980. The court granted an extension, to July 28, on June 23, 1980.

On January 30, 1980, EPA announced that it would reopen the rulemaking docket for the receipt of written

[1] For supplements to the General Preamble, *See* 44 FR 38583 (July 2, 1979); 44 FR 50371 (August 28, 1979); 44 FR 51924, 51928–29 (September 5, 1979); 44 FR 53761 (September 17, 1979); and 44 FR 67182 (November 23, 1979).

[2] For a fuller description of those nonattainment regulations and guidelines, *See* 44 FR 51925 and 45 FR 31304–05.

comments on various aspects of the rulemaking, including the final opinion of the court, certain issues that the Agency described in the notice, the redraft of the monitoring guidelines, and various meetings between EPA and others. 45 FR 6802.

On February 5, 1980, EPA issued a stay of the 1978 Part 52 PSD regulations as to certain sources and modifications. 45 FR 7800. The stay was effective as of January 30, 1980. Its purpose was "to relieve from the permitting requirements of the 1978 PSD regulations roughly those sources and modifications that would not be subject to the permitting requirements of valid replacement regulations that would comport with the *Alabama Power* opinion." *Id.*

On May 13, 1980, EPA promulgated a stay of the Offset Ruling and the construction moratorium that is similar to the PSD stay. *See* 45 FR 31304. On the same day, EPA promulgated certain amendments to the Offset Ruling, the regulations relating to new source review at 40 CFR 51.18, and the construction moratorium. Those amendments established the geographic applicability of the various nonattainment requirements relating to the construction of new sources and modifications. 44 FR 31307. Those amendments embody EPA's responses to many of the comments on the September proposal.

Finally, on May 19, 1980, EPA promulgated regulations aimed at consolidating and unifying various permit requirements and procedures. 45 FR 33290. Those new regulations contain provisions which will govern the processing of applications for permits under the new Part 52 PSD regulations.

During the course of the rulemaking that EPA began in September, it received approximately 375 written comments. The discussion that follows summarizes the proposals, the comments on them, EPA's responses, and the final provisions.

III. Highlights

Several significant changes from the September 5, 1979 proposal have occurred. These changes include the addition of certain provisions not addressed by the September 5, 1979 proposal but which are necessary under the Act. Several regulatory provisions which are unchanged in substance by today's notice have also been reprinted to clarify the effects of any revised paragraph numbering.

A. *Transition:* The proposed transition scheme for phasing in the additional monitoring requirements has been expanded to require no new monitoring requirements for PSD applications submitted and complete within 10 months of the promulgation date. In addition, today's rules allow less than a full year of monitoring data to be included with PSD applications filed after the above times but before 18 months after the promulgation date. PSD applications filed later than 18 months from the date of promulgation will be subject to the full new monitoring requirements.

B. *Potential To Emit:* Potential to emit is the maximum design capacity of the source, except as constrained by federally enforceable permit conditions. This would include permit conditions restricting hours or type of source operation.

C. *50-Ton Exemption:* Today's regulations essentially delete the "50-Ton Exemption" for both nonattainment and PSD. The eligibility date for the section 165(b) exemption has been changed from August 7, 1977 to March 1, 1978.

D. *Fugitive Emissions:* For the purpose of PSD and nonattainment, "fugitive emissions" now means those emissions released directly into the atmosphere, which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening. Fugitive emissions are not to be considered in determining whether a source would be a major source, except when such emissions come from specified source categories.

E. *Fugitive Dust:* Today's regulations promulgate the proposed deletion of the "fugitive dust exemption" from the applicable provisions of both PSD and the Offset Ruling.

F. *Stationary Source:* The definition of source for PSD purposes has been made more liberal than the previous regulations. Under today's rules, a PSD source is a grouping of all pollutant emitting activities at one location and owned or under the control of the same person or persons. This generally relates to the common notion of a plant. Smaller portions of such a plant no longer will be examined for applicability purposes. For added clarification, pollutant-emitting activities will now be considered part of the same "plant" if they belong to the same "major group" as described in the Standard Industrial Classification Manual. At this time, however, the Agency has decided not to change its previous approach to defining source for nonattainment purposes. Therefore, today's rules continue to incorporate the "dual definition" concept of source which requires consideration of overall emissions from a "plant" and from each "installation" within that plant. In a change from the proposal, this dual definition will apply to major sources in all nonattainment areas designated under section 107 of the Act, regardless of SIP approvability or degree of completion.

G. *Modification:* The definition and treatment of modifications have been changed since the September 5, 1979 proposal. The concept of accumulating minor changes made at an existing minor source until the sum was equivalent to a major stationary source has been deleted. Rather, a source must now qualify as a major stationary source prior to making a modification to become subject to review, unless the change itself is greater than 100 or 250 tons per year. Contemporaneous changes now generally refer to emissions increases and decreases occurring within the same 5-year time period unless the state opts for a different time period in its Part D SIP or PSD program. Reductions, to be creditable, must be enforceable under the SIP before the contemporaneous emission increase would begin construction. Such reductions, as well as significant increases, will be quantitatively assessed on the basis of an "actual emissions" baseline, rather than a "potential to emit" baseline, as was proposed. "Reconstruction" (*i.e.*, 50% or more capital replacement) has been deleted from PSD but has been retained for nonattainment NSR, including the prohibition on construction.

H. *"De Minimis" Exemptions:* Three types of changes from the September 5 proposal appear in today's regulations: (1) different numbers have been developed for defining significant emissions from new sources and significant net emissions increases from modifications; (2) new air quality *de minimis* numbers have been generated and can only be used to exempt PSD sources from the ambient monitoring requirements; and (3) a ten kilometer proximity cutoff has been specified to indicate when a source, regardless of pollutant emissions, must be prepared to demonstrate that no 24-hour impact greater than 1 $\mu g/m^3$ would occur in the Class I area.

I. *Geographic Applicability:* PSD will generally apply only if the otherwise subject major construction locates in a section 107 area which is designated attainment or unclassified under section 107 for any criteria pollutant (regardless of what pollutants the proposed construction would emit or what pollutant qualified it as major). An exception to this rule is that no PSD permit is required for major construction which emits only the pollutant for which the area of location is nonattainment.

J. *Pollutant Applicability:* Any net significant emissions increase of any pollutant subject to regulation under the Act (not just those pollutants for which the source is major) now qualifies as a PSD modification. Nonattainment review will continue to focus on only the major nonattainment pollutant. No PSD review will be required for a given criteria pollutant, if a source would construct in an area designated nonattainment for that pollutant.

K. *Baseline Area/Date:* Baseline area now refers to all section 107 areas which are designated attainment or unclassified for PM or SO_2 (as may be redesignated) in which the PSD source triggering the baseline date would locate or would have an annual air quality impact equal to or greater than 1 $\mu g/m^3$. Interstate impacts, however, do not trigger baseline date. This differs from the proposal, which focused on the AQCR rather than the designated area. Baseline dates are pollutant specific and can be established by the first PSD application of a source with significant emissions of the applicable pollutant. States will have the flexibility to redesignate clean or unclassified areas under section 107 and thereby remove baseline dates for certain areas. However, no redesignation may subdivide the impact area (>1 $\mu g/m^3$) of the source triggering a baseline date.

L. *Best Available Control Technology:* Today's regulations reflect the proposal with one exception. A provision has been added that requires BACT for modifications only when both a net emissions increase occurs at the changed unit(s) and a significant net emissions increase occurs at the plant; BACT applies only to the units actually modified.

M. *Monitoring:* The proposed transition scheme for phasing in the additional monitoring requirements will provide relief for sources covered under the existing regulations that are in the process of monitoring and offer allowances for setup time of monitors in gathering the required data.

N. *Notification:* The notification provisions appearing in the September 5, 1979 proposal have been deleted from today's regulations.

O. *PSD SIP Revisions:* The requirements proposed on September 5 for governing the development of PSD SIP submittals are essentially unchanged. These regulations allow limited flexibility in the development of different but equally effective state plans.

P. *Increment Consumption:* A discussion has been included in the preamble to summarize the effects that the *Alabama Power* decision has had on increment tracking. This section also discusses how certain SIP related issues are to be addressed, such as the Gulf Coast problem (SIP shows a theoretical increment violation in a clean area, unrelated to actual air quality impact) and temporary SIP relaxations. (SIP would be relaxed and only temporary emissions would occur.)

Q. *Public Participation:* The requirements of paragraph (r) of § 52.21 have been replaced with the public participation procedures associated with the consolidated permit regulations (40 CFR 124).

IV. Transition

This section focuses on those provisions of the final PSD and nonattainment regulations which govern the transition from the preexisting requirements to the new ones. It begins with a discussion of the new transition provisions of the Part 52 PSD regulations and then deals in turn with the transition provisions of the Part 51 PSD regulations, the Offset Ruling, the Part 51 nonattainment regulations, and finally the construction moratorium.

A. Part 52 PSD Regulations

The new transition provisions of the Part 52 PSD regulations fall into three categories: those that relate to the new coverage of the regulations, those that relate to the new requirements for best available control technology (BACT) and air quality assessments, and those that relate to the new procedural requirements. The discussion which follows deals with each in that order.

1. *Coverage.*

a. *Proposed transition provisions:* The preconstruction permit requirements of the 1978 Part 52 regulations applied to a certain class of projects that emit or would emit pollutants. The keystone of those regulations, section 52.21(i)(1), provided that "[n]o major stationary source of major modification shall be constructed unless the [permit] requirements of [the Part 52 regulations] have been met." It established the general rule that the permit requirements applied to any "major stationary source" or "major modification." The balance of section 52.21(i) then listed certain exceptions to that general rule. The main exceptions established various "grandfather" exemptions. The permit requirements of the regulations applied, therefore, to any pollutant-emitting project that was "major" and had no "grandfather" status.

In September 1979, EPA proposed to establish new Part 52 PSD regulations whose coverage would be substantially different from that of the 1978 regulations. First, it proposed to define "major stationary source" differently than it had defined that term in the 1978 regulations. Under the 1978 regulations, whether a "source" was "major" depended upon whether its "potential to emit" any pollutant regulated under the Act would equal or exceed certain thresholds. "Potential to emit" referred largely to the maximum rate at which a "source" would emit a pollutant *without* control equipment. Under the amendments that EPA proposed in September, "potential to emit" would be the maximum rate at which a "source" would emit a pollutant *with* control equipment. Second, EPA proposed to define "major modification" differently than it had defined that term in the 1978 regulations. There, a "major modification" was any change at a "source" that would increase the "potential to emit" of the "source" by 100 tons per year of any pollutant regulated under the Act, or 250 tons per year, depending on source type and ignoring any emission reductions. Under the amendments that EPA proposed in September, "major modification" would have become any change at a "source" that would result in a *significant net* increase in the "potential to emit" of the "source." "Significant" is defined as emissions greater than certain *de minimis* values. Finally, EPA proposed to limit the geographic applicability of the PSD permit requirements by adding an exception to section 52.21(i) that would exclude a "source" or "modification" from PSD review on the basis of its location.[3]

Amendments of the sort that EPA proposed in September would have left many projects that previously fell or would have fallen within the coverage of the 1978 Part 52 regulations outside the coverage of the resulting Part 52 regulation. For instance, many new "sources" that were "major" under the 1978 regulations would not have been "major" under the proposed amendments, because while their maximum uncontrolled emissions would exceed the applicable thresholds, their maximum controlled emissions would not.

Of those projects that were or would have been subject to the PSD permit requirements under the 1978 PSD regulations, but not under the proposed

[3] Specifically, EPA proposed that the permit requirements would apply only to any "major stationary source" or "major modification" that would be located in an area designated under section 107 of the Act as attainment or unclassifiable for a pollutant for which the "source" or "modification" would be major or would significantly impact an area in another state which is designated as attainment or unclassifiable for any such pollutant.

amendments, some have already received a PSD permit, while others have not. In September, EPA proposed to put both sets of projects outside the reach of the permit requirements as soon as possible by putting the new definitions of "potential to emit" and "modification" and the new limitation on geographic applicability into effect immediately upon their promulgation. *See* 44 FR 51927. But EPA also proposed that any permit that had already been issued would remain in effect, binding and particular project to its terms, until the permit had been rescinded under a proposed paragraph (w) or had expired under an existing paragraph (s). *See id.* at 51927, 51956. Under paragraph (w), a permittee would have been able to obtain rescission only if the permittee filed a complete application with the issuing authority within 90 days after paragraph (w) had come into effect.

Amendments of the sort that EPA proposed in September would also have brought some projects that previously fell or would have fallen outside the coverage of the 1978 regulations inside the coverage of the Part 52 regulations. For instance, many changes at a "source" that would result in a *gross* increase in "potential to emit" well below 100 or 250 tons per year might nevertheless result in a significant net increase.

In September, EPA proposed to exempt from PSD review certain of these projects that fell or would have fallen beyond the reach of the PSD permit requirements under the 1978 regulations, but not under the proposed amendments. In particular, EPA proposed to "grandfather" any such project which before the promulgation of the new amendments had received each preconstruction permit that the state implementation plan (SIP) required and which will have "commenced" construction within 18 months after promulgation. *See id.* at 51928 (first column), 51953 (proposed § 52.21(i)(7);) 44 FR 57108 (items B(1) and (C)(2)).

Finally, EPA proposed to add another new grandfather provision to § 52.21(i). That provision would have stated that the permit requirements of those regulations do not apply to any "source" or "modification" on which construction "commenced" before August 7, 1977, the date of enactment of the 1977 Amendments. *See id.* at 51928 (first column), 51953 (proposed § 52.21(i)(3)). The purpose of the proposal was merely to state in regulatory form what section 168(b) of the Act, 42 U.S.C. 7478(b), already provides.

b. *Comments and final action on the proposed transition provisions relating to coverage:* EPA received no comments on its proposal to put the new definitions of "potential to emit" and "modification" and the new limitation on geographic applicability into effect immediately upon promulgation. EPA therefore has put those provisions into effect as of the date this notice appears in the **Federal Register.** Some projects that were within the coverage of the 1978 Part 52 regulations, but have yet to receive a PSD permit, are now outside the coverage of the new Part 52 regulations, since the prohibition on construction without a permit in § 52.21(i)(1)(i) no longer applies to them. As a result, construction on them may begin immediately.[4] Because further delay is pointless, and might be harmful in some cases, EPA finds that it has "good cause" to put the new applicability provisions into effect immediately upon promulgation, within the meaning of section 4(d)(3) of the Administrative Procedure Act (APA), 5 U.S.C. 553(d)(3). *See also* APA 4(d)(1), 5 U.S.C. 553(d)(1).

EPA did receive numerous comments on its proposal to rescind certain permits, and to treat them as binding unless and until rescinded. While one commenter agreed with the proposal, most did not. They objected primarily to two aspects of the proposal: first, that it would place on the permittee the dual burden of coming forward with an application for rescission and of providing proof that the project in question does fall outside the coverage of the new Part 52 regulations and, second, that it would bar rescission if the permittee failed to file a complete application within a certain period of time. The commenters argued that EPA had no authority originally to require a permit for any project that falls outside the coverage of the new regulations and that it therefore has no authority now either to place the burden of coming forward and of proof on a permittee or to keep a rescindable permit in effect merely because of a failure to file a complete application for rescission by a certain time.

In response, EPA has promulgated a new provision, § 52.21(w), which does place the burden of coming forward and of proof on the permittee, but imposes no deadline for filing an application. Whether EPA had authority originally to require a permit for a project that falls outside the coverage of the new regulations is immaterial. EPA has authority under section 301(a)(1) of the Act, 42 U.S.C. 7601(a)(1), to fashion within reason the regulatory tools it needs to carry out its tasks. Here EPA has undertaken not only to release certain PSD permittees from the constraints of their PSD permits, but also to settle as finally, as publicly, and as quickly as possible which old permits are binding and which are not. Prospective applicants, in order to prepare applications, and permitting authorities, in order to meet their obligations under the PSD regulations, must assess increment consumption. Confusion and uncertainty over whether particular projects are subject to the emissions limitations in their PSD permits can only frustrate efforts to assess increment consumption. New § 52.21(w) maximizes EPA's ability to perform satisfactorily the tasks it has undertaken.

First, by stating explicitly that a permit generally remains in effect until rescinded, § 52.21(w) gives each permittee with a rescindable permit a strong reason to bring it before the reviewing authority as soon as possible. Second, by putting the burdens of coming forward and of proof on the permittee, § 52.21(w) ensures that the reviewing authority will spend its time efficiently and will have adequate information with which to make a sound decision. Third, by establishing that only the reviewing authority may rescind a permit, the provision promotes the soundness and therefore the finality of the rescission, since the reviewing authority will have the expertise and objectivity necessary to check adequately whether the permittee has applied the intricate applicability rules correctly. Finally, by requiring that the reviewing authority publish each rescission, § 52.21(w) ensures that the status of each permit will be in the public record.

Certain commenters suggested two alternatives to EPA's proposed rescission provision. One alternative was to declare upon promulgation that any PSD permit for a project that falls outside the coverage of the new regulations is null and void as of that time, but that any permittee which concludes it holds such a permit must send the reviewing authority a bare notice of that conclusion. The other alternative was to require any such permittee to send the reviewing authority an application for rescission and to establish that the failure of the reviewing authority to act on the application within a certain period would operate to grant the application. EPA has decided to adopt neither alternative. Under both, a project that should not be able to escape PSD

[4] The partial stay of the 1978 regulations that EPA issued in January 1980 has probably already relieved most of those projects from the permit requirements of those regulations.

constraints would be able to escape them merely because of an oversight or a manpower deficiency. EPA, however, has no authority to allow escape from review on that basis.

Certain commenters also objected to other aspects of the proposed rescission provision. In particular, one commenter asserted that proposed § 52.21(w)(3), which would say that "[t]he permitting authority may approve" an application that does show that the permit is rescindable, should state instead that "[t]he permitting authority *shall* approve" such an application. (Emphasis added.) EPA agrees, and has placed the necessary mandatory language in the final provision. Other commenters urged that the final provision recognize the possibility that a permittee may wish to obtain rescission of only certain elements of a permit. In response, EPA has introduced language under which the reviewing authority may rescind only certain elements, if that is appropriate in the particular case.

With respect to the rescission provision, it should be noted that rescission of a permit would in no way affect any other limitations on the project that may apply by virtue of the SIP or a state permit. It should also be noted that, if a source or modification whose permit is rescinded were later found to be causing or contributing to an increment violation, additional controls might be necessary. *See* 40 CFR 51.24 (a)(3)(1979).

EPA received many comments on its proposal to "grandfather" certain projects that fall outside the coverage of the 1978 regulations, but not the new Part 52 regulations. Two commenters, while not focusing specifically on that proposal, expressed general opposition to "grandfathering" any project that would otherwise fall within the coverage of the new regulations. In its view, EPA should adhere to the transitional rules that it established in the 1978 regulations, so that in general a project would escape PSD review under the new Part 52 regulations only if certain permits were obtained for it by March 1, 1978, and construction "commenced" on it by March 19, 1979.

EPA disagrees that it should or must adhere to the transitional rules in the 1978 regulations in deciding which of the projects in question here should have to get a PSD permit. Part C of Title I of the Act contains two provisions, sections 165(a) and 168, which describe how the PSD permit requirements of Part C are to be implemented. Those sections, however, contradict each other irreconcilably. *See Citizens to Save Spencer County* v. *EPA*, 600 F.2d 844, 851–54, 860–73 (D.C. Cir., 1979). EPA has authority under section 301(a)(1) of the Act, therefore, to set transitional rules which accommodate reasonably the purposes and concerns behind the two contradictory provisions. *See id.* at 873–74.

The court in *Citizens to Save Spencer County* identified those "considerations" as follows:

> (1) enhanced protection of the environmental quality of the nation's air; (2) minimization of economic dislocation and loss as a result of such enhanced protection; (3) a heightened enforcement role for states * * *; and (4) facilitation of an efficient administrative transition from enforcement of the "old" to "new" preconstruction review requirements. (*Id.* at 869 (footnotes omitted).)

Here, the proposed grandfather provision would reasonably accommodate those considerations. Most of the projects in question are modifications that would result in a significant net increase in the maximum controlled emissions of the "source," but not in a gross increase in uncontrolled emissions equal to or above 100 or 250 tons per year. This discrete group of small modifications, even in the aggregate, have a relatively minor effect on air quality. But, because they are numerous, delaying them by imposing new PSD requirements could frustrate economic development. The proposed provision would strike a rough balance between the benefits and the cost of applying PSD to those projects by allowing any company that has already obtained each of the preconstruction permits otherwise necessary under the SIP to proceed to construction without delay. To require such a company to obtain a PSD permit could mean substantial delays. To impose such delays here would be excessive.[5]

One commenter urged EPA to promulgate a grandfather provision that would use the date of complete application instead of the date of permit issuance. The commenter was concerned that the proposed provision would treat unfairly a company that obtained the last permit necessary under the SIP just a day or two after the date this notice appeared in the **Federal Register.** Use of such a date, however, might exempt many more projects from review. Hence, in EPA's view, it would fail to give adequate expression to the interests behind section 165, especially the goal of protecting air quality.

[5] Even if the conflict between sections 165(a) and 168 had not conferred on EPA the discretion to exempt certain projects that would otherwise be subject to PSD review for the first time, EPA would have authority under section 301(a)(1) to exempt those projects in order to phase-in new requirements on a reasonable schedule.

Certain commenters pointed out that a company might be unable to "commence construction" within the proposed 18-month period, because it might be unable to get sufficiently in advance any preconstruction permits that federal or state law outside the SIP might require. They recommended that EPA set the deadline 18 months from issuance of the last necessary federal authorization. That recommendation parallels a proposal EPA made in July 1979 to amend the grandfather provisions of the 1978 regulations so as to extend the "commence" construction deadlines in those provisions generally to a date nine months from the issuance of the last necessary federal authorization. *See* 44 FR 42722. EPA has not yet completed that rulemaking. When it does, it will decide whether to accept the recommendation of the commenters here.

EPA has decided to promulgate the grandfather provision basically as proposed. *See* § 52.21(i)(4)(v). The final provision contains the following clause: "the owner or operator * * * obtained all final federal, state and local preconstruction approvals or permits necessary" under the SIP by a certain date. EPA intends that clause to refer only to the date on which the reviewing authority issues the permit. For emissions increases as a result of SIP relaxations, the appropriate date is the effective date of final EPA approval. Because of the construction moratorium, 40 CFR 52.24, 44 FR 38471, some SIP permits may be issued before the time that the owner or operator is allowed to begin construction. Nevertheless, in EPA's view, the owner or operator "obtains" the permit when the reviewing authority issues it, even if permission to begin construction takes effect subsequently.

EPA received no comments on its proposal to put into regulatory language the provision in section 168(b) of the Act that only the PSD regulations in effect before August 7, 1977, apply to any project on which construction "commenced" by then. Hence, EPA is promulgating that provision basically as proposed. *See* section 52.21(i)(4)(i).

2. *Substantive Provisions Relating to BACT.*

a. *Proposed transition provisions:* In September, EPA proposed certain new substantive requirements. One of the new requirements was that a project apply BACT for each pollutant regulated under the Act that the project would emit in a significant, but "minor" amount. Under the 1978 Part 52 regulations, a project has to apply BACT only for each pollutant regulated under the Act that the project would emit in a

"major" amount. EPA added that it intended to put the new BACT requirement into effect immediately upon its promulgation.

In proposing the new BACT requirement, EPA also proposed to exempt certain projects from it. In particular, the Agency proposed not to apply the requirement to any project whose application for a PSD permit was complete before the requirement came into effect. *See* 44 FR 51928, 51954 (proposed § 52.21(j)(2)).

b. *Comments and final action on proposed transition provisions relating to BACT requirements:* In general, those commenting on the proposal to grandfather any project whose application was complete before the date of publication of this notice from the new BACT requirement favored such an exemption for at least those projects. Only two commenters, the same two who opposed the grandfather provision discussed above, opposed such an exemption for any project. They argued that EPA should adhere to the transitional rules that it established in the 1978 regulations, so that the new BACT requirements would apply to any project that fell or would fall within the coverage of those regulations, even to those which have already received a PSD permit.

EPA disagrees that it should or must adhere to the 1978 transitional rules in applying the new BACT requirements. As discussed above, the court in *Citizens to Save Spencer County* held that EPA has a "responsibility to harmonize the statutory provisions [sections 165(a) and 168] so as to implement the congressional mandate that new federal preconstruction review requirements be instituted promptly but with minimum economic dislocation." 600 F.2d at 851. Requiring a company which has already received a permit, or completed application for one, to amend project designs and permit applications to include BACT for pollutants to be emitted in "minor" amounts would hardly minimize economic dislocation. To the contrary, it would delay construction substantially in many cases. The benefits of that delay in those cases would probably fail to counterbalance its cost, since the new BACT requirements would apply only to pollutants this discrete group of projects would emit in "minor" amounts. Thus, applying the new BACT requirements retroactively to projects that already have a permit or a complete application would fail to give adequate expression to the economic considerations behind section 168.

Another commenter argued that the proposal did not go far enough, in that it would require companies which on the date of promulgation were just about to file a complete application to amend project designs and applications. The commenter urged EPA to apply the new BACT requirement only to projects whose applications were not complete within one year after the date of publication of this notice in the **Federal Register**. That alternative, however, would fail to give adequate expression to the environmental considerations behind section 165(a). EPA therefore has rejected it, too.

Instead, EPA has decided to adopt a provision like the proposal which exempts from the new BACT requirements any project whose application was complete before this notice appears in the **Federal Register**. *See* § 52.21(i)(9). EPA believes that the final provision reasonably accommodates the purposes and concerns behind sections 165(a) and 168.[6]

The final provision differs from the proposed provision somewhat. First, it appears in paragraph (i), instead of paragraph (j), the provision that sets forth the general BACT requirement. EPA has sought to gather each of the exemption provisions into paragraph (i). Second, the new exemption provision exempts an eligible project from the new BACT requirement entirely, but adds that the project is subject to the BACT requirements of the 1978 regulations, if they would otherwise have applied. The purpose of that structure is in part to assure that BACT would apply to a pollutant for which the project would be "major" under the 1978 regulations, but "minor" under the new Part 52 regulations due to the new concepts of "potential to emit" and "modification."

The final Part 52 regulations contain a definition of the term "complete" in reference to an application. Under that definition an application becomes "complete" when it contains all of the information necessary for application processing.

It should be noted, finally, that the date an application was complete will generally differ from the date on which the reviewing authority makes its completeness determination, since the filing of the last necessary piece of information will typically occur before the determination is made. When EPA makes a completeness determination, it will specify the date as of which the application was "complete." That date will be the date on which the last necessary piece of information was received. One of the provisions of the Consolidated Permit Regulations, 40 CFR 124.3(f) (discussed below), refers to the "effective date" of an application. Generally, the "effective date" of an application will follow the date it is "complete."

3. *Substantive Provisions Relating to Air Quality Analyses.*

a. *Proposed transition provisions:* Another new substantive requirement that EPA proposed in September was that an applicant provide an analysis of air quality in the area the project would affect for each pollutant regulated under the Act that the project would emit in "minor," but still significant, amounts. Under the 1978 regulations, an applicant had to provide such an analysis only for those pollutants for which the project would be "major" and for which EPA had set a national ambient air quality standard (NAAQS). The remaining new requirement was that, if the project would emit particulate matter or sulfur dioxide in a significant amount, the analysis focus on the extent to which ambient concentrations of the particular pollutant had consumed the applicable PSD increments.

In proposing the new requirements for air quality analyses, EPA also proposed to exempt certain projects from them. In particular, EPA proposed not to apply the new requirements to any project whose application was complete before the requirements came into effect. *See* 44 FR 51928, 51954 (proposed § 52.21(n)(1)(i)).

The 1978 Part 52 regulations contained a requirement that any air quality analysis for a pollutant for which a NAAQS exists ("criteria pollutant") must generally include monitoring data gathered over and relating to the year preceding the submission of a complete application. In September, EPA proposed a reformulation of that requirement. That requirement, however, when coupled with the new requirement for an analysis for each criteria pollutant emitted in "minor" amounts, could cause a prospective applicant substantial delay. As a result, EPA also proposed to require any applicant who does not file a complete application before the date of promulgation to gather monitoring data for any such "minor" pollutant only over the period (up to one year) from the date of promulgation and the date the applicant would file an otherwise complete application. *See id.* at 51928, 51954 (proposed § 52.21(n)(1)(iii)).

b. *Comments and final action on transition provisions relating to air quality analysis requirements:* Two

[6] Even if the conflict between sections 165(a) and 168 had not conferred on EPA the discretion to exempt projects with a complete application, EPA would have authority under section 301(a)(1) to exempt them, since applying the new BACT requirements to such projects would be unfair.

commenters argued that EPA should adhere to the transitional rules of the 1978 regulations with respect to the new requirements for air quality analyses. In their view, the monitoring requirements should apply in general to any "major" project for which certain permits were not obtained by March 1, 1978, and on which construction had not commenced by March 19, 1979. Certain other commenters objected to any application of the new monitoring requirements to a company which, although it had not filed a complete application by the date of promulgation, had nevertheless previously undertaken a program of monitoring the EPA or a state had approved.

Some additional comments were directed to the proposed phase-in provision. Those comments contended that a prospective applicant would find it impossible to satisfy that provision, since the purchase, installation, and "debugging" of new monitoring equipment, together with the analysis of any new data, would require at least several months. Many commenters did note that the draft of the revision of the monitoring guideline would allow three months for those tasks, but asserted that even three months would generally be insufficient. See U.S. EPA, *(Draft) Ambient Monitoring Guidelines for Prevention of Significant Deterioration (PSD)*, (October 1979). Some recommended an allowance of 2–5 months, others 6–9 months, and still others more than 10 months.

A number of commenters observed that the proposed regulatory language failed to embody the intent that the preamble had described. First, the proposed exemption for each "major" project whose application was complete before the date of promulgation focused only on the new requirement for an analyses for each pollutant that the project would emit in a "minor" amount. Hence, it would have failed to shield each such project from the new requirement for an analysis for each non-criteria pollutant that the project would emit in a "major" amount. Second, the provision that would have phased-in any new monitoring requirements focused only on projects whose applications were complete by the date of promulgation. Consequently, it specified no phase-in rules for projects whose applications were not complete by then, the very projects that EPA intended the rules to benefit.

Finally, one commenter pointed out an anomaly in the proposed phase-in provision: it focused only on the new requirement, in proposed § 52.21(n)(1)(iii), that an applicant provide monitoring data for any criteria pollutant that the project would emit in "minor" amounts. As a result, the proposed provision would have required a company with a project that is "major" under the new regulations, but was not under the 1978 regulations, to gather the full amount of monitoring data for each of its "major" pollutants, but none of its "minor" pollutants. But, since the monitoring requirements would have been new for the "major" pollutants, as well as the "minor" pollutants, such a company should have protection with respect to the "major" pollutants, too.

The final transition provisions relating to the new requirements for air quality analyses adhere to the spirit of the proposed provisions, but differ substantially in structure and articulation. One of the four final provisions, § 52.21(i)(9), exempts certain sources and modifications from the new requirements with respect to monitoring entirely. It provides that those requirements shall *not* apply to a source of modification that was subject to the 1978 Part 52 regulations, if its application becomes complete on or before the date this notice appears in the **Federal Register.** Instead, the air quality analysis requirements in the 1978 regulations apply to the source or modification.

Two of the three remaining provisions exempt certain other sources and modifications from the new monitoring requirements for criteria and non-criteria pollutants. One of those provisions, § 52.21(i)(10)(i), exempts a source or modification that would have been subject to the 1978 Part 52 regulations from those new monitoring requirements, if its application becomes complete with respect to the requirements of the new Part 52 regulations, other than the new monitoring requirements, on or before a date ten months from the date of promulgation. The provision adds the clarification that the monitoring requirements of the 1978 regulations apply instead to the source or modification. The other exemption provision, § 52.21(i)(10(ii), is similar. It exempts a source or modification that would not have been subject to the 1978 Part 52 regulations, if its application becomes complete with respect to the requirements of the New Part 52 regulations, other than those for monitoring, on or before a date ten months from the date this notice appears in the **Federal Register.**

The remaining provision, § 52.21(m)(1)(v), phases-in the monitoring requirements of new § 52.21(m)(1)(iv) to the extent that they place monitoring burdens on an applicant that the 1978 Part 52 regulations would not have imposed. Section (m)(1)(iv) provides in general that any required air quality analysis for a criteria pollutant must include monitoring data gathered over a period of at least one year. However, the new phase-in provision establishes the general rule that for certain applications the required monitoring data shall have been gathered over a period at least equal to the period from the date six months from the date of promulgation to the date the application becomes complete, except as to the monitoring requirements of the new Part 52 regulations. The applications to which this provision applies are those which become complete, except as to those monitoring requirements, between the date ten months from promulgation and the date eighteen months from promulgation. The new phase-in provision then states three exceptions to that general rule. First, an applicant with a project that would have been subject to the 1978 Part 52 regulations must provide at least whatever monitoring data the 1978 Part 52 regulations would have required the applicant to provide. Second, if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a shorter period (not to be less than four months), the required data may be gathered over at least that shorter period. Finally, if the monitoring data would relate exclusively to ozone and would not have been required under the 1978 regulations, the Administrator may waive the otherwise applicable requirements of the phase-in provision to the extent that the applicant shows that the monitoring data would be unrepresentative of air quality over a full year.

The following example illustrates how the proposed phase-in provision works. A company proposes to construct a new plant that would emit sulfur dioxide and particulate matter. Under both the new Part 52 regulations and the 1978 regulations, the plant would be "major" for sulfur dioxide and "minor" for particulate matter. The emissions of particulate matter would not be *de minimis*. But for the phase-in provision, the new Part 52 regulations would require an application for a permit for the plant to contain a year's worth of monitoring data for both sulfur dioxide and particulate matter. (This assumes that the Administrator does not determine that a complete and adequate analysis could be accomplished with data gathered over a shorter period.)

The 1978 regulations would have required the application to contain a year's worth of data for just sulfur dioxide. The company submits an application which becomes complete, except with respect to monitoring, at the end of the fifteenth month after promulgation. Under the phase-in provision, the application must contain (1) a year's worth of monitoring data for sulfur dioxide and (2) nine months' worth of data for particulate matter.

The four final provisions embody EPA's response to the comments on the proposals. First, EPA has adopted the fundamental approach of the proposal, which was to apply the new monitoring requirements prospectively only. EPA has concluded that that approach reasonably accommodates the purposes and concerns of sections 165(a) and (e)(2), on the one hand, and section 168, on the other. In brief, the approach institutes the new requirements promptly, but with minimum economic dislocation. See *Citizens To Save Spencer County* v. *EPA*, 600 F.2d at 851. Full and immediate application of the new monitoring requirements would have caused substantial delays in the submission of complete applications and hence the issuance of permits, but provided little direct environmental benefit in return. As for applicants who undertook an approved program of monitoring before the date of this notice, the phase-in provision affords them adequate protection from delay, while at the same time generally demanding as much compliance with the new monitoring requirements as possible.[7] In short, EPA disagreed with the commenters who complained that the proposals would have instituted the new requirements too late, and with those who complained that the proposals would have instituted them too soon.

Second, with respect to the new monitoring requirements for criteria and non-criteria pollutants, EPA has established a grace period of ten months in the final grandfather provisions. It has done so because it agrees with the commenters who asserted that instituting a new monitoring program and analyzing the data it generates requires more than three months in many, if not most, circumstances. EPA has selected a grace period of ten months with respect to monitoring for both criteria and non-criteria pollutants, first, because six months is an estimate of the amount of time that would generally be needed to complete those tasks and, second, because there is little usefulness to less than four months of data for most pollutants.

The promulgated provisions cure the ambiguities in the proposal observed by some commenters. Section 52.21(i)(10) exempts an eligible project from the requirements relating, not only to any non-criteria pollutant that it would emit in "minor" amounts, but also to any non-criteria pollutant that it would emit in "major" amounts. In addition, the phase-in provisions now deal explicitly with projects whose applications were *not* complete by the applicable deadline. Finally, § 52.21(i)(10) protects not only projects that were subject to the 1978 regulations, but also projects that were not subject to them.

4. *Comments on the effective date of the substantive provisions.*

In proposing the new substantive provisions relating to BACT and air quality analyses the Agency stated that it intended to put those new provisions into effect immediately upon their promulgation. One commenter contended that EPA should put the new provisions into effect 30 days after promulgation, rather than immediately on the date of promulgation, so that "potential applicants [would have] sufficient lead time in planning modifications and new sources." With respect to the new provisions relating to air quality monitoring, the 10-month grace period and phase-in provision described above should satisfy the concerns of the commenter. With respect to the new BACT provisions, however, EPA disagrees. Prospective applicants have had ample warning of the new BACT provisions. The court in *Alabama Power* held in June of 1979 that Congress intended them to be imposed and in September 1979 EPA specified when it intended to impose them. Therefore, there is good cause to make these requirements immediately effective. The Administrative Procedure Act (APA), moreover, would not require a 30-day delay in implementation, since the provisions amount to legal interpretations. *See* APA section 4(d)(2), 5 U.S.C. section 553(d)(2).

5. *New Provisions Governing Procedure.*

EPA recently promulgated regulations aimed at consolidating and unifying various permit requirements and procedures. *See* 45 FR 33290 (May 19,1979) (the "Consolidated Permit Regulations"). Those new regulations contain provisions which will govern the processing of applications for permits under the Part 52 PSD regulations. Those provisions appear as 40 CFR 124.1–124.21 and 124.41–124.42, 45 FR 33485–93. Paragraph (r) of the 1978 Part 52 regulations has governed the processing of PSD permit applications under those 1978 regulations.

The Consolidated Permit Regulations contain a provision, section 124.21, which describes the transition from the procedures of paragraph (r) to the new consolidated permit procedures. It provides that those new procedures shall "apply to PSD proceedings in progress on July 18, 1980." 45 FR 33492. It adds that the requirements of sections 124.9 and 124.18, which would require the preparation of a formal administrative record, shall apply only to "PSD permits for which draft permits [*i.e.*, preliminary determinations] were prepared after the effective date of these regulations." *Id.*

In promulgating the new Part 52 regulations, EPA has adopted a new paragraph (q). It states that the new consolidated permit procedures govern the processing of PSD permit applications to the extent that they apply. It adds that the procedures of the 1978 Part 52 regulations continue to apply to the extent that the new procedures have not yet displaced them. In time, the new procedures will displace the old ones entirely.

B. Part 51 PSD Regulations

In September, EPA did not propose an amendments to the 1978 Part 51 regulations that paralleled the proposed Part 52 transition provisions. The Part 51 amendments that EPA did propose paralleled only the Part 52 provisions that would affect coverage and substance. The few comments that were submitted focused on this gap.

One commenter asked that EPA state in the Part 51 regulations that a state which has already adopted and obtained EPA approval of its own PSD program may, in conforming that program to the new Part 51 regulations, adopt a rescission provision like new § 52.21(w) into its plan. EPA believes that it is unnecessary to make such a statement in regulatory form. A state is free, in any event, to adopt such a provision and EPA would approve it.

Another commenter asked EPA to establish in the Part 51 regulations that a state with its own PSD program, in adopting new, more stringent requirements for BACT and air quality assessments in accordance with the new Part 51 regulations, may also adopt grandfather provisions that would apply the new requirements prospectively. In response, EPA had added a new section 51.24(a)(6) to the Part 51 regulations. The new section provides that PSD SIP revision may operate prospectively,

[7] Even if the conflict between sections 165(a), 165(e)(2), and 168 had not conferred on EPA the discretion to exempt certain projects from the new air quality analysis requirements, EPA would have had authority under section 301(a)(1) to exempt those projects, because application of those requirements would have been unfair.

thereby establishing that a state may adopt grandfather provisions of that sort. It adds, however, that the revision must take effect no later than the date of its approval. EPA has also added a new section 51.24(i)(9) to the Part 51 regulations. It provides that an approval revision to a state PSD program, which program EPA has already approved, may contain transition provisions that parallel the new Part 52 transition provisions. The new section also establishes that the proposed transition provisions must operate at least as stringently as their Part 52 counterpart would in the context of the state PSD program.

Finally, a third commenter urged EPA to require a state with its own PSD program to delete these aspects of the plan that go beyond the requirements of the new Part 51 regulations within nine months after the date of promulgation of those new regulations, unless the state within that period of time submits "to EPA written acknowledgment that it is not required by federal law to include such provisions in its state plan, but has nevertheless elected to do so under state law pursuant to section 116 of the Act." The commenter feared that, absent such a requirement, inertia and lack of resources might prevent some states from deleting the provisions in question. Such a requirement, however, would interfere unnecessarily in the affairs of a state. EPA, moreover, doubts that it would have the authority in any event to repeal the more stringent aspects of a state plan simply because the state failed to say by a certain time that it wanted to retain those aspects. EPA therefore has not promulgated the requirement sought by the commenter.

After examining the Part 51 regulations in response to those comments, EPA has decided to add two new provisions. The first, section 51.24(a)(6), merely states in regulatory form what section 406(d)(2)(B) of the Clean Air Act Amendments of 1977 already states: any PSD SIP revision required by the new Part 51 regulations must be adopted and submitted within nine months of the date this notice appears in the Federal Register. The second provision, § 51.24(a)(6)(ii), establishes explicitly that any PSD SIP revision must contain provisions which describe when and as to what sources and modifications the revision is to take effect. The purpose of that requirement is merely to minimize confusion and uncertainty during the transition from any old to new PSD SIP requirements.

C. Offset Ruling

The amendments to the Offset Ruling which EPA is announcing in this notice expand its coverage, just as the amendments to the Part 52 PSD regulations expand its coverage. In EPA's view, the expansion of the coverage of the Offset Ruling should operate prospectively only. Hence, it has inserted into the Ruling a grandfather provision that parallels the relevant PSD grandfather provision. It provides that the Ruling does not apply to any source or modification that was not subject to the version of the Ruling in effect prior to the date this notice appears in the Federal Register, if all necessary SIP permits were obtained for the source or modification by that date and if construction commences within 18 months of that date.

D. Part 51 Nonattainment Regulations

Pursuant to section 406(d)(2)(B) of the Clean Air Act Amendments of 1977, states will have nine months after the date of this notice appears in the Federal Register in which to adopt and submit any new definitions and other regulatory provisions required by new 40 CFR 51.18(j). States need not adopt verbatim the definitions in section 51.18(j)(1), but they must demonstrate that any different definitions they retain or adopt have the effect of being at least as stringent as those set out in § 51.18(j)(1). If a state plan currently includes definitions or regulatory provisions which are more stringent than the nonattainment definitions and other provisions contained in these final rules, the state has the choice of retaining its current regulations or of revising them so as to conform to EPA's rules. If a state does not submit any necessary revisions to its plan within nine months after the date this notice appears in the Federal Register, the construction moratorium will go into effect 15 months after this date in all nonattainment areas in that state. The additional 6 months is consistent with the review period allotted for Part D submitted under section 110(a)(2)(I) and 129(c) of Pub. L. 95–95.

EPA received only one comment on transitional requirements for § 51.18(j). This commenter requested that EPA allow states which have already adopted NSR regulations pursuant to section 173 of the Act be permitted to adopt a rescission provision like that of § 52.21(w). EPA believes that to make such a statement in regulatory form is unnecessary. A state is free to adopt such a provision, and EPA will approve it, provided that the state's NSR program meets the requirements of section 173 and that permit rescission will not interfere with reasonable further progress or attainment of ambient air quality standards.

E. Construction Moratorium

The amendments to the construction moratorium expand its coverage in some ways, too. Hence, EPA has promulgated a grandfather provision patterned after the relevant PSD and Offset Ruling provisions. It appears as § 52.24(g).

F. Pending SIP Revisions

By the date this notice appears in the Federal Register, EPA will not have taken final action on many PSD and nonattainment SIP revisions that states have already submitted. EPA intends to review those pending revisions under the requirements that applied to them before the date of promulgation. To wait until a state had revised its revisions to bring them into line with the new PSD and nonattainment requirements would cause the state and its industry to suffer a heavy and undue burden, particularly in those cases where approval of a Part D plan is needed to lift the construction moratorium.

G. Effective Date of the Nonattainment Provisions

EPA has made all of the new nonattainment provisions announced here effective immediately upon their promulgation. EPA finds that it has "good cause" within the meaning of the relevant provisions of the Administrative Procedure Act to do so. First, the new provisions in the main provide relief from pre-existing regulatory burdens. Second, the decision in *Alabama Power* and the September 1979 proposal provided ample warning of the new changes. Finally, it is important for planning and management by EPA, the states and industry that these new provisions come into effect as soon as possible.

H. Miscellaneous

Under the amendments announced in this notice, each set of PSD and nonattainment regulations uses the phrase "this section" at some points and phrases such as "40 CFR 52.21" at other points. EPA intends "this section," when used in a particular set of regulations to refer only to the version of the regulations which has resulted from the amendments announced here. For example, the phrase "this section" in new § 52.21(i)(1)(i) refers only to the Part 52 PSD regulations as newly constituted. EPA intends phrases such as ' '40 CFR 52.21" to refer to any version of the particular regulations which has appeared or is to appear at the particular location in the Code of Federal Regulations. For example, "40 CFR 52.21" refers to each version of the Part 52 PSD regulations that has ever

existed, including the version that has resulted from the amendments announced here.

V. Potential to Emit

The preconstruction review requirements of section 165 of the Act apply to any "major emitting facility." 42 U.S.C. 7475. Pursuant to section 169(1), that term includes any stationary source which emits or has the "potential to emit" 100 tons per year or more of any pollutant, for sources included in one of 28 specified source categories, or 250 tons per year or more of any pollutant for any other type of source. 42 U.S.C. 7479(1).

A. Control Equipment

Obviously, many more sources would be affected if the term "potential to emit" referred to the amount of pollution that a source would emit without controls than if it took the operation of control equipment into account. In the PSD regulations promulgated on June 19, 1978, EPA took the former approach and defined "potential to emit" as "the capability at maximum capacity to emit a pollutant in the absence of air pollution control equipment." 40 CFR 51.24(b)(3), 52.21(b)(3) (1979). This approach was rejected by the *Alabama Power* decision which held that Congress intended that, in determining a facility's potential to emit, EPA "must look to the facility's 'design capacity' a concept which not only includes a facility's maximum productive capacity (a criterion employed by EPA) but also takes into account the anticipated functioning of the air pollution control equipment designed into the facility." 13 ERC 1993, 2003.

In response to the court's decision, EPA proposed, on September 5, 1979, a revised definition under which the application of control equipment would be taken into account in computing potential emissions. That approach, which was very strongly supported by public comments, is now being promulgated. 40 CFR 51.24(b)(5) and 52.21(b)(5).

The proposal noted that EPA will assume that a facility's air pollution control equipment will function in the manner reasonably anticipated. In this promulgation the Administrator is implementing the proposed approach by requiring that operation of control equipment be an enforceable requirement. In other words, a company may receive credit for the application of control equipment only to the extent that the resulting reduction in emissions is federally enforceable (see below). This provision is necessary, as a practical matter, to ensure that sources will perform the proper operation and maintenance for the control equipment. Thus, a source installing control equipment that would reduce emissions more than that required by generally applicable emissions limitations cannot receive credit for the additional increment of pollution reduction, unless it is federally enforceable. The definition of "potential to emit" is being modified appropriately.

Under the definition being promulgated, the potential to emit of existing sources with respect to the treatment of enforceable in-place control equipment shall be defined in the same fashion as discussed above for new sources. This responds to commenters who complained of this discrepancy in the September 5 proposal. Accordingly, potential to emit for all sources means the ability at maximum design capacity to emit air pollution, taking into account any *in-place* control equipment. Design capacity, and thus potential to emit, may be further limited if control equipment better than that normally required by the applicable SIP is installed and a correspondingly more stringent level of emissions control is included as an enforceable permit conditon. Finally, it should be noted that the potential to emit of a stationary source in today's rule is of primary importance in defining when a source would be major; it is not generally used in determining increment consumption or the baseline for assessing emission increases and decreases at a source (*see* Modification).

B. Continuous Operation

Under the existing definition of "potential to emit," a source can avoid PSD review if it binds itself, in a federally enforceable permit, to sufficiently limited hours of operation. 40 CFR 51.24(v)(5), 52.21(b)(5) (1979). In the September 5, 1979 proposal, EPA proposed to delete the clause which allows such adjustments and to presume continuous (24 hours per day, 365 days per year) operation. Consistent with that change, EPA also proposed to delete, from the same regulation, the words "or amount"; those words at present allow permit limitations on amount of materials combusted, processed, or stored to be considered in computing potential to emit. In making this proposal, the Administrator also requested comment on the need to adjust the assumption of continuous operation, in the case of sources which are physically incapable of such operation.

Many commenters (169 of 173) have strongly criticized this proposal, the most frequent response being that few sources operate constantly, and most cannot do so. These commenters also advised the Agency of certain benefits which would accrue from allowance of permit conditions in computing potential to emit. For example, a benefit noted is that such an approach would better relate the PSD permit applicability of new sources to the offset potential of existing sources, and to how the increment would be consumed. This approach was also claimed to be consistent with EPA's stated goal of developing PSD requirements which will fit into state programs in such a way as to minimize disruption of those programs and promote PSD SIP development by the states. Additionally, insignificant reviews would be minimized and PSD applicability would be more reflective of emissions actually produced by the source.

There was some comment in support of the proposal. A state environmental agency noted that emissions limits calculated from less than continuous operation are less easily enforceable than those which are based on continuous opertion. An environmental group supported the proposal on the grounds that it is consistent with the interpretation of "full design capacity," that it would be appropriately technology-forcing, and that it is necessary to protect the short term increment. These concerns are addressed below.

The court based its definition of "potential to emit" on the source's full design capacity. *Id.* at 2003. The June opinion in *Alabama Power* did not directly address the acceptability of legal limitations on operation but did stress design capacity in the sense of physical and technological, as opposed to operational, limitations. However, in the final opinion, released on December 14, 1979, the court stated:

> The design capacity of a facility rarely contemplates uninterrupted operation 24 hours per day, 365 days per year. Projected downtime for repairs and maintenance *or other factors* may reduce the hours of operation that are appropriately considered in the calculation of a facility's "potential to emit." (*Id.* at 2005, n. 73.) (Emphasis added)

EPA interprets this language as not precluding permit conditions, that are federally enforceable under the applicable SIP, from circumscribing a source's potential to emit. In view of the above, the Agency believes it has discretion to adopt the most reasonable approach to this issue and has, therefore, reconsidered its proposal. Today's regulations recognize the ability of all federally enforceable limitations to constrain the potential to emit of a stationary source.

The Administrator believes that the policy concerning "enforceable permit conditions" is responsive to most of the concerns raised by commenters who were critical of EPA's proposal. New sources are now allowed to avoid NSR for PSD and nonattainment areas by limiting their type or amount of operation. Moreover, potential to emit is now defined in the same way for new and existing stationary sources. The use of certain permit conditions also addresses the concerns raised regarding physical incapability and peak load or standby units. This is, source owners or operators can now agree to source-specific permit conditions to limit their operation as appropriate. Such conditions can make infrequent operation and other physically limiting factors outside the design capacity of an emissions unit legally enforceable and can thereby limit the applicability of NSR.

The final policy concerning enforceable permit conditions has also taken in account the concerns of those favoring the proposal. One commenter noted that limited operation conditions would require greater enforcement attention. The Administrator agrees, but he believes that such conditions can be reasonably enforced. Another commenter also noted the need to minimize any air quality threats to short term increments by sources with intermittent operation but high short term rates of emission. No commenter presented a solution to this problem. EPA believes, however, that short term emissions limitations can be computed to address threats to short term increments, should any problems actually arise. It would be the responsibility of the reviewing authority to identify, in periodic evaluations, any sources causing such problems and apply appropriate limitations on their emissions. The Administrator will consider rulemaking to develop short term applicability thresholds, if necessary, after a reasonable amount of review experience has been developed.

Finally, as a result of today's policy, a potential problem exists concerning the future relaxation of a preconstruction permit that previously caused a proposed stationary source to enjoy minor rather than major status. For example, a source might evade NSR through agreement to unrealistically stringent operating limitations in its permit, and later obtain a relaxation of the condition. The Agency believes that the problem can be dealt with by 40 CFR 52.21(r)(4), entitled "Source Obligation." That paragraph provides that any owner or operator of a source, who would receive a relaxation of a permit condition that had enabled avoidance of NSR, would then become subject to review for all units subject to the original permit, as if they were new sources. In other words, if operational limitations are to be considered as an aspect of a source's design, it is reasonable that the permit accurately incorporate that design. If such operation is changed, the permit, and concomitant obligations, should be correspondingly changed.

C. Additional Guidance

Fugitive emissions under today's regulations are applicable in defining potential to emit. (*See* Fugitive Emissions.) However, like the proposal, such emissions do not count in assessing permit applicability unless a specified type of source category is involved. To accomplish this a specific exemption has been added to the final regulations by which fugitive emissions will be included in determining potential to emit only for specified source categories.

The definition of "potential to emit" is important not only to PSD preconstruction review, but also to NSR under the Offset Ruling (44 FR 3274), the statutory requirements for nonattainment areas, and the restrictions on construction in sections 110(a)(2)(I) and 173(4) of the Act. EPA is promulgating for each of those nonattainment programs the same definition of "potential to emit" that it is promulgating for the PSD program, as well as a provision like § 52.21(r)(4). EPA also intends this definition to be implemented for those programs in the same way as for PSD.

EPA has traditionally distinguished, for the purpose of NSR, between the direct emissions of a source and its "secondary emissions." (*See* Additional Issues.) In revising the Offset Ruling in January 1979 the Agency added a definition of "secondary emissions" and a provision describing for what purposes and under what circumstances those emissions are to be taken into account. *See* 44 FR 3281, 3283–84 (January 16, 1979). EPA is now adding that concept to the PSD regulations and to the nonattainment provisions relating to NSR and the restrictions on construction. For each of those sets of provisions "secondary emissions" are to be excluded in determining whether the regulations apply to a source (*i.e.*, whether a source or modification is "major"). Similarly, the control technology requirements of BACT and lowest achievable emission rate (LAER) do not apply to secondary emissions. How the Agency would treat those emissions for other purposes, including PSD air quality impact analysis, is described in Additional Issues.

VI. 50-Ton Exemption

Under the 1978 PSD regulations, stationary sources or modifications with allowable emissions of less than 50 tons per year, 1000 pounds per day, or 100 pounds per hour were in general exempted from the BACT and ambient air quality analysis PSD requirements. 40 CFR 51.24(j)(2), (k), and 52.21(j)(2), (k) (1979). In its preliminary *per curiam* decision the court thought that its ruling on "potential to emit" made a ruling on the 50-ton exemption "academic," since no 50-ton source would ever be major if "potential to emit" referred to controlled emissions. 13 ERC at 1228–29. Nevertheless, it remanded the exemption to the Agency for reconsideration and noted that the Agency had exceeded its authority in establishing the exemption. In response, EPA proposed to delete the provisions which embodied the exemption, and to delete parallel provisions in the Offset Ruling. EPA, however, proposed adding to the PSD regulations a 50-ton exemption for certain modifications. The proposed exemption tracked section 165(b) of the Act closely, but not exactly. Essentially it provided that a source qualifying for the exemption would face a limited air quality review for SO_2 and PM. Use of the exemption would be restricted to modifications, at a plant existing as of August 7, 1977, entailing emissions increases of 50 tons or less of any pollutant after application of BACT and which would impact no Class I area or interfere with the attainment of PM or SO_2 standards. All net emission changes since August 7, 1977 would be aggregated in applying the exemption.

All of the seventeen commenters who focused on the proposed provision expressed general agreement with this approach, but some commenters stated that the exemption should be broader. For example, four commenters wanted an additional 50-ton exemption after each full review. Five commenters requested a special, more lenient, review for pollutants whose emissions rates fall between 50 tons per year and the *de minimis* level in those cases where the exemption would not apply. The Administrator finds no grounds for providing additional exemptions after each review. Similarly, there is no justification or authority under section 165(b) for a special limited review for emissions increases falling between *de minimis* amounts and the 50-ton level. A few commenters suggested that other eligibility values than 50 tons be used. EPA responds that section 165 of the Act

mandates the 50-ton figure, but that much of these commenters' concerns are dealt with by the *de minimis* provisions being promulgated today. Two other commenters requested that the exemption be governed by net emissions increases. Today's regulations provide that review is applicable to net emissions increases, thus addressing the concerns of the two commenters cited above. With this exception, and the two noted below, the 50-ton exemption is being promulgated as proposed.

Some commenters pointed out that EPA's proposed 50-ton exemption clause was more limted in its application than the Clean Air Act language of section 165(b), in that the September 5 proposal contained additional consideration of Class I area impacts (*e.g.*, 44 FR 51949, 40 CFR 51.24(k)(2)(i)). EPA agrees with these commenters and has eliminated that portion of the 50-ton exemption language dealing with Class I areas. *See* 40 CFR 51.24(i)(7) and 52.21(i)(7).

The 50-ton exemption contained in the Act made those sources existing as of August 7, 1977, eligible for the exemption; the same applicability date was proposed in September 1979 for this revised exemption. The *Alabama Power* final opinion suggested that EPA had authority to conform the eligibility date for the section 165(b) exemption to the "effective date" of the preconstruction permit requirements of the 1978 regulations, i.e., March 1, 1978. In the January 30, 1980 **Federal Register** notice EPA sought comment on changing the eligibility date and on whether March 1, 1978 would be the appropriate choice.

Twenty-four commenters addressed the issue of the eligibility date. Nineteen of these favored a date of March 1 or 19, 1978. Four wanted the date to be that of the final promulgation of these regulations. One commenter disagreed with the date change because it considers the exemption itself to be unauthorized; however, the Act clearly provides for the exemption, as explained elsewhere in this section. One industrial group alleged that the date of promulgation would be the proper eligibility date for the specific case of fugitive emissions, in that fugitives were not regulated as of March 1, 1978. This is apparently a reference to the fact that rulemaking relative to potential to emit (*see* Potential To Emit) had not yet been performed. In fact, though, fugitive emissions were covered by the 1978 regulations and the calculation of potential to emit does not change that circumstance. The commenters preferring March 19 to March 1 referred to a statement in *Alabama Power* that March 19, 1978 is the "effective date" of the regulations. 13 ERC at 2006, n.79. The "effective date" of those regulations is, however, March 1, 1978. *See Citizens to Preserve Spencer County* v. *EPA*, 12 ERC 1961, 1978; and Preamble to 1978 Regulations, 43 FR 26380, 26390. Concerning the comments favoring the date of this promulgation as the eligibility date, the Administrator notes that section 165(b) of the Act limits eligibility for the 50-ton exemption to those sources in existence on the date of enactment of the 1977 Admendments to the Act. For the reasons noted in the *Alabama Power* decision, EPA has authority to extend eligibility to March 1, 1978. However, the Agency cannot extend this deadline to today's promulgation. For these reasons March 1, 1978 is now promulgated as the eligibility date for the 50-ton exemption.

VII. Fugitive Emissions

For PSD determinations prior to the *Alabama Power* decision, EPA considered *all* reasonably quantifiable emissions of a pollutant—including both point emissions (*e.g.*, from a stack or chimney) and fugitive emissions—on the ground that the emissions deteriorate air quality regardless of how they emanate. This practice applied to calculations of a source's emissions and potential emissions of a given pollutant both: (1) for the threshold determination under section 169(1) of whether the source was a "major emitting facility" subject to section 165, and (2) for the permitting requirements of section 165 itself.

The *Alabama Power* court upheld EPA's practice for the latter purpose, and confirmed that:

> The terms of section 165, which detail the preconstruction review and permit requirements for each new or modified "major emitting facility" apply with equal force to fugitive emissions and emissions from industrial point sources.
>
> * * * * *
>
> EPA is correct that a major emitting facility is subject to the requirements of section 165 for each pollutant it emits irrespective of the manner in which it is emitted. [13 ERC at 2016–2017.]

However, as to the first practice, the court held that section 169(1) is controlled by the rulemaking provision of section 302(j), and that fugitive emissions of a given pollutant may be included in the threshold calculation under section 169(1) only if the Administrator first determines, by rule, that they are to be included.

Accordingly, as part of the September 5, 1979 rulemaking proposal, the Administrator identified 27 categories of stationary sources for which he proposed to include fugitive emissions in threshold calculations of "major emitting facility" status for purposes of both section 165 and new source review regulations. Numerous commenters responded that the Administrator's proposal did not constitute "adequate" rulemaking, and that fugitive emissions could not be included in threshold calculations unless the rulemaking also established, on an industry-by-industry basis, methods for quantification of fugitive emissions and for analysis of their impacts on air quality, and included the identification of effective techniques for their control. EPA has considered these comments, but believes that Congress intended the rulemaking provision of section 302(j) to serve a much simpler and narrower purpose.

As the court itself noted, "[t]he legislative history of this rulemaking provision is sparse," and it is therefore particularly difficult to discern Congress' motivation for including it. 13 ERC at 2017. In general, section 302(j) sets out the criteria for determining whether a source is "major" and hence subject to the stringent requirements of certain key provisions of the Act. Congress clearly intended such determinations to always include point emissions, the type most commonly associated with major polluters. It also expressed its affirmative intent *not* to exclude "non-point" or "fugitive" emissions from those determinations:

> [T]he "major stationary source" definition is clarified to indicate the inclusion of major sources of fugitive emissions (last year's bill was unclear in this respect) * * *.[H.R. Rep. 95–294, 95th Cong. 1st Sess. 4 (1977).]

Rather than include fugitive emissions across-the-board, however, Congress left it to the Administrator to determine for which particular categories of sources fugitive emissions will be included in threshold calculations.

EPA therefore believes that the purpose of the rulemaking under section 302(j) is to afford members of affected categories of sources an opportunity to comment on the Administrator's determination to include fugitive emissions in the threshold calculation, and to allow them to present factual or policy arguments in support of claims that it would *not* be appropriate to do so. Although many such presentations will be technically oriented, EPA does not agree that section 302(j) requires the formal promulgation of measurement, modeling or control techniques or guidelines, because the fundamental decision which the Administrator is making under section 302(j) is *whether* fugitive emissions should be included in threshold calculations.

EPA finds support for this interpretation of section 302(j) in the fact that section 165 does *not* contain any rulemaking provision governing the *substantive* regulation of fugitive emissions. As explained earlier, the *Alabama Power* court confirmed that once a source is determined to be a major emitting facility under section 169(1), the substantive preconstruction review and permitting requirements of section 165 "apply with equal force to fugitive emissions and emissions from industrial point sources." In other words, even if fugitive emissions remain excluded from threshold calculations, section 165 requires that fugitive emissions be taken into account in determinations of whether NAAQS or allowable increments will be violated (section 165(a)(3)) and that fugitive emissions be subjected to BACT requirements (section 165(a)(4)). But these substantive provisions do *not* require EPA's prior promulgation of technical rules governing measurement, analysis or control such as those which the commenters suggest are necessary under section 302(j). Since the determination to include fugitive emissions in threshold applicability calculations is discretionary under sections 302(j) and 169(1), while the substantive regulation of fugitive emissions from all major emitting facilities is mandatory under section 165, EPA does not believe that the rulemaking provision of section 302(j) was intended to require the promulgation of such technical guidelines or regulations.

EPA therefore concludes that the rulemaking which it conducted was "adequate" under section 302(j) since affected sources were afforded the opportunity to comment upon the proposed inclusion of fugitive emissions in their threshold calculations. EPA's responses to more specific comments are set out below. Several commenters objected that the first 26 specific categories of sources identified in the proposal (as sources whose fugitive emissions would be taken into account in threshold calculations) were virtually identical to the 28 categories of sources identified in section 169(1) as sources with threshold tonnages of 100 tons per year (rather than 250 tons per year) for determinations of "major emitting facility" status.[8] The commenters complained that by merely copying the 28 sources without any other supporting rationale, EPA failed to conduct proper rulemaking.

Although it is true that the two lists are virtually identical, it is not true that EPA failed to conduct proper rulemaking. To the contrary, the Administrator recognized that in specifically identifying 28 categories of sources in section 169(1), "Congress' intention was to identify facilities which, due to their size, are financially able to bear the substantial regulatory costs imposed by the PSD provisions and which, as a group, are primarily responsible for emission of the deleterious pollutants that befoul our nation's air." 13 ERC at 2003. In light of that intent, the Administrator initially determined that as a matter of policy, it would be appropriate to count *all* emissions—including fugitive emissions—in threshold calculations of applicability for those 28 categories. The proposal reflected that determination as well as the Administrator's observation that, because those sources have traditionally been considered the major polluters in the country, EPA's experience in quantifying fugitive emissions from them is, in general, greater than its experience in doing so for other sources.[9]

Source Category and Reference
Primary zinc smelters
Technical Guidance for Control of Industrial Process Fugitive Particulate Emissions—March 1977 (EPA–450/3–77–010)
Portland cement plants
(EPA–450/3–77–010)
Iron and steel mill plants
Particulate Emission Factors Applicable to Iron and Steel Industry (EPA–450/4–79–028) (EPA–450/3–77–010)
Primary aluminum ore reduction plants
(EPA–450/3–77–010)
Primary copper smelters
(EPA–450/3–77–010)
Petroleum refineries
Compilation of Air Pollutant Emission Factors (AP–42)
Lime plants
(NSPS) (AP–42) (EPA–450/3–77–010)
Phosphate rock processing plants
(EPA–450/3–77–010)
Coke oven batteries
(EPA–450/4–79–028)
Carbon black plants
(AP–42)
Primary lead smelters
(AP–42) (EPA–450/3–77–010)
Sintering plants
(See Iron and steel mill plants)
Fossil fuel-fired boilers
(See Fossil fuel-fired steam electric plants)
Petroleum storage and transfer units
(AP–42)
Fossil fuel-fired steam electric plants
(EPA–450/3–77–010)

Several commenters pointed out, however, that the two lists were not identical insofar as certain restrictions or limitations for six categories of sources in the section 169(1) list were not reflected in the proposed section 302(j) list. Specifically, the section 169(1) list includes only the following (the italicized portions were omitted from the proposal): fossil-fuel fired steam electric plants *of more than two-hundred-and-fifty million British thermal units per hour heat input;* coal cleaning plants (*thermal dryers*); municipal incinerators *capable of charging more than two-hundred-and-fifty tons of refuse per day;* carbon black plants (*furnace process*); fossil-fuel boilers *of more than two-hundred-and-fifty million British thermal units per hour heat input;* and petroleum storage and transfer facilities *with a capacity exceeding three-hundred-thousand barrels.* These discrepancies are the result of an inadvertent administrative error, since EPA intended to identify in the proposed section 302(j) list the same categories of sources identified by Congress in the section 169(1) list. Accordingly, the final list promulgated today reflects the qualifying descriptions specified above for the six categories of sources. Several commenters objected to the last category on the list of sources for which the Administrator proposed to include fugitive emissions in threshold calculations—namely, "any other stationary source category which, at the time of the applicability determination, is being regulated under section 111 or 112 of the Act." Section 111 concerns the establishment of standards of performance for new stationary sources (new source performance standards or NSPS) and section 112 concerns the establishment of national emissions standards for hazardous air pollutants (NESHAP). The commenters argued that the focus of these provisions is on emissions controls rather than on ambient air quality, and that there is therefore no logical link to support the automatic inclusion of fugitive emissions from a source for PSD threshold calculation purposes simply because the source is being regulated under section 111 or section 112. EPA disagrees with some of the commenters' assumptions and characterizations of NSPS and NESHAP regulation, but concludes for other reasons that the last category should be revised to apply only to sources which are being regulated under section 111 or section 112 as of the effective date of the amended PSD and NSR regulations.

[8] The apparent discrepancy in the number of categories (i.e., 26 versus 28) is explained by the fact that the September 5, 1979 proposal listed hydrofluoric, sulfuric and nitric acid plants together in a single subheading.

[9] For example, EPA has previously published fugitive emissions data for many of the identified categories of sources:

The commenters contend that since an NSPS under section 111 merely reflects, for a category of sources, an emissions limitation which is achievable through the best system of continuous emissions reduction which "the Administrator determines has been adequately demonstrated," the establishment of an NSPS for a source is unrelated to the ambient air quality considerations which are at the heart of PSD review. What the commenters overlook, however, is that under section 111(b)(1)(B), NSPS are only promulgated for categories of stationary sources which have been included in a list under section 111(b)(1)(A); and section 111(b)(1)(A) directs the Administrator to "include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." In other words, although the NSPS itself may be based on technological considerations, the decision to develop the NSPS is clearly based on ambient air quality concerns. Moreover, under section 112, ambient air quality is clearly a compelling concern because a hazardous air pollutant to which a NESHAP will apply is one "which in the judgment of the Administrator causes, or contributes to, air pollution which may reasonably be anticipated to result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness."

In short, categories of sources are regulated under section 111 or section 112 on the basis of determinations by the Administrator that their emissions seriously and adversely impact ambient air quality, and the Administrator therefore determined that it would be appropriate to include their fugitive emissions in their threshold calculations for purposes of PSD and NSR review and regulation. That basic policy determination is being finalized today.

At the same time, however, EPA believes that the comments about "automatic" inclusion of categories of sources which are not now regulated under section 111 or section 112, but which may be regulated thereunder at some point in the future, raise valid concerns. Although EPA believes that the same basic policy considerations would support the inclusion of fugitive emissions for such categories of sources, EPA recognizes that unless a source had affirmative notice during this rulemaking that it will be regulated in the future under section 111 or section 112, it will not really have been afforded a meaningful opportunity to comment on the proposed inclusion of its fugitive emissions in its threshold calculations. Accordingly, EPA has determined to limit the scope of the last category on the proposed list to sources which are being regulated under section 111 or section 112 as of the effective date of these amended PSD and NSR regulations. At the time of any future rulemaking under section 111 or section 112 proposing to regulate additional categories of sources, EPA will conduct parallel section 302(j) rulemaking concerning the proposed inclusion of fugitive emissions in threshold calculations. On the issue of the appropriateness of including fugitive emissions in threshold calculations for particular categories of sources, the basic objection expressed by most commenters was that fugitive emissions data were either unavailable or inadequate, and that it would therefore be inappropriate to include fugitive emissions in threshold calculations for a particular category.

In response, EPA notes that such concerns should and will be addressed in the context of particular applicability determinations, but that they have not changed the basic policy decision made by the Administrator under section 302(j). As explained earlier, fugitive emissions *must* be taken into account under section 165 in determining the impact on ambient air quality of a proposed new source and the BACT requirements which will apply to it, even if there are no existing fugitive emissions data, or if the available data are crude. Obviously, the nature and extent of the available data and technologies are important factors in determining how fugitive emissions should be taken into account and how they should be regulated under the review and permitting process of section 165; but those factors will not avoid or eliminate the consideration of fugitive emissions under that process. Similarly, although the issue of quantification may be relevant to particular applicability determinations, EPA does not believe that that issue alone is critical in determining whether, as a general policy matter, it is appropriate to include fugitive emissions in threshold calculations for a particular category of sources.

EPA emphasizes, however, that fugitive emissions from a source in one of the listed categories will only be included in threshold calculations "to the extent quantifiable." EPA's intent was and is to provide sources the flexibility to explore with the reviewing authority in the context of a particular applicability determination, issues of quantification which might be peculiar to an individual source. (Of course, fugitive emissions will not have to be quantified for threshold purposes if the source would qualify as a "major emitting facility" on the basis of point emissions alone, a situation which EPA believes will occur more often than not.) As indicated above, EPA has in the past published data and other information relating to the quantification of fugitive emissions for various categories of sources and, as some commenters noted, additional data and information are currently under development. EPA considers these publications concerning quantification of fugitive emissions as guidance to be used as the starting point for analysis, not as methodology or data which must be rigidly adhered to in all circumstances.

EPA encourages the development of more sophisticated or precise methods or models for quantification of fugitive emissions, and will accept any estimate of a source's fugitive emissions if the source can support the accuracy and reliability of the methodology which it has developed or employed. In situations where there are no published emissions factors or other fugitive emissions data for a particular category of sources, EPA will consider quantification estimates developed by a source which have any reasonable and rational basis, including estimates based on the transfer of technology or based on principles of material balance. Moreover, if a source satisfactorily demonstrates that all such methodologies are inappropriate in its circumstances and that there is absolutely no basis for reasonably estimating its fugitive emissions, EPA would be willing to discount fugitive emissions in the threshold calculation for that individual source.

In short, sources will have an opportunity to discuss the appropriateness and reasonableness of fugitive emissions estimates for purposes of both the threshold calculation, as well as the requirements of section 165. EPA is therefore finalizing today the proposed list of categories of sources whose fugitive emissions will be included in threshold calculations. EPA has considered comments with respect to the proposed definition of "fugitive emissions," and has determined that one change is appropriate. Instead of defining fugitive emissions as "those emission which *do not* pass through a stack, chimney, vent, or other functionally equivalent opening," EPA believes that the term should apply to "those emissions which *could not reasonably pass* through a stack, chimney, vent or other

functionally equivalent opening." This change will ensure that sources will not discharge as fugitive emissions those emissions which would ordinarily be collected and discharged through stacks or other functionally equivalent openings, and will eliminate disincentives for the construction of ductwork and stacks for the collection of emissions. Emissions which could reasonably pass through a stack, chimney, vent, or other functionally equivalent opening will be treated the same as all other point emissions for threshold calculation purposes.

In addition, in light of EPA's action today deleting the fugitive dust exemption (*see* Fugitive Dust Exemption), EPA is finalizing the proposed deletion of the existing definition of "fugitive dust" at 40 CFR 51.24(b)(6) and 52.21(b)(6) (1979).

VIII. Fugitive Dust Exemption

The 1978 PSD regulations provided that "fugitive dust" from a major stationary source or major modification be excluded from air quality impact assessment, 40 CFR 51.24(k)(5), 52.21(k)(5)(1979). Because of its decision regarding inclusion of fugitive emissions in threshold calculations, and because it questioned EPA's authority to establish the exemption in the manner in which it did, the court in *Alabama Power* vacated EPA's generalized exemption for fugitive dust and remanded it to the Agency for further consideration. 13 ERC at 1231 and 13 ERC at 2017.

In response to the court's opinion, EPA proposed deletion of the fugitive dust exemption. It also proposed to delete a parallel provision in the Offset Ruling (44 FR 3274). The majority of the public commenters directly opposed this proposal. The primary reasons were that fugitive dust allegedly has little impact on health and that techniques of evaluating its air quality impacts are unreliable.

As indicated above, the *Alabama Power* court vacated EPA's partial exemption of fugitive dust from the requirements of section 165 because the exemption was premised on the erroneous assumption that "the statute of its own momentum subjects major sources of fugitive emissions to PSD preconstruction review and permit requirements" 13 ERC at 2017. However, the court also expressed serious doubt that EPA had the statutuory authority to establish such an exemption by regulation, because (1) section 165 does not distinguish between fugitive emissions and point emissions, but applies "with equal force" to both types of emissions, 13 ERC at 2016, and (2) in the absence of explicit statutory exemption authority, EPA's "general" exemption authority is narrow in reach. 13 ERC at 2005–2010.

The court did outline, though, a mechanism which it indicated is available under the statutory scheme for acccomplishing the objective of partially exempting fugitive dust emitted by major emitting facilities from the requirements of section 165. That approach would involve defining the pollutant "particulate matter" "to exclude particulates of a size or composition determined not to present substantial health or welfare concerns," 13 ERC at 2018, n. 134, and then regulating such "excluded particulates" under section 111. Pursuant to section 109, EPA is currently reviewing the criteria document for the particulate matter NAAQS, and particle size is a factor being considered in this review. If the standard is revised, the rulemaking requirements of section 307(d) will apply.

EPA today is adopting its proposed deletion of the existing "fugitive dust exemption" and is deferring further action on any such "exemption" pending completion of the standard review process.

IX. Source

A. Proposed Definitions of "Source"

In the 1978 PSD regulations, EPA defined "source" as "any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." The Offset Ruling contained the same definition of "source."

In its June 1979 opinion in *Alabama Power*, the Court of Appeals rejected the definition of "source" in the PSD regulations. It concluded that Congress intended section 111(a)(3) of the Act to govern the definition of "source" for PSD purposes. That section defines "source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." In defining "source," EPA used the terms "building," "structure," "facility," and "installation," but then added "equipment," "operation," and "combination thereof." The court held that EPA, in adding those terms, exceeded its authority. It stated, however, that the Agency has substantial discretion to define one or more of the four terms in section 111(a)(3) to include a wide range of pollutant-emitting activities.

In its June opinion, the court also focused on the clause "which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or persons under common control)." The court held that the approach, which that clause embodied, of grouping pollutant-emitting activities solely on the basis of proximity and control is generally acceptable, since the Agency had "evidenced an intention to refrain from unreasonable literal applications of the definition and instead to consider as a single source only common sense industrial groupings." 13 ERC at 1230.

In September 1979, EPA proposed to define "building, structure, facility and installation" for PSD purposes as "any grouping of pollutant-emitting activities which are located on one or more contiguous or adjacent properties and which are owned or operated by the same person (or by persons under common control)." As the preamble to the September proposal explains in detail, EPA concluded that the proposed definition would serve the purposes of PSD adquately by requiring review of those major projects that would cause air quality deterioration. At the same time, the definition would operate to avoid review of projects that would not increase deterioration significantly. In EPA's view, the dominant purpose of PSD review is to maintain air quality within the applicable increments.

In September, EPA proposed to define the four component terms differently for nonattainment purposes. Specifically, the Agency proposed to define "building, structure and facility" as it had proposed to define them for PSD purposes, and "installation" as "an identifiable piece of process equipment." One effect of that proposal would be the application of nonattainment requirements to a new piece of equipment that would emit significant amounts of a pollutant for which the area had been designated nonattainment, regardless of any accompanying emissions offsets at the plant. The preamble to the proposal explained: "Unlike the PSD provision, the nonattainment provisions are primarily intended not merely to prevent excessive increases in emissions, but to reduce emissions. This fundamental difference in purpose requires a different approach to defining the sources that will be subject to NSR." 44 FR 51932. EPA proposed to apply this definition to "incomplete" SIPs, i.e., those which did not demonstrate attainment based exclusively on currently approved requirements. Fully

"complete" SIPs could, under EPA's proposal, use the PSD definition.

In December 1979, the court issued its final opinion on the 1978 PSD regulations, which opinion superseded the June 1979 opinion. In the December opinion, the court reaffirmed its earlier conclusions that EPA must adhere to section 111(a)(3) in defining "source" for PSD purposes and that EPA has discretion to define the component terms "reasonably to carry out" the purposes of PSD. 13 ERC at 2039. The court added that "a plant is to be viewed as a source" and that the Agency "should" provide for the aggregation of polluting-emitting activities "according to considerations such as proximity and ownership." *Id.* at 2039 and 2040. But it warned that "EPA cannot treat contiguous and commonly owned units as a single source unless they fit within the four permissible statutory terms." Finally, the court said that any new definitions "should also provide explicit notice as to whether (and on what statutory authority) EPA construes the term source, as divided into its constituent units, to include the unloading of vessels at marine terminals and 'long-line' operations such as pipelines, railroads, and transmission lines. We agreed with Industry Groups that EPA has not yet given adequate notice as to whether it considers those industrial activities to be subject to PSD." *Id.* at 2040.

In January 1980, EPA solicited comment on the September proposals in light of the December opinion of the court. 45 FR 6803. EPA specifically asked for comment on whether factors other than proximity and control, such as the functional relationship of one activity to another, should be used. The Agency also asked for specific examples of cases where a literal application of the proposed definition would be unreasonable.

B. PSD: Comments on Proposal and Responses

Most commenters agreed that for PSD purposes EPA should adopt definitions of "building," "structure," "facility," and "installation" that would aggregate pollutant-emitting activities, instead of definitions that would restrict one or more of those terms to an individual activity. One commenter, however, argued that EPA should adopt for PSD purposes the same definitions of those terms that it had proposed to adopt for nonattainment purposes. The commenter asserted that the decision of the court in *ASARCO* v. *EPA*, 578 F.2d 319 (D.C. Cir. 1978), required the Agency to impose BACT on a new unit at a plant, even if the unit would result in no net increase in emissions. The commenter also asserted that the "all-encompassing definition * * * destroys the intent of the PSD program by letting opportunities for *reducing* increment consumption disappear before control technology standards (*i.e.*, NSPS) can be in place." (Emphasis added.)

EPA has decided to adopt for PSD purposes the sort of "all-encompassing" definitions that the commenter opposed. First, in its December 1979 opinion in *Alabama Power*, the court explicitly held that *ASARCO* "does not prevent aggregation of individual units of a plant into a single source." 13 ERC at 2040. Second, the dominant purpose of PSD review is not to reduce increment consumption, but rather to maintain air quality deterioration below an applicable increment. A definitional structure that aggregates pollutant-emitting activities into one "source" would serve that purpose, since it would allow only those changes at the "source" that would not significantly worsen air quality to escape review.

Some of the commenters who agreed that each of the component terms of "source" should aggregate pollutant-emitting activities also supported the use of proximity and control as the sole criteria for aggregating them. Most of those commenters, however, objected to the use of proximity and control as the sole criteria, some on the ground that the proposed definitions would be too inclusive and others on the ground that the definitions would not be inclusive enough.

The commenters who thought the definitions would be too inclusive asserted that they would group sets of activities at one site and under common control that are functionally or operationally distinct. Typical of the examples they gave are the following activities at one site and under common control: (1) a surface coal mine and coal-burning electrical generators that the mine supplies with coal; (2) a rock quarry and the portland cement plant that the quarry supplies with raw material; (3) a primary aluminum ore reduction plant, an aluminum fabrication plant and an aluminum reclamation plant; (4) a refinery, a service station, a research laboratory, a fertilizer factory, and a pesticide factory; and (5) a uranium mill and an oil field. With the language of the June 1979 opinion in mind, the commenters contended generally that to group the nominally different activities in each of those examples would violate any common sense notion of "plant."

The commenters who thought the proposed definitions would be too inclusive suggested a wide range of alternative definitions. For example, one group proposed that activities at one site and under common control should be combined only if: (1) they share the first three digits under the Standard Industrial Classification Code of the U.S. Department of Commerce, (2) they are dependent upon or affect the process of each other, (3) they use a common raw product or produce a common product, and (4) the proponent of the project in question does not show that the activities have entirely separate air quality impacts.

The commenters who thought the proposed definitions would not be inclusive enough urged the Agency to abandon control as a factor and adopt function in its place. Some of them described a plan by a group of independent companies to construct jointly a single coal-burning power plant to replace oil-burning power plants at various manufacturing sites belonging to those companies near to the site of the coal-burning plant. The commenters contended that EPA should treat the old plants and the new plant as being within one "source," so that the new plant might escape PSD review. They argued that the new plant would not deteriorate air quality, since presumably the decrease in emissions from the shutdown of the old plants would offset the increase from the new plant, and that to allow it to escape review would facilitate the national switch from oil to coal.

After considering the comments of those who objected to the use of proximity and control only, EPA has decided to adopt for PSD purposes a definition of "building, structure, facility, and installation" that is different from the one it proposed in September. The final definition provides that those component terms each denote "all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same 'Major Group' (*i.e.*, which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101–0066 and 003–005–00176–0, respectively)."

In EPA's view, the December opinion of the court in *Alabama Power* sets the following boundaries on the definition for PSD purposes of the component terms of "source": (1) it must carry out

reasonably the purposes of PSD; (2) it must approximate a common sense notion of "plant"; and (3) it must avoid aggregating pollutant-emitting activities that as a group would not fit within the ordinary meaning of "building," "structure," "facility," or "installation."

The comments on the proposed definition of "source" have persuaded EPA that the definition would fail to approximate a common sense notion of "plant," since in a significant number of cases it would group activities that ordinarily would be considered as separate. For instance, a uranium mill and an oil field would ordinarily be regarded as separate entities, yet the proposed definition would treat them as one.

In formulating a new definition of "source," EPA accepted the suggestion of one commenter that the Agency use a standard industrial classification code for distinguishing between sets of activities on the basis of their functional interrelationships. While EPA sought to distinguish between activities on that basis, it also sought to maximize the predictability of aggregating activities and to minimize the difficulty of administering the definition. To have merely added function to the proposed definition as another abstract factor would have reduced the predictability of aggregating activities under that definition dramatically, since any assessment of functional interrelationships would be highly subjective. To have merely added function would also have made administration of the definition substantially more difficult, since any attempt to assess those interrelationships would have embroiled the Agency in numerous, fine-grained analyses. A classification code, by contrast, offers objectivity and relative simplicity.

EPA has chosen the classification code in the *Standard Industrial Classification Manual, 1972,* as amended in 1977 ("*SIC*"), because it is both widely-known and widely-used. EPA has also chosen to use just one set of categories in the manual, those that describe each "Major Group" in the classification system and that bear a two-digit classification number, although the commenter who suggested that EPA use such a code also suggested that the Agency use the categories at the three-digit level. On the one hand, the two-digit categories are narrow enough to separate sets of activities into common sense groupings. In fact, most of the nominally different sets of activities in the examples given above would fall into a different two-digit category; only the fertilizer factory and the pesticides factory would fall into the same category. On the other hand, the categories are broad enough to minimize the likelihood of artificially dividing a set of activities that does constitute a "plant" into more than one group and the likelihood of disputes over whether a set of activities falls entirely into one category or another.

Each source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered. Thus, one source classification encompasses both primary and support facilities, even when the latter includes units with a different two-digit SIC code. Support facilities are typically those which convey, store, or otherwise assist in the production of the principal product. Where a single unit is used to support two otherwise distinct sets of activities, the unit is to be included within the source which relies most heavily on its support. For example, a boiler might be used to generate process steam for both a commonly controlled and located kraft pulp mill and plywood manufacturing plant. If the yearly boiler output is used primarily by the pulp mill, then the total emissions of the boiler should be attributed to the mill.

In adopting the new definition of "source," EPA rejected the requests of those commenters who thought that the proposed definition would not be inclusive enough. As noted above, they urged that EPA formulate a definition that looked only to proximity and *function.* But such a definition by looking to function would unnecessarily increase uncertainty and drain the Agency's resources. In addition, such a definition would present groupings, such as the example the commenters gave, that would severely strain the boundaries of even the most elastic of the four terms, "building," "structure," "facility," and "installation."

Many commenters urged EPA to clarify the extent to which the final definition of those terms encompasses the activities along a "long-line" operation, such as a pipeline or electrical power line. For example, some urged EPA to add to the definition the provision that the properties for such operations are neither contiguous nor adjacent. To add such a provision is unnecessary. EPA has stated in the past and now confirms that it does not intend "source" to encompass activities that would be many miles apart along a long-line operation. For instance, EPA would not treat all of the pumping stations along a multistate pipeline as one "source."

EPA is unable to say precisely at this point how far apart activities must be in order to be treated separately. The Agency can answer that question only through case-by-case determinations. One commenter asked, however, whether EPA would treat a surface coal mine and an electrical generator separated by 20 miles and linked by a railroad as one "source," if the mine, the generator, and the railroad were all under common control. EPA confirms that it would not. First, the mine and the generator would be too far apart. Second, each would fall into a different two-digit *SIC* category.

Three commenters focused on whether and to what extent the emissions from each ship that would dock at a proposed marine terminal should be taken into account in determining whether the terminal would be "major" for PSD purposes. One commenter argued in effect that the emissions of each such ship that are quantifiable and occur while the ship is coming to, staying at or going from the terminal should be taken into account. In the view of that commenter, all of those activities would be "integral" to the operation of the terminal. Another commenter asserted that none of the emissions of any such ship should be taken into account, because ships are mobile sources. The remaining commenter contended that only the emissions that: (1) come from a ship which is under the proprietary control of the owner or operator of the terminal and (2) occur while the ship is at the dock should be included in an applicability determination. That commenter viewed the ability of the terminal owner or operator to regulate the behavior of a ship as the critical consideration.

The permit requirements of the final Part 52 PSD regulations apply to a collection of pollutant-emitting activities according to the "potential to emit" of just those activities in that collection which constitute a "stationary source." Whether and to what extent the emissions of ships that would dock at a terminal are to be taken into account in determining PSD applicability depends, therefore, on whether and to what extent the term "stationary source" in the final regulations encompasses not only the activities of the terminal itself, but also the activities of the ships while they are coming to, staying at, or going from the terminal.

The final definition of "building, structure, facility, and installation" resolves that question. EPA intends the term "stationary source" under that

definition to encompass the activities of a marine terminal and only those dockside activities that would serve the purposes of the terminal directly and would be under the control of its owner or operator. The term "dockside activities" means those activities in which the ships would engage while docked at the terminal. While "stationary source" encompasses combinations of activities, it is limited to combinations that would be "stationary," that is, fixed to the particular site. The activities of a terminal itself would be stationary, but all ship activities would not be. Only those that would directly serve the purposes of the terminal, such as loading and unloading, would be stationary since they alone would be in a sense fixed to the particular site. Hence, "stationary source" encompasses the activities of a marine terminal and only those dockside activities that would directly serve its purposes.

In addition, while "stationary source" encompasses combinations of stationary activities, it is further limited to those that would locate on "contiguous or adjacent properties." In EPA's view, only dockside activities would be located on "property" that is contiguous or adjacent to the terminal. Next, "stationary source" is also limited to those combinations of activities that would be "under the control" of one person or one group of persons who are themselves under common control. Hence, "stationary source" encompasses only the activities at a terminal and those dockside activities over which the owner or operator of the terminal would have control. Finally, the activities at a terminal and any such dockside activities fall under a single two-digit *SIC* category, namely "Water Transportation" (number 44).

Whether a particular dockside activitiy would directly serve the purposes of a terminal and would be under the control of its owner or operator depends upon the circumstances of a specific situation. Presumably, however, the activity of loading or unloading a ship would in every case directly serve the purposes of the terminal and would be under the control of its owner or operator to a substantial extent. In particular, the Agency would expect that no loading or unloading could occur without the consent of the owner or operator and consequently that the owner or operator would set, or at least have a significant say in the setting of, the schedule for loading or unloading.

In adopting this interpretation of "stationary source," EPA in large measure has rejected the arguments of the commenters on the ship emissions issue. First, to treat *all* of the activities of a ship while it is coming to, staying at, and going from a terminal would violate any common sense notion of "building," "structure," "facility," or "installation." To group just those activities occurring at the terminal that are essential to its functioning entirely comports with common sense. Second, an activity such as loading and unloading is certainly stationary, even if the ships that engage in it have mobility. Ships, moreover, are not "mobile sources" within the meaning of section 110(a)(5) of the Act, the provision restricting indirect source review. Finally, the fact that a terminal owner or operator does not own a particular ship does not mean that the owner or operator has no control over behavior of the ship at the terminal.

In deference to the position taken in *Alabama Power*, EPA has decided to treat the definition of "source" in the 1978 PSD regulations as *not* encompassing any ship or ship activity. As a result, ship emissions are not to be taken into account at all in determining whether a marine terminal is subject to review under the 1978 PSD regulations. A terminal which would not be subject to review under the 1978 regulations if ship emissions are not included in the determination of potential to emit can also be excluded from review under the new regulations provided certain conditions are met. These conditions are that the owner or operator of such a source has obtained each of the permits required under the SIP for the terminal before the date this notice appears in the **Federal Register** and commences construction on it within 18 months after that date.

The final definition of the component terms of "stationary source" differs from the proposed definition in one significant respect. The proposed definition used the phrase *"any grouping of* pollutant-emitting activities." The final definition uses the phrase *"all of the* pollutant-emitting activities." Taken literally, the proposed definition would have referred not only to all of the activities at a plant, but also to any subgroup of those activities. EPA, however, intended it to refer only to all of the activities. The final definition merely makes that explicit.

C. Nonattainment: Comments on Proposal and Response

Many commenters objected to EPA's proposed definition of "source" for nonattainment areas. Several commenters argued that there was no statutory basis for the distinction drawn in the proposal between "complete" and "incomplete" SIPs. Most of the commenters further claimed that the "dual definition" (*i.e.*, treating a source as both a plant and an individual piece of process equipment at the plant) both was illegal under the statute and *Alabama Power* and was wrong as a matter of policy.

The legal arguments presented by the commenters fell into two broad categories. First, they argued that the dual definition really defined "source" as a combination of surces, which had been forbidden by both *Alabama Power* and *ASARCO.* EPA therefore could, in these commenters' view, define "source" as either the entire plant or an individual piece of process equipment, but not both. These commenters opted for the former approach.

The second legal argument challenged EPA's contention that use of the plant-wide definition would be improper in nonattainment areas, because the purpose of the nonattainment new source review program is to reduce emissions, not to hold emissions constant. The commenters claimed that the Act gives primary responsibility for assuring reasonable further progress to the states, and the states therefore can choose whatever mix of strategies they want to achieve reasonable further progress. This suggested to the commenters that EPA had no authority to ban a plant-wide definition for new source review if the state could otherwise demonstrate reasonable further progress.

Several commenters also pointed to a variety of policy concerns which they felt militated against EPA's proposed dual definition. First, they argued that the definition would discourage technological innovation that could actually reduce emissions, because sources would be reluctant to modernize for fear that such requirements as LAER would be applied to them. In particular, they felt sources would be unwilling to retire old inefficient facilities and replace them with efficient cleaner ones. Second, some commenters claimed that there was no point to reviewing a facility where offsetting emissions could be obtained, since on the whole ambient air quality would not get any worse. Finally, many commenters complained that the definitional structure as a whole was far too complex, and they urged that EPA simplify the system both by eliminating the distinction between "complete" and "incomplete" SIPs and by adopting one definition for both PSD and nonattainment areas. Most commenters preferred the PSD

definition, although some urged that the dual definition be used.

In revising the Offset Ruling in January 1979, EPA adopted definitions of "source" and "modification" which had the effect of requiring any increase greater than 100 tons in the potential to emit of a plant to undergo nonattainment new source review, even if offsetting reductions at the plant were to accompany the change. The effect of the proposed definitions of "source" and "modification" which are being promulgated today would be basically the same as those in the Offset Ruling. Adoption of the proposed definitions would constitute, therefore, a continuation of an established approach to nonattainment new source review.

The comments on the dual definition have failed to persuade EPA that it should abandon the established approach at this time. As a result, the agency has decided to adopt the dual definition in each set of nonattainment regulations. For the reasons given below, EPA does not agree that the dual definition is either illegal or unsound from a policy standpoint. In addition, the agency has decided that the dual definition should be used regardless of whether the SIP is complete or incomplete. EPA agrees with the commenters that there is little support in the statute for defining "source" according to the complete or incomplete status of the SIP, and that the proposed definition was complicated.

The dual definition, by defining individual units as a "source," will bring more units in for review in areas with unhealthy air and thereby result in reducing emissions from the status quo. The legislative history of the Act indicates that new source review was intended to be an important tool in the drive towards attainment of ambient air quality standards. As the House Report stated:

> [M]aximum pollution control from new sources is necessary in order to permit room for maximum potential economic growth. This is particularly true in light of the requirement for reasonable further progress and the indications that emissions from many existing sources in nonattainment areas will be increasing (due to fuel switching, natural gas curtailments) or remaining static (due to delayed compliance orders, et cetera). Finally, the technology forcing purpose of the act is best served by requiring maximum feasible pollution control from these new sources in dirty air areas. For all these reasons, the committee adopted the requirement for proposed new or modified major stationary sources in nonattainment areas to meet the lowest achievable emission rate requirement.

H. Rep. No. 95–294, 95th Congress, 1st Sess. 215 (1977). In addition, after hearing testimony that no steel sources owned by five major steel companies were in compliance, the House inserted into section 173 a requirement that the owner of a proposed source or modification demonstrate that all other sources owned, operated, or controlled by him in the state are in compliance with the applicable SIP. *Id.* at 210–213. In this way, Congress meant to use new source review as a means of cleaning up *existing* sources as well.

To realize this goal fully, Congress intended that new source review be applied to the greatest extent possible. For example, Senator Muskie, in presenting the Clean Air Act Amendments of 1977 to the Senate, spoke of reviewing "any physical change which increases [emissions] * * *," and he went on to note:

> Thus, [under the offset ruling and Part D NSR requirements] a new source is still subject to such requirements as "lowest achievable emission rate" even if it is constructed as a replacement for an older facility resulting in a new reduction from previous emission levels. 123 Cong. Rec. at S 13702 (daily edition, August 4, 1977).

Since the dual definition would bring in more sources or modifications for review than would the plant-wide definition used for PSD purposes (including many replacement facilities which would not be reviewed under a plant-wide definition), use of the dual definition clearly is more consistent with Congressional intent.

The dual definition also is consistent with *Alabama Power* and *ASARCO*. *Alabama Power* held that EPA had broad discretion to define the constituent terms of "source" so as best to effectuate the purposes of the statute. Different definitions of "source" can therefore be used for different sections of the statute. *See* 13 ERC at 2039. As EPA discussed in detail in its proposal, the purpose of the nonattainment provisions is to "positively reduce emissions," not merely to hold emissions constant. In addition, unrestricted use of meeting emissions at an entire plant in nonattainment areas would make attainment more difficult, since many of the limited number of cost-effective opportunities to reduce emissions will in fact be used to avoid review. *See* 44 FR 51932. The dual definition therefore comports with the purposes of Part D of the Act.

Moreover, *Alabama Power* and *ASARCO* taken together suggest that there is a distinction between Clean Air Act programs designed to *enhance* air quality and those designed only to *maintain* air quality. In *ASARCO*, the Court of Appeals for the District of Columbia Circuit struck down the definition of "source" for new source performance standards (NSPS), which had employed a "bubble" concept. An important element in the court's decision was its belief that the "bubble," by allowing sources to escape NSPS, was inconsistent with the purpose of NSPS, which was to improve air quality. *See* 578 F.2d at 327–28. But in *Alabama Power*, the same court held that for PSD purposes, EPA must use a "bubble" approach, precisely because PSD is designed to maintain air quality and therefore deals with "a significantly different regulation and statutory purpose." 13 ERC at 2044.

Under this analysis, use of a plant-wide definition to avoid new source review would appear to be inappropriate in nonattainment areas, since the purpose of nonattainment SIPs is to improve existing air quality so as to attain the ambient air quality standards. EPA therefore believes that it would be more consistent with the purposes of the Act not to permit states to choose a plant-wide definition of source.

Promulgation of the dual definition follows the mandate of *Alabama Power*, which held that, while EPA could not define "source" as a combination of sources, EPA had broad discretion to define "building," "structure," "facility," and "installation" so as to best accomplish the purposes of the Act. 13 ERC at 2039. This holding contemplates that one term (such as "building") may be more inclusive than another term (such as "installation"), and so a "building" may include many "installations." In this way, a "source" can, under *Alabama Power*, be composed of smaller "sources," yet not be a combination of sources. The dual definition fits into *Alabama Power*, since under EPA's definitional scheme, a "source" is either an individual piece of process equipment or the entire plant; it is not a combination of sources. That is, when deciding whether a source must undergo new source review, the reviewing authority must determinine whether there was a significant increase in emissions at either a "major" individual piece of equipment or at the plant as a whole. Wherever such an increase occurs is a "source." Thus the plant itself is a source, not a combination of sources, although it may contain smaller sources.

EPA recognizes that use of different definitions for PSD and nonattainment areas adds to the complexity of the permitting process. But this additional complexity is outweighed by the need for a more inclusive definition of source in nonattainment areas in order to assure attainment of standards.

Although it is claimed that some sources may not be willing to modernize their facilities due to the perceived added expense of LAER and the need to demonstrate statewide compliance, EPA believes that its approach is justified by the fact that the dual definition will bring in more sources and modifications for review and will require better pollution control technology in nonattainment areas.[10]

EPA disagrees that use of a plant-wide definition would allow a plant with a new installation to achieve the same emissions reductions as LAER, but in a less expensive manner by finding offsets elsewhere in the plant. This argument assumes that LAER is markedly more costly than the requirements that would otherwise apply. EPA believes that its own past actions, and those of the states, indicate that LAER need not and is not generally being interpreted in this manner.

EPA believes, and most commenters agreed, that new facilities should install state-of-the-art control technology. Such a requirement is imposed by the Clean Air Act for major new sources in PSD areas (BACT), for major new sources in nonattainment areas (LAER), and whenever EPA has set new source performance standards (NSPS). EPA therefore intends to interpret the LAER requirement in a reasonable manner, as it believes it has in the past, and to take a close look whenever LAER would be substantially stricter than these other requirements.

EPA intends that its interpretation of "building, structure, and facility" be identical to that for "building, structure, facility, or installation" used for PSD purposes.[11]

X. Modification

This section discusses the final PSD and nonattainment definitions of "major modifications" and "net emissions increase" which EPA is promulgating in this notice. The section first describes those final provisions. It then focuses on each of their major aspects, giving in particular the relevant proposal, the comments on it and EPA's responses. An example of how the definitions work appears at the end of the section. The section also discusses a provision which appears in the PSD and nonattainment definitions of "major stationary source," but which stems from the final formulation of "major modification." That provision establishes that a physical change at a "minor" stationary source which change by itself would constitute a "major stationary source" shall be treated as a "major stationary source."

A. Final Definitions of "Major Modification" and "Net Emissions Increase"

With the final amendments announced here, the Part 51 and Part 52 PSD regulations now define "major modification" as any *"physical change"* or *"change in method of operation"* at a major stationary source which would result in a *"significant net emissions increase"* in any pollutant subject to regulation under the Act. *See* §§ 51.24(b)(2) and 52.21(b)(2).

While the new PSD regulations do not define "physical change" or "change in method of operation," they provide that those phrases do not encompass certain specific types of events. Those types are: (1) routine maintenance, repair and replacement; (2) a fuel switch due to an order under the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or due to a natural gas curtailment plan under the Federal Power Act; (3) a fuel switch due to an order or rule under section 125 of the Clean Air Act; (4) a switch at a steam generating unit to a fuel derived in whole or in part from municipal solid waste; (5) a switch to a fuel or raw material which (a) the source was capable of accommodating before January 6, 1975, so long as the switch would require no change in any preconstruction permit condition established after that date under the SIP (including any PSD permit condition) or (b) the source is approved to make under a PSD permit; (6) any increase in the hours or rate of operation of a source, so long as the increase would require no change in any preconstruction permit condition established after January 6, 1975 under the SIP; and (7) a change in the ownership of a stationary source.

The new PSD regulations define "significant" in terms of *de minimis* thresholds for each pollutant subject to regulation under the Act. Those thresholds appear in §§ 51.24(b)(21) and 52.21(b)(21). For example, the threshold for sulfur dioxide is 40 tons per year. A "net emissions increase" in sulfur dioxide below that level is not "significant." For a fuller discussion of the thresholds, see the section entitled *De Minimis* Exemptions.

Finally, the new PSD regulations contain definitions of "net emissions increase," which appear as §§ 51.24(b)(3) and 52.21(b)(3). Under those definitions, "net emissions increase" denotes the positive sum of any increase in "actual emissions" from a particular physical or operational change at a source and any other increases and decreases in "actual emissions" that are contemporaneous with the particular change and otherwise creditable.

The first step in determining whether a "net emissions increase" would occur is to determine whether the physical or operational change in question would itself result in an increase in "actual emissions." If it would not, then it could not result in a "net emissions increase." If it would, the second step is to identify and quantify any other prior increases and decreases in "actual emissions" that would be contemporaneous with the particular change and otherwise creditable. The third step, finally, is to total the increase from the particular change with the other contemporaneous increases and decreases. If the total would exceed zero, then a "net emissions increase" would result from the change.

The definitions of "net emissions increase" specify which increases and decreases in "actual emissions" are contemporaneous. Under the definition in the Part 52 PSD regulations, increases or decreases are contemporaneous with a proposed change only if they occur between two dates: first, the date five years before construction "commences" on the proposed physical or operational change in question and, second, the date the increase from that change "occurs." An increase from a physical change "occurs" when the affected emissions unit becomes operational and begins to emit a particular pollutant. Any unit that requires shakedown becomes operational only after a reasonable shakedown period (not to exceed 180 days). Under the definition in the Part 51 regulations, a state in revising its SIP may set a period other than the five-year period of the Part 52 regulations to define what is contemporaneous and what is not, so long as the period is not unreasonably long.

The definitions of "net emissions increase" in the PSD regulations also specify which contemporaneous increases and decreases in "actual emissions" are creditable. A contemporaneous increase or decrease is creditable only if the relevant reviewing authority has not relied on it in issuing a PSD permit for the source,

[10] Contrary to one commenter's argument, EPA believes that the dual definition will not cause sources to locate in clean areas. Any such source would be subject to PSD review in any event.

[11] One commenter requested EPA define "source as one emitting the criteria pollutants, and not "any pollutant regulated under the Act." EPA has decided to retain its definition, since it comports with section 302(j) of the Act. However, pursuant to section 172(b)(6), EPA will require new source review permits only for those pollutants for which an area has been designated nonattainment and for which the source is major.

and that permit is still in effect when the increase in "actual emissions" from the particular change occurs. A reviewing authority "relies" on an increase or decrease when, after taking the increase or decrease into account, it concludes that the proposed project would not cause or contribute to a violation of an increment or ambient standard. A contemporaneous increase or decrease in "actual emissions" of sulfur dioxide or particulate matter that occurs before the applicable baseline date is creditable only if, in addition, it is required to be considered in calculating how much of a particular increment remains available.

Finally, the definitions of "net emissions increase" in the new PSD regulations specify the extent to which any contemporaneous and otherwise creditable increase or decrease is creditable. Any such increase is creditable to the extent that the new level of "actual emissions" exceeds the old level of "actual emissions." Any such decrease is creditable only to the extent that (1) the old level of "actual emissions" (or the old level of "allowable emissions," if it is lower) exceeds the new level of "actual emissions," (2) the decrease is federally enforceable at the time construction begins on the proposed physical or operational change which it is intended to offset, and (3) the decrease has roughly the same health and welfare significance as the increase from the proposed change.

Under the final PSD regulations, the phrase "actual emissions" means the rate at which an emissions unit actually emits a particular pollutant. *See* §§ 51.24(b)(21) and 52.21(b)(21). In general, that rate as of a particular date equals the average rate in tons per year at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and is representative of normal source operation. The reviewing authority may presume that any "source-specific allowable emissions" for the unit is equivalent to the actual emissions of the unit. For any unit which has yet to begin normal operations on the date in question, its actual emissions equal its "potential to emit" on that date. For a fuller discussion of the concept of "actual emissions" and in particular of what constitutes "source-specific allowable emissions," see the section on Increment Consumption.

The final PSD regulations also describe in detail the concept of "allowable emissions." *See* §§ 51.24(b)(16) and 52.21(b)(16). That phrase means in essence the maximum rate at which an emissions unit under the most stringent of certain legal constraints may emit a particular pollutant. The legal constraints are (1) any applicable standards in 40 CFR Parts 60 and 61, (2) any applicable SIP limitations, including any with a future compliance date, and (3) any applicable condition in a permit issued under the SIP that is federally enforceable, also including any condition with a future compliance date.

The final amendments to the Offset Ruling, 40 CFR 51.18 and 40 CFR 52.24 which are announced here also include new definitions of "major modification," "significant," "net emissions increase," "actual emissions," and "allowable emissions." In general those definitions follow the pattern of the PSD definitions. Only the definitions of "net emissions increase" in those nonattainment provisions vary significantly. They add that a decrease in "actual emissions" which is contemporaneous with the increase in question may be credited only if and only to the extent that the relevant permitting authority has not already accepted it as a satisfactory "offset" in issuing a preconstruction permit under the SIP.

B. No Net Increase

The *Alabama Power* decision rejected EPA's regulatory approach of requiring PSD review of potential emissions increases at existing stationary sources only when such increases would equal or exceed the 100/250 ton threshold used in the review of new sources. It held instead that a change in a major stationary source is subject to review only if it would result in any significant net increase. In response, EPA proposed on September 5, 1979, an approach that would subject to new source review (NSR) under the relevant PSD or nonattainment provisions only each significant net increase that would occur in the potential to emit of a major stationary source. Under the proposal, a significant net increase was to be an overall increase in the potential to emit of the source equal to or greater than a pollutant-specific emissions cutoff (*see De Minimis* Exemptions), taking into account contemporaneous emissions increases and decreases at the same source. An exception to this general rule of netting contemporaneous increases and decreases was to be the case of construction restrictions under sections 110(a)(2)(I) and 173(4). There, accumulated increases would count toward triggering the growth prohibitions, without regard to any contemporaneous reductions occurring at the same source.

Public comment supported this proposal (except with respect to the construction restrictions) as the clear and proper interpretation of the *Alabama Power* decision. Sixty-two of sixty-three commenters endorsed the general netting approach to modification taken in the proposal, although several took issue with certain of the specific rules relating to the concept (see discussion below). Several commenters felt that requiring any significant net increase to undergo review was too strict on existing sources as compared with new sources, since new sources can emit up to 100/250 tons per year and still not be subject to review. The terms of the Act and the court decision preclude allowing such a general exemption for existing sources. Pursuant to *Alabama Power*, the Administrator is today promulgating the netting concept for determining the review applicability of changes at existing major stationary sources (consistent with each program's definition of source). This promulgation affects regulations for PSD (40 CFR 52.21 and 40 CFR 51.24), nonattainment NSR (Emissions Offset Interpretative Ruling and 40 CFR 51.18(j), Review of New Stationary Sources and Modifications), and the construction restrictions under sections 110(a)(2)(I) and 173(4), (40 CFR 52.24, Statutory Restriction on new Stationary Sources). Allowance of netting for determining the applicability of 40 CFR 52.24 is a change from the proposal and is discussed below.

C. Pollutant Applicability

EPA proposed to require preconstruction review only if the increase in potential to emit would be for a pollutant which the source emits in major amounts. Once an increase in the major pollutant triggered PSD review then review would be required for all regulated pullutants emitted in greater than *de minimis* amounts as a result of the modification. Review would also be required if the emissions change itself were equivalent to a major stationary source.

Only limited comment was received on EPA's proposal to require review where major changes in emissions of minor pollutants or greater than *de minimis* changes in emissions of a major pollutant would occur. While a few groups endorsed the September 5 proposal, one group argued that *Alabama Power* did not restrict PSD applicability to just modifications involving the pollutant(s) which the source emits in major amounts. That group pointed out that section 111(a)(4) of the Act defines "modification" as "any physical change in, or change in the method of operation of, a stationary

source which increases the amount of *any* air pollutant emitted by such source or which results in the emissions of *any air pollutant not previously emitted.*" (Emphasis added.)

The Administrator agrees that requiring review for a net emissions increase in any pollutant subject to regulation under the Act is consistent with the *Alabama Power* decision. Consequently, EPA is promulgating a final rule that requires PSD preconstruction review for net emissions increases in greater than *de minimis* amounts at a major stationary source for any pollutant subject to regulation under the Act emitted by the source, regardless of whether the source is major for that pollutant.

The Administrator is not changing the September 5 proposal with respect to pollutant applicability in nonattainment areas. *See* Geographic and Pollutant Applicability. The source must be major for the nonattainment pollutant(s) and must make a greater than *de minimis* emissions change in such a pollutant in order to trigger nonattainment review for that pollutant(s). A PSD review, however, would be triggered if a greater than *de minimis* change occurs at that major source for any regulated pollutant emitted by the source other than the nonattainment pollutant(s).

D. Netting of Actual Emissions

EPA proposed on September 5 that an activity be deemed a major modification when the "potential to emit" of the major stationary source experiences a net increase greater than a *de minimis* amount, taking into account all contemporaneous changes. EPA also proposed that a reduction would be creditable only if the physical capability of the source to emit a pollutant were actually reduced. In addition, where "allowable emissions" for a source, as defined in the 1978 PSD regulations and the Offset Ruling would be less than its "potential to emit," no credit would be given for reducing potential emissions to "allowable emissions." "Allowable emissions," as defined in those regulations, meant the emissions rate calculated using the maximum rated capacity of the source and is represented by the most stringent than any of the following: (1) any applicable standards in 40 CFR Parts 60 and 61; (2) any applicable SIP emissions limitations; and (3) any emissions rate specified as a permit condition under the SIP. The applicable SIP limitation in the case of designated nonattainment areas included the emissions rate that was assumed for the source in the attainment demonstration and in the schedule for making reasonable further progress.

Forty of forty-two commenters favored an allowable emissions baseline, for determining whether a net emissions increase would occur, instead of one using "potential to emit." The other two commenters endorsed EPA's proposal. Many also complained of the different criteria for determining "potential to emit" from new and existing sources. (Under the proposal, "allowable emissions" and physical incapability could have constrained the "potential to emit" of existing but not new stationary sources.)

There are problems with using a baseline for netting that is based on the existing source's "potential to emit." A computation of an existing source's potential emissions could give a figure considerably higher than what it is actually emitting. This would be especially true if the source operated only a small part of the time or used considerably cleaner fuels than it is allowed to burn. Such an approach would therefore create a "paper offset" that could permit actual air quality to deteriorate seriously, while the change which increased actual emissions avoided NSR. Similar problems would arise if offsets were based on allowable emissions, as recommended by most commenters.

In the June 1979 opinion in *Alabama Power*, the court held that the definition of "modification" in section 111(a)(4) governs the definition of that term for PSD purposes. Section 111(a) provides that a "modification" is "any physical change in, or change in the method of operation of, a stationary source which increases *the amount* of any air pollutant *emitted* by such source or which results in *the emissions* of any air pollutant not previously *emitted.*" (Emphasis added.) Although the *underlined* words in the definition appear to refer to what the source is actually emitting at a particular time, the court in the June opinion described the concept of "modification" in terms of changes in the "potential to emit" of a source. As a result, EPA proposed definitions which also referred to changes in "potential to emit."

In its December 1979 opinion, however, the court used an entirely different set of terms to describe "modification." Instead of using "potential to emit," it used language which, like the section 111(a)(4) definition, suggest changes in actual emissions. For example, at one point the court states: "If these plants *increase* pollution, they will generally need a permit. Exceptions to this rule will occur when the *increases* are *de minimis*, and when the *increases* are offset by contemporaneous decreases of pollutants, as we discuss below * * *" (Emphasis added.)

Following the lead of the court, EPA has also shifted the focus of its regulatory definitions from "potential to emit" to "actual emissions." For both PSD and nonattainment purposes, a "major modification" is now any significant "net emissions increase" at a major stationary source that results from certain changes. "Net emissions increase" is, in turn, roughly any net increase in "actual emissions." Not only are those definitions consistent with the court's view of section 111(a)(4), but they also avoid the "paper offset" problem described above, thereby better serving PSD and nonattainment purposes.

E. Contemporaneous Increases and Decreases

Under *Alabama Power*, a modification is any net increase in emissions that would result form "contemporaneous" changes at a major stationary source. The court decision left to EPA the task of defining what changes should be considered "contemporaneous."

A narrow interpretation of the term "contemporaneous" would restrict creditable decreases in emissions to those occurring at the same time as the emissions increases to be offset. The administrator decided against proposing such an interpretation, since it might promote the continued operation of old or obsolete equipment in order to preserve offset credit. Instead, EPA proposed a system that would grant credit for *any* post-promulgation emissions reduction and for certain pre-promulgation emissions reductions involving recent shutdowns or production curtailments. In order to be creditable, the reductions were to be enforceable before operation of the emissions unit(s) that would result in the emissions increases (except that a 180-day shakedown period could be granted for replacements). A preconstruction notice was also proposed as a mandatory means to record any reduction credit. (For a discussion of that proposed notice requirement, see the section entitled Notification.)

On January 30, 1980 (45 FR 6802), EPA solicited additional comment on its proposal for "contemporaneous." In particular, the Administrator asked whether a three-year time limit should be imposed for qualifying reductions as "contemporaneous." The proposed three-year time cap would have run from the time of the emissions reduction to the time that the source would have filed any necessary permit application

for the prospective emissions increase(s). Where a permit would have not been required, the reference time would instead be the date on which construction commenced on the change resulting in the emissions increase.

Several comments were received on the September 5 proposal. Many confused the dates for accumulation at minor stationary sources (see discussion below) with the time limits for "contemporaneous" changes at major stationary sources. The majority of commenters on the January 30 **Federal Register** notice were from the industrial sector and they urged EPA to treat *any* emissions decrease which occurs before a proposed increase as being "Contemporaneous" with that increase. EPA however, has rejected those urgings. To credit any decrease that occurs before a proposed increase would violate any common sense notion of what is "contemporaneous," since a period of contemporaneity must have some definite boundaries.

EPA agrees with those industry commenters, however, to the extent that they contended that the period of contemporaneity should be fairly large. In particular, EPA believes that the period should be wide enough so as to minimize any incentive for keeping old or obsolete equipment in operation beyond its usefulness. As a result, EPA has set five years, plus time for construction, as the period of contemporaneity for the purposes of the Part 52 PSD regulations, the Offset Ruling and the construction moratorium. Specifically, the definition of "net emissions increase" in each of those regulations provides that a decrease in "actual emissions" may be credited only if it occurs between the date five years before construction "commences" on a proposed physical or operational change and the date the increase in "actual emissions" from that change occurs. A five-year limit was selected for those regulations rather than a three-year value, since five years is frequently used as the time duration over which corporate expansion planning is conducted.

For the purposes of the Part 51 PSD and nonattainment regulations, EPA has established that each state may set the period of contemporaneity for its own NSR regulations. The state may not, however, set a period of unreasonable or undefined length.

F. Otherwise Creditable Increases and Decreases

Whether an increase or decrease in "actual emissions" is creditable for PSD or nonattainment purposes depends, not only on whether it is contemporaneous with the increase in question, but also on certain other factors. First, under each of the PSD and nonattainment definitions, a prior increase or decrease is creditable only if the relevant reviewing authority has not relied upon it in issuing a permit under the relevant NSR program. As stated earlier, a reviewing authority "relies" on an increase or decrease when, after taking the increase or decrease into account, it concludes that the proposed project would not cause or contribute to a violation of an increment or ambient standard. The purpose of that rule is to "wipe the slate clean." Once the reviewing authority has evaluated a significant net increase in issuing an NSR permit the net increase should not be a factor in deciding whether subsequent events should undergo scrutiny, too.

Second, under the PSD definition of "net emissions increase," an increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the baseline date is creditable only if it would be considered in calculating how much of an increment remains available. In formulating that definition, EPA sought to establish as close a correspondence as possible between what consumed increment and what must undergo NSR for PSD. Without that rule, some changes that *would* consume increment could escape review because of a prior decrease that was subsumed in the baseline concentration. In addition, without that rule, some changes that *would not* consume increment could have to undergo review because of a prior increase that was also subsumed in the baseline concentration.

G. The Extent to Which Increases and Decreases are Creditable

Each of the definitions of "net emissions increase" in the PSD and nonattainment regulations contains provisions which govern the extent to which a creditable increase or decrease in "actual emissions" may be credited.

The rules in each of those definitions relating to increases are simple. An increase is creditable to the extent that the new level of "actual emissions" at the emissions unit in question exceeds the old level. The old level of "actual emissions" is that which prevailed just prior to the physical or operational change which caused the increase. The new level is that which prevails just after the change.

The rules relating to decreases that are common to each of the definitions are more complex. First, a decrease is creditable only to the extent that "the old level of actual emissions or *the old level of allowable emissions, whichever is lower,* exceeds the new level of actual emissions." (Emphasis added.) Since "allowable emissions" encompasses any federally enforceable requirement, including any with a future compliance date, the underlined language prevents a company from taking credit for decreases that it has had to make or will have to make in the future. EPA concluded that to give credit for a decrease a company has had to make in order to bring an emissions unit into compliance was unwise, since together with the five-year "contemporaneous" period it would create an incentive to stay out of compliance. Furthermore, it would be contrary to the purposes of the Act and good sense to provide what is in essence a benefit for recalcitrance. Similarly, EPA concluded that to give credit for a decrease a company will ultimately have to make anyway in order to meet a requirement by a certain date would also be unwise, since it would encourage procrastination. Further, allowing decreases which fulfill preexisting requirements to be used to avoid review would undermine the purposes of the PSD and nonattainment programs by interfering with efforts to preserve or achieve attainment.

Second, a decrease is creditable only to the extent that it is "federally enforceable" from the moment that actual construction begins on the physical or operational change which causes the "actual emissions" increase in question. The purpose of that rule is to ensure that the decrease is real and that it remains in effect. The term "federally enforceable" is defined in the regulations as any limitation or conditions which EPA can enforce, such as any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved under 40 CFR 51.18 and 40 CFR 51.24.

Finally, a decrease is creditable only to the extent that it has the same health and welfare significance as the increases in question. By this provision, EPA seeks mainly to prevent an increase in emissions with considerable health and welfare significance from escaping review merely because of a contemporaneous decrease in less harmful emissions. The basic health and welfare protection purposes of the Act mandate this provision.

The definitions of "net emissions increase" in the nonattainment regulations contain a restriction on crediting decreases that the PSD regulations do not contain. Specifically, they provide that a permitting authority may not credit a decrease to the extent that any permitting authority has

already accepted the decrease in satisfaction of the offset requirements of the applicable nonattainment regulations and consequently has issued a preconstruction permit to any source or modification, including the source at which the decrease occurred. The purpose of that rule is to prevent any "double crediting" of decreases in "actual emissions." Double crediting would allow air quality to deteriorate without prior review.

EPA is considering whether to introduce a provision to prevent double crediting in the PSD context. A discussion of the problem appears in the section on Increment Consumption.

H. Accumulation

On September 5, 1979, EPA proposed to continue the current policy of requiring PSD and nonattainment NSR when aggregate new emissions from individually minor units at the same stationary source, which itself was minor as of a certain date, are sufficient to require the series of changes to be treated as a major stationary source. In addition, the Administrator proposed to make the current policy consistent with the *Alabama Power* decision by applying NSR when the aggregate *net* increase in potential to emit after the applicable date qualifies it as a major stationary source (the existing rules accumulate only emissions increases and do not take decreases in account). For PSD review, the date from which emissions increases were to be aggregated was August 7, 1977, the date found in the 1978 PSD regulations. The proposed December 21, 1976 date for each of the nonattainment regulations, including the construction moratorium, marks the time when sources constructing in nonattainment areas were placed on notice that accumulation could later subject them to review.

EPA also proposed that, once a series of individually minor changes or one major change at a minor stationary source had qualified for review, the control technology assessment would focus on the last changed unit triggering review while the air quality assessment would consider all aggregated emissions.

Finally, the Administrator proposed on September 5 that accumulation would also govern the review of individual *de minimis* changes at major stationary sources. Once a source had aggregated enough emissions to make it major, a subsequent emissions increase of any size at the source would have to undergo review, unless the increase together with any contemporaneous increases or decreases of any size would qualify as a *de minimis* increase.

Twenty of the twenty-three comments received did not favor retaining the accumulation concept, even with the addition of netting. Two other commenters endorsed accumulation, but with different starting dates. Two industrial commenters claimed that accumulation cannot be legally required, since section 111(a)(4) defines modification in terms of *any change* and not a *series of changes* at a stationary source. Most other commenters agreed that neither the court nor the Act takes a position on accumulation, but they requested that the Agency not adopt or maintain such a concept. These commenters claimed that both major and minor source accumulation complicates the regulations and could eventually subject the most minor of emissions changes to review. The increase in paperwork, and the administrative strain of trying to document and report *de minimis* emissions changes, were claimed to be overwhelming, costly, and counterproductive.

These concerns might have had merit if the proposed *de minimis* emission levels had not been raised in the final regulations and the accumulation of *de minimis* changes was to continue even after a preconstruction permit had been issued. It was suggested that the general NSR procedures found in all SIPs be relied upon to effect good control for the *de minimis* or minor emissions changes, instead of accumulation. Commenters stressed that, in any event, accumulation of *de minimis* increases should run over the same time period for crediting contemporaneous reductions.

The Administrator has reconsidered the need for an accumulation rule and has decided to retain accumulation to determine if a greater than *de minimis* increase would occur at a major stationary source and to delete accumulation for aggregating changes at minor stationary sources. The primary reason for proposing accumulation at minor sources was to prevent circumvention of the regulations by the systematic construction of carefully sized emissions units which only in the aggregate would trigger review. Even though all signficant changes at a source would face reveiw once the source became major, a significant loophole was thought to exist. For example, absent an accumulation rule, a company could construct a 498-ton source without having to get a PSD permit by constructing first one-half of it and then subsequently the other half. The Administrator, however, does not find adequate support in the Act for applying PSD review to the change at a minor source which would make the source major. Section 165 applies only to major emitting facilities on which "construction" commences after a specified date, where the term "construction" includes "modification." Similarly, section 172(b)(6) requires permits for the construction of new or modified major stationary sources. EPA believes that, in general, PSD and nonattainment review cannot be applied to a modification unless it would occur at a source that is already major. The one exception to this rule is where a proposed addition to an existing minor stationary source would be major in its own right. Such construction is equivalent to a new major stationary source and should therefore be subject to PSD and nonattainment review. A new subsection in each of the PSD and nonattainment regulations embodies that view.

In general, under the promulgation announced here a series of minor changes at the same minor stationary source will not be accumulated. On the other hand, a series of individually *de minimis* changes at a major stationary source would be accumulated within a contemporaneous time frame to see if a review would be required. This is reflected in the definitions of "net emissions increase" in the PSD and nonattainment regulations. Plainly, a series of individually *de minimis* increases in emissions in the aggregate deteriorate air quality significantly.

I. Restrictions on Construction

EPA proposed that the netting of emissions changes would not be permitted in areas subject to construction restrictions under section 110(a)(2)(I) or 173(4). EPA based this proposal on an interpretation that Congress intended all forms of offsets to cease after June 30, 1979, in the absence of an approved Part D plan. This policy would also have promoted the timely submittal of attainment plans and prevented the nonattainment problem from growing worse while the plan was being developed. The Administrator believed that sources might convert reductions later needed for attainment into offsets before the plan requiring those reductions could be adopted and approved.

Thirty-two of thirty-five commenters said that the proposed "increase only" approach was unacceptable. No substantial support was given by the three that favored it. Several questioned the legality of the proposed interpretation and claimed that *Alabama Power* authorized only a netting approach, despite any programmatic sense that another

approach might have. Several asserted that EPA's proposal would discourage early cleanup and actually perpetuate the existing air quality problem.

The Administrator has reconsidered the interpretation that led to the proposal of the "increase only" approach for carrying out the growth restrictions and concluded that the *Alabama Power* decision does not support it. Thus, in the final rules promulgated today, a major stationary source can construct in a growth restricted area, if sufficient contemporaneous, creditable net reductions are found (subject to the limitations on reconstruction described below).

J. Reconstruction

In the September 5, 1979 proposal, a reconstruction (roughly, improvements at an existing source which equal 50% or more of the capital cost for replacing the source) was to be treated as if it were a new source for purposes of NSR under both PSD and nonattainment rules. Under the proposal, a reconstructed major stationary source would be subject to review regardless of any contemporaneous emissions reductions that would occur at the same source. The Administrator proposed this approach in accordance with Congressional intent to subject new construction in nonattainment areas to requirements such as meeting the lowest achievable emission rate (LAER), even though a replacement of an older unit would result in a net reduction from previous emission levels (*see* 123 CONG. REC. 13702, col. 2 (daily ed. August 4, 1977) (statement of Senator Muskie)). In the agency's view nonattainment areas require very stringent NSR Procedures to overcome the inertia of the nonattainment problem. Having a reconstruction provision would promote maximum air quality improvements from an area's limited reduction capability by requiring more construction projects to meet LAER and bring other sources in the State under common control into compliance with the SIP.

The reconstruction rule was also proposed for PSD in an effort to be consistent with nonattainment NSR. Although the Administrator recognized that the air quality rationale for having reconstruction in nonattainment areas was considerably stronger than that for PSD inclusion, it was believed that less confusion would result with a parallel application of the reconstruction rule.

All ten commenters on the reconstruction topic voiced general disapproval for the proposal. Eight of the ten favored dropping the concept entirely from both sets of regulations, with the remaining two requesting that its applicability be restricted. They advised that EPA should rely instead on the reconstruction provisions of NSPS and NESHAP to ensure such construction would apply adequate control technology. Commenters complained that review criteria based solely on the replacement cost of equipment regardless of air quality improvements make little sense for NSR rules charged with safeguarding air quality. They further argued that the added regulatory complexity inherent to the inclusion of a reconstruction provision was not warranted and its addition to NSR would not be consistent with the "no net increase" exemption under *Alabama Power*.

The Administrator agrees that the reconstruction requirement makes only limited air quality sense for PSD and has reconsidered the need to retain this concept for the program. It is true that a reconstructed source not otherwise subjected to PSD review as a major modification (i.e., such source would not cause a significant net emissions increase) would not interfere with the PSD air quality objective of allowing only limited deterioration of existing air quality. On the other hand, the PSD objective of maximizing future use of the allowable increments through application of best available control technology (BACT) would not be strictly met. Nevertheless, the Administrator believes that the general PSD objective of safeguarding existing air quality from significant degradation will not be undermined by deleting the requirement for review of reconstructions.

The proposal would have implemented reconstruction for PSD only on a plant wide basis. Thus, an entire plant would have to be reconstructed in order for it to be subjected to PSD review as a reconstruction. Few instances of plantwide reconstruction are expected. The limited applicability under PSD brings further doubt as to the real need for the added complexity that a reconstruction provision would bring to determining the permit applicability of construction projects. Furthermore, the deletion of reconstruction from PSD would avoid some increment tracking problems; treating reconstruction as new PSD sources could lead to increment consumption unrelated to actual air quality changes.

The Administrator does not agree with the commenters who argued that applying "reconstruction" in nonattainment areas would bring unwarranted complexity and no air quality benefits. As explained in the proposal, EPA believes that the reconstruction provision within nonattainment NSR rules is consistent with stated Congressional intent and programmatic goals to get reasonable air quality improvements from each major construction activity. Since *Alabama Power* did not strictly bind EPA in nonattainment concerns and since the reconstruction concept was not expressly precluded, the Administrator has determined that reconstruction is warranted in nonattainment areas and is today promulgating this concept as proposed for nonattainment NSR rules.

Commenters also asked that several exemptions be considered if a reconstruction rule were promulgated. Among the exemptions suggested were: (1) current NSPS exemptions for modifications, (2) Fuel-Use Act exemptions, (3) involuntary replacement of damaged equipment, and (4) voluntary fuel switches. The Administrator is not promulgating any of these exemptions into the reconstruction provision. First, the current NSPS exemptions and involuntary replacement of damaged equipment do not avoid applicability of NSPS under 40 CFR 60.15 when a unit would have been reconstructed. Therefore, it would be inconsistent to establish such a concept under nonattainment NSR. In addition, 40 CFR 60.15, which governs how the reconstruction rule will apply in the affected NSR programs (*see e.g.*, 40 CFR Part 51 Appendix S, section II. A(12)), allows the Administrator, in paragraph (f), some case-by-case discretion in determining when a reconstruction would occur. Thus, no specific exemptions such as those suggested appear warranted at this time.

K. Exclusions

In September, EPA proposed to exclude "routine maintenance, repair and replacement" from the category "physical change" which appeared in the proposed PSD and nonattainment definitions of "major modification." At the same time EPA proposed to exclude the following events from the category "change in method of operation," unless previously limited by enforceable permit conditions: (1) a fuel switch due to an order under the Energy Supply and Environmental Coordination Act of 1974 (ESECA) (or any superseding legislation) or due to a natural gas curtailment plan under the Federal Power Act; (2) a voluntary switch to an alternative fuel or raw material that the source prior to January 6, 1975, was capable of accommodating; (3) a fuel switch due to an order or rule under section 125 of the

Clean Air Act; (4) a switch to "refuse derived fuel generated from municipal solid waste" (RDF), and (5) a change in the ownership of a source.

EPA received few comments on the proposed exclusions. Certain commenters expressed reservations about the legal and policy basis of the RDF exclusion. Another commenter urged EPA to expand the exclusion for voluntary switches to an alternative fuel or raw material. Specifically, the commenter urged the Agency to drop the provisions which limited the exclusion to switches that would not require a change in permit conditions and to sources that were capable of accommodating the fuel or material before January 6, 1975. The commenter agreed with the position EPA took in the preamble to the 1978 Part 52 PSD regulations that Congress in enacting section 169(2)(C) intended that voluntary switches to an alternative fuel or raw material should be treated in the same way that they were being treated under section 111. *See* 43 FR 26396 (June 19, 1978). At the time Congress enacted section 169(2)(e), the regulations promulgated under section 111 excluded any such switch if the source could accommodate the fuel or material before the relevant NSPS applied to the source type. Whether a permit condition would restrict the switch was immaterial. *See* 40 CFR 60.14(e)(4) (1979). In view of this, the commenter argued that Congress intended the exclusion in the PSD and nonattainment regulations to look only at whether the source was capable of accommodating the fuel or material before those regulations first applied to it.

After considering the comments on the RDF exclusion, EPA has decided to promulgate it. The Resource Conservation and Recovery Act of 1974, 42 U.S.C. 3251 *et seq.*, firmly supports the exclusion. In that statute, Congress expressed a strong interest in the development and use of RDF. In addition, the exclusion has a sound policy basis, in view of the importance of reducing the nation's dependence on foreign oil.

In promulgating the exclusion, however, EPA has drawn it, by way of clarification, somewhat more tightly. It now excludes only a switch to RDF by a "steam generating unit." EPA intends that term to have the same meaning for the purposes of PSD and nonattainment NSR as it does for the purposes of the new NSPS for certain electric utility "steam generating units." For the NSPS definition of that term, see 40 CFR 60.41a (1979).

In response to the comment on the voluntary fuel and raw material switch provision, EPA has retained the language which limited it to sources which were capable of accommodating the fuel or material before January 6, 1975 (or December 21, 1976, for the Offset Ruling and 40 CFR 51.18; or July 1, 1979, for the construction moratorium) and the language which limited the exclusion to those not requiring a permit alteration. First, EPA disagrees that the cutoff date in the counterpart NSPS exclusion is analogous to the date the particular preconstruction permit regulations applied to a particular source. To the contrary, the NSPS counterpart is more broadly drawn; it focuses on the date the NSPS first applied to the *source type.* Second, EPA disagrees that the counterpart governs whether the NSR exclusions must ignore permit conditions. The NSPS program does not involve assessments of the impact of a source on air quality. In EPA's view, any switch to another fuel or raw material that would distort a prior assessment of a source's air quality impact should have to undergo scrutiny.

It should be noted that EPA has added a new clause to the exclusion for voluntary fuel switches. It provides that a switch which the relevant reviewing authority has already approved is not a "physical change" or "change in the method of operation" for NSR purposes. Obviously, a second evaluation of the air quality impact of the switch would be unnecessary.

The comment relating to voluntary switches has prompted EPA to add one more exclusion. It would exclude any increase in hours or rate of operation, as long as the increase would not require a change in any preconstruction permit condition established under the SIP (including PSD permits) after the relevant date of concern.

This exclusion stems largely from EPA's decision that the definitions of "major modification" should focus on changes in "actual emissions." While EPA has concluded that as a general rule Congress intended any significant net increase in such emissions to undergo PSD or nonattainment review, it is also convinced that Congress could not have intended a company to have to get a NSR permit before it could lawfully change hours or rate of operation. Plainly, such a requirement would severely and unduly hamper the ability of any company to take advantage of favorable market conditions. The emphasis of the relevant statutory provisions on "construction" strongly supports EPA's interpretation of Congress' intent. *See, e.g.*, section 165(a), 42 U.S.C. 7475. At the same time, any change in hours or rate of operation that would disturb a prior assessment of a source's environmental impact should have to undergo scrutiny.

Because of the absence of any significant comments on the other four exclusions, EPA has promulgated them as proposed.

L. Example of How the Definitions Work

The way in which the definition of modification works is best illustrated by an example. The example also demonstrates the relationship among a source's potential to emit, its actual emissions, and its allowable emissions.

In December 1980, a new source (Source A) that will emit SO_2 and PM files a PSD application to locate in an area that is attainment for SO_2 and PM. At maximum operating capacity including application of best available control technology, and assuming year-round continuous operation, the source can emit 700 tons of SO_2 per year. Seven hundred tons per year (tpy) is the source's physical potential to emit SO_2. Its physical potential to emit PM is 15 tpy. Provided that the 15 tpy of PM emissions is made federally enforceable, PM emissions will not be significant (*i.e.*, less than 25 tpy) and are, therefore, not subject to PSD review.

In the course of review, modeling reveals the SO_2 increment will be violated in the source's area of impact if it emits 700 tons SO_2 per year. The source, therefore, decides to limit its operation so as to decrease its emissions to 600 tons SO_2 per year. This reduction proves sufficient to eliminate the predicted violation. The source is issued a PSD permit that sets an SO_2 emissions limitation of 600 tpy, which reflects the revised source operation (approximately 20 hours a day, seven days a week). This emissions rate is the source's legal potential to emit. It is also the source's allowable emissions, since it is the emissions rate specified as a federally enforceable permit condition. *See e.g.*, § 52.21(b)(15)(iii).

During the first three years of operation, from March 1982 to March 1985, the demand for the source's product is less than anticipated. As a result, the source's actual emissions are 250 tpy during the first year and 300 tpy during the next two years.

In April 1985, another new source of SO_2 (Source B) proposes to locate in the area of impact of Source A. Consequently, in calculating its impact on ambient standards and its increment consumption, Source B is required to model the emissions of Source A. Under EPA's increment consumption policy (*see* Increment Consumption), Source

A's actual emissions should be modeled. Because Source A has an individually-tailored PSD permit, the definition of actual emissions allows the reviewing authority to presume that the allowable emissions in Source A's PSD permit reflects its actual emissions, unless the reviewing authority or source applicant has reason to believe that allowable emissions are not representative of actual source emissions.

In the case of Source A, allowable emissions, in fact, differ from actual emissions. Assuming that the reviewing authority is aware of this difference as a result of its periodic assessment or because Source B has presented this information in its application, Source A is modeled at its actual emissions rate representative of normal source operation during a two-year period preceding the date of concern. In this case, the date of concern would be approximately the date Source B submits its application. The reviewing authority should, therefore, look to the two-year period preceding that date unless that period of time was atypical of normal source operation. For Source A, the two-year period preceding Source B's application can be considered representative of normal source operation. Source A's actual emissions during that period, on an average annual basis, are approximately 300 tpy. The modeling of increment consumption for Source B should assume that emissions rate for Source A.

Unless Source A's permit is revised at this point to reflect its actual emissions rate of 300 tpy, Source A could attempt to use the decrease in its actual emissions in the future to offset a future emissions increase of its own. This would result in a large net increase in actual emissions for the area which could violate the applicable PSD increment. The potential problem of double counting of emissions decreases is discussed in more detail in Increment Consumption.

Assume that in June 1987, Source A decides to modify its facility. Demand for its product has increased and Source A wants to add a new emissions unit that will emit 60 tpy SO_2. In addition, Source A plans to increase the hours of operation at the units which began production in March 1982, to result in an actual emissions increase of 75 tpy at those units. If no contemporaneous decreases have occurred, both changes will result in significant net increases in actual emissions. Both changes then qualify as modifications. The addition of a new unit is a physical change. The increase in hours of operation is a change in the method of operation, assuming that the reviewing authority revised Source A's permit to reflect its actual emissions of 300 tpy at the time Source A's actual emissions were used by Source B in modeling increment consumption.

If Source A was able to decrease sufficiently its actual emissions at another unit at the source, it would be able to avoid PSD review for one or both modifications. Assume, for example, that in April 1986, Source A applied additional control equipment and decreased actual SO_2 emissions across the facility by 100 tpy. In June 1987, Source A can use those decreases to offset its proposed contemporaneous increases provided the decreases are made federally enforceable. If Source A's proposed increase in hours of operation for the units which began operation in March 1982 would result in an emissions increase of 75 tpy and the emissions from the proposed new unit are 60 tpy, Source A can use its 100 tpy decrease to avoid PSD review for both changes. Seventy-five tons of the decrease can be used to offset the increase in hours of operation and 25 tons of the decrease can offset 25 tons of the increase due to the new unit. Since the net emissions increase of 35 tons is not significant, it would not be a major modification requiring PSD review.[12]

Suppose Source A then plans to increase its emissions by 150 tpy in November 1990 and to decrease emissions by 80 tpy in February 1989. The increases and decreases since April 1986 are all contemporaneous because they occurred within the same five-year period. Now, assume Source A revises its permit to reflect only 50 tons of the 80-ton decrease in February 1989. Source A can receive credit for only 50 tons of the 80-ton decrease, since only this amount was made federally enforceable. However, Source A does receive credit for the April 1986 decrease of 100 tpy, assuming that decrease was made federally enforceable at the time of the June 1987 increase, or is made federally enforceable prior to commencement of construction on the November 1990 increase. Source A's total creditable decreases are then 150 tpy. Its increases are 135 tpy in June 1987 and 150 tpy in November 1990, for a total increase of 285 tpy. The net emissions increase is 135 tpy, which is significant for SO_2. Source A must get a PSD permit for the change leading to the 150 tpy increase in November 1990. However, it is not required to get a PSD permit for the June 1987 increases.

If, from March 1982 to March 1985, Source A had exceeded its allowable rate of 700 tpy, Source A could not receive full credit for its April 1986 decrease. For example, assume Source A's actual emissions from March 1982 to March 1986 were 800 tpy, 100 tpy over its allowed rate. None of the 100 tpy reduction in April 1986 would then be creditable. The amount of Source A's creditable decrease could also be reduced if the designation of the area where Source A is located were changed from attainment to nonattainment in March 1985 and Source A became subject to a new, more stringent SIP requirement in March 1986. If, for example, the SIP required Source A to reduce emissions from 700 to 600 tpy by December 1988, none of the 100 tpy decrease in April 1986 would again be creditable.

XI. De Minimis Exemptions

In the *Alabama Power* decision, the court indicated that emissions from certain small modifications, and emissions of certain pollutants at new sources, could be exempted from some or all PSD review requirements on the grounds that such emissions would be *de minimis*. In other words, the Administrator may determine levels below which there is no practical value in conducting an extensive PSD review. The court also indicated that the Agency could establish exemptions based on administrative necessity (e.g., the inability of reviewing authorities to provide the necessary work force to properly review a very large number of permit applications). The September 5 proposal incorporated the *de minimis* concept and requested comments on the approach taken. At that time, the Administrator noted that because of the urgency associated with the proposal, the *de minimis* numbers published were not supported by extensive analysis, and that a more thorough analysis would be undertaken prior to promulgation.

The proposal included two tables, one for defining significant emissions changes (in tons per year) and one for defining significant air quality changes (in micrograms per cubic meter). Values lower than those in the proposed tables were recommended as being *de minimis*. These tables, with respect to criteria pollutants, were generally based on the "significance" levels published in the preamble to the June 19, 1978 PSD regulations (43 FR 26398) and in the Offset Ruling (44 FR 3283). These significance levels in turn were derived from the Class I increment values listed

[12] Under the provisions of 40 CFR Part 51 Appendix S, 40 CFR 51.18(j), and 40 CFR 52.24, the emissions increases at Source A would probably be subject to review as modifications, notwithstanding the contemporaneous decreases at the source.

in Part C of Title I of the Clean Air Act. For noncriteria pollutants, a similar approach was taken: the Agency extrapolated emissions rates from documented air quality guideline numbers, where available.

In the proposal, the tables were presented as preamble guidelines to be used in the following manner. For PSD, any new source subject to review was to be analyzed for the application of BACT for each pollutant whose emissions would exceed the value in Table 1. In addition, an air quality analysis to determine the impact of these pollutants was required. For modifications, any pollutant for which the source was major and for which there was a contemporaneous net increase equal to or greater than the applicable value(s) in Table 1 would trigger PSD review of the modification; as in the case of new sources, BACT and air quality impact analyses were required for each pollutant whose net emissions increased by greater than a *de minimis* amount. Table 2 was proposed to provide an exemption from air quality impact analysis (including monitoring) for those sources and modifications which could demonstrate that their maximum expected air quality impact would be less than the values listed. Sources, including modifications, claiming to be exempt from reviews on the basis of *de minimis* emissions would be required to so notify the Administrator. The *de minimis* requirements also would apply to nonattainment sources, but would be restricted to the pollutant(s) for which the area is nonattainment.

The Agency received extensive comments on the proposed *de minimis* approach. In all there were 121 comments addressing this issue. While there was almost universal endorsement of the concept, a large number of commenters (65) criticized the proposed values as being too low. Some of these commenters stated that there was a lack of support for the numbers presented and felt that the emissions table was more restrictive than the table of air quality concentrations; others claimed that the low *de minimis* levels made the applicability of the review process inequitable for modifications in comparison to new sources. A consistent theme was that the proposed values would necessitate unproductive review in terms of environmental benefit while consuming applicant and reviewing authority resources. Although there were suggestions concerning how big the emissions numbers should be (100 tons per year was a popular choice), little specific guidance was given on how to develop alternative numbers. Suggestions generally were limited to using various percentages of the national ambient air quality standards or the amount of existing emissions. One commenter did suggest the use of an equation that accounted for variability in stack height.

Only one commenter criticized the *de minimis* levels for being too high. This commenter also believed that exemptions from review because of emissions less than the *de minimis* rate should not be automatic, but should be allowed only after a case-by-case review of source impact. In addition, the commenter stated that in areas where the increment is almost entirely consumed, sources should be subject to PSD review for any increase in emissions.

A frequently addressed aspect was the perceived need to incorporate any *de minimis* values in the regulations, as opposed to leaving them as guidelines in the preamble. Forty-eight of fifty-six commenters favored such a change. The general concern was that since the preamble is omitted from the Code of Federal Regulations, the regulations as written would appear to be ambiguous as to the term "significant." Those that favored leaving the tables as guidelines did so generally to provide more flexibility either for sources to demonstrate that they should be exempt or for states to develop alternative *de minimis* values.

There were several other meaningful comments. Sixteen commenters recommended that *de minimis* coverage be limited to criteria pollutants. Eighteen commenters contended that the need to accumulate *de minimis* changes was burdensome, environmentally unnecessary, and should be dropped; some questioned the legislative basis for this requirement. Several commenters cited the difficulty, if not impossibility, of monitoring for all regulated pollutants. These commenters were especially concerned regarding monitoring for noncriteria pollutants, indicating that the requisite technology was not available in some cases. Other commenters questioned how the term "no impact," which is used in the regulations to protect Class I areas, relates to the Table 2 *de minimis* values.

Mindful of the comments received, the Administrator has undertaken a reassessment of the *de minimis* issue. This reassessment is decribed in two documents. One is a report entitled "Impact of Proposed and Alternative *De Minimis* Levels for Criteria Pollutants," EPA–450/2–80–072, and the other is a staff paper entitled "Approach to Developing *De Minimis* Values for Noncriteria Air Pollutants." These are available for examination in the rulemaking docket. In addition, copies may be obtained by writing to the Air Information Center, U.S. EPA Library Services, MD–35, Research Triangle Park, NC 27711.

Obviously, a significant part of the reassessment involved the use of reasonable judgment. The task requires consideration of an area in which not only is data limited, but criteria for decision making is almost non-existent. The first task of the reevaluation was to identify the basic objectives to be met in selecting *de minimis* values. The primary objectives identified were: (1) provide effective Class I area protection; (2) guard against excessive "unreviewed" consumption of the Class II or III increments; and (3) assure meaningful permit reviews. "Meaningful" in this context implies that there would be a possibility of obtaining useful air quality information or obtaining greater emission reductions as a result of BACT analysis than would be expected from normal state permit or NSPS/NESHAP processing.

The proposed *de minimis* air quality values, which stemmed from the legislated Class I increments, caused concern for two reasons. First, if a modification occurs near enough to a Class I area, almost any *de minimis* emissions level could impact the area. Thus, proximity rather than emissions level appears to be more important in Class I area protection. Second, the general imposition of Class I criteria on the review process for Class II and III areas may be overly stringent. These concerns were examined as part of the *de minimis* reassessment.

As a result of this examination, the Administrator has decided that higher *de minimis* emissions rates than those used in the proposal could apply to review of sources which would not construct within a specified distance of a Class I area. However, a proposed source or modification that would construct close to a Class I area must be prepared to demonstrate for each regulated pollutant that it would emit that it would not have a significant impact on such area (defined as one microgram per cubic meter ($\mu g/m3$) or more, 24-hour average), even if the proposed emissions increases are below the applicable *de minimis* threshold. The effect of this change is to require less review for many sources through higher *de minimis* values (compared to the proposal), while adding a limited air quality analysis requirement for only a few sources. Such a change is consistent with the objectives of protecting Class I

areas while limiting PSD review to projects with significant impact.

There were three basic alternatives available for specifying *de minimis* cutoffs—one based solely on air quality impact, one based solely on emissions rate, and one based on a combination of these, such as was proposed on September 5. The Administrator has chosen to specify *de minimis* cutoffs in terms of emissions rate for applicability, BACT and air quality analysis purposes, with no provisions for case-by-case demonstration of a source's air quality impact. This is a departure from the proposal in that, as proposed, a source could avoid air quality analysis requirements for a given pollutant by demonstrating that it would produce a maximum impact less than the air quality concentrations listed for that pollutant. An air quality concentration *de minimis* level for each pollutant for which measurement methods are available is included in the regulations only for the purpose of providing a possible exemption from monitoring requirements.

This approach has been adopted for several reasons. First, the Congress specified emissions rates, not projected air quality impacts, in the Clean Air Act as the criteria for determining which sources are major and therefore subject to PSD review. Moreover, the court, in the *Alabama Power* decision, continually refers to emissions rate rather than air quality concentration in its discussion of the *de minimis* issue. Therefore, it would be inconsistent with the existing guidance to abandon the emissions rate concept.

Second, if applicability decisions depended on confirming a demonstration by the source that its impact would be less than a given air quality level, it is the Administrator's opinion that the review process would become excessively complex and greatly increase the resources needed by reviewing authorities to carry out the program. In addition, such an approval would create and atmosphere of uncertainty as to whether individual sources needed to apply for a permit or not, and could lead to uneven application of the regulations from state to state. Third, the task of establishing *de minimis* air quality levels for noncriteria pollutants, with proper consideration of threshold levels and factors of safety (if any), is very complex and could not be done in the time available.

Finally, given the inclusion of a *de minimis* exclusion for monitoring, it serves little purpose to have a separate table to permit an exclusion from the remaining air quality impact analysis requirement. (A separate table would be required because monitoring capability and concern for potential effects are unlikely to be associated with the same air quality concentrations.) Besides making the regulations more complicated, this resultant demonstration necessary to earn an exemption from air quality impact analysis would in itself *be* an air quality impact analysis.

In analyzing the basis for *de minimis* emissions rates, it was apparent that two distinct classes of pollutants were involved. The first consists of the criteria pollutants for which extensive health and welfare information has been developed and documented in the respective criteria documents. The other class consists of the noncriteria pollutants for which, as the name implies, no criteria on ambient effects exist. Rather, these pollutants are covered by either New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAP), both of which are based on a national emissions standard, rather than an air quality management approach. That is, the regulations developed pursuant to both these legislative requirements generally specify emissions limitations and/or equipment performance standards as opposed to threshold air quality levels that must be achieved as for the criteria pollutants. Thus, it appeared reasonable to develop *de minimis* cutoffs from separate perspectives—to base criteria pollutant *de minimis* emissions cutoffs on air quality "design values" and to base the noncriteria pollutant *de minimis* values on the emissions rates embodied in the NSPS and NESHAP.

The first step in developing *de minimis* emissions rates for the criteria pollutants, therefore, was the establishment of air quality "design values." Such design values were then converted to emission rates in accordance with EPA modeling procedures,[13] using data on sources permitted under the PSD program. The latter provided modeling parameters associated with sources of the type expected to be most affected by the *de minimis* requirements. Ambient concentations representing percentages of the primary 24-hour air quality standard, as well as percentages of the Class II increment, were evaluated for particulate matter (PM) and sulfur dioxide (SO_2). Similarly, various percentages of the primary standard for the other criteria pollutants were examined.

The primary standard was chosen as the basis for design values because, except for PM and SO_2, none of the criteria pollutants have a secondary standard that is different than the primary standard. The 24-hour standard instead of the annual standard was used for PM and SO_2 since short term rather than the long term impact tends to be the controlling factor in determining whether air quality increments are exceeded. In addition, levels higher than five percent of the primary standard were not seriously considered because that percentage equates to approximately 35 percent of the TSP Class II increment. The Administrator does not believe that a source which, due to its own emissions, could potentially consume more than that amount of increment should be exempt from review.

Two factors had an important influence on the choice of *de minimis* emissions levels within the resulting range of annual emissions rates. The primary one was the cumulative effect on increment consumption of multiple sources in an area each making the maximum *de minimis* emissions increase (thereby going unreviewed under PSD at the time of the change). The other, and secondary one, was the projected consequence of a given *de minimis* level on administrative burden. To determine the cumulative effect on increment consumption expected from several sources, all making maximum *de minimis* increases (a rather unlikely event) in the same area, actual source distributions in the Dayton, Ohio, area were used. Dayton was chosen because it is a fairly representative industrialized community, and source data suitable for modeling was readily available. To check the impact of the various *de minimis* levels on administrative burden, data from past permitting experience were again used, in this case to prepare curves showing the number of sources expected to require review at various *de minimis* emissions levels. A description of these analyses is found in the *de minimis* report on criteria pollutants cited earlier.

As a result of the reevaluation, the Administrator has decided to use four percent of the 24-hour primary standard as a design value for both PM and SO_2. These ambient levels correspond to emissions rates of 25 tons per year for PM and 40 tons per year for SO_2 (except for lead, all emissions rates predicted from the modeling for criteria pollutants were rounded to the nearest five tons).

[13] Guidelines for Air Quality Maintenance Planning and Analysis, Volume 10 (Revised): Procedures for Evaluating Air Quality Impact of New Stationary Sources, OAQPS No. 1.2-029R, October 1977.

Four percent of the lead standard was also used, yielding an emissions rate of 0.6 tons per year. The emissions rate for carbon monoxide (CO) in all cases was greater than 100 tons per year, the limit set in the Clean Air Act to define major for many source categories. Therefore, as proposed, the *de minimis* emissions rate for CO is established at 100 tons per year.

Because the nitrogen dioxide standard is expressed only as an annual average, a factor of two percent was used to determine the design value. There were two reasons for this decision. First, for a given level of emissions, a predicted annual concentration will be smaller than a short-term value. Conversely, therefore, a lower percentage for the annual standard than for a shorter term standard is indicated if one is to maintain a reasonably consistent rationale for emissions rates. Second, the emissions rate corresponding to two percent of the standard is 40 tons per year, which is comparable to the rate established for SO_2. Both these pollutants are frequently emitted from the same source, in roughly equivalent amounts; for example, a typical power plant meeting the NSPS with low sulfur coal would emit about 1300 tons per year of nitrogen oxides and about 1500 tons per year of SO_2.

Finally, models for use in establishing a relationship between individual source hydrocarbon (VOC) emissions and ozone concentrations are not presently available. Thus, it was not possible to model an emissions rate from an air quality design value. However, in view of the link between VOC and NO_x emissions in the formation of ozone, the emissions rate for VOC was also set at 40 tons per year.

It should be recognized that several sources or modifications can be allowed in the same area even though each might consume up to four percent of the standard (about 16 percent of the Class II increment for SO_2 and about 28 percent for PM). This is because the source specific concentration occurs in only a limited area (often one point) and the temporal and spatial conditions which lead to maximum consumption by one source are seldom the same for other sources that may be making similar *de minimis* changes. To reinforce this understanding, a modeling analysis of 37 sources in the Dayton area was conducted. The maximum aggregate increment consumption projected to occur as a result of all major sources each making a *de minimis* emissions increase equal to 40 tons per year (*e.g.*, that for SO_2) was less than 1.5 μg/m3 on a 24-hour basis. While representative of only one set of conditions, this result could probably be expected in most industrialized areas.

Excessive increment consumption is unlikely, given the safeguards existing in the regulations. Although such sources would not get PSD permits, they do not go unreviewed. Most, if not all, will be permitted under ongoing state NSR programs pursuant to 40 CFR 51.18. Moreover, their contribution to increment consumption will be evaluated either by the next major source undergoing PSD review, or during the periodic assessment of source growth. Nevertheless, in atypical situations there might still be concern with the *de minimis* levels causing accelerated increment consumption. This can be controlled by a state, upon taking the program, through the establishment of smaller *de minimis* levels.

To determine a proximity cutoff that gives assurance of protection of Class I areas, a modeling analysis was performed to identify the effect of the *de minimis* emissions levels on such areas using Volume 10 screening procedures. For the purpose of this analysis, the effect of varying stack height and meteorology, as well as the influence of terrain features, was considered. Significant impact was taken to be one $\mu g/m^3$, 24-hour average. The results indicate that sources locating more than 10 kilometers from a Class I area would not have such an impact as a result of making *de minimis* changes. Therefore, the regulations promulgated here require that any new or modified major stationary source within that distance from a Class I area will be subject to review if the source would have an impact on the area equal to or greater than one $\mu g/m^3$, 24-hour average. It must be pointed out that while the preceding responds to those commenters concerned about how to judge whether a source has "no impact" on a Class I area, the analysis of impact on such an area from major sources subject to PSD review must be done on a case-by-case basis. Further, such sources may be subject to an evaluation by the appropriate Federal Land Manager as described in the regulations.

Noncriteria pollutant emissions rates were developed from the existing emission standards (NSPS and NESHAP). In general, a fraction of the applicable standard was used. In the Administrator's judgment, since the NSPS represents the best adequately demonstrated control technology on a nationwide basis, and the NESHAPs are established with an ample margin of safety to prevent unreasonable risk to the public health from hazardous pollutants, a small percentage of these standards would, for PSD purposes, prevent a significant change from escaping review.

Levels generally representing 20 percent of a NSPS emissions standard and, because of their greater impact on health, ten percent of a NESHAP emissions standard, were evaluated. The air quality impacts of the resulting NSPS emissions rates were then calculated in a manner similar to that used for the criteria pollutants. These concentrations were compared to available health and welfare data to assure that significant adverse effects were avoided. In the case of fluorides, this check resulted in a reduction of the emissions rate originally indicated. No adjustment based on resultant effect was made for the hazardous pollutants since the NESHAP emissions rate, as noted above, is itself intended to protect the public health with an ample margin of safety; therefore, ten percent of such a value is in the Administrator's judgment sufficiently stringent for use as a *de minimis* level.

A brief discussion of the rationale for each noncriteria pollutant emissions rate is given below. For more information, see the staff paper cited earlier.

Hazardous Pollutants (NESHAP):

Asbestos—Reevaluation of existing data indicates that trying to establish a quantitative link between emissions and potential effects is not possible. No level of exposure can be presumed *de minimis*. Therefore, a theoretical *de minimis* emissions rate of zero was considered. Such a value is not practical, however, since changes of any kind at sources using materials containing even traces of asbestos could trigger review regardless of the amount of asbestos emitted. Therefore, an estimate was made of the emissions from well controlled sources from which asbestos can be emitted. Although data is very limited, rough estimates of emissions from four source categories were developed. Three categories are covered by the NESHAP regulations: asbestos milling, manufacturing using asbestos in the process (e.g., textiles, asbestos tile), and asbestos asphalt manufacture. Rock crushing, a fourth category not covered by the NESHAP, was also examined. Emissions rates from these four categories, using available data, were respectively 0.2 tons per year (TPY), 0.07 TPY, 0.04 TPY, and 0.06 TPY. Because asbestos is carcinogenic, a conservative approach to establishing the *de minimis* emissions rate has been taken. The *de minimis* level is based on a source category

which has relatively small asbestos emissions, and which includes the majority of asbestos emitting sources—manufacturing operations using asbestos. Therefore, the promulgated asbestos *de minimis* rate is 0.007 TPY, based on ten percent of the emissions estimated from asbestos manufacturing sources.

Beryllium—The NESHAP emissions rate is ten grams per day or 0.004 tons per year. Ten percent of this yields a *de minimis* emission rate of 0.0004 tons per year.

Mercury—The NESHAP emissions rate is 2300 grams per day which equates to approximately one ton per year. At ten percent, the promulgated *de minimis* emissions rate is 0.1 tons per year.

Vinyl chloride—The NESHAP standard is expressed in parts per million of the effluent stream. It was therefore necessary to assume model plant characteristics in order to develop expected emissions from a well controlled plant. As in the case of asbestos, the Administrator believes that it is prudent to base these calculations on a small model plant considering the suspected carcinogenicity of this pollutant. Such plants, well controlled, emit about 10 tons per year. Based on this value, the promulgated *de minimis* emissions rate is one ton per year.

NSPS Pollutants:

Fluorides—The proposed *de minimis* emissions rate for fluorides was extremely conservative, and was strongly criticized as being too low by several commenters. Upon reevaluation, the Administrator agrees with the comments. A *de minimis* emissions rate based on the NSPS for aluminum plants is 30 tons per year—a well controlled, moderate sized, plant emits about 150 tons per year of fluorides. At a rate of 30 tons per year, the predicted maximum 24-hour ambient concentration is approximately ten micrograms per cubic meter. That concentration is about ten times the level that has been observed to produce effects on vegetation (about one microgram). In order to limit the potential for such damage, a *de minimis* emissions rate of three tons per year, corresponding to a one microgram impact, is promulgated.

An alternative would have been to base the emissions rate on the NSPS for phosphate fertilizer plants. Fertilizer plants typically emit much less than aluminum plants (i.e., about two tons per year controlled). A 20 percent *de minimis* value would then be less than 0.5 tons, which is unrealistic in view of other sources such as aluminum plants. Moreover, changes at a fertilizer plant that resulted in a fluoride emissions increase of 0.5 tons per year would probably get reviewed under state new source review and/or NSPS requirements.

Sulfuric Acid—A model plant of 1300 tons per day of production was used. The NSPS emissions limit is 0.15 pounds of sulfuric acid per ton of product processed. Thus, the model plant would emit about 35 tons per year. This yielded a *de minimis* emissions rate of seven tons per year using the 20 percent factor.

Total Reduced Sulfur, Reduced Sulfur—These pollutant classes include hydrogen sulfide (H_2S) and are regulated primarily to avoid nuisance (odor) problems. Total reduced sulfur (TRS) emissions are based on a representative kraft pulp mill (900 tons of pulp per day) which at 20 percent yields a *de minimis* emissions rate of 10 tons per year. Similarly, using a model refinery of about 100 long tons per day, the reduced sulfur (RS) compound emissions rate is 10 tons per year.

(The emissions rates calculated on the above model plants were 8.3 tons per year for TRS and 9.4 tons per year for RS. Both values were rounded to 10 tons per year for administrative purposes.)

Hydrogen Sulfide—Regulated under the refinery NSPS only. Specified as one thirtieth of reduced sulfur emissions, in major part as a check on control efficiency. Since concern, at the NSPS emissions levels, for TRS, RS, and H_2S is the same (nuisance rather than health impact) the *de minimis* emissions rate for H_2S alone is set at ten tons per year.

Methyl Mercaptan, Dimethyl Sulfide, Dimethyl Disulfide, Carbon Disulfide, Carbonyl Sulfide—*De minimis* emissions rates were proposed for these compounds. However, none of them are individually regulated under the Act. Rather, they are described as constituents of either TRS or RS. Therefore, since *de minimis* emissions rates are promulgated for TRS and RS, individual *de minimis* for the five compounds have been dropped.

The complete list of the emissions levels promulgated today, and where applicable, the *de minimis* air quality design values from which they are derived, is given below in Table A:

Table A.—*De Minimis Values*

Pollutant	De Minimis emissions rate (TPY)	Design air quality value (average time) ($\mu g/m^3$)
Carbon monoxide	100	
Nitrogen oxides	40	2 (annual).
Sulfur dioxide	40	14.6 (24-hour).
Total suspended particulates.	25	10.4 (24-hour).
Ozone (volatile organic compounds).	40	
Lead	0.6	0.06 (3 month).
Asbestos	0.007	
Beryllium	0.0004	
Mercury	0.1	
Vinyl chloride	1.0	
Fluorides	3	
Sulfuric acid mist	7	
Total reduced sulfur (including H_2S).	10	
Reduced sulfur (including H_2S).	10	
Hydrogen sulfide	10	

The air quality design values are not included in the regulations. *De minimis* emissions levels are included for use in defining the term "significant." As in the proposal, these values determine the need to review modifications and determine which pollutants require BACT and air quality impact analyses for any new source or modification requiring review.

The Administrator does not believe that the promugated *de minimis* levels will produce an extraordinary administrative burden on reviewing authorities. Based on the data available, it is estimated that approximately 700 more sources will be subject to PSD review annually, all for small modifications not heretofore reviewed.

The regulations also include a list of air quality concentrations for each pollutant as criteria for exempting sources from the monitoring requirements at the discretion of the reviewing authority. Table B summarizes the applicable air quality values by pollutant type.

Table B.—*Monitoring Exemption*

Pollutant	Air quality value (averaging time) ($\mu g/m^3$)
Carbon monoxide	575 (8-hour).
Nitrogen dioxide	14 (24-hour).
Sulfur dioxide	13 (24-hour).
Total suspended particulates	10 (24-hour).
Ozone	[1]
Lead	0.1 (24-hour).
Asbestos	[2]
Beryllium	0.0005 (24-hour).
Mercury	0.25 (24-hour).
Vinyl chloride	15 (24-hour).
Fluorides	0.25 (24-hour).
Sulfuric acid mist	[2]
Total reduced sulfur (including H_2S).	10 (1-hour).
Reduced sulfur (including H_2S)	10 (1-hour).
Hydrogen sulfide	0.023 (1-hour).

[1] All cases where emissions of VOC are less than 100 tons per year.

[2] No satisfactory monitoring technique available at this time.

Several Table B values are somewhat different from the design air quality numbers shown in Table A. This is because the Table B values are based on the current capability to provide a

meaningful measurement of the pollutants. The values promulgated represent five times the lowest detectable concentration in ambient air that can be measured by the instruments available for monitoring each pollutant. The factor of five was chosen after reviewing test data for the various methods considered reasonably available. The decision was based in part on considerations of instrument sensitivity, potential for sampling error, problems with instrument variability (*e.g.*, zero drift) and the capability to read recorded data. For a more thorough discussion of this determination, see the memorandum from K. Rehme to W. Peters dated May 20, 1980, which is available in the rulemaking docket and from the address given for the other reports.

There also are several changes in the use of Table B from the Table 2 proposed on September 5. First, a source deemed subject to review may claim the *de minimis* air quality impact exemption from only the monitoring requirement for the reasons noted earlier. Next, under the proposal, a source had to demonstrate that its ambient impact would be *de minimis* to obtain an exemption from monitoring. As promulgated, the regulation allows a source to be exempted from the preapplication monitoring requirement if it shows either that existing air pollution in the source impact area or its projected impact in the affected area is *de minimis*. In most cases, little is to be gained from preconstruction monitoring in situations where either condition applies.

Finally, because there will be situations where monitoring will be necessary even if modeling predicts *de minimis* conditions, the exemption is not automatic but rather must be with the approval of the reviewing authority. For example, Table B values should not be used when (1) there is an apparent threat to an applicable PSD increment or NAAQS based on modeling alone or (2) when there is a question of adverse impact on a Class I area. Questions of adverse impact on a Class I area are to be decided on a case-by-case basis with the objectives of the affected Federal Land Manager in mind.

Some of the suggestions made in the comments have not been adopted. For the reasons stated earlier, many of the *de minimis* values have been increased. The automatic exemption on the basis of emissions rate is retained, although the exemption from monitoring has been made discretionary. The Administrator believes that a clear indication of applicability is necessary. It is not reasonable to expect a potential applicant to have continuous knowledge of the status of increment consumption and thus know when an application is required and when it is not. Nor have the *de minimis* values been promulgated as a guide only, with a screening review of all sources made mandatory as suggested by one commenter. The Administrator does not believe that there is a substantial programmatic benefit to be derived from such a stringent requirement.

Accumulation of *de minimis* values has not been dropped, because for most pollutants the promulgated *de minimis* emissions levels are now substantially higher than those proposed. The suggestion to allow sources with greater than *de minimis* emissions to make a showing that their air quality impact was *de minimis* and escape review was considered and then rejected. The higher emissions levels promulgated will offer much of the requested relief. Moreover, such an approach would not streamline the review process (*i.e.*, a detailed air quality analysis would still be necessary), and several sources with taller stacks might avoid review and the BACT requirement. Variations in actual impact because of stack height can be a factor in the BACT review. Similarly, an equation considering stack height to determine the *de minimis* emissions rate cutoff has not been promulgated. It is questionable whether such an equation could be developed for application nationwide that would be any less judgmental than the fixed *de minimis* emissions rates promulgated. Moreover, that approach would be little more than a case-by-case applicability assessment which the Administrator believes is inadvisable for reasons already described.

Other suggestions not accepted were to raise the *de minimis* emissions levels to 100/250 tons per year for the criteria pollutants, and to limit the *de minimis* concept to only the criteria pollutants. In developing an approach to defining *de minimis* for PSD purposes and consequently calculating the specific *de minimis* values under the guidance given within the Act and *Alabama Power*, emissions levels as high as 100 tons per year could not be justified for most criteria pollutants. Use of the *de minimis* concept with respect to only the criteria pollutants suggests that any increase (i.e., a zero *de minimis* value) would be significant for noncriteria pollutants and must be reviewed. As mentioned earlier, a zero *de minimis* is not practical for this program.

XII. Geographic and Pollutant Applicability

A. Background

Alabama Power held that in determining the applicability of PSD review, EPA must look to whether a source locates in an area to which Part C of the Act applies, rather than to the impact the source would have upon such an area. Accordingly, EPA proposed on September 5 to apply PSD review to a source if the source locates in an area designated attainment or unclassifiable for a pollutant which the source emits in major amounts. Each pollutant emitted by the source would be subject to PSD review, unless the pollutant was one for which an area is designated nonattainment and the source emitted that pollutant in major amounts. A modification to a source would be subject to PSD review under the September 5 proposal if it would result in a significant net increase in the emissions of any regulated pollutant for which the source is major and for which the area is designated attainment or unclassifiable. In addition, EPA proposed on September 5 to apply PSD review to a source or modification that would significantly affect an area in another state designated as attainment or unclassifiable for a pollutant for which the source or modification would be major. *See* 44 FR 5190–41, 51949 (§ 51.24(i)(2)), 5193–54 (§ 52.21(i)(8)).

On January 30, 1980, EPA stated that it intended not to apply PSD review based solely on interstate impact, because the court's final interpretation of the Act in *Alabama Power* suggested that PSD review was not appropriate in such circumstances. EPA also noted that under its September 5 proposal, a source or modification would be exempt from PSD review if it emitted in major amounts only pollutants for which an area had been designated nonattainment. EPA solicited comments on whether this exclusion should be retained, as well as on its proposal to delete PSD review based solely on interstate impacts. *See* 45 FR 6803 (January 30, 1980).

B. PSD Applicability

After further evaluation of its proposed approach, and consideration of the comments submitted in response to the September 5, 1979, and January 30, 1980, notices (see discussion below), EPA has decided to modify the September 5 proposal somewhat. Under today's action, except with respect to nonattainment pollutants, PSD review will apply to any source that emits any pollutant in major amounts, if the source would locate in an area designated

attainment or unclassifiable for *any* criteria pollutant. If the source is subject to PSD review, then PSD review will be applied to each pollutant the source emits in greater than *de minimis* amounts, unless the area is designated as nonattainment under section 107(d)(1) for the particular pollutant. It should be noted that in order for PSD review to apply to a source, the source need not be major for a pollutant for which an area is designated attainment or unclassifiable; the source need only emit *any* pollutant in major amounts (i.e., the amounts specified in section 169(1) of the Act) and be located in an area designated attainment or unclassifiable for that or any other pollutant. Therefore, sources that are major only for pollutants for which an area is designated nonattainment will not be exempt from PSD review unless the source is located in an area which is designated nonattainment for all criteria pollutants or unless all of the regulated pollutants emitted by the source in greater than *de minimis* amounts are nonattainment pollutants.

The applicability of the PSD regulations to modifications mirrors that for new sources (*see* Modification). PSD review will apply to any modification to a source which emits any pollutant subject to regulation under the Act in major amounts, if the modification would result in a significant net increase in the emissions of *any* pollutant, and if the source is located in an area designated attainment or unclassifiable for any criteria pollutant. PSD review would not apply to any nonattainment pollutant. Unlike the approach proposed on September 5, in order for PSD review to apply, the modification need not increase emissions of a pollutant for which the source is major, nor need the source be major for a pollutant for which the area is designated attainment or unclassifiable.

EPA believes that this approach is required by *Alabama Power* and sections 165(a) and 169(1) of the Act. Section 165(a) states that "[n]o major emitting facility on which construction is commenced after the date of the enactment of [Part C of the Act], may be constructed in any area to which this part applies unless" the conditions set out in section 165(a) are met. *Alabama Power* held that this provision must be interpreted literally and that, in particular, EPA should focus on the *location* of the source, not its impact. *See* 13 ERC at 2012–2016. Today's action provides the necessary literal interpretation. A "major emitting facility" is defined in section 169(1) as a source which would emit at least 100 or 250 tons per year (tpy) (depending on the type of source) of "any" pollutant. This would cover both critiera pollutants, for which national ambient air quality standards have been promulgated, and non-criteria pollutants subject to regulation under the Act. Section 165 refers to an "area to which this part [part C] applies," which the Court in *Alabama Power* interpreted to mean "clean air areas," *i.e.* areas designated pursuant to section 107 as attainment or unclassifiable for a particular air pollutant 13 ERC at 2013. *See also* sections 161, 162, and 167 of the Clean Air Act. But neither section 165 nor section 169(1) links the pollutant for which the source is major and the pollutant for which an area is designated attainment or unclassifiable. Read literally, section 165(a) applies PSD preconstruction review to all sources that are major for any pollutant subject to regulation under the Act and locate in an area designated attainment or unclassified for any pollutant.

Section 165(a) also does not link review of a particular pollutant to the attainment status for that pollutant or limit review to pollutants for which a source is major. Rather, read literally, section 165(a) applies PSD review to *all* pollutants subject to regulation under the Act emitted by the source provided that the source is major for *some* pollutant and is located in a clean air area for some pollutant. However, implicit in *Alabama Power* and the structure of the Act is a recognition that where nonattainment pollutants are emitted in major amounts (i.e., where a source emits in major amounts a pollutant for which the area in which the source would locate is designated nonattainment), Part D NSR rather than Part C PSD review should apply to these pollutants (see below). PSD review does not apply to the nonattainment pollutants emitted by the source otherwise subject to review.

C. Nonattainment Applicability

On May 13, 1980, 45 FR 31307, EPA promulgated a final rule setting out the applicability of nonattainment review of new and modified sources. In brief, EPA clarified that the construction moratorium under section 110(a)(2)(I) and NSR under the Offset Ruling and section 173 apply to all major construction proposed in such areas. This applicability is unaffected by the particular air quality levels within the designated nonattainment area which would be caused or impacted by the proposed major source or major modification. States still are required under section 110(a)(2)(D) to review new or modified sources locating outside of nonattainment areas, but causing or contributing to a violation of an ambient air quality standard; however, review need not meet all of the nonattainment requirements under section 173 and the offset policy.

The current regulations concerning pollutant applicability in nonattainment areas have not been changed. These rules are different from the PSD pollutant applicability rules. Major sources are subject to review under the Offset Ruling, section 173, and the construction moratorium only if they emit in major amounts the pollutant(s) for which the area is designated nonattainment. In addition, only those nonattainment pollutants which the source emits in major amounts are subject to review or the construction moratorium. Similarly, only if a modification increases emissions of a pollutant for which the source is major and for which the area is designated nonattainment do nonattainment requirements apply. The basic rationale for these restrictions is that section 110(a)(2)(I), which contains the construction moratorium, restricts the construction moratorium to pollutants for which the source is major and for which the area is designated nonattainment. Since there is no requirement similar to the one in section 165(a) that subjects a source to review for all regulated pollutants it emits once it is subject to review for one pollutant, preconstruction review under the Offset Ruling and section 173 is restricted in the same manner as the construction moratorium.

For example, construction of a new plant with potential emissions of 500 tpy PM and 50 tpy SO_2 in an area designated nonattainment for both PM and SO_2 would be subject to nonattainment requirements for PM only, since the source is minor for SO_2. Similarly, modification of this plant resulting in a net increase in emissions of 50 tpy in SO_2 would not be subject to nonattainment requirements. See also examples (3), (4), and (7).

D. Case Examples

The following additional examples illustrate how applicability of PSD requirements will work under today's final regulations:

(1) Construction of a new plant with potential emissions of 500 tpy PM and 50 tpy SO_2 in an area designated attainment for both PM and SO_2 would be subject to PSD review for both PM and SO_2.

(2) Construction of the same plant as in example (1), but in an area designated attainment for SO_2 and nonattainment for PM, would be subject to PSD review

for SO_2 and nonattainment requirements for PM.

(3) Construction of the same plant as in example (1), but in an area designated attainment for PM and nonattainment for SO_2, would be subject to PSD review for PM only. PSD review would not apply for SO_2, since SO_2 is a nonattainment pollutant.

(4) Construction of the same plant as in example (1), but in an area designated nonattainment for both PM and SO_2 would be subject to no PSD review and to nonattainment requirements for PM. This would be the case even if the SO_2 emissions would have an impact on a nearby Class I area for SO_2 or on an area located in another state which is designated attainment or unclassifiable for PM.

(5) Modification to the plant in example (1), where the plant is located in an area designated attainment for both PM and SO_2 resulting in a 30 tpy net increase in PM emissions, would be subject to PSD review for PM.

(6) Modification to the plant in example (1), where the plant is located in an area designated attainment for SO_2 and nonattainment for PM, resulting in increased emissions of 50 tpy in SO_2, would be subject to PSD review for SO_2. (It is a significant increase at a major source located in an attainment area.) But if the modification only were to increase the emissions of PM by 30 tpy, only nonattainment requirements would apply, since this is a modification of a major source for a nonattainment pollutant.

(7) Modification to the plant in example (1), where the plant is located in an area designated attainment for PM and nonattainment for SO_2, resulting in increased emissions of 50 tpy SO_2, would be subject to neither PSD review, nor the nonattainment NSR requirements. Nonattainment NSR would not apply since the 50 tpy increase in the nonattainment pollutant does not occur at an existing major stationary source for that pollutant. PSD does not apply since the only change is to a nonattainment pollutant. Instead, the general NSR under the SIP would typically apply to this pollutant, and the new emissions of SO_2 would be accommodated in the SIP's allowance for area and minor source growth.

(8) Construction of a new plant with potential emissions of 500 tpy hydrogen sulfide (H_2S) in an area designated attainment for PM would be subject to PSD review for H_2S. If, in addition, the plant had potential emissions of 50 tpy PM, PSD review would be applied to both H_2S and PM.

(9) Construction of a new plant with potential emissions of 500 tpy CO and 50 tpy H_2S in an area designated nonattainment for CO and attainment for SO_2 would be subject to PSD review for H_2S and to nonattainment requirements for CO. If this plant were later modified, resulting in a net increase in emissions of 30 tpy in H_2S, PSD review would apply for H_2S.

(10) Construction of a new plant with potential emissions of 500 tpy H_2S in an area designated nonattainment for all criteria pollutants would not be subject to either PSD review or nonattainment requirements. Part D applies only to criteria pollutants, and the area here is not subject to Part C, since it is not designated attainment or unclassifiable for any criteria pollutant.

E. Interstate Pollution

The September 5 proposal, in response to the *per curiam Alabama Power* decision issued on June 18, 1979, would have required PSD review for a major source locating or modifying in a designated nonattainment area only if such construction would substantially impact a clean air area in another state. In its final opinion issued on December 14, 1979, the court reversed its earlier position regarding the need for a PSD review of all interstate impacts to a neighboring state's clean air area. Under both rulings, PSD review would apply in all cases where the construction would take place in a clean area. Pursuant to the court's revised ruling in *Alabama Power*, EPA will not apply PSD review to a pollutant emitted by a source locating in an area designated nonattainment for that pollutant, even where the source would impact a PSD area in another state. Sixteen of the nineteen comments received by EPA supported this decision. Three commenters requested EPA to propose regulations to control interstate pollution pursuant to sections 110(a)(2)(E) and 161. EPA is now evaluating how best to control interstate pollution, and may propose regulations some time in the future.

F. Geographic Applicability for VOC Sources

On September 5, EPA proposed to delete the "36 hour rule," which subjected a source of volatile organic compounds (VOC) to review, if the source proposed construction within 36 hours pollutant travel time of an ozone nonattainment area. Pollutant travel time was to be calculated using wind conditions associated with concentrations exceeding the ambient standard for ozone. Most commenters agreed with the proposal to delete this requirement. One commenter who disagreed focused on the need for the rule as a means of determining which sources locating outside a designated nonattainment area should be subject to nonattainment review. Another argued that without the rule EPA will end up unnecessarily reviewing sources in remote rural areas whose impact on the ozone nonattainmnent problem is insignificant, since ozone is a regional problem.

For the reasons expressed on September 5 (44 FR 51940), EPA has decided to delete the 36 hour rule. The commenters' concerns are taken care of by the rules on geographic applicability for nonattainment areas, as set out at 45 FR 31307 (May 13, 1980). Thus, all major VOC sources locating in a designated ozone nonattainment area will be subject to review under section 173. Major VOC sources locating outside a designated nonattainment area will be subject to PSD review and will be required to monitor for ozone. If the monitoring indicates that the area of source location is nonattainment, then the provisions of the Offset Ruling or State plans adopted pursuant to section 110(a)(2)(D) of the Act shall apply until the area is redesiginated as nonattainment and a SIP revision has been approved. Of course, a source of VOC may choose to accept nonattainment review requirements immediately (i.e., LAER, offsets, statewide compliance of other sources under the same ownership) and conduct post-approval monitoring as presently permitted under the PSD regulations.

G. Response to Comments

Additional responses to comments regarding applicability of nonattainment requirements can be found at 45 FR 31307. Comments concerning interstate pollution and the geographic applicability of VOC sources, are responded to above.

With regard to PSD review, several commenters argued that EPA's approach would be overly complex and would impose great administrative burdens with few corresponding benefits to air quality. EPA does not agree. Applicability of PSD review as outlined above is required by the Act. Congress believed that such broad applicability was needed to adequately guard against significant deterioration in existing clean areas. EPA cannot restrict applicability and override Congressional intent simply because of an added administrative burden such applicability might impose. For similar reasons, EPA disagrees with the suggestion that it should restrict PSD review to only those pollutants that a source emits in major amounts.

Fourteen commenters argued that EPA should not apply PSD review to noncriteria pollutants, because the lack of NAAQS and increments for noncriteria pollutants indicates that Congress did not consider these pollutants to be able to cause significant deterioration and felt that the extent of harm by these pollutants has yet to be demonstrated. They claimed noncriteria pollutant sources are already subject to NSPS and NESHAP regulation. However, as other commenters have correctly noted, section 169(1) refers to sources with the potential to emit "any" pollutant above certain amounts. Moreover, section 165(a)(4) states that BACT must apply to "each polluant subject to regulation under this Act" emitted by a source. Neither of these provisions is limited to criteria pollutants. *See also Alabama Power*, 13 ERC at 2045.

Two commenters urged that if EPA decides to regulate sources with minor but significant emissions of criteria pollutants and sources of noncriteria pollutants, it should do so only if there already exists a SIP emission limit for the "minor" pollutants or only if section 111 or 112 (NSPS and NESHAP, respectively) has been made applicable after appropriate rulemaking to such sources of noncriteria pollutants. The difficulty with this approach is that the Act requires PSD review, regardless of whether another rule already applies to the source except in the case of nonattainment pollutants (see above). Moreover, the suggested approach could allow an unacceptably large number of sources to escape review, since many sources may not have an applicable SIP emissions limit or NSPS or NESHAP limit.

While most commenters endorsed the September 5 proposal that PSD permitting should be limited to instances where greater than *de minimis* changes in a major pollutant would occur, one commenter argued that *Alabama Power* did not restrict PSD applicability to modifications involving the pollutant(s) which the source emits in major amounts. This commenter claimed that section 111(a)(4) of the Act defines "modfication" as *"any* physical change in , or change in the method of operation of a stationary source which increases the amount of *any* air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." (Emphasis added.) As mentioned above in the Modification section, the Administrator agrees with this interpretation. Thus, today's final rule, with the exception of nonattainment pollutants, requires a PSD preconstruction review for greater than *de minimis* net increases in the potential to emit of a major stationary source for any pollutant subject to regulation under the Act.

Twenty-three commenters supported exempting nonattainment pollutants from PSD review. However, three commenters argued that PSD review should apply to nonattainment pollutants emitted in minor amounts, claiming that review in nonattainment areas should be as broad as that in PSD areas. EPA agrees with the former comments. As noted earlier, sections 165(a) and 169(1) apply to "any" pollutant regulated under the Act. The only restraint on PSD review, then, is section 173 in Part D, which governs the specific review of sources emitting nonattainment pollutant(s) in major amounts. In addition, sources emitting the nonattainment pollutants in minor amounts are subject to the general NSR contained in SIPs, and the impacts of such sources are accounted for in demonstrations of reasonable further progress and within the growth allowance provisions of the SIP. Thus, there is no need to apply PSD review to either type of nonattainment pollutant which already faces adequate review.

Twenty-three commenters also supported exempting from PSD review sources which emit only nonattainment pollutants in major amounts, but PSD pollutants in minor amounts, citing *Alabama Power* for support. Neither *Alabama Power* nor the Act support such an exemption. *Alabama Power* held that, at a minimum, PSD review does not apply to major sources which locate in an area designated nonattainment for all criteria pollutants. But the court did not take into account the fact that the same source may emit both PSD and nonattainment pollutants. Since, as noted above, section 165(a) does not link the pollutant for which the source is major and the pollutant for which an area is designated attainment or unclassifiable, EPA interprets section 165(a) as requiring PSD review for each source that is major for some pollutant and locates in an area designated attainment or unclassifiable for that or any other pollutant and that this review encompasses PSD pollutants whether or not emitted in major amounts.

Finally, some commenters perceived an inconsistency in requiring broader pollutant applicability for PSD review than for nonattainment review, yet using a broader definition of "source" for nonattainment areas than for PSD areas. However, EPA's actions are consistent with the Act. The scope of PSD review applicability and the nonattainment definition of source are separate issues and there is no basis for requiring that they be resolved in such a way as to in some manner equalize their effects.

XIII. Baseline Concentration, Baseline Area, and Baseline Date

EPA's June 1978 PSD regulations generally define baseline concentration as the ambient concentration level reflecting actual air quality as of August 7, 1977, including projected emissions of major sources commencing construction or modification before January 6, 1975, but not in operation by August 7, 1977, and excluding emissions from major sources commencing construction (including modification) after January 6, 1975. (40 CFR 51.24(b)(11), 52.21(b)(11) (1979).) Emissions from major source construction commencing after January 6, 1975, as well as most emissions increases occurring from existing sources after the baseline date are counted against the applicable PSD increments. (A more detailed discussion of the relationship between baseline concentration and increment consumption is provided in Increment Consumption.) Actual air quality includes emissions increases after the baseline date at existing sources whose emissions are counted in the baseline concentration, if the increases are due to increased hours of operation or capacity utilization authorized under the SIP and reasonably anticipated to occur on the baseline date. The baseline concentration also includes emissions increases allowed under a SIP relaxation pending final EPA approval on the baseline date, if the allowable emissions under the revision were higher than the source's actual emissions on the baseline date. The June 1978 regulations established a uniform baseline date of August 7, 1977 for all clean air areas. A definition of baseline area was unnecessary since all PSD areas were covered by the August 7, 1977 baseline date.

The *Alabama Power* decision held that a uniform baseline date was not authorized by section 169(4). It required the baseline date to be established at the time of the first application for a permit in an area subject to PSD requirements. EPA's regulations were consequently remanded for change.

The *Alabama Power* decision, however, supports EPA's definition of baseline concentration. In holding that monitoring data is required under section 165(e)(2), the court confirmed that actual air quality data should be used to determine baseline concentrations. *See* 13 ERC 2022. Since monitoring data provide information on actual air quality concentrations from

existing sources and since section 169(4) explicitly states that required monitoring data should be used in establishing baseline concentrations, the court's decision supports EPA's requirement that baseline concentrations reflect actual air quality. In addition, the court implicitly affirmed EPA's approach in ruling that EPA correctly excluded from baseline concentrations emissions increases due to voluntary fuel switches after the baseline date. Since actual air quality on the baseline date would not reflect these increases, their exclusion from baseline concentrations is consistent with EPA's actual air quality approach to baseline concentrations. Finally, the court noted Congress' rejection of a House bill that would have allowed certain source emissions to be included in baseline concentrations, even though the emissions have not occurred by the baseline date. *See* 13 ERC 2026. The court concluded that Congress considered and rejected an approach that would depart from actual air quality in calculating baseline concentrations, except in the limited circumstances set forth in section 169(4).

In its September 5, 1979 response to the court's decision, EPA proposed to delete the uniform August 7, 1977 baseline date and to define baseline date as the date of the first complete application, after August 7, 1977, for a PSD permit to construct or modify a major stationary source in an area subject to PSD requirements. As part of that definition, EPA proposed to define baseline area as all parts of an Air Quality Control Region (AQCR) designated as attainment or unclassifiable under section 107(d) of the Act. Under that definition, an application of a major stationary source to construct in any part of an AQCR designated as attainment or unclassifiable would trigger the baseline date for both SO_2 and PM in all portions of the AQCR.

EPA's proposed definition of baseline area was based in part on its consistency with the term "area" as used in section 107, which requires air quality designations for AQCRs or portions thereof. The definition was also intended to avoid implementation problems that might result from having different baseline areas and dates within the same AQCR. EPA proposed, however, to allow states some flexibility in defining baseline area. *See* discussion at 44 FR 51942.

EPA further proposed to retain its current definition of baseline concentration but asked for comment on a particular problem specific to the Gulf Coast areas (*see* 44 FR 57107, October 4, 1979 and discussion in Increment Consumption). EPA's September 5 proposal specifically asked for comment on two aspects of its proposal: (1) whether baseline area should be defined as clean portions of the AQCR in which a source applies for a permit, and (2) whether a permit application should trigger the baseline date only in the clean portions of the AQCR in which the source would locate or also in clean areas of any AQCR which would be impacted by the source.

After issuance of the court's full opinion in December, EPA proposed and asked for comment on three changes to its September 5 proposal (45 FR 6802, January 30, 1980). First, EPA stated it was considering defining baseline area as any area designated attainment or unclassifiable under section 107(d) in which a source subject to PSD requirements would locate or impact, rather than all clean portions of an AQCR in which a source would locate or impact. Second, EPA's solicited comment on whether states should be allowed to redefine the boundaries of areas designated as attainment or unclassifiable. EPA suggested, however, that states should be limited to redesignations no smaller than the source's area of impact. Third, EPA indicated it was considering adoption of a pollutant-specific baseline date and area. Under that approach, a source would trigger the baseline only for the pollutants it emitted. Thus, if the source would emit neither SO_2 nor PM, it would not trigger any baseline. EPA also requested comment on whether a source which would be major for SO_2 and minor for PM would trigger a baseline date only for SO_2 or for both pollutants.

EPA's final action and response to comments on each of the issues is discussed below. For simplification, the discussion focuses on the four basic issues of baseline concentration, baseline area, baseline date, and pollutant-specific baseline. Issues related to increment consumption are discussed in the next section.

A. Baseline Concentration

As proposed, EPA is continuing its current definition of baseline concentration as the ambient concentration levels at the time of the first permit application in an area subject to PSD requirements. Baseline concentration generally includes actual source emissions from existing sources but excludes emissions from major sources commencing construction after January 6, 1975. Actual source emissions are generally estimated from source records and any other information reflecting actual source operation over the two-year time period preceding the baseline date. The baseline concentration also includes projected emissions from major sources commencing construction (including modification) before January 6, 1975, but not in operation by August 7, 1977.

Unlike the June 1978 policy, baseline concentration will no longer routinely include those emissions increases after the baseline date from sources contributing to the baseline concentration, which are due to increased hours of operation or capacity utilization. Existing policy permitted this grandfathering, provided such increases were allowed under the SIP and reasonably anticipated to occur as of the baseline date. Today's policy which normally excludes such increases is consistent with using actual source emissions to calculate baseline concentrations. An actual emissions policy, however, does allow air quality impacts due to production rate increases to sometimes be considered as part of the baseline concentration. If a source can demonstrate that its operation after the baseline date is more representative of normal source operation than its operation preceding the baseline date, the definition of actual emissions allows the reviewing authority to use the more representative period to calculate the source's actual emissions contribution to the baseline concentration. EPA thus believes that sufficient flexibility exists within the definition of actual emissions to allow any reasonably anticipated increases or decreases genuinely reflecting normal source operation to be included in the baseline concentration.

EPA is also promulgating a change in its current policy on SIP relaxations. Under that policy, emissions allowed under SIP relaxations pending on August 7, 1977 are included in the baseline concentration if the allowed source emissions were higher than actual source emissions. EPA adopted that policy in June 1978 in recognition of the fact that some states with SIP revisions pending on August 7, 1977 had allowed sources to increase emissions prior to final EPA approval of the relaxations, while other states with pending relaxations had required sources to comply with the lower emissions limitations in the existing SIP until final approval occurred. *See* 43 FR 26401 col. 3. To avoid penalizing sources in states that did not allow increases prior to approval, EPA provided that baseline concentrations include the allowable emissions under revised SIPs, if the relaxation was pending on August 7, 1977 and the allowed emissions exceeded the source's actual emissions.

The effect was to allow sources to avoid increment consumption analyses for the emissions increase allowed in the revision. EPA considered the exemption justified because states and sources were unaware that EPA would establish a uniform baseline date of August 7, 1977, and those emissions increases after that date would consume increment.

EPA believes this exemption from increment consumption analyses is no longer necessary. States and sources have been on notice since June 1978 that emissions increases at existing sources due to SIP relaxations must be evaluated for possible increment consumption. No state or source has been uncertain as to the applicable baseline date, or been placed in an inequitable position as to other states or sources. Therefore, today's regulations do not exempt from increment consumption analyses those SIP relaxations not finally approved by EPA prior to the baseline date in the affected area.

One commenter suggested that EPA extend the transition provision within the June 1978 regulations for assessing increment consumption. 43 FR 26401 col. 2. This provided that increased emissions from plan relaxations received after the August 7, 1977 baseline date but before the June 19, 1978 promulgation would consume the applicable increment but could be reviewed as part of the periodic assessment rather than assessed individually for increment consumption prior to plan approval.

EPA does not believe that a similar exception is required under today's regulations. EPA considered the exception necessary in June 1978 due to uncertainty as to how the 1977 Amendments would affect pending SIP relaxations. Such uncertainty no longer exists, since sources have been on notice since June 1978 that SIP relaxations after that date must be individually reviewed for increment consumption. Therefore, emissions increases due to plan relaxations received after June 19, 1978 must be individually evaluated for increment consumption prior to EPA approval.

EPA is concerned, however, that the new definition of baseline concentration may work a hardship on states with SIP relaxations pending when a PSD application is filed in an area. A state may submit a SIP relaxation affecting a source, or group of sources, located in an area where the baseline date has not been set, and would not be required to provide an increment consumption analysis. If prior to final EPA approval, a source filed a PSD application in the area, the application would establish a baseline date and the state would have to withdraw the revision until it has conducted the necessary increment analysis. To prevent such burdensome delays, EPA is exempting from individual increment analyses SIP relaxations pending at the time a baseline date is established in the area affected by the revision. However, increment consumption due to emissions from these relaxations must be evaluated as part of a state's periodic assessment. Exemptions from individual analyses is analogous to the previous relief provided for sources subject to SIP relaxations submitted after August 7, 1977, but before EPA's June 1978 promulgation. The exemption is therefore consistent with prior EPA policy.

B. Baseline Area.

In response to the September 5, 1979 proposal, fifty-three commenters felt that an AQCR definition of baseline area would not produce a great deal of administrative relief and would, simultaneously, limit an area's growth options. These commenters favored defining baseline area as the area of significant source impact, based on required modeling and monitoring analysis. Such an approach was claimed to provide just as much administrative relief, more growth options, and elimination of the problem of a small PSD source triggering the baseline date for a large area. Seventeen commenters favored a baseline area definition geared to areas designated as clean or unclassified under section 107. Those favoring this alternative strongly preferred a "redesignation" procedure to accompany this option. Other commenters objecting to the AQCR approach suggested: county boundary lines (three), and the entire state (one).

In response to EPA's January 30 notice, fourteen of sixteen commenters favored a source impact area definition of baseline area. One of the remaining two commenters favored retention of the AQCR approach while the other commenter desired a county or some other legal boundary approach. All eighteen comments received favored triggering a baseline only in the area in which a source would locate, and not in those other areas which it would impact. Nineteen of twenty-nine commenters favored permitting state redesignation but to areas no smaller than a source impact area. Seven other commenters favored no limitations on the redesignation procedure. The remaining three commenters opposed allowing states to redefine baseline areas through redesignation.

EPA has determined that baseline area should be defined as the area designated as attainment or unclassifiable under section 107(d) in which a source or modification subject to PSD review would construct or on which it would have an impact equal to or greater than 1 $\mu g/m^3$ on an annual basis. EPA has concluded that "an area subject to this part," as used in section 169(4), refers to areas designated attainment or unclassifiable under section 107(d).

This view is strongly suggested by Judge Robinson's opinion on baseline concentration in the December 1979 *Alabama Power* ruling. Referring to Congress' intent to use actual air quality data to establish baseline concentrations, Judge Robinson states that "the task of monitoring existing ambient pollution levels *in attainment areas* is assigned to the first permit applicant, who will provide the information essential to calculation of the baseline." (Emphasis added) 13 ERC 1993, 2022. The footnote which follows that sentence discusses a state's obligation under section 107(d)(1) to submit area designations to EPA and the fact that section 107 lists submitted to date by the states indicate that many areas lack acceptable air quality information. *Id.* The references to attainment areas and section 107(d) designated areas indicate that the court interprets the statute as requiring that baseline concentrations be calculated for each clean area designated under section 107(d)(1).

EPA thus believes that neither the statute nor the court opinion support the proposed AQCR approach. The majority of comments also opposed defining baseline area as AQCR. Opposition was based on the view that it would do little to alleviate administrative problems, offered no flexibility in states, and would often limit an area's growth options by encompassing too large an area.

EPA has also determined that a PSD source should trigger the baseline in all intrastate clean areas that it impacts as well as the area it locates in. One objective of PSD is to track air quality changes in clean air areas. If a major source significantly affects any clean air area in the same state the purposes of PSD will be served if air quality deterioration from minor/area source growth and actual changes in baseline source emissions are tracked from the time significant SO_2 or PM emissions from a new or modified major source impact a clean area. Such a policy is also consistent with the language of section 165(e)(1) of the Act which

requires an air quality analysis of the affected area, not just the area of immediate location. The Administrator does not believe that such a policy should transcend state boundaries. Since triggering baseline dates is an important factor in managing growth, EPA has concluded that states should have jurisdiction over their own baseline dates. On the other hand, establishment of baseline dates does not affect increment consumption across state borders by major source construction commencing after January 6, 1975.

EPA has concluded that baseline areas may be redefined by the states through area redesignations. Section 107(d) specifically authorizes states to submit redesignations to the Administrator. Consequently, states may submit redefinitions of the boundaries of attainment or unclassifiable areas at any time. If EPA agrees that the available data support the change, it will redefine the areas as requested. As long as no PSD source has located in, or significantly impacted on a clean area being considered for redesignation, the area can be redesignated as a new attainment or unclassifiable area, even if the area were previously part of a larger clean area in which the baseline date had been set.

Area redesignations are subject to certain restrictions. The boundaries of any area redesignated by a state cannot intersect the area of impact of any major stationary source or major modification that established or would have established a baseline date for the area proposed for redesignation or that is otherwise required to obtain a PSD permit. In addition, area redesignations can be no smaller than the area of impact of such sources. These restrictions comport with the PSD objective of tracking air quality effects in an area once a major source or modification has affected an area. By setting the baseline date at the time a major source or modification impacts an area and preventing the date from being changed by subsequent area redesignations, the system ensures that future growth in the area will be assessed for its air quality effects from that date forward. Moreover, if states could define baseline areas as small as the immediate area in which a source is located and not include the source impact area, air quality could deteriorate or increments could be violated in a nearby area impacted by the source, but neither the state nor EPA would review the air quality impact. The source could therefore affect air quality but the reviewing authority would be unaware of the deterioration. In addition to jeopardizing air quality, "postage stamp" baseline areas would be difficult to administer.

A source will be considered to impact an area if it has an impact of 1 $\mu g/m^3$ or more of SO_2 or PM on an annual basis. This figure has been selected because it corresponds to levels of significance used in previous Agency determinations for SO_2 and PM. The annual average was selected over the short term value due to its ease of implementation. That is, the shape of source impact areas is less complex and the 1 $\mu g/m^3$ annual average provides ample area coverage of the source impact area.

The Administrator believes that defining baseline area as section 107 areas and allowing state redesignation will satisfy most of the commenters who objected to the proposed AQCR definition and favored state flexibility in designations. The redesignation process partially meets the concerns of commenters who preferred defining baseline area as source impact area. Where a baseline date is established for an area that is large relative to the impact area of the triggering source, the state has the option of redefining the area to reflect more accurately the area affected by the source.

C. Baseline Date

Consistent with the Agency's proposal, today's promulgation defines baseline date as the date after August 7, 1977 on which the first complete application for a PSD permit is filed with the appropriate reviewing authority. Section 51.24(b)(14), 52.21(b)(14). As discussed in the September 5 notice, EPA has determined that this definition is mandated by the court's interpretation of section 169(4), which requires a baseline concentration to be set on the date, after August 7, 1977, "of the first application for a permit in an area subject to this part." *See* 44 FR 51941 col. 3. Consequently, the first complete PSD permit application by a major source to construct in a baseline area, as that term is defined in § 51.24(b)(15) and 52.21(b)(15), and explained above, will trigger a baseline date.

As discussed below, under *Pollutant-Specific Baseline*, the regulation further requires that a baseline date be set for each pollutant emitted by the applicant source in greater than *de minimis* amounts, if increments or other equivalent measures under section 166 have been established for the pollutant. At present, increments are established only for SO_2 and PM, and no increments or equivalent measures for other pollutants have been established. Section 166 requires EPA to adopt regulations establishing increments or other equivalent measures for other criteria pollutants. Section 166 does not by its terms require EPA to apply section 169(4) in determining baseline dates for criteria pollutants other than SO_2 and PM. EPA is now conducting rulemaking under section 166 to develop increments or equivalent measures for the other criteria pollutants. As part of that rulemaking, EPA is considering how to establish baseline dates for those pollutants.

While comments supported EPA's proposal to establish the time of the first complete application in an area as the baseline date, eight commenters suggested that the date be set at the time of the first application after August 7, 1978, rather than August 7, 1977. This review is consistent with other comments noting that section 165(e)(2) requires permit applicants after August 7, 1978 to provide one year's monitoring or other equivalent air quality analysis to determine a baseline concentration for the area. These commenters claimed that since baseline concentration is to be established through actual ambient air quality data and no applicant can gather the necessary monitoring data before one year after the effective date of the part, the baseline date should not be triggered by applications filed before that date.

EPA understands the commenter's concerns. However, EPA believes Congress was aware that prior to August 7, 1978, applicants could not provide a full year of monitoring data, as evidenced by the fact that the monitoring requirement in section 165(e)(2) is not effective until August 7, 1978. Congress nonetheless provided that baseline concentrations be established by the first permit application, an event which could occur at any time after August 7, 1977. Congress therefore considered that baseline concentrations and increment consumption could be determined with less than a full year's monitoring data. The need to accept less data is reflected in the provision of section 169(4) that baseline concentrations be based on available air quality data and on such monitoring data as the applicant is required to submit. The provision suggests that calculations of baseline and increment use may have to be made with limited data, if available data, such as that from the state agencies, is not appropriate. EPA interprets the requirements for monitoring data after August 7, 1978, and not August 7, 1977, as intended to provide a grace period for sources, rather than evidencing intent to

postpone the establishment of baseline dates.

One commenter questioned whether baseline dates would be triggered by permit applications previously filed by sources that were major under the June 1978 PSD regulations, but no longer major under the regulations promulgated today, even if the permit applicant failed to apply for a permit rescission. EPA concurs in the commenter's suggestion that a subsequent permit applicant in any area may inform the permitting authority that the baseline date was not triggered on the date that a source which no longer qualifies as major applied for a PSD permit. As the commenter points out, this eliminates the need for an immediate rescission of all past permits affecting sources no longer subject to PSD review. It also avoids penalizing permit applicants if a source that is no longer major fails to apply for a permit rescission.

The Administration wishes to clarify another point related to a change in review status for the source which has triggered the baseline date. If the applicant that established the baseline date is later denied a PSD permit or voluntarily withdraws its PSD application, a question arises as to whether the baseline date has been triggered. In the Administrator's judgment the applicable baseline date remains in place, since no change in date is authorized under the Act. Section 169(4) establishes source application as the baseline triggering mechanism and does not qualify this by the later issuance of a permit. This policy is consistent with the establishment of a baseline concentration which is based on the available monitoring data, typically that gathered by the source applicant. The data to establish the baseline concentration would be available regardless of the eventual permit status of the baseline triggering application. Using source application also stabilizes the NSR permitting process. Later applicants can determine whether a baseline date has been set in an area by looking to whether a previous application has been filed, rather than needing to determine if the permit has been or will be issued.

Finally, the Administrator wishes to point out that it is the first PSD application submitted under either 40 CFR 52.21 or state PSD regulations developed pursuant to 40 CFR 51.24 which triggers a baseline date. When states assume responsibility for implementing the PSD program, several PSD baseline dates may well have been triggered. However, as mentioned above, states can minimize the impact of early baseline dates by redesignating the size of the baseline area which is affected by a previously established baseline date.

D. Pollutant-Specific Baseline

The Agency has concluded that a pollutant-specific baseline is consistent with section 169(4) and the statutory structure. Section 169(4) requires that a baseline concentration be established "with respect to a pollutant * * * in an area subject to (Part C)." Therefore, by the terms of the statute, a baseline concentration is established for individual pollutants. Moreover, such concentrations are established for areas subject to PSD. Section 107(d), which provides that areas designated attainment or unclassifiable are subject to PSD, requires designations to be made on a pollutant-specific basis. Section 107(d)(1)(D) and (E). To be consistent, both baseline date and baseline area (and any subsequent redesignations under section 107 of the Act) must also be pollutant-specific.

The comments that favored a pollutant-specific baseline generally did so on two grounds: the reference to "pollutant" in section 169(4) and the statutory requirement to use monitoring data to establish baseline concentration. Since monitoring and increment consumption are pollutant-specific, baseline concentrations must be as well. The Administrator agrees that the monitoring requirement supports pollutant-specific baselines. Four of the thirty-eight commenters that opposed pollutant-specific baselines did so primarily for implementation reasons. Although pollutant-specific baselines may add some complexity to the PSD program, EPA has concluded that the statutory structure contemplates pollutant-specific area designations.

The following example illustrates the concept of pollutant-specific baseline dates. If a major source of NO_x that would also emit SO_2 in significant amounts and PM in less than significant amounts submits a complete application for a permit to construct in an area designated under section 107(d)(1) as attainment for all pollutants, and no previous source has triggered any baseline dates, the source would establish the baseline date for SO_2 but not PM. If a later modification to the source results in a significant net increase in PM emissions and no other application previously triggered the PM baseline date, the proposed PSD application for the modification would then establish the PM baseline date.

XIV. Increment Consumption

There are two basic issues in the area of increment consumption: (1) which source emissions consume increment and (2) how to calculate the amount of increment consumed by those emissions. The *Alabama Power* decision addressed neither question. EPA, therefore, proposed in September to continue its current approach. Under the approach, four categories of source emissions affect increment: (1) as provided by section 169(4), emissions from major source construction (including modification) commencing after January 6, 1975. This group includes emissions from sources issued PSD permits and state new source review (NSR) permits (including those issued in accordance with section 51.18(j) and the Offset Ruling) as well as emissions from non-permitted sources; (2) emissions changes occurring after the baseline date at sources whose previous emissions on the baseline date are included in the baseline concentration; (3) emissions changes due to SIP revisions that are approved after the baseline date; and (4) minor and area source growth occurring after the baseline date. EPA's current regulations provide that the first and third category of sources affect increment on the basis of emissions allowed under the permit and emissions allowed under the SIP as revised, respectively. The second and fourth categories affect increment on the basis of actual emissions changes from the emissions included in the baseline concentration.

Since its proposal, EPA has reevaluated its current policy in light of both the December opinion of the court and the Gulf Coast problem (discussed below). EPA has concluded that increment consumption and expansion should be based primarily on actual emissions increases and decreases, which can be presumed to be allowable emissions for sources subject to source-specific emissions limitations. This change principally affects increment calculations for major source construction not subject to source-specific permits or SIP requirements and for sources whose allowable limits are demonstrated not to reflect actual emissions. PSD applications pending today before EPA or a state agency authorized to review or issue PSD permits will be reviewed for increment consumption on the basis of the revised policy.

A. Use of Actual Emissions

1. Rationale for Use of Actual Emissions.

As discussed in the *Baseline Concentration* section, the *Alabama Power* decision supported EPA's requirements that baseline concentrations reflect actual air quality in an area. Increment consumption or expansion is directly related to baseline concentration. Any emissions not included in the baseline are counted against the increment. The complementary relationship between the concepts supports using the same approach for calculating emissions contributions to each. Since the *Alabama Power* decision and the statute both provide that actual air quality be used to determine baseline concentrations, but provide no guidance on increment consumption calculations, EPA has concluded that the most reasonable approach, consistent with the statute, is to use actual source emissions, to the extent possible, to calculate increment consumption or expansion.

EPA's decision is also based on concerns raised by the Gulf Coast problem, discussed below. In that area, and possibly others, source emissions allowed under permits and SIP provisions in many cases are higher than actual source emissions. Sources could therefore increase their emissions without being subject to PSD review or the SIP revision process. However, if increment calculations were based on allowable emissions, EPA believes increment violations would be inappropriately predicted and proposed source construction would be delayed or halted. In practice, EPA expects that few, if any, sources will increase their emissions to allowable levels.

EPA believes it is unwise to restrict source growth based only on emissions a source is permitted to emit but which, in many instances, have not been and are not likely to ever be emitted. Increment calculations based on the best prediction of actual emissions links PSD permitting more closely to actual air quality deterioration than calculations based on allowable "paper" emissions. In addition, use of actual emissions for increment consumption is consistent with using an actual emissions baseline for defining a major modification and for calculating emissions offset baselines.

2. Calculation of Increment Consumption Using Actual Emissions.

To determine how much increment remains available to a proposed major source or modification, the source owner or operator must analyze several types of emissions changes as of its application date. These changes generally include: (1) emissions changes that have occurred at baseline sources and emissions from new minor and area sources since the baseline date; (2) emissions that have occurred or will occur at sources which have submitted complete PSD applications as of thirty days prior to the date that the proposed source files its application; and (3) emissions changes reflected in SIP relaxations submitted after August 7, 1977, and pending as of thirty days prior to the date the source files its application, or emissions changes reflected in SIP relaxations which have been approved since August 7, 1977, but which have not yet occurred. (*See*, discussion below on calculation of increment consumption for SIP relaxations.) The thirty-day cutoffs are specified to stabilize the review process by preventing new applications and SIP relaxation proposals from invalidating otherwise adequate increment consumption analyses without warning.

Increment calculations will generally be based on actual emissions as reflected by normal source operation for a period of two years. EPA has selected two years based on its recent experience in reviewing state NSR programs for nonattainment areas. The state submittals use periods of between one and three years to evaluate source emissions. In EPA's judgment, two years represents a reasonable period for assessing actual source operation. Since the framework for nonattainment NSR programs will generally form the basis for a state's PSD plan, EPA believes it is appropriate to use the same time period for evaluating actual source emissions in the PSD program. Two years is also being used to calculate the emissions offset baseline for modifications in nonattainment areas.

The two-year period of concern should generally be the two years preceding the date as of which increment consumption is being calculated, provided that the two-year period is representative of normal source operation. The reviewing authority has discretion to use another two-year period, if the authority determines that some other period of time is more typical of normal source operation than the two years immediately preceding the date of concern. In general, actual emissions estimates will be derived from source records. Actual emissions may also be determined by source tests or other methods approved by the reviewing authority. Best engineering judgments may be used in the absence of acceptable test data.

EPA believes that, in calculating actual emissions, emissions allowed under federally enforceable source-specific requirements should be presumed to represent actual emission levels. Source-specific requirements include permits that specify operating conditions for an individual source, such as PSD permits, state NSR permits issued in accordance with § 51.18(j) and other § 51.18 programs, including Appendix S (the Offset Ruling), and SIP emissions limitations established for individual sources. The presumption that federally enforceable source-specific requirements correctly reflect actual operating conditions should be rejected by EPA or a state, if reliable evidence is available which shows that actual emissions differ from the level established in the SIP or the permit.

EPA believes two factors support the presumption that source-specific requirements represent actual source emissions. First, since the requirements are tailored to the design and operation of the source which are agreed on by the source and the reviewing authority, EPA believes it is generally appropriate to presume the source will operate and emit at the allowed levels. Second, the presumption maintains the integrity of the PSD and NSR systems and the SIP process. When EPA or a state devotes the resources necessary to develop source-specific emissions limitations, EPA believes it is reasonable to presume those limitations closely reflect actual source operation. EPA, states, and sources should then be able to rely on those emissions limitations when modeling increment consumption. In addition, the reviewing authority must at least initially rely on the allowed levels contained in source-specific permits for new or modified units, since these units are not yet operational at a normal level of operation. EPA, a state, or source remains free to rebut the presumption by demonstrating that the source-specific requirement is not representative of actual emissions. If this occurs, however, EPA would encourage states to revise the permits or the SIP to reflect actual source emissions. Such revisions will reduce uncertainty and complexity in the increment tracking system, since it will allow reviewing authorities and sources to rely on permits and SIP emissions limitations to model increment consumption.

Review of increment usage due to SIP relaxations will also be based initially on emissions allowed under the SIP as revised (provided this allowed level is higher than the source emissions contributing to the baseline concentration). Calculations will generally be made on the difference between the source emissions included in the baseline concentration and the

emissions allowed under the revised SIP. Initial use of allowable emissions is necessary because the increment calculation generally occurs before the source has actually increased its emissions. Therefore, at the time the revision is reviewed, increment consumption must be based on the predicted source operation under the revision. In addition, since SIP revisions are commonly based on source requests, it is reasonable to assume such sources will actually emit at levels permitted by the relaxation.

Subsequent to the initial review process, increment calculations for SIP relaxations may depart from allowable emissions under the SIP, if the source has not actually increased its emissions. For example, three years after approval of a SIP relaxation, if it is found that the source has not increased its emissions to levels allowed in the SIP, estimates of increment usage should be revised to reflect actual source emissions. If this occurs, EPA would also encourage states to revise the emissions levels allowed in the SIP to represent the source's actual emissions.

Finally, the required increment consumption analysis can be amended by the applicant after the PSD review process has begun. For example, an applicant would normally revise its analysis to reflect increment made available by the withdrawal of PSD applications previously considered in the applicant's calculation of increment consumption. In no event, however, will the source be required to take account of emissions changes or changes due to pending PSD applications or SIP relaxations that could increase the amount of increment consumed by other sources.

B. Exclusions From Increment Consumption

1. *Exclusions Requested by Governors.*

Section 163(c) authorizes four exclusions from increment consumption upon the request of a governor. Exemptions are available for federally-ordered fuel switches under the Energy Supply and Environmental Coordination Act of 1974 or superseding legislation, fuel switches due to natural gas curtailment plans under the Federal Power Act, temporary emissions of particulate matter due to construction and related activities, and new sources constructing outside the United States. In the cases of the federally-ordered switches and natural gas curtailment plans, the exclusion is limited to a maximum of five years after the effective date of the order or plan.

The statute provides that these exclusions are available only if the state has an EPA-approved PSD plan. Section 163(c). In its June 1978 regulations, however, EPA permitted governors to use the exclusions during the nine-month period between promulgation of the regulations and the date plan revisions were required to be submitted. *See* § 52.21(f)(3) (1979). As discussed in the preamble to the June 1978 regulations, EPA concluded that prohibiting use of the exclusions after the nine-month period would be an adequate incentive to states to submit PSD plans. *See* 43 FR 26402 (Col. 1).

EPA has decided to extend this policy to today's regulations. In view of the many changes in the regulations resulting from the court's decision, states which have already submitted plans will have to submit revised provisions and states which have not yet submitted plans will have to develop plans based on the new regulations. As with the June 1978 requirements, EPA believes that disallowing the exclusions nine months from today will provide sufficient encouragement to states to submit plans, and will offer states more flexibility for growth in this interim period. Therefore, governors may request the exclusions until nine months from today's promulgation, even if no PSD plan has been submitted to or approved by EPA. Thereafter, the exclusions will be unavailable unless the state has submitted an approvable PSD plan to EPA.

2. Temporary Emissions

EPA's June 1978 regulations and the September 1979 proposal provided that temporary emissions from new sources or modifications would be exempt from impact analysis requirements §§ 51.24(k)(iii), 52.21(k)(iii) (1979); 51.24(k)(1), 52.21(k)(1) (proposed). Temporary emissions typically include, but are not limited to, emissions from a pilot plant, a portable facility, construction or exploration activities. Similarly, EPA proposed to exempt from increment analyses the impacts on the PSD increments from the temporary emissions associated with the development of an approved innovative control technology system, provided the applicable ambient standards were not jeopardized. The regulations, however, did not provide a comparable exemption for temporary emissions resulting from short-term SIP relaxations.

Only three commenters addressed the concern of temporary emissions and increment consumption. These commenters offered suggestions in light of the proposed position on innovative control systems. These commenters supported the existing policy of exempting temporary emissions from increment air quality analyses when no Class I areas or areas with known increment violations would be impacted.

Temporary SIP relaxations are comparable to temporary emissions from new and modified major stationary sources since both affect air quality for a limited period of time. Therefore, the Administrator has decided that the existing policy of exempting temporary emissions should be extended to those associated with certain SIP relaxations. A SIP relaxation will be eligible for such relief if it meets the following five conditions. These conditions are intended to ensure that the emissions increase associated with the SIP relaxation will be limited in duration and that no residual harm will occur to the environment as a result of the relaxation. (1) The SIP revision allows an emissions increase for a temporary period only. As stated in the preamble to the June 1978 regulations, temporary emissions generally would last no more than two years at one location, although emissions for a longer period of time may be considered temporary if an appropriate demonstration is made. *See* 43 FR 26394 col. 2. (2) The revision is nonrenewable. This condition is intended to prevent sources from indefinitely postponing compliance with emissions limitations necessary to prevent PSD increment violations. (3) The temporary emissions will not cause or contribute to the violation of any applicable NAAQS. (4) At the expiration of the temporary SIP relaxation, the source must be required to comply with an emissions limitation that ensures the post-exemption emissions will be equal to or less than the emissions existing before the exemption was granted. (5) The temporary emissions from the revision do not impact any Class I area and any area where an increment is known to be violated. Restricting the exemption to sources impacting Class II or III areas conforms to Congress' intent to provide maximum protection of air quality values in Class I areas and meets the commenter's concerns.

In addition to SIP relaxations for individual sources, the exemption will be available for temporary emissions due to SIP relaxations that apply to several sources, if the state provides adequate assurances that no standards will be violated.

C. Increment Expansion Due to Emissions Reductions Prior to the Baseline Date

EPA's policy under the June 1978 regulations is unclear as to whether emissions reductions prior to the

baseline date increase the amount of available increments. The policy allows decreases after January 6, 1975, and prior to the baseline date, to be used by sources to offset subsequent increases and exempt the increases from the requirement for an ambient air quality assessment. In effect, EPA treats such decrease as expanding available increments, since the decreases permit later emissions increases at the same source to avoid the otherwise required air quality assessment. The policy did not state, however, whether isolated decreases not made in conjunction with intrasource increases were considered to expand available increments. In contrast, the policy is clear that emissions reductions after the baseline date increase available increments.

As a result of the revised definition of modification which permits offset credit for emissions reductions occurring within a moving five-year period, EPA has decided to clarify its existing policy. All emissions reductions prior to the baseline date at major stationary sources will now be considered to expand available increments. Since contemporaneous emissions reductions accomplished before the baseline date can be used by a source to offset a contemporaneous post-baseline emissions increase, and thereby avoid PSD review, it is also reasonable to allow these contemporaneous pre-baseline date reductions to expand the increment. Without this change, source owners that reduce emissions by retiring or controlling old equipment before the baseline date will be penalized by having increases after the baseline date count against increments even though the pre-baseline decrease might offset the later increase and eliminate the need for PSD review. In contrast, source owners that postpone the reductions and increases until after the baseline date is set would both secure contemporaneous offsets and avoid increment consumption.

EPA believes that this inequity should be eliminated to encourage early retirement of old equipment. Section 169(4) provides that emissions from major emitting facilities that commenced construction after January 6, 1975, shall be counted against available increments. The provision implies that both emissions increases and decreases should be considered for their impact on available increments. In view of the statutory language and policy considerations, EPA has determined that decreases made prior to a baseline date can expand available increments in the same manner as decreases made after a baseline date. However, to ensure that the emissions reductions remain effective, reductions will add to available increments only if the lower emissions limitations are federally enforceable.

The changed policy is reflected in a new definition of "construction" which is any physical change or change in the method of operation of a stationary source resulting in a change in the actual emissions of the source (including fabrication, erection, installation, demolition, or modification). Any construction commencing at a major source since January 6, 1975, may result in an increase or decrease in actual source emissions. If an actual decrease involving construction at a major stationary source occurs before the baseline date, the reduction will expand the available increment if it is included in a federally enforceable permit or SIP provision. An actual increase associated with construction activities at a major stationary source will consume increment.

The Administrator would also like to clarify that changes in fugitive emissions levels (to the extent quantifiable) at major stationary sources, resulting from construction commenced since January 6, 1975, will consume or expand the available increment. This is true even if such changes occurred prior to the baseline date.

D. Gulf Coast Problem.

In the September 5 proposal, and in an October 4, 1979 correction notice, EPA solicited comments on how to calculate increment consumption by gas-fired boilers in the Gulf Coast area that had received state approval to burn oil in the event of a future natural gas shortage. *See* 44 FR 51942 (September 5, 1979), and 44 FR 57107 (October 4, 1979). The affected units include both boilers that could accommodate such a fuel-switch before January 6, 1975 and boilers that were altered to accommodate the fuel-switch after that date. All affected units were permitted to switch fuel before August 7, 1977, the earliest possible baseline date. Assuming the baseline date is set in the area where these sources are located, which EPA believes is the case for most of the sources, each group of sources may cause increment violations.

For sources that could burn alternative fuels prior to January 6, 1975, the problem is posed by the fact that if all sources made the switch to oil allowed under their permits, SO_2 increment violations would occur. Since neither a SIP revision nor a PSD Permit would be required for the sources to make the fuel switches, EPA and the state could be unaware of the violations until another source applied for a PSD permit or until a periodic assessment was made. If actual increment violations were discovered during the PSD review process for the proposed source, the source would not be permitted to build or modify until the violations were corrected. If violations were found during a periodic assessment, the state would have to suspend further growth until its plan was revised to correct the violations. Consquently, the inadequacy of the exiting permits to prevent increment violations could result in increment violations which would delay, and possibly prevent, additional growth in the area.

A similar problem is posed by sources that could not accommodate oil before January 6, 1975. Since these sources increased their potential to emit after January 6, 1975, under EPA's June 1978 policy, this change would have constituted "construction" at a major stationary source after January 6, 1975. Therefore, under section 169(4), any emissions increases caused by the "construction" would have consumed increment. As noted above, EPA's June 1978 policy required increment calculations to be based on emissions allowed under a permit or SIP and not on actual source emissions. If a PSD source applied to locate in an area and these Gulf Coast sources were modeled based on emissions increases due to fuel switches allowed by their permits, EPA believes several SO_2 increment violations would be predicted. Under existing policy, the proposed PSD source would then be required to correct the violations prior to receiving construction approval. Future growth in the area could, therefore, be delayed or prevented.

The problem posed by the second group of sources is reduced to some extent by the increment consumption policy promulgated today. Since increment usage will now be based on changes in actual source emissions, increment violations will not occur in the area unless the sources actually switch to oil from natural gas. Because natural gas is expected to remain less expensive and more available than oil, EPA believes few, if any, switches are likely. Therefore, while the increments may still be jeopardized due to inadequate permit conditions, PSD review can proceed as long as actual emissions increases at existing sources and actual emissions from sources with PSD or NSR permits are not predicted to cause increment violations.

If an actual increment violation has occurred, EPA's June 1978 policy imposes a PSD permit moratorium until

the violation is corrected. 43 FR 26401 (col. 1), June 19, 1978. This policy is continued in today's regulations. Therefore, if an increment violation is predicted to occur within the significant impact area of a proposed source (1 $\mu g/m^3$ on an annual average), a PSD permit cannot be issued to the source, unless the state or source obtains sufficient emissions reductions to restore the increment. The issue of how to deal with potential increment violations due to inadequate permit conditions is addressed in the next discussion.

Several comments were received in response to EPA's request for comments on the Gulf Coast problem. Although EPA believes its revised policy of using actual emissions to calculate increment consumption resolves the immediate Gulf Coast dilemma, and similar potential problems in other states, EPA is responding below to suggestions made by commenters.

EPA's notices questioned whether the Agency should or may include in the baseline concentration emissions increases due to fuel switches. Twelve of thirteen commenters on the issue supported including increases due to fuel switches in the baseline concentration and the majority of the commenters favored including in the baseline concentration other emissions increases approved prior to the baseline date but not occurring by that date. Commenters also proposed using allowable emissions in all cases to calculate baseline concentrations.

As discussed above and in Baseline Concentration, EPA has determined that both baseline concentrations and increment consumption should be based on actual air quality impacts. This decision is consistent with the suggestion of some commenters that EPA consider increment consumption to occur only when actual emissions increase and not when the permit or SIP allowing the increase is approved. As a result of EPA's revised policy, emissions increases due to fuel switches cannot be included in the baseline concentration unless the increase occurred prior to the baseline date and at a source which could accommodate this switch prior to January 6, 1975 without physical change or received approval under a PSD permit to make the switch.

One commenter was particularly concerned that unless allowable emissions were included in the baseline concentration, utilities with SIP relaxations approved shortly before the baseline date would be penalized if the utilities were unable to make the allowed increase by the baseline date. The commenter argued that some utilities would be unable to make the technical changes necessary to accommodate the fuel switch prior to the baseline date. Such utilities would, therefore, be required to do an increment consumption analysis, in contrast to other sources that made the switch before the baseline date. The commenter suggested that accounting for the allowed emissions increase in the baseline concentration would resolve this inequity and would be consistent with EPA's June 1978 policy of including in the baseline concentration emissions allowed under SIP relaxations pending before EPA on the baseline date.

While appreciating the commenter's concerns, EPA has concluded that no exemption from increment consumption analyses is appropriate in these cases. First, as discussed in Baseline Concentration, EPA has changed its June 1978 policy to provide that increment is consumed by emissions increases due to SIP relaxations pending EPA approval on the baseline date. Therefore, the exemption cited by the commenter no longer applies. Second, the June 1978 exemption was provided for sources whose emissions increases were delayed by the administrative process and not by physical limitations at the source. Therefore, the June 1978 exemption would not have applied to these utilities. Third, under the regulations promulgated today, if significant construction is necessary to make the allowed emissions increase, the change is a modification and would be subject to PSD review, including increment consumption analysis, in any case.

Other commenters suggested that prospective application of the definitions of major emitting facility and modification promulgated today would resolve the Gulf Coast problem. Under this approach, emissions increases that occurred after January 6, 1975, and would otherwise be considered modifications that consume increment under today's regulations, would not be evaluated under the new definitions. These commenters argued that the Gulf Coast problem is due to increment consumption from emissions increases not subject to the PSD permitting process at the time the increases were approved. The commenters stated that EPA has flexibility in deciding the effective date of the definitions.

EPA believes that section 169(4) requires emissions from all major emitting facilities (as defined in the Act and not as defined in the old PSD regulations) commencing construction after January 6, 1975 to count against increment. The statute provides no discretion to exempt these emissions from increment consumption. EPA also notes that under the PSD regulations effective from January 6, 1975 to August 7, 1977, emissions increases at such sources would have consumed increment to the extent the fuel switches occurred. (*See* 39 FR 42510).

E. Potential Increment Violations

1. Inadequate SIP and Permit Provisions. While the use of actual emissions to calculate increment consumption partially resolves the Gulf Coast problem, the potential for increment violations remains, due to inadequate SIP and permit provisions. As stated in the preceding discussion, many sources in the Gulf Coast area, and in other states as well, have permits or SIP requirements that allow actual emissions increases without subjecting the source to PSD review or the SIP revision process. For example, sources may be allowed to burn fuels with higher sulfur contents, as in the Gulf Coast area, or may have high allowable limits that would permit sources to relax existing pollution controls. If all sources in an area increased actual emissions to levels allowed under the SIP or permits, EPA believes increment violations would occur. Because no PSD review or SIP revision would be required, neither the state nor EPA would know of the violations until a PSD application was filed or a periodic assessment occurred. Growth would be halted until the violation was corrected.

At present, increment violations due to allowed but unreviewed emissions increases, and consequent construction delays, are only potential problems. EPA has therefore concluded that it is premature to promulgate remedial regulations to prevent such theoretical violations. EPA, however, encourages states to be alert to emissions increases that affect the increment. EPA urges states to closely monitor emissions increases from baseline sources and from new or modified sources not subject to PSD review which affect the available increment. States should consider requiring sources to report any emissions increases after the baseline date, including increases reflecting changed operating conditions that will continue for an extended period of time, perhaps six months. States would then learn of increases that consume increments and could take those increases into account in PSD permit reviews and periodic increment assessments. In addition, states are encouraged to revise SIPs and/or issue operating permits so that SIP requirements and permits reflect actual

source operating conditions. This will protect against large unreviewed emissions increases. While EPA is not promulgating a reporting requirement today, it will reconsider the need for a notification system if it finds that unreviewed emissions increases are causing or contributing to increment violations.

2. Double Counting of Emissions Decreases.

EPA is concerned about another potential problem: double counting of emissions decreases. The problem could arise if an existing source (Source A) reduces its actual emissions and a new source (Source B) seeking to locate in the area proposes to use the decrease when modeling increment consumption. Source B would do this by including the emissions decrease in its modeling of actual emissions from Source A. If the reviewing authority does not require Source B to ensure that the decrease at Source A is federally enforceable and does not record Source B's use of the decrease at the time Source B conducts its modeling, Source A may well use the same decrease to offset a future contemporaneous increase at Source A and thereby avoid PSD review for the increase. The use of one emissions decrease to offset two emissions increases could lead to air quality deterioration, and possible increment violations that would require correction before more PSD permits could be issued.

While EPA believes double counting of decreases should not be permitted, it is not promulgating regulations today to address the problem. EPA is uncertain how often, if ever, the problem will arise. Certainly it will be difficult for a new source to prove to the satisfaction of the reviewing authority the value of an emissions decrease accomplished at another source. Moreover, while EPA believes double counting of decreases should not occur, it is uncertain what solution is equitable for affected sources. In the absence of a formal increment banking system, or other provisions regulating increment allocation, the reviewing authority would have no basis for denying Source B use of any available increment. This could result in hardship to Source A if it deprives Source A of use of its decrease as an offset for future increases.

The issue of double counting is part of the broader question of increment management and allocation of air quality rights. EPA intends to develop banking regulations, which will include guidance to states on methods of increment allocation and regulating use of emissions decreases. To this end, EPA solicits suggestions on how to prevent double counting of decreases and on methods of increment allocation and management.

XV. Best Available Control Technology

Section 165 of the Act provides in part that any "major emitting facility" constructed in a PSD area must apply best available control technology (BACT) "for each pollutant subject to regulation under this Act emitted from, or which results from, such facility:" Section 169(3) of the Act defines BACT and specifically requires that it not be applied in a manner so as to result in emissions in excess of those that are allowed by standards established pursuant to sections 111 or 112 of the Act. 42 U.S.C. 7479(3). The Agency's existing regulations required BACT only for each pollutant for which a source or modification would be "major." 40 CFR 51.24(i)(1), 52.21(i)(1)(1978).

The *Alabama Power* decision held that the Act requires that BACT be applied to all pollutants subject to regulation under the Act, not only those for which the source is major, and that EPA is without authority to circumscribe the requirement in this manner. 13 ERC 1993, 2046. The court did conclude, however, that EPA has authority to set *de minimis* thresholds for BACT applicability, in order to alleviate economic and administrative burdens. *Id.*

In response to the court's decision, EPA proposed and is now promulgating regulations regarding application of BACT. 40 CFR 51.24(k)(1), 52.21(k)(1). With respect to new major stationary sources, BACT will be required for each regulated pollutant emitted in excess of specified *de minimis* amounts. Application of BACT is also required, in the case of major modifications, for each regulated pollutant emitted for which there is a significant net emission increase (greater than *de minimis* amounts) at the source. The BACT requirement applies to only the modified units and added units at the source whose construction results in a source-wide significant net increase in the emissions of the regulated pollutant. The new BACT requirements apply only to the owner or operator of a PSD source or modification whose application for a PSD permit was not complete before today's promulgation. (*See* Transition).

The *de minimis* emissions rates promulgated by the Administrator (*see De Minimis* Exemption) will apply to both BACT and LAER requirements. The Agency specifically solicited comments on the need to specify *de minimis* levels for BACT, since the case-by-case BACT determinations would presumably take *de minimis* levels and such related issues as cost into account. Twenty-six commenters addressed this issue. Seventeen agreed in principle but generally considered the proposed levels too low and requested special consideration for pollutants emitted in less than major amounts. Eight of nine dissenters preferred case-by-case BACT determinations, with no *de minimis* values.

The Administrator is implementing the proposed *de minimis* approach for determining BACT applicability, although several values have been increased. (*See De Minimis* Exemptions.) This action should alleviate the concerns of those commenting about the need for BACT review of those pollutants emitted in small amounts. The Agency also solicited comments on the potential problem of a source obtaining lenient BACT determinations and later applying better controls to offset additional expansion plans. Twelve of thirteen commenters addressing this issue concluded that no such problem would arise. They claimed that it would be implausible to suppose that state programs and EPA regional offices would evade such responsibility, especially since loose BACT determinations would result in accelerated consumption of increment. The Administrator agrees that there appears to be adequate protection against loose BACT determinations.

Each of the three comments that addressed a need to phase in the BACT requirement favored a six month to one year grace period because of the complexity of the program. However, the Administrator believes that the case-by-case flexibility of BACT determinations is sufficient to phase in these regulations. Moreover, sources have effectively had a one year notice, in that the original *Alabama Power* decision, published June 18, 1979, informed them of the new BACT requirements. (*See* Transition.)

An additional issue, regarding the pollutant applicability of the BACT requirement, arose during the comment period. The proposal required BACT for the new or modified emissions units which were associated with the modification and not for those unchanged emissions units at the same source. Thus, if an existing boiler at a source were modified or a new boiler added in such a way as to significantly increase particulate emissions, only that boiler would be subject to BACT, not the other emissions units at the source. However, the proposal could be interpreted as requiring BACT for certain pollutants where the

Administrator did not intend to require BACT. For example, the proposal could be interpreted as requiring BACT review for any pollutant emitted from a source that was modified, regardless of whether the emissions of the pollutant increased. However, that was not the Agency's intent.

If a new unit were added or if a modification were made to a unit at a source, but there are contemporaneous decreases in emissions elsewhere at the source, BACT is required only for the pollutants for which there is a net significant plant-wide increase. For example, consider the addition of a boiler whose emissions of PM, SO_2, and NO_x each exceed *de minimis* levels. If, at the same time, an emission unit of SO_2 elsewhere at the source were shut down, such that plant-wide emissions of SO_2 either do not increase or increase by less than a *de minimis* amount, BACT is required for the new boiler only for PM and NO_x. Of course, BACT will not be required if there is no significant plant-wide increase in emissions of any pollutant. Similarly, if an existing emissions unit of a source were modified such that there is an emissions increase for one or more pollutants, but not all, BACT is required only for the pollutants for which there is both a net increase at the unit and a net significant plant-wide increase.

The above final policy governing the applicability of BACT to modifications is also consistent with existing policy under section 111, which the court said should govern modification concerns. The applicable regulation, 40 CFR 60.14(a), states that "any physical or operational change to an existing facility which results in an increase in the emissions rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility *for each pollutant to which a standard applies and for which there is an increase in the emissions rate* to the atmosphere." (Emphasis added.)

The regulation cited above makes two important statements about the applicability requirements. First, the BACT requirements apply only with regard to those pollutants for which there has been a net significant increase. This was emphasized by the Alabama Power decision: "Congress wished to apply the permit process, then only where industrial changes might increase pollution in an area, not where an existing plant changed its operations in ways that produced no pollution increase * * *. The interpretation of 'modification' as requiring a net increase is thus consistent with the purpose of the Act * * *. The EPA has properly exempted from best available control technology (BACT) and ambient air quality review those 'modifications' of a source that do not produce a net increase in any pollutant." 13 ERC at 2043.

Second, BACT is required for net significant increases of *any* pollutant regulated under the Act, regardless of the category of source involved or the emissions standards generally applicable to it. Section 165(a)(4) of the Act requires application of BACT "for each pollutant subject to regulation under this Act" emitted from a subject facility. 42 U.S.C. 7475(a)(4). This includes not only criteria pollutants but also all pollutants regulated under NSPS or NESHAP. In this manner, BACT can complement the NSPS process by extending coverage to additional source types and units and perhaps identifying candidates for future NSPS and NESHAP regulations.

XVI. Monitoring

In *Alabama Power*, the court held that section 165(e)(1) of the Act requires an ambient air quality analysis for each pollutant subject to regulation under the Act that a proposed source or modification would emit, prior to applying for a PSD permit. Since existing PSD regulations require monitoring only for criteria pollutants emitted in major amounts, EPA responded to the June 18, 1979 *per curiam* opinion by proposing to require, for criteria and noncriteria pollutants, an air quality analysis that would generally include monitoring data. In order to gather and analyze the appropriate data necessary to apply for a PSD permit, a proposed source would have to establish an appropriate monitoring network or would have to gather and analyze representative air monitoring data resulting from ongoing monitoring activities.

As proposed, preconstruction monitoring data was required as part of the air quality analysis when: (1) the estimated ambient impact of any new pollutant emissions from the stationary source or modification would be larger than the pollutant specific *de minimis* air quality concentration (Table B); or (2) the new emissions or net emissions increases for the pollutant would be major (100/250 tons per year). In addition to this rule, EPA proposed that a case-by-case analysis of the proposed stationary source or modification which would impact on a Class I area be conducted even though the anticipated impact would fall below the *de minimis* level. Later, in October 1979, EPA provided further guidance for applying these requirements in the draft revision of the *Ambient Monitoring Guidelines for Prevention of Significant Deterioration (PSD)*, OAQPS 1.2–096, U.S. EPA, Office of Air Quality Planning and Standards and Office of Research and Development, RTP, NC 27711.

The proposal stated that certain noncriteria pollutants (sulfuric acid mist, carbon disulfide, carbonyl sulfide, methyl mercaptan, dimethyl disulfide, and dimethyl sulfide) were lacking measurement methods approved by EPA. Until such time as approved techniques would become available, the Agency proposed to use mathematical modeling to estimate the air quality resulting from the emissions of these pollutants. Considering these limitations and the general lack of experience in monitoring on a routine basis, the Administrator proposed to implement noncriteria pollutant monitoring requirements on a case-by-case basis.

In addition to the pre-application monitoring requirements already described, EPA's proposal included discretionary authority for requiring post-construction monitoring to determine the effects of the new emissions on existing air quality. For cases in which larger pollutant emission impacts are anticipated, post-construction monitoring can be a particularly useful aid in adjusting modeling results used to predict concentrations resulting from the source's operation. The approach was thought to be responsive to the *Alabama Power* decision which required EPA to use monitors to help refine modeling techniques. Accordingly, EPA proposed to generally require post-construction monitoring from large sources of particulate matter and sulfur dioxide. Other sources whose emissions are estimated to result in air quality levels approaching an allowable increment or a NAAQS could also be required to submit post-construction monitoring data. The rule promulgated today is consistent with the proposal.

The Administrator believed that the required monitoring data would be most productive in checking the accuracy of models and, in some cases, could be used to calculate increment consumption. If an applicant or other party believes that a model required by EPA had either overpredicted or underpredicted the air quality impact of a source, EPA stated that monitoring data would be evaluated to the extent possible to determine whether adjustments would be necessary. EPA anticipated that the future development of more sophisticated monitoring

techniques may permit increased use of monitoring data to track increment consumption and establish ambient baselines, as well as improve the level of confidence in modeling.

Lastly, EPA considered the approach needed to smoothly usher in the new monitoring requirements. The September 5 Federal Register indicated that EPA intended to require any additional monitoring requirements, as now necessary under *Alabama Power*, to be phased in. Later, in October 1979, the draft ambient monitoring guidelines specified that a three-month allowance would be subtracted from the time interval over which the owner must monitor to allow for procuring and setting up the necessary monitoring equipment. (*See* Transition).

There was a large response to EPA's proposal and draft monitoring guidelines—nearly 100 public comments and over 800 requests for the guidance document were received. The comments indicated general agreement with EPA's interpretation of the court's preliminary opinion. But some concern was expressed over certain specific portions of the proposal: (1) the limited technology available to monitor the noncriteria pollutants in the ambient air; (2) the large cost associated with gathering all the required air quality data for all regulated pollutants; (3) the identification process for "representative" data; and (4) the need for post-construction monitoring.

Subsequent to the publication of the September 5, 1979 proposal and the receipt of the public comment, the court issued its final decision on December 14, 1979. One important change the court made upon reconsideration of the June 18 opinion was "that section 165(e)(1) requires that *an analysis* be conducted, and that it be conducted for each pollutant regulated under the Act. But * * * that section 165(e)(1), standing alone does not require monitoring as *the* method of analysis to be employed in the fulfillment of its requirements." 13 ERC 1993, 2019. This ruling gave EPA more flexibility in defining the minimum requirements for a proper analysis of the noncriteria pollutants. "EPA might * * * choose *either* monitoring or modeling as the method of analysis * * *" *Id.* In other monitoring issues the court essentially affirmed its preliminary opinions.

Today, the Administrator is promulgating the proposed monitoring requirements with the noted exceptions. (*See* 40 CFR 51.24(m), 52.21(m)). EPA will generally require one year's worth of monitoring data as part of the air quality analysis for only the criteria pollutants. For the noncriteria and hazardous pollutants, modeling, not monitoring, will be the mechanism used to perform most detailed air quality analyses. However, there may be certain circumstances where monitoring may be the only option available to perform an adequate analysis for the noncriteria pollutants (e.g., when little or no data on emission inventories for the area of concern exist). In that case, EPA will require ambient monitoring for the noncriteria pollutants if there is an acceptable method for the monitoring of that pollutant. Presently, the Administrator has acceptable methods for measuring ambient concentrations of: (1) all the criteria pollutants; (2) mercury; (3) beryllium; (4) vinyl chloride; (5) fluorides; and (6) hydrogen sulfide. A list of acceptable methods and copies of the method description are available by writing to: U.S. EPA, Environmental Monitoring Systems Laboratory, Quality Assurance Division (MD–77), Research Triangle Park, N.C. 27711. Also, techniques to measure ambient total reduced sulfur and reduced sulfur compounds have been chosen and will be added to the list within the next several months. At this time there are no acceptable methods for measuring ambient levels of asbestos and sulfuric acid mist.

As EPA gains more experience from the PSD program with respect to noncriteria pollutant analysis and as the technology develops, the Administrator will consider an increased role for ambient monitoring within the required air quality analysis.

In addition to the exemptions given in the *de minimis* section of this Federal Register publication, EPA may not always require a source owner to establish a monitoring network when the data would not validate or improve the estimates made by the mathematical models. When the existing air pollution levels are conservatively estimated to be quite small and a monitoring network could not reliably measure the predicted background concentrations, EPA will generally not require the source owner to generate preconstruction monitoring data. Also, if the source owner has submitted preconstruction data for the source site, and the post-construction monitoring network could not measure a predicted degradation in the air quality, then EPA will generally not require the source owner to collect further monitoring data. More guidance for meeting all the monitoring requirements is given in the *Ambient Monitoring Guidelines for Prevention of Significant Deterioration* (PSD), EPA–450/4–80–012, July 1980, available from the Monitoring and Data Analysis Division, OAQPS, (MD–14), U.S. EPA, Research Triangle Park, N.C. 27711.

In the September 5, 1979 proposed regulations and the October 1979 draft of *Ambient Monitoring Guidelines for Prevention of Significant Deterioration* (PSD), EPA solicited comments on the use of representative air quality data to satisfy PSD monitoring requirements. Thirty-nine comments were received on the various aspects of the use of representative air quality data. The major responses were as follows: twenty-four commenters supported the use of existing representative air quality data, especially for remote areas. Five commenters wanted EPA to allow the use of bubbler data in lieu of continuous monitoring data, seven respondents believed that data older than two years should be allowed, and three objected to the quality assurance requirements for the representative data.

EPA has considered all of the comments and has taken the following actions:

(1) The use of existing representative air quality data will be permitted in lieu of monitoring, provided that the data meet the criteria in the above reference guideline.

(2) No bubbler data will be permitted because the data should be of the same quality as that obtained if the applicant monitored according to the requirements in the above referenced guideline. This guideline specifies monitoring must be done with continuous instruments to eliminate measurement biases associated with bubbler data. Continuous measurements are also more suitable for routine monitoring purposes in checking for compliance with short-term standards.

(3) EPA will allow the use of data, for preconstruction purposes only, collected in the three-year period preceding the permit application provided reference/equivalent quality assurance procedures were followed during the measurement period. The draft guideline has previously specified a two-year requirement.

(4) EPA reaffirms the intent that all monitoring data collected must have been collected in accordance with acceptable quality assurance procedures. The specifics of the minimum quality assurance program needed for collecting air quality data are contained in the referenced guideline.

Finally, the court held that EPA had failed to provide concrete guidance to the states for designating when less than one year of monitoring data would meet the required air quality analysis, as specifically allowed under section 165(e)(2). Such guidance is given under

PSD SIP Revisions located elsewhere in today's **Federal Register** publication.

XVII. Notification

The proposal contained a requirement that certain construction projects exempt from PSD permit rules file a report at least 90 days in advance of the time that the exempted construction would commence. Notification requirements similar to those in the PSD proposal were also included in the proposed nonattainment rules, under 40 CFR 51.18(j) and 52.24, and Appendix S of Part 51 (the Emission Offset Interpretative Ruling). These notice requirements would apply to source construction which would not be subject to NSR solely because (1) the increase in emissions was offset by a contemporaneous decrease so as not to cause a significant net increase at the source (*see* Modification), or (2) the application of air pollution controls not generally required by the applicable SIP or 40 CFR 60 or 61, would lower the "potential to emit" of the source below the applicable threshold for permitting. The proposal would have required the submittal of comprehensive data for both new and existing emissions units at the stationary source and all other information needed by the reviewing authority to determine if the exemption reported by the source was proper. No formal applicability determination, however, was to be made and no major delays in the construction program of any such source were intended.

The Administrator believed such reporting was necessary because of the additional complexity of such determinations and the decreased number of sources subject to PSD due to changes in applicability rules. A need was apparent to record unreviewed emission increases and reductions occurring years apart at the same plant, in order to assess their impacts on air quality as well as to simply register in advance claims for reduction credits. For these reasons the Administrator proposed to use his authority under section 114 to monitor these determinations of offsetting emissions reductions and increased control efficiency. Section 114 authorizes the Administrator to require a source owner to provide such information as he may reasonably require in order to carry out Part C of the Act or to determine if a source owner is in violation of a SIP requirement.

Fifty-nine comments were received on the notification requirements. Only two comments completely supported the Agency proposal. Thirty-eight of the commenters felt that the requirements were unnecessary and not authorized by the Clean Air Act. Many stated that the requirements were burdensome and equivalent to a preconstruction permit process. Twenty-four commenters specifically stated that section 114 does not allow such a comprehensive data gathering requirement, although reasonable data gathering is allowed.

Those who thought the requirements unnecessary cited the adequacy of existing state permitting programs to deal with these problems and the possibility of post-construction recordkeeping to accomplish the same objectives. EPA was advised to take enforcement action against the few source owners who would incorrectly exempt a source from review and then construct the source without obtaining a permit, rather than risk pervasive construction delays of properly exempted sources. Many commenters felt that the administrative burden to both the reviewing agency and the source outweighed its benefits. Seventeen commenters specifically stated that the extra cost to source owners would remove the real incentives for early cleanup and would act to perpetuate the operation of older units with high air pollutant emissions.

The Administrator maintains that reporting similar to the preconstruction notice is needed and can be required under section 114. However, the comments, particularly those concerning the potential of existing state programs to accomplish this function, have caused EPA to reconsider the need at this time for a preconstruction notification requirement. State comments and meetings with several state representatives in Atlanta (*see* Docket account of III–D–4) indicate that all states currently learn of all proposed emission units and changes before such would commence construction. Most states acquire such knowledge through their existing general NSR procedures, approved under 40 CFR 51.18, even if a net decrease would occur at the source. Other states learn of proposed emission increases through notification letters filed by the source pursuant to a formal applicability determination.

Many states do not routinely require sources to record emission decreases, especially when such would occur well in advance of related emission increases. While a preconstruction notice would be desirable to document these decreases, the requirements for contemporaneous emission reduction credit (*see* Modification) are sufficient to fulfill this need. That is, emission reductions, in order to be creditable in offsetting any contemporaneous increase at the same stationary source, must be enforceable before the associated unit(s) with the emissions increase(s) commence construction. Such reductions, to be enforceable, must generally be made part of an enforceable operating or construction permit or be processed as a formal SIP revision. Although the Administrator is still concerned that sufficient information may not be available when a source owner wishes to document previous emissions reductions, he is opting for a "wait-and-see" approach in order to alleviate the concerns of the majority of the commenters who felt the notification requirements were unjustified and burdensome.

Also, since states will soon be administering the PSD program, it is best to allow them the flexibility to integrate notification requirements into their existing permit programs. The notification requirements in each state will be different, depending upon whether the state has an emission banking system and how it operates, the type of emission inventory system, and the information available from operating and construction permits. PSD increment tracking systems will also be set up by states, which can tailor informational requirements to their own tracking systems.

While today's regulations do not contain a formal preconstruction notice requirement, owners and operators are hereby put on notice for the following: (1) Sufficient records regarding the details of contemporaneous emission increases and decreases or applicable source determinations of "potential to emit" should be maintained so as to verify that no permit was required should the Administrator so require under section 114; (2) If experience in implementing the "no net increase" provisions of PSD applicability indicates that a more comprehensive notification system is required, the Administrator will promulgate an amendment to PSD and nonattainment regulations similar to the deleted provisions of the September 5 proposal; and (3) Any source which improperly avoids review and commences construction will be considered in violation of the applicable SIP and will be retroactively reviewed under the applicable NSR regulation.

XVIII. PSD SIP Revisions

Comments have been solicited on three aspects of the development of acceptable PSD plans by states. The issues are: (1) the authority of states to submit different but equally effective PSD programs, (2) state flexibility in defining baseline areas, and (3) state flexibility in allowing monitoring exemptions.

A. *Equivalent State Programs.* Under existing regulations, the Administrator cannot approve proposed state PSD regulations unless the state requirements are identical to or individually more stringent than the corresponding 40 CFR 51.24 regulations. While the Act does contain specific requirements for several major aspects of PSD programs, it does not prohibit states from using, in other areas, approaches equivalent to those of the federal regulations in order to meet the statutory objectives. Accordingly, the Administrator proposed on September 5, 1979 that states be given some flexibility in preparing PSD plans. The Administrator requested comment on such an approach and suggested portions of the PSD requirements for which equivalent approaches might be acceptable, and others for which alternative regulations would not be approvable. Where SIPs were allowed to differ, a test of overall equivalence was to be used based on the ability of the state system to capture as many emissions as would the 40 CFR 51.24 regulations.

All forty-nine comments on this topic strongly endorsed the general approach of giving states flexibility in developing PSD programs, although several commenters expressed the desire for a more extended area for SIP flexibility. Among those areas are: (1) the entire PSD program, (2) fugitive dust applicability, (3) modeling techniques, and (4) treatment of minor modifications and exempted sources. Another commenter asserted that EPA could hold the states responsible only for plans that addressed minimal requirements, such as maximum increment consumption.

After consideration of the comments, the Administrator has decided to treat PSD SIP revisions generally in the manner proposed. This means that states will be permitted to meet the following requirements of 40 CFR 51.24 with different but equivalent regulations, or implement the federal regulations with considerable discretion:

a. Baseline area.

b. Type and amount of data needed for monitoring purposes.

c. Temporary exclusions from increment consumption.

d. Defining "contemporaneous" as a reasonable period that may be greater or shorter than 5 years.

e. Banking of emissions reductions for future offsets.

f. Source information and analysis required of the applicant.

g. Public participation after providing the opportunity for public hearing.

h. Alternatives to first-come-first-served permit processing.

State PSD programs must follow the federal regulations in other matters. This includes, but is not limited to the following:

a. Maximum allowable increments.

b. Modeling techniques.

c. Class I area protection.

d. Notice to the Administrator or the applicable Federal Land Manager for prospective permit actions.

e. New (grass roots) major stationary source applicability.

f. NSPS, NESHAP minimum requirements for BACT determinations.

g. Definitions generally as contained in 40 CFR 51.24(b). (State definitions need not be verbatim translations, but must have the same effect).

The Agency is not expanding the area of state program flexibility to those four areas, noted earlier, that were suggested by the commenters. First, the Administrator does not believe that complete program flexibility is allowable under the Act, nor does he find a basis for the comment that EPA is without authority to require that SIPs include more than skeletal program components. The second suggestion, regarding fugitive dust, is not feasible at this time for reasons detailed elsewhere (*see* Fugitive Dust Exemption). With regard to the third comment, the Act specifically directs the Administrator to specify air quality models. Section 165(e)(3), 42 U.S.C. 7475(e)(3). In addition, national consistency is important for such air quality impact analysis in order to standardize how increment would be consumed or enhanced across the country.

With regard to the degree of state flexibility in exempting additional types of new and modified sources, EPA believes that adequate exemptions have been provided in today's regulations and no further ones are authorized under the Act. The Administrator wishes to note that today's rules allow a state the opportunity to change the time period defining contemporaneous emissions increases. This change affects the definition of major modification and thereby affects the number of PSD reviews.

The opportunity for states to change the time period within which emissions changes would be considered contemporaneous is not constrained by a test of equivalency. Rather, it should be considered by states in developing PSD SIPs in conjunction with their deliberations on alternatives to first-come-first-served permitting and emission offset banking. The Administrator believes these issues are related to the state's inherent flexibility under the Act to manage increment consumption.

B. Baseline Area

This aspect of the equivalent state program issue deals with the definition of the area for which the baseline date is triggered by a PSD permit application and, specifically, with whether this definition must be the same under a PSD SIP as it is in 40 CFR 52.21. The proposal defined baseline area for both 40 CFR 51 and 52 as every part of an affected AQCR designated attainment or unclassified on the baseline date. Comments were solicited concerning the desirability of allowing states to define "area" as any *portion* of an AQCR that had been designated as attainment or unclassifiable, or, conversely, to allow states to define "area" as the entire state.

All commenters specifically addressing the issue of allowing states to have flexibility in defining baseline area were in favor of that approach. Many were more specific, suggesting that 107 designated areas or source impact areas be used.

The Administrator has decided to allow flexibility to states, not by accepting alternative definitions in SIPs, but by defining baseline area in such manner as to allow flexibility. This change in definition arises from a revised legal interpretation of what meaning "area" may be given under the Act. (*see* Baseline Concentration). Baseline area is now defined as all areas (and every part therein) within the state that are designated attainment or unclassified under section 107(d)(1) (D) or (E) of the Act in which the source establishing the baseline date would locate or would have an air quality impact equal to or greater than 1 $\mu g/m^3$ (annual average) for the pollutant (SO_2 and/or TSP) for which the baseline date is established. Flexibility is inherent in state authority to redesignate areas under section 107. Thus, large tracts of land belonging to one clean or unclassified PSD area can later be divided into several smaller PSD baseline areas with potentially different baseline dates. Other than the limitations associated with processing 107 area redesignations as SIP revisions, EPA requires that area redesignations under section 107 cannot intersect or be smaller than the area of impact of any major stationary source or major modification which establishes a baseline date or is subject to PSD and would be constructed in the same state as the state proposing the redesignation. A baseline date will, therefore, be triggered for the entire designated section 107 area unless nonimpacted portions are redesignated to smaller areas.

This approach allows the flexibility requested by the commenters, but precludes "postage-stamp" designations designed to trigger baseline only in the immediate vicinity of the source. It also avoids the difficult area boundary problems which would arise from defining area as the PSD source impact area. States are cautioned to carefully weigh any inclination to postpone baseline dates through area redesignations against increased difficulties associated with tracking increment consumption.

C. State Monitoring Exemption

Alabama Power remanded to EPA that portion of the monitoring requirements which allowed states to accept less than one year of preconstruction monitoring data for cases in which a shorter period would be sufficient to perform a complete and adequate analysis. The court ruled that EPA had not provided adequate guidance to the states for making this determination. 13 ERC 1993, 2020.

The proposal contained concrete guidance for use by states in determining if less than one year of monitoring data is sufficient. That guidance provided that as little as four months of monitoring data for the criteria pollutants was acceptable if the applicant demonstrated that the maximum pollutant concentrations would occur within that time.

Fourteen comments were received on various aspects of this proposal. Thirteen commenters supported the flexibility of requiring less than one year of monitoring data under specified circumstances. Two commenters addressed ozone monitoring requirements where there were more than four months with average daily maximum temperatures greater than 20°C (68°F).

The Administrator has decided to promulgate the proposed regulations except for the following:

(1) Less than one year of monitoring data will be permitted for all regulated pollutants, rather than for just the criteria pollutants. However, it must be demonstrated through historical data or dispersion models that the data for such shorter periods of time, but not less than four months, will be obtained during a time period when maximum air quality levels can be expected.

(2) Guidance for monitoring ozone during the warmest four months of the year has been deleted. Monitoring for ozone, as well as other pollutants, will still be required during the time period when maximum air quality levels can be expected. Ozone concentrations will generally be higher during the warmest four months of the year. However, ozone monitoring must also be conducted when the yearly maximum ozone concentrations are likely to occur during months other than the warmest four months of the year. This will ensure that ozone monitoring will cover the expected maximum concentrations.

XIX. Additional Issues

A. Innovative Technology

In the September 5, 1979, **Federal Register** the Agency proposed a new paragraph (u) which sets out specific requirements for reviewing sources that wish to utilize innovative control technologies. The new paragraph sets out criteria to be used by the Administrator in determining whether a proposed control technology is innovative, in addition to establishing specific provisions for implementing the BACT and modeling requirements.

All of the commenters recognized the need to encourage the development of technology and generally approved of EPA's approach. One large environmental group commented that while it approved of the added flexibility in specifying BACT for innovative technologies, it was concerned that Class I areas might be compromised if increment violations were allowed to occur during the period of testing. We share this concern of the environmental group and are today promulgating a regulation which ensures full protection of Class I areas.

Today's amendments provide that, for a source whose technology has been designated as "innovative" by the Administrator, the BACT requirement should insure the installation of the innovative system and the adoption of a compliance schedule for meeting a final emission limitation. This final emission limitation must at least represent the BACT level that would have been initially defined under § 52.21(j), assuming the use of proven state-of-the-art technology. The compliance schedule may extend no more than 7 years after permit issuance or 4 years after startup of the source. The regulations also provide that the Administrator may withdraw his approval if a source: (1) fails to meet the final emissions limitation by the specified date, (2) fails to protect the public health, welfare, or safety, or (3) shows an indication that the innovative control system will not be successful. The source will then be given a period of no more than 3 years to come into compliance with the BACT level determined with the use of the demonstrated system of control.

The September 5 **Federal Register** proposed that with the consent of the governor an "innovative technology" source could conduct the increment impact analysis using the final emission limitation specified in the permit, provided that no interference with applicable NAAQS would result during the interim period. EPA reasoned that any increased level of emissions which might occur during the interim period would be temporary and would not significantly impact the increments. However, one of the commenters pointed out that Class I areas require protection even from temporary violations. We agree with the concerns of this commenter and cite § 52.21(i)(7) in their support. That section exempts temporary sources from the modeling requirements except when they impact Class I areas or areas where the increment is known to be violated. Today's regulations allow an "innovative" source to use its final emission limitation for increment modeling purposes, but only if there is no impact on any Class I area or any area with a known increment violation. As in the proposal, the final rules requiring modeling for the purpose of evaluating the impact on NAAQS must take into account interim emission projections. Under no condition may a source be approved if it would cause a violation of the NAAQS, even a temporary violation.

B. Modified Permits

In the September 5, 1979 **Federal Register**, EPA proposed to add a new paragraph (t) entitled "Modified Permits." The new paragraph provided a simplified approval procedure for sources that make minor changes in design capacity or in the nature of process equipment between the time they obtain a PSD permit and the time they complete construction. It also required prior approval, through permit modifications, of increases in hours of operation.

The comments on this section were mixed. Some commenters felt that the new paragraph was redundant and superfluous, while others generally approved of it but asked for clarification. Upon further consideration, the Agency believes that there is a need to distinguish between situations in which permits would be changed for primarily administrative reasons, such as a change to reflect a revised construction schedule, and situations in which the permit change involves a significant increase in emissions. In the latter case a new permit must be issued; in the former, however, an abbreviated procedure involving modification of the permit might be preferable. There are numerous issues to be considered in implementing

such an approach. These include the means to differentiate between significant and nonsignificant changes, and the specific procedural requirements for modifying a permit. Those issues were not adequately addressed in the proposal and for that reason the Agency has decided that it does not have a sufficient basis for completing rulemaking at this time. However, further rulemaking is being considered for future proposal and comment will be requested on the issues at that time.

C. Nonprofit Institutions

EPA proposed on September 5 to exempt modifications of nonprofit institutions from PSD review requirements as is already done for new construction of this type. This would mean that, upon written request by the governor of the state, a PSD permit would not be required of a major stationary source or major modification that qualifies as a nonprofit health or educational institution. Today the Administrator promulgates this exemption as proposed since no signficant public comment was received. It should be noted that although such major new or modified sources would not require a PSD permit, the emissions from these sources would consume the applicable PSD increment(s) after January 6, 1975.

D. Portable Sources

With regard to portable sources, EPA proposed to change the 30 day notice to a 10 day notice for previously permitted PSD sources wishing to relocate. Based on experience in implementing the PSD regulations, and having received no adverse public comments on this proposal, the Administrator is adopting this proposal with one exception. Sources with PSD permits must provide a notice to the reviewing authority not less than ten days before relocation activities would commence, unless the Administrator has previously approved a different minimum time for relocation notice.

The Administrator would also like to clarify that a source is portable only if it would have temporary location and temporary emissions. Existing EPA policy defines temporary emissions as emissions from a stationary source that would be less than two years in duration, unless the Administrator determines that a longer time period would be appropriate. Thus, for a portable source to qualify for the above exemption, it must typically be located at the new location less than two years.

E. Secondary Emissions

Desiring to make the PSD review requirements similar to nonattainment requirements wherever possible, the Administrator proposed to add the definition of secondary emissions found in the offset ruling (44 FR 3274) to the PSD regulations. *See* 43 FR 26403. Secondary emissions would mean emissions from new or existings sources which occur as a result of the construction and/or operation of a major source or major modification, but do not necessarily come from the source itself. Secondary emissions would include:

(a) emissions from ships or trains coming to or from a source or modification; or

(b) emissions from offsite support sources which would otherwise increase emissions as a result of construction or operation of a major source. Although reasonably quantifiable secondary emissions would be reviewed in the air quality anaylsis, such emissions would not be included in determining "potential" emissions.

Public reaction to the September 5, 1979 proposal and the final *Alabama Power* opinion regarding EPA's treatment of secondary emissions was small. Generally the commenters favored the exclusion of secondary emissions from the PSD permit process altogether. Their objections centered on the availability and reliability of the emission factor data to "reasonably" quantify secondary emissions. Also the possibility of redundant reviews was highlighted by several commenters. The Administrator, in weighing these comments, has decided to promulgate the regulations addressing secondary emissions as proposed on September 5, 1979. *See* 40 CFR 51.24(b)(3), 52.21(b)(3), 51.24(b)(20), and 52.21(b)(20).

The Clean Air Act clearly calls for a detailed and extensive air quality impact assessment. For instance, each permit application must include impacts from the growth projected in the area that would occur as a result of the proposed source's construction. *See* section 165(a)(6). Also, once the baseline date is set, such emissions would consume the maximum allowable increments, so each permit decision must give consideration to all the possible ramifications of allowing a source or modification to construct. *See* section 165(a)(3) ("cause or *contribute*"). Secondary emissions must be considered when those emissions are specific, well defined, reasonably quantifiable, and impact the same general area.

F. Baseline for Calculating Offsets Under Section 173(1)(A)

The Offset Ruling sets out rules and guidance for determining the baseline for calculating emissions offset credit, as well as guidance on the location of offsetting emissions. *See* 40 CFR Part 51, Appendix S, Sections IV.C. and D. To aid the states in developing their NSR regulations for nonattainment areas, or in revising those regulations, EPA has decided to promulgate those rules and guidance in § 51.18(j)(3).[14] The langauge promulgated today is identical to that used in the Offset Ruling, except as explained below.

On January 16, 1979, EPA modified the Offset Ruling to conform to section 129(a)(1) of the Act by setting the baseline for determining emissions offset credit at the emissions level specified for the source in the applicable SIP. EPA is retaining this baseline level for the Offset Ruling. However, the approach for NSR programs adopted pursuant to section 173 is slightly different. Section 173(1)(A) sets the baseline as the "allowable" emissions of the source, but it further specifies that the offsets obtained by the source must be sufficient to represent reasonable further progress (RFP). Some Part D SIP revisions approved by EPA have demonstrated attainment and RFP based on the allowable emissions of sources in a nonattainment area. However, many Part D SIP revisions have based their demonstrations on the *actual* emissions of the sources in a nonattainment area, rather than the sources' allowable emissions. This means that to be consistent with RFP, sources must reduce their actual, rather than their allowable, emissions. Otherwise, sources could claim credit for offsets in situations where the offset would actually interfere with RFP.[15]

To accommodate the different approaches to RFP, EPA has provided that the baseline for determining emissions offset credit shall be the

[14] On January 16, 1979, EPA solicited comments on certain aspects of the Offset Ruling, none of which directly concerned the matters published today. EPA will respond to those comments after today's promulgation.

[15] For example, suppose a source's allowable emissions are 1,000 tpy, and its actual emissions are 500 tpy. Now suppose it wants to add a new emissions unit, thereby adding 100 tpy, and the SIP requires a 100 tpy reduction for RFP. The source might achieve both objectives by decreasing its total allowable emissions to 900 tpy, i.e., it adds the 100 tpy for the new facility, but makes other reductions in allowable emissions of 200 tpy. This is adequate if the RFP demonstration relies upon allowable emissions, since the source started at 1,000 typ and now is at 900 tpy. But if RFP is based on actual emissions, then there is a *loss* of 100 tpy, because RFP assumed 500 tpy and now the source emits 600 tpy.

allowable emissions of the source, where the SIP relies upon allowable emissions to demonstrate RFP; but the baseline must be actual emissions where the demonstration is based on reductions in actual emissions. EPA believes for the reasons discussed above that this approach is necessary to assure RFP towards attainment of ambient air quality standards.

G. Economic Impact Assessment

In the September 5 proposal, it was stated that the Agency would prepare an economic impact assessment of the proposed changes after the final court opinion was issued, which took place on December 14, 1979. The Agency further indicated that it would make the report available for public comment prior to promulgation, and that any resulting comments would be taken into account in the promulgated regulations.

Although the results of the impact assessment released today have been considered in developing the regulations, primarily for understanding *de minimis* effects, it has not been possible to complete the assessment in time to get comments prior to promulgation. In fact, because of the inherent complexity of the program, it has not been possible to do a true economic impact assessment (*i.e.*, one which considers impacts on market positions, prices, closures, etc.).

The document made available today presents as assessment of the overall impact of the proposed regulations with respect to several of the major issues or changes in the proposed regulations. The assessment does not attempt to quantify the impact of every issue nor does it attempt to assess the overall impact associated with the implementation of the PSD regulations in general. It is designed to provide a relative assessment of the impact of the September 5 proposal versus the June 1978 regulations in terms of the: sources to be affected, their associated emissions, major requirements which must be met (or which are no longer required to be met), and estimated cost savings for sources no longer subject to PSD review as a result of the proposed regulations. In short, the analysis provides an estimate of differential cost impact of the 1978 versus the proposed PSD regulations and an assessment of the major issues associated with the proposed PSD regulations.

As noted, the assessment focused on the difference between the June 1978 regulations and those proposed on September 5. However, there are significant changes in the promulgated regulations compared to those proposed, especially with regard to the *de minimis* values. Since these values have a major impact on expected cost, a projection of the impact of the final regulations was also made.

It is estimated that there will be a savings as a result of the promulgation for sources which would have been subject to the old regulations but which would not be subject to the new. This would represent an annual savings of $2.2 to 6.1 million assuming the sources which have received permits from April 1978 to November 1979 are representative of those which will receive permits in the future.

Although there is an overall savings for sources which would not longer be subject to PSD review, the new regulations require more extensive review for some sources, as well as review of sources which were not previously covered; that is, modified sources with uncontrolled emissions of less than 100 or 250 tons per year but which have controlled emissions greater than *de minimis*. Since these sources are not now subject to PSD review, they would be required to prepare a PSD permit, conduct the necessary air quality impact assessments, incur some delays in construction as a result of undergoing PSD review in addition to state NSR review, and install BACT instead of just meeting the emissions limits required by the State Implementation Plan or New Source Performance Standards as applicable. As a result of the additional cost incurred because of more extensive review and by the sources not currently subject to PSD, the overall effect of the promulgated regulations (including the savings described above) is an increase of approximately $12.4 to 24.5 million per year.

The complete analysis is contained in the document entitled *Regulatory Impact Assessment for the September 5, 1979 Proposed Prevention of Significant Deterioration Regulations*, EPA–450/2–80–073. This document is available for inspection in the rulemaking docket. Copies may be obtained by writing to the Air Information Center, U.S. EPA Library Services, (MD–35), Research Triangle Park, NC 27711.

H. Consolidated Permit Regulations

As mentioned in the section on TRANSITION, EPA recently promulgated regulations, known as the Consolidated Permit Regulations, which now generally govern the processing of applications for permits under Part 52 PSD regulations. Among the regulatory amendments announced here are three minor changes to the Consolidated Permit Regulation. First, EPA has deleted the substantive language of 40 CFR 124.3(b) and put "Reserved" in its place. Section 124.3(b) related primarily to the 50–ton exemptions of the 1978 Part 52 regulations. With the deletion of those exemptions, § 124.3(b) would have become superfluous. Second, EPA has conformed 40 CFR 124.5(g)(2) to the numbering in the new Part 52 regulations. Finally, the agency has corrected 40 CFR 124.42(b) by substituting "submitted" for "requested."

Final Action

The following regulatory amendments are nationally applicable, and this action is based upon determinations of nationwide scope and effect. Therefore, under section 307(b)(1) of the Act, judicial review may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for judicial review must be filed on or before October 6, 1980.

(Sections 101(b)(1), 110, 160–169, 171–178, and 301(a) of the Clean Air Act as amended (42 U.S.C. 7401(b)(1), 7410, 7470–7479, 7501–7508, and 7601(a)); Section 129(a) of the Clean Air Act Amendments of 1977 (Pub. L. No. 95–95, 91 Stat. 685 (August, 7, 1977)))

Dated: July 31, 1980.

Douglas M. Costle,

Administrator.

State Plans For New Source Review For PSD Purposes

1. Section 51.24 of Title 40 of the Code of Federal Regulations is amended by deleting paragraph (k) and redesignating paragraphs (l) through (s) as (k) through (r) and then by revising paragraphs (a)(2), (b), (f), (i)–(k), (m) and (r) and adding new paragraphs (a)(6) and (s) to read as follows:

§ 51.24 Prevention of significant deterioration of air quality.

(a)(1) *Plan Requirements*

* * * * *

(2) *Plan Revisions.* If a State Implementation Plan revision would result in increased air quality deterioration over any baseline concentration, the plan revision shall include a demonstration that it will not cause or contribute to a violation of the applicable increment(s). If a plan revision proposing less restrictive requirements was submitted after August 7, 1977 but on or before any applicable baseline date and was pending action by the Administrator on that date, no such demonstration is necessary with respect to the area for which a baseline date would be established before final action is taken on the plan revision. Instead, the assessment described in paragraph

(a)(4) shall review the expected impact to the applicable increment(s).

* * * * *

(6) *Amendments.* (i) Any state required to revise its implementation plan by reason of an amendment to this section, including any amendment adopted simultaneously with this paragraph, shall adopt and submit such plan revision to the Administrator for approval before May 7, 1981.

(ii) Any revision to an implementation plan that would amend the provisions for the prevention of significant air quality deterioration in the plan shall specify when and as to what sources and modifications the revision is to take effect.

(iii) Any revision to an implementation plan that an amendment to this section required shall take effect no later than the date of its approval and may operate prospectively.

(b) *Definitions.* All state plans shall use the following definitions for the purposes of this section. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definitions below:

(1)(i) "Major stationary source" means:

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(*b*) Notwithstanding the stationary source size specified in paragraph (b)(1)(i)(*a*) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(*c*) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) as a major stationary source if the change would constitute a major stationary source by itself.

(ii) A major source that is major for volatile organic compounds shall be considered major for ozone.

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

(*b*) Use of an alternative fuel or raw material by reason of any order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(*c*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*d*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*e*) Use of an alternative fuel or raw material by a stationary source which:

(*1*) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24; or

(*2*) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.24;

(*f*) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(*g*) Any change in ownership at a stationary source.

(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs within a reasonable period (to be specified by the state) before the date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the applicable baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(v) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(vi) A decrease in actual emissions is creditable only to the extent that:

(*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(*b*) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(*c*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(vii) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(4) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of

operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(5) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(6) "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual, 1972*, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101–0066 and 003–005–00176–0, respectively).

(7) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

(8) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(9) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(11) "Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operation this term refers to those on-site activities, other than preparatory activities, which mark the initiation of the change.

(12) "Best available control technology" means an emissions limitation (including a visible emissions standard) based on the maximum degree of reduction for each pollutant subject to regulation under the Act which would be emitted from any proposed major stationary source or major modification which the reviewing authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or, modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combination techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR Parts 60 and 61. If the reviewing authority determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the imposition of an emissions standard infeasible, a design, equipment, work practice, operational standard or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

(13)(i) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable baseline date. A baseline concentration is determined for each pollutant for which a baseline date is established and shall include:

(*a*) The actual emissions representative of sources in existence on the applicable baseline date, except as provided in paragraph (b)(13)(ii);

(*b*) The allowable emissions of major stationary sources which commenced construction before January 6, 1975, but were not in operation by the applicable baseline date.

(ii) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

(*a*) Actual emission from any major stationary source on which construction commenced after January 6, 1975; and

(*b*) Actual emissions increases and decreases at any stationary source occurring after the baseline date.

(14)(i) "Baseline date" means the earliest date after August 7, 1977, that:

(*a*) A major stationary source or major modification subject to 40 CFR 52.21 submits a complete application under that section; or

(*b*) A major stationary source or major modificatioin subject to regulations approved pursuant to 40 CFR 51.24 submits a complete application under such regulations.

(ii) The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

(*a*) The area in which the proposed source or modification would construct is designated as attainment or unclassifiable under section 107(d)(i) (D) or (E) of the Act for the pollutant on the date of its complete application under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.24; and

(*b*) In the case of a major stationary source, the pollutant would be emitted in significant amounts, or, in the case of a major modification, there would be a significant net emissions increase of the pollutant.

(15)(i) "Baseline area" means any intrastate area (and every part thereof) designated as attainment or unclassifiable under section 107(d)(1) (D) or (E) of the Act in which the major source or major modification establishing the baseline date would construct or would have an air quality impact equal to or greater than 1 $\mu g/m^3$ (annual average) of the pollutant for which the baseline date is established.

(ii) Area redesignations under section 107(d)(1) (D) or (E) of the Act cannot intersect or be smaller than the area of impact of any major stationary source or major modification which:

(*a*) Establishes a baseline date; or

(*b*) Is subject to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.24, and would be constructed in the same state as the state proposing the redesignation.

(16) "Allowable emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits

which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) The applicable standards as set forth in 40 CFR Parts 60 and 61;

(ii) The applicable State Implementation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition.

(17) "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(18) "Secondary emissions" means emissions which occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purposes of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general areas the stationary source modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(i) Emissions from ships or trains coming to or from the new or modified stationary source; and

(ii) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

(19) "Innovative control technology" means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or of achieving at least comparable reductions at lower cost in terms of energy, economics, or nonair quality environmental impacts.

(20) "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(21)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with subparagraphs (ii)–(iv) below.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority may allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(22) "Complete" means, in reference to an application for a permit, that the application contains all the information necessary for processing the application. Designating an application complete for purposes of permit processing does not preclude the reviewing authority from requesting or accepting any additional information.

(23)(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy
Asbestos: 0.007 tpy
Beryllium: 0.0004 tpy
Mercury: 0.1 tpy
Vinyl chloride: 1 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H_2S): 10 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy

(ii) "Significant" means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the Act that paragraph (b)(23)(i) does not list, any emissions rate.

(iii) Notwithstanding paragraph (b)(23)(i), "significant" means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$ (24-hour average).

(24) "Federal Land Manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(25) "High terrain" means any area having an elevation 900 feet or more above the base of the stack of a source.

(26) "Low terrain" means any area other than high terrain.

(27) "Indian Reservation" means any federally recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(28) "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

* * * * *

(f) *Exclusions from increment consumption.* (1) The plan may provide that the following concentrations shall be excluded in determining compliance with a maximum allowable increase:

(i) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the emissions from such sources before the effective date of such an order;

(ii) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(iii) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

(iv) The increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration; and

(v) Concentrations attributable to the temporary increase in emissions of sulfur dioxide or particulate matter from stationary sources which are affected by plan revisions approved by the Administrator as meeting the criteria specified in paragraph (f)(4).

(2) If the plan provides that the concentrations to which paragraph (f)(1) (i) or (ii) refers shall be excluded, it shall also provide that no exclusion of such concentrations shall apply more than five years after the effective date of the

order to which paragraph (f)(1)(i) refers or the plan to which paragraph (f)(1)(ii) refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

(3) No exclusion under paragraph (f) of this section shall occur later than 9 months after August 7, 1980, unless a State Implementation Plan revision meeting the requirements of 40 CFR 51.24 has been submitted to the Administrator.

(4) For purposes of excluding concentrations pursuant to paragraph (f)(1)(v), the Administrator may approve a plan revision that:

(i) Specifies the time over which the temporary emissions increase of sulfur dioxide or particulate matter would occur. Such time is not to exceed two years in duration unless a longer time is approved by the Administrator;

(ii) Specifies that the time period for excluding certain contributions in accordance with paragraph (f)(4)(i) is not renewable;

(iii) Allows no emissions increase from a stationary source which would:

(*a*) Impact a Class I area or an area where an applicable increment is known to be violated; or

(*b*) Cause or contribute to the violation of a national ambient air quality standard;

(iv) Requires limitations to be in effect the end of the time period specified in accordance with paragraph (f)(4)(i) which would ensure that the emissions levels from stationary sources affected by the plan revision would not exceed those levels occurring from such sources before the plan revision was approved.

* * * * *

(i) *Review of Major Stationary Sources and Major Modifications—Source Applicability and Exemptions.*

(1) The plan shall provide that no major stationary source or major modification shall begin actual construction unless, as a minumum, requirements equivalent to those contained in paragraphs (j) through (r) of this section have been met.

(2) The plan shall provide that the requirements equivalent to those contained in paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the Act that it would emit, except as this section would otherwise allow.

(3) The plan shall provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section apply only to any major stationary source or major modification that would be constructed in an area which is designated as attainment or unclassifiable under section 107(a)(1)(D) or (E) of the Act; and

(4) The plan may provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section do not apply to a particular major stationary source or major modification if:

(i) The major stationary source would be a nonprofit health or nonprofit educational institution or a major modification that would occur at such an institution; or

(ii) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and such source does not belong to any following categories:

(*a*) Coal cleaning plants (with thermal dryers);

(*b*) Kraft pulp mills;

(*c*) Portland cement plants;

(*d*) Primary zinc smelters;

(*e*) Iron and steel mills;

(*f*) Primary aluminum ore reduction plants;

(*g*) Primary copper smelters;

(*h*) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(*i*) Hydrofluoric, sulfuric, or nitric acid plants;

(*j*) Petroleum refineries;

(*k*) Lime plants;

(*l*) Phosphate rock processing plants;

(*m*) Coke oven batteries;

(*n*) Sulfur recovery plants;

(*o*) Carbon black plants (furnace process);

(*p*) Primary lead smelters;

(*q*) Fuel conversion plants;

(*r*) Sintering plants;

(*s*) Secondary metal production plants;

(*t*) Chemical process plants;

(*u*) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(*v*) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(*w*) Taconite ore processing plants;

(*x*) Glass fiber processing plants;

(*y*) Charcoal production plants;

(*z*) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(*aa*) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act; or

(iii) The source or modification is a portable stationary source which has previously received a permit under requirements equivalent to those contained in paragraphs (j) through (r) of this section, if:

(*a*) The source proposes to relocate and emissions of the source at the new location would be temporary; and

(*b*) The emissions from the source would not exceed its allowable emissions; and

(*c*) The emissions from the source would impact no Class I area and no area where an applicable increment is known to be violated; and

(*d*) Reasonable notice is given to the reviewing authority prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the reviewing authority not less than 10 days in advance of the proposed relocation unless a different time duration is previously approved by the reviewing authority.

(5) The plan may provide that requirements equivalent to those contained in paragraphs (j) through (r) of this section do not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment under section 107 of the Act.

(6) The plan may provide that requirements equivalent to those contained in paragraphs (k), (m), and (o) of this section do not apply to a proposed major stationary source or major modification with respect to a particular pollutant, if the allowable emissions of that pollutant from a new source, or the net emissions increase of that pollutant from a modification, would be temporary and impact no Class I area and no area where an applicable increment is known to be violated.

(7) The plan may provide that requirements equivalent to those contained in paragraphs (k), (m), and (o) of this section as they relate to any maximum allowable increase for a Class II area do not apply to a modification of a major stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each pollutant subject to regulation under the Act from the modification after the application of best available control technology would be less than 50 tons per year.

(8) The plan may provide that the reviewing authority may exempt a proposed major stationary source or major modification from the requirements of paragraph (m) with

respect to monitoring for a particular pollutant, if:

(i) The emissions increase of the pollutant from a new stationary source or the net emissions increase of the pollutant from a modification would cause, in any area, air quality impacts less than the following amounts:

(*a*) Carbon monoxide—575 ug/m^3, 8-hour average;

(*b*) Nitrogen dioxide—14 ug/m^3, annual average;

(*c*) Total suspended particulates—10 ug/m^3, 24-hour average;

(*d*) Sulfur dioxide—13 ug/m^3, 24-hour average;

(*e*) Ozone [1]

(*f*) Lead—0.1 ug/m^3, 24-hour average;

(*g*) Mercury—0.25 ug/m^3, 24-hour average;

(*h*) Beryllium—0.0005 ug/m^3, 24-hour average;

(*i*) Fluorides—0.25 ug/m^3, 24-hour average;

(*j*) Vinyl chloride—15 ug/m^3, 24-hour average;

(*k*) Total reduced sulfur—10 ug/m^3, 1-hour average;

(*l*) Hydrogen sulfide—0.04 ug/m^3, 1-hour average;

(*m*) Reduced sulfur compounds—10 ug/m^3, 1-hour average; or

(ii) The concentrations of the pollutant in the area that the source or modification would affect are less than the concentrations listed in (i)(8)(i); or

(iii) The pollutants is not listed in paragraph (i)(8)(i).

(9) If EPA approves a plan revision under 40 CFR 51.24 as in effect before August 7, 1980, any subsequent revision which meets the requirements of this section may contain transition provisions which parallel the transition provisions of 40 CFR 52.21(i)(9), (i)(10) and (m)(1)(v) as in effect on that date, which provisions relate to requirements for best available control technology and air quality analyses. Any such subsequent revision may not contain any transition provision which in the context of the revision would operate any less stringently than would its counterpart in 40 CFR 52.21.

(j) *Control Technology Review.* The plan shall provide that:

(1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emission standards and standard of performance under 40 CFR Parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each pollutant subject to regulation under the Act that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each pollutant subject to regulation under the Act for which it would be a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the least reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

(k) *Source Impact Analysis.* The plan shall provide that the owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reduction (including secondary emissions) would not cause or contribute to air pollution in violation of:

(1) Any national ambient air quality standard in any air quality control region; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

(l) *Air Quality Models.*

* * * * *

(m) *Air Quality Analysis.* (1) Preapplication analysis.

(i) The plan shall provide that any application for a permit under regulations approved pursuant to this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(*a*) For the source, each pollutant that it would have the potential to emit in a significant amount;

(*b*) For the modification, each pollutant for which it would result in a significant net emissions increase.

(ii) The plan shall provide that, with respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the reviewing authority determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(iii) The plan shall provide that with respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maxiumum allowable increase.

(iv) The plan shall provide that, in general, the continuous air monitoring data that is required shall have been gathered over a period of one year and shall represent the year preceding receipt of the application, except that, if the reviewing authority determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

(v) The plan may provide that the owner or operator of a proposed major stationary source or major modification of volatile organic compounds who satisfies all conditions of 40 CFR Part 51 Appendix S, section IV may provide postapproval monitoring data for ozone in lieu of providing preconstruction data as required under paragraph (m)(1).

(2) Post-construction monitoring. The plan shall provide that the owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the reviewing authority determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

(3) Operation of monitoring stations. The plan shall provide that the owner or operator of a major stationary source or major modification shall meet the requirements of Appendix B to Part 58 of this chapter during the operation of monitoring stations for purposes of satisfying paragraph (m) of this section.

(n) *Source Information.*

* * * * *

(o) *Additional Impact Analyses.*

* * * * *

(p) *Sources Impacting Federal Class I Areas—Additional Requirements.*

* * * * *

(q) *Public Participation.*

* * * * *

[1] No *de minimis* air quality level is provided for ozone. However, any net increase of 100 tons per year or more of volatile organic compounds subject to PSD would be required to perform and ambient impact analysis, including the gathering of ambient air quality data.

(r) *Source Obligation.* (1) The plan shall include enforceable procedures to provide that approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of the plan and any other requirements under local, state or federal law.

(2) The plan shall provide that at such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

(s) *Innovative Control Technology.* (1) The plan may provide that an owner or operator of a proposed major stationary source or major modification may request the reviewing authority to approve a system of innovative control technology.

(2) The plan may provide that the reviewing authority may, with the consent of the governor(s) of other affected state(s), determine that the source or modification may employ a system of innovative control technology, if:

(i) The proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function;

(ii) The owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under paragraph (j)(2) by a date specified by the reviewing authority. Such date shall not be later than 4 years from the time of startup or 7 years from permit issuance;

(iii) The source or modification would meet the requirements equivalent to those in paragraphs (j) and (k) based on the emissions rate that the stationary source employing the system of innovative control technology would be required to meet on the date specified by the reviewing authority;

(iv) The source or modification would not before the date specified by the reviewing authority:

(*a*) Cause or contribute to any violation of an applicable national ambient air quality standard; or

(*b*) Impact any Class I area; or

(*c*) Impact any area where an applicable increment is known to be violated;

(v) All other applicable requirements including those for public participation have been met.

(3) The plan shall provide that the reviewing authority shall withdraw any approval to employ a system of innovative control technology made under this section, if:

(i) The proposed system fails by the specified date to achieve the required continuous emissions reduction rate; or

(ii) The proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(iii) The reviewing authority decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

(4) The plan may provide that if a source or modification fails to meet the required level of continuous emissions reduction within the specified time period, or if the approval is withdrawn in accordance with paragraph (s)(3), the reviewing authority may allow the source or modification up to an additional 3 years to meet the requirement for the application of best available control technology through use of a demonstrated system of control.

New Source Review For PSD Purposes

2. (a) Section 52.21 of Title 40 of the Code of Federal Regulations is amended by deleting paragraph (k) and redesignating paragraphs (l) through (v) as (k) through (u) and then by revising paragraphs (b), (f), (i), (j), (k) and (g) and adding new paragraphs (r)(4), (v) and (w) as follows:

§ 52.21. Prevention of significant deterioration of air quality.

* * * * *

(b) *Definitions.* For the purposes of this section:

(1)(i) "Major stationary source" means:

(*a*) Any of the following stationary sources of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act: Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil fuel boilers (or combinations thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(b) Notwithstanding the stationary source size specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant subject to regulation under the Act; or

(c) Any physical change that would occur at a stationary source not otherwise qualifying under paragraph (b)(1) as a major stationary source, if the changes would constitute a major stationary source by itself.

(ii) A major stationary source that is major for volatile organic compounds shall be considered major for ozone.

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(a) Routine maintenance, repair and replacement;

(b) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plant pursuant to the Federal Power Act;

(c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(d) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(e) Use of an alternative fuel or raw material by a stationary source which:

(1) The source was capable of accommodating before January 6, 1975, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975 pursuant to 40 CFR 52.21

or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24; or

(2) The source is approved to use under any permit issued under 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.24;

(f) An increase in the hours of operation or in the production rate, unless such change would be prohibited under any federally enforceable permit condition which was established after January 6, 1975, pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(g) Any change in ownership at a stationary source.

(3)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(a) Any increase in actual emissions from a particular physical change or change in method of operation at a stationary source; and

(b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(*a*) The date five years before construction on the particular change commences; and

(*b*) The date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the Administrator has not relied on it in issuing a permit for the source under this section, which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase or decrease in actual emissions of sulfur dioxide or particulate matter which occurs before the applicable baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(v) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(vi) A decrease in actual emissions is creditable only to the extent that:

(*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(*b*) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(*c*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(viii) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(4) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(5) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(6) "Building, structure, facility, or installation" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same first two digit code) as described in the *Standard Industrial Classification Manual, 1972,* as amended by the 1977 Supplement (U. S. Government Printing Office stock numbers 4101–0066 and 003–005–00176–0, respectively).

(7) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

(8) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(9) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(10) "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(11) "Begin actual contruction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying underground pipework and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activites other than preparatory activities which mark the initiation of the change.

(12) "Best available control technology" means an emissions limitation (including a visible emission standard) based on the maximum degree of reduction for each pollutant subject to regulation under Act which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems, and techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant. In no event shall application of best available control technology result in emissions of any pollutant which would exceed the emissions allowed by any applicable standard under 40 CFR Parts and 60 and 61. If the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular emissions unit would make the impostion of an emissions standard infeasible, a design, equipment, work practice, operational standard, or combination thereof, may be prescribed instead to satisfy the requirement for the application of best available control technology. Such standard shall, to the degree possible, set forth the emissions reduction achievable by implementation of such

design, equipment, work practice or operation, and shall provide for compliance by means which achieve equivalent results.

(13)(i) "Baseline concentration" means that ambient concentration level which exists in the baseline area at the time of the applicable baseline date. A baseline concentration is determined for each pollutant for which a baseline date is established and shall include:

(*a*) The actual emissions representative of sources in existence on the applicable baseline date, except as provided in paragraph (b)(13)(ii);

(*b*) The allowable emissions of major stationary sources which commenced construction before January 6, 1975, but were not in operation by the applicable baseline date.

(ii) The following will not be included in the baseline concentration and will affect the applicable maximum allowable increase(s):

(*a*) Actual emissions from any major stationary source on which construction commenced after January 6, 1975; and

(*b*) Actual emissions increases and decreases at any stationary source occurring after the baseline date.

(14)(i) "Baseline date" means the earliest date after August 7, 1977, on which the first complete application under 40 CFR 52.21 is submitted by a major stationary source or major modification subject to the requirements of 40 CFR 52.21.

(ii) The baseline date is established for each pollutant for which increments or other equivalent measures have been established if:

(*a*) The area in which the proposed source or modification would construct is designated as attainment or unclassifiable under section 107(d)(i) (D) or (E) of the Act for the pollutant on the date of its complete application under 40 CFR 52.21; and

(*b*) In the case of a major stationary source, the pollutant would be emitted in significant amounts, or, in the case of a major modification, there would be a significant net emissions increase of the pollutant.

(15)(i) "Baseline area" means any intrastate area (and every part thereof) designated as attainment or unclassifiable under section 107(d)(1) (D) or (E) of the Act in which the major source or major modification establishing the baseline date would construct or would have an air quality impact equal to or greater than 1 $\mu g/m^3$ (annual average) of the pollutant for which the baseline date is established.

(ii) Area redesignations under section 107(d)(1) (D) or (E) of the Act cannot intersect or be smaller than the area of impact of any mjaor stationary source or major modification which:

(*a*) Establishes a baseline date; or

(*b*) Is subject to 40 CFR 52.21 and would be constructed in the same state as the state proposing the redesignation.

(16) "Allowable emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) The applicable standards as set forth in 40 CFR Parts 60 and 61;

(ii) The applicable State Implemenation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

(17) "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 and 40 CFR 51.24.

(18) "Secondary emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(i) Emissions from ships or trains coming to or from the new or modified stationary source; and

(ii) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

(19) "Innovative control technology" means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emissions reduction than any control system in current practice or of achieving at least comparable reductions at lower cost in terms of energy, economics, or nonair quality environmental impacts.

(20) "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(21)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with subparagraphs (ii)–(iv) below.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedies the particular date and which is representative of normal source operation. The Administrator shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The Administrator may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(22) "Complete" means, in reference to an application for a permit, that the application contains all of the information necessary for processing the application.

(23)(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy
Asbestos: 0.007 tpy
Beryllium: 0.0004 tpy
Mercury: 0.1 tpy
Vinyl chloride: 1 tpy
Fluorides: 3 tpy
Sulfuric acid mist: 7 tpy
Hydrogen sulfide (H_2S): 10 tpy
Total reduced sulfur (including H_2S): 10 tpy
Reduced sulfur compounds (including H_2S): 10 tpy

(ii) "Significant" means, in reference to a net emissions increase or the potential of a source to emit a pollutant subject to regulation under the Act that paragraph (b)(23)(i) does not list, any emissions rate.

(iii) Notwithstanding paragraph (b)(23)(i), "significant" means any emissions rate or any net emissions increase associated with a major stationary source or major modification, which would construct within 10 kilometers of a Class I area, and have an impact on such area equal to or greater than 1 $\mu g/m^3$, (24-hour average).

(24) "Federal Land Manager" means, with respect to any lands in the United States, the Secretary of the department with authority over such lands.

(25) "High terrain" means any area having an elevation 900 feet or more above the base of the stack of a source.

(26) "Low terrain" means any area other than high terrain.

(27) "Indian Reservation" means any federally recognized reservation established by Treaty, Agreement, Executive Order, or Act of Congress.

(28) "Indian Governing Body" means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of selfgovernment.

* * * * *

(f) *Exclusions from increment consumption.* (1) Upon written request of the governor, made after notice and opportunity for at least one public hearing to be held in accordance with procedures established in 40 CFR 51.4, the Administrator shall exclude the following concentrations in determining compliance with a maximum allowable increase:

(i) Concentrations attributable to the increase in emissions from stationary sources which have converted from the use of petroleum products, natural gas, or both by reason of an order in effect under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) over the emissions from such sources before the effective date of such an order;

(ii) Concentrations attributable to the increase in emissions from sources which have converted from using natural gas by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act over the emissions from such sources before the effective date of such plan;

(iii) Concentrations of particulate matter attributable to the increase in emissions from construction or other temporary emission-related activities of new or modified sources;

(iv) The increase in concentrations attributable to new sources outside the United States over the concentrations attributable to existing sources which are included in the baseline concentration; and

(v) Concentrations attributable to the temporary increase in emissions of sulfur dioxide or particulate matter from stationary sources which are affected by plan revisions approved by the Administrator as meeting the criteria specified in paragraph (f)(4).

(2) No exclusion of such concentrations shall apply more than five years after the effective date of the order to which paragraph (f)(1)(i) refers or the plan to which paragraph (f)(1)(ii) refers, whichever is applicable. If both such order and plan are applicable, no such exclusion shall apply more than five years after the later of such effective dates.

(3) No exclusion under paragraph (f) of this section shall occur later than 9 months after August 7, 1980, unless a State Implementation Plan revision meeting the requirements of 40 CFR 51.24 has been submitted to the Administrator.

(4) For purposes of excluding concentrations pursuant to paragraph (f)(1)(v), the proposed plan revision shall:

(i) Specify the time over which the temporary emissions increase of sulfur dioxide or particulate matter would occur. Such time is not to exceed two years in duration unless a longer time is approved by the Administrator;

(ii) Specify that the time period for excluding certain contributions in accordance with paragraph (f)(4)(i) is not renewable;

(iii) Allow no emissions increase from a stationary source which would:

(*a*) Impact a Class I area or an area where an applicable increment is known to be violated; or

(*b*) Cause or contribute to the violation of a national ambient air quality standard;

(iv) Require limitations to be in effect at the end of the time period specified in accordance with paragraph (f)(4)(i) which would ensure that the emissions levels from stationary sources affected by the plan revision would not exceed those levels occurring from such sources before the plan revision was approved.

* * * * *

(i) *Review of Major Stationary Sources and Major Modifications—Source Applicability and Exemptions.* (1) No stationary source or modification to which the requirements of paragraphs (j) through (r) of this section apply shall begin actual construction without a permit which states that the stationary source or modification would meet those requirements. The Administrator has authority to issue any such permit.

(2) The requirements of paragraphs (j) through (r) of this section shall apply to any major stationary source and any major modification with respect to each pollutant subject to regulation under the Act that it would emit, except as this section otherwise provides.

(3) The requirements of paragraphs (j) through (r) of this section apply only to any major stationary source or major modification that would be constructed in an area designated as attainment or unclassifiable under section 107(d)(1)(D) or (E) of the Act.

(4) The requirements of paragraphs (j) through (r) of this section shall not apply to a particular major stationary source or major modification, if:

(i) Construction commenced on the source or modification before August 7, 1977. The regulations at 40 CFR 52.21 as in effect before August 7, 1977, shall govern the review and permitting of any such source or modification; or

(ii) The source or modification was subject to the review requirements of 40 CFR 52.21(d)(i) as in effect before March 1, 1978, and the owner or operator:

(a) Obtained under 40 CFR 52.21 a final approval effective before March 1, 1978;

(b) Commenced construction before March 19, 1979; and

(c) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(iii) The source or modification was subject to 40 CFR 52.21 as in effect before March 1, 1978, and the review of an application for approval for the stationary source or modification under 40 CFR 52.21 would have been completed by March 1, 1978, but for an extension of the public comment period pursuant to a request for such an extension. In such a case, the application shall continue to be processed, and granted or denied, under 40 CFR 52.21 as in effect prior to March 1, 1978; or

(iv) The source or modification was not subject to 40 CFR 52.21 as in effect before March 1, 1978, and the owner or operator:

(a) Obtained all final federal, state and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before March 1, 1978;

(b) Commenced construction before March 19, 1979; and

(c) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time; or

(v) The source or modification was not subject to 40 CFR 52.21 as in effect on June 19, 1978 or under the partial stay

of regulations published on February 5, 1980 (45 FR 7800), and the owner or operator:

(a) Obtained all final federal, state and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

(b) Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

(c) Did not discontinuue construction for a period of 18 months or more and completed construction within a reasonable time; or

(vi) The source or modification would be a nonprofit health or nonprofit educational institution, or a major modification would occur at such an institution, and the governor of the state in which the source or modification would be located requests that it be exempt from those requirements; or

(vii) The source or modification would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(a) Coal cleaning plants (with thermal dryers);

(b) Kraft pulp mills;

(c) Portland cement plants;

(d) Primary zinc smelters;

(e) Iron and steel mills;

(f) Primary aluminum ore reduction plants;

(g) Primary copper smelters;

(h) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(i) Hydrofluoric, sulfuric, or nitric acid plants;

(j) Petroleum refineries;

(k) Lime plants;

(l) Phosphate rock processing plants;

(m) Coke oven batteries;

(n) Sulfur recovery plants;

(o) Carbon black plants (furnace process);

(p) Primary lead smelters;

(q) Fuel conversion plants;

(r) Sintering plants;

(s) Secondary metal production plants;

(t) Chemical process plants;

(u) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(v) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(w) Taconite ore processing plants;

(x) Glass fiber processing plants;

(y) Charcoal production plants;

(z) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(aa) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act; or

(viii) The source is a portable stationary source which has previously received a permit under this section, and

(*a*) The owner or operator proposes to relocate the source and emissions of the source at the new location would be temporary; and

(*b*) The emissions from the source would not exceed its allowable emissions; and

(*c*) The emissions from the source would impact no Class I area and no area where an applicable increment is known to be violated; and

(*d*) Reasonable notice is given to the Administrator prior to the relocation identifying the proposed new location and the probable duration of operation at the new location. Such notice shall be given to the Administrator not less than 10 days in advance of the proposed relocation unless a different time duration is previously approved by the Administrator.

(5) The requirements of paragraphs (j) through (r) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant if the owner or operator demonstrates that, as to that pollutant, the source or modification is located in an area designated as nonattainment under section 107 of the Act.

(6) The requirements of paragraphs (k), (m) and (o) of this section shall not apply to a major stationary source or major modification with respect to a particular pollutant, if the allowable emissions of that pollutant from the source, or the net emissions increase of that pollutant from the modification:

(i) Would impact no Class I area and no area where an applicable increment is known to be violated, and

(ii) Would be temporary.

(7) The requirements of paragraphs (k), (m) and (o) of this section as they relate to any maximum allowable increase for a Class II area shall not apply to a major modification at a stationary source that was in existence on March 1, 1978, if the net increase in allowable emissions of each pollutant subject to regulation under the Act from the modification after the application of best available control technology would be less than 50 tons per year.

(8) The Administrator may exempt a stationary source or modification from the requirements of paragraph (m) with respect to monitoring for a particular pollutant if:

(i) The emissions increase of the poliutant from the new source or the net emissions increase of the pollutant from the modification would cause, in any area, air quality impacts less than the following amounts:

Carbon monoxide—575 $\mu g/m^3$, 8-hour average;

Nitrogen dioxide—14 $\mu g/m^3$, annual average;

Total suspended particulate—10 $\mu g/m^3$, 24-hour average;

Sulfur dioxide—13 $\mu g/m^3$, 24-hour average;

Ozone; [2]

Lead—0.1 $\mu g/m^3$, 24-hour average;

Mercury—0.25 $\mu g/m^3$, 24-hour average;

Beryllium—0.0005 $\mu g/m^3$, 24-hour average;

Fluorides—0.25 $\mu g/m^3$, 24-hour average;

Vinyl chloride—15 $\mu g/m^3$, 24-hour average;

Total reduced sulfur—10 $\mu g/m^3$, 1-hour average;

Hydrogen sulfide—0.04 $\mu g/m^3$, 1-hour average;

Reduced sulfur compounds—10 $\mu g/m^3$, 1-hour average; or

(ii) The concentrations of the pollutant in the area that the source or modification would affect are less than the concentrations listed in paragraph (i)(8)(i), or the pollutant is not listed in paragraph (i)(8)(i).

(9) The requirements for best available control technology in paragraph (j) of this section and the requirements for air quality analyses in paragraph (m)(1) shall not apply to a particular stationary source or modification that was subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submitted an application for a permit under those regulations before August 7, 1980, and the Administrator subsequently determines that the application as submitted before that date was complete. Instead, the requirements at 40 CFR 52.21(j) and (n) as in effect on June 19, 1978 apply to any such source or modification.

(10)(i) The requirements for air quality monitoring in paragraphs (m)(1)(ii)-(iv) of this section shall not apply to a particular source or modification that was subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an

[2] No *de minimis* air quality level is provided for ozone. However, any net increase of 100 tons per year or more of volatile organic compounds subject to PSD would be required to perform an ambient impact analysis including the gathering of ambient air quality data.

application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as submitted before that date was complete with respect to the requirements of this section other than those in paragraphs (m)(1)(ii)-(iv) and with respect to the requirements for such analyses at 40 CFR 52.21(m)(2) as in effect on June 19, 1978. Instead, the latter requirements shall apply to any such source or modification.

(ii) The requirements for air quality monitoring in paragraphs (m)(1)(ii)-(iv) of this section shall not apply to a particular source or modification that was not subject to 40 CFR 52.21 as in effect on June 19, 1978, if the owner or operator of the source or modification submits an application for a permit under this section on or before June 8, 1981, and the Administrator subsequently determines that the application as submitted before that date was complete, except with respect to the requirements in paragraphs (m)(1)(ii)-(iv).

(j) *Control Technology Review.* (1) A major stationary source or major modification shall meet each applicable emissions limitation under the State Implementation Plan and each applicable emissions standard and standard of performance under 40 CFR Parts 60 and 61.

(2) A new major stationary source shall apply best available control technology for each pollutant subject to regulation under the Act that it would have the potential to emit in significant amounts.

(3) A major modification shall apply best available control technology for each pollutant subject to regulation under the Act for which it would result in a significant net emissions increase at the source. This requirement applies to each proposed emissions unit at which a net emissions increase in the pollutant would occur as a result of a physical change or change in the method of operation in the unit.

(4) For phased construction projects, the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time which occurs no later than 18 months prior to commencement of construction of each independent phase of the project. At such time, the owner or operator of the applicable stationary source may be required to demonstrate the adequacy of any previous determination of best available control technology for the source.

(k) *Source Impact Analysis.* The owner or operator of the proposed source or modification shall demonstrate that allowable emission increases from the proposed source or modification, in conjunction with all other applicable emissions increases or reductions (including secondary emissions), would not cause or contribute to air pollution in violation of:

(1) Any national ambient air quality standard in any air quality control region; or

(2) Any applicable maximum allowable increase over the baseline concentration in any area.

(l) *Air Quality Models.*

* * * * *

(m) *Air Quality Analysis.* (1) Preapplication analysis.

(i) Any application for a permit under this section shall contain an analysis of ambient air quality in the area that the major stationary source or major modification would affect for each of the following pollutants:

(*a*) For the source, each pollutant that it would have the potential to omit in a significant amount;

(*b*) For the modification, each pollutant for which it would result in a significant net emissions increase.

(ii) With respect to any such pollutant for which no National Ambient Air Quality Standard exists, the analysis shall contain such air quality monitoring data as the Administrator determines is necessary to assess ambient air quality for that pollutant in any area that the emissions of that pollutant would affect.

(iii) With respect to any such pollutant (other than nonmethane hydrocarbons) for which such a standard does exist, the analysis shall contain continuous air quality monitoring data gathered for purposes of determining whether emissions of that pollutant would cause or contribute to a violation of the standard or any maximum allowable increase.

(iv) In general, the continuous air quality monitoring data that is required shall have been gathered over a period of at least one year and shall represent at least the year preceding receipt of the application, except that, if the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data gathered over a period shorter than one year (but not to be less than four months), the data that is required shall have been gathered over at least that shorter period.

(v) For any application which becomes complete, except as to the requirements of paragraph (m)(1) (iii) and (iv), between June 8, 1981, and February 9, 1982, the data that paragraph (m)(1)(iii) requires shall have been gathered over at least the period from February 9, 1981, to the date the application becomes otherwise complete, except that:

(*a*) If the source or modification would have been major for that pollutant under 40 CFR 52.21 as in effect on June 19, 1978, any monitoring data shall have been gathered over at least the period required by those regulations.

(*b*) If the Administrator determines that a complete and adequate analysis can be accomplished with monitoring data over a shorter period (not to be less than four months), the data that paragraph (m)(1)(iii) requires shall have been gathered over at least that shorter period.

(*c*) If the monitoring data would relate exclusively to ozone and would not have been required under 40 CFR 52.21 as in effect on June 19, 1978, the Administrator may waive the otherwise applicable requirements of this paragraph (v) to the extent that the applicant shows that the monitoring data would be unrepresentative of air quality over a full year.

(vi) The owner or operator of a proposed stationary source or modification of violatile organic compounds who satisfies all conditions of 40 CFR Part 51 Appendix S, section IV may provide post-approval monitoring data for ozone in lieu of providing preconstruction data as requried under paragraph (m)(1).

(2) Post-construction monitoring. The owner or operator of a major stationary source or major modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the Administrator determines is necessary to determine the effect emissions from the stationary source or modification may have, or are having, on air quality in any area.

(3) Operations of monitoring stations. The owner or operator of a major stationary source or major modification shall meet the requirements of Appendix B to Part 58 of this chapter during the operation of monitoring stations for purposes of satisfying paragraph (m) of this section.

(n) *Source Information.*

* * * * *

(o) *Additional Impact Analyses.*

* * * * *

(p) *Sources Impacting Federal Class I Areas—Additional Requirements.*

* * * * *

(q) *Public Participation.* The Administrator shall follow the applicable procedures of 40 CFR Part 124 in processing applications under this section. The Administrator shall follow the procedures at 40 CFR 52.21(r) as in effect on June 19, 1979, to the extent that

the procedures of 40 CFR Part 124 do not apply.

(r) *Source Obligation.*

* * * * *

(4) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements or paragraphs (j) through (s) of this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

* * * * *

(s) *Environmental Impact Statements.*

* * * * *

(t) *Disputed Permits or Redesignations.*

* * * * *

(u) *Delegation of Authority.*

* * * * *

(v) *Innovative Control Technology.* (1) An owner or operator of a proposed major stationary source or major modification may request the Administrator in writing no later than the close of the comment period under 40 CFR 124.10 to approve a system of innovative control technology.

(2) The Administrator shall, with the consent of the governor(s) of the affected state(s), determine that the source or modification may employ a system of innovative control technology, if:

(i) The proposed control system would not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation or function;

(ii) The owner or operator agrees to achieve a level of continuous emissions reduction equivalent to that which would have been required under paragraph (j)(2) by a date specified by the Administrator. Such date shall not be later than 4 years from the time of startup or 7 years from permit issuance;

(iii) The source or modification would meet the requirements of paragraphs (j) and (k) based on the emissions rate that the stationary source employing the system of innovative control technology would be required to meet on the date specified by the Administrator;

(iv) The source or modification would not before the date specified by the Administrator:

(a) Cause or contribute to a violation of an applicable national ambient air quality standard; or

(b) Impact any Class I area; or

(c) Impact any area where an applicable increment is known to be violated; and

(v) All other applicable requirements including those for public participation have been met.

(3) The Administrator shall withdraw any approval to employ a system of innovative control technology made under this section, if:

(i) The proposed system fails by the specified date to achieve the required continuous emissions reduction rate; or

(ii) The proposed system fails before the specified date so as to contribute to an unreasonable risk to public health, welfare, or safety; or

(iii) The Administrator decides at any time that the proposed system is unlikely to achieve the required level of control or to protect the public health, welfare, or safety.

(4) If a source or modification fails to meet the required level of continuous emission reduction within the specified time period or the approval is withdrawn in accordance with paragraph (v)(3), the Administrator may allow the source or modification up to an additional 3 years to meet the requirement for the application of best available control technology through use of a demonstrated system of control.

(w) *Permit rescission.* (1) Any permit issued under this section or a prior version of this section shall remain in effect, unless and until it expires under paragraph (s) of this section or is rescinded.

(2) Any owner or operator of a stationary source or modification who holds a permit for the source or modification which was issued under 40 CFR 52.21 as in effect on June 19, 1978, may request that the Administrator rescind the permit or a particular portion of the permit.

(3) The Administrator shall grant an application for rescission if the application shows that this section would not apply to the source or modification.

(4) If the Administrator rescinds a permit under this paragraph, the public shall be given adequate notice of the rescission. Publication of an announcement of rescission in a newspaper of general circulation in the affected region within 60 days of the rescission shall be considered adequate notice.

2. (b) In § 52.60 (AL), § 52.96 (AK), § 52.144 (AZ), § 52.131 (AR), § 52.270 (CA), § 52.343 (CO), § 52.383 (CT), § 52.432 (DE), § 52.499 (DC), § 52.530 (FL), § 52.632 (HI), § 52.683 (ID), § 52.738 (IL), § 52.793 (IN), § 52.833 (IA), § 52.884 (KS), § 52.931 (KY), § 52.986 (LA), § 52.1116 (MD), § 52.1180 (MI), § 52.1234 (MN), § 52.1280 (MS), § 52.1339 (MO), § 52.1382 (MT), § 52.1436 (NB), § 52.1485 (NV), § 52.1529 (NH), § 52.1603 (NJ), § 52.1634 (NM), § 52.1689 (NY), § 52.1778 (NC), § 52.1884 (OH), § 52.1929 (OK), § 52.1987 (OR), § 52.2058 (PA), § 52.2083 (RI), § 52.2131 (SC), § 52.2178 (SD), § 52.2303 (TX), § 52.2346 (UT), § 52.2451 (VA), § 52.2497 (WA), § 52.2528 (WV), § 52.2581 (WI), § 52.2676 (GU), § 52.2729 (PR), § 52.2779 (VI), and § 52.2827 (AmS), paragraphs (a) and (b) are revised to read as follows:

* * * * *

(a) The requirements of sections 160 through 165 of the Clean Air Act are not met, since the plan does not include approvable procedures for preventing the significant deterioration of air quality.

(b) *Regulations for preventing significant deterioration of air quality.* The provisions of 52.21(b) through (w) are hereby incorporated and made a part of the applicable state plan for the State of ———.

Emission Offset Interpretative Ruling

3. Sections I, II, III and IV of the Emission Offset Interpretative Ruling, 40 CFR Part 51 Appendix S, as revised 44 FR 3274 (January 16, 1979) and 45 FR 31307 (May 13, 1980), are amended as follows:

A. By adding a new third paragraph to Section I, to read as follows:

I. Introduction

* * * * *

The requirement of this Ruling shall not apply to any major stationary source or major modification that was not subject to the Ruling as in effect on January 16, 1979, if the owner or operator:

A. Obtained all final federal, state, and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

B. Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

C. Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

B. By revising Section II, subsection A, to read as follows:

II. Initial Screening Analyses and Determination of Applicable Requirements.

A. *Definitions*—For the purposes of this Ruling:

1. "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

2. "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control

of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two digit code) as described in the *Standard Industrial Classification Manual*, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101–0066 and 003–005–00176–0, respectively).

3. "Installation" means an identifiable piece of process equipment.

4. "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

5.(i) "Major stationary source" means:

(*a*) Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act; or

(*b*) Any physical change that would occur at a stationary source not qualifying under paragraph 5.(i)(*a*) as a major stationary source, if the change would constitute a major stationary source by itself.

(ii) A major stationary source that is major for volatile organic compounds shall be considered major for ozone.

6.(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is considered significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

(*b*) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(*c*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*d*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*e*) Use of an alternative fuel or raw material by a stationary source which:

(*1*) The source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was established after December 21, 1976, purusant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24; or

(*2*) The source is approved to use under any permit issued under this ruling;

(*f*) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24;

(*g*) Any change in ownership at a stationary source.

7.(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(*a*) The date five years before construction on the particular change commences and

(*b*) The date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the Administrator has not relied on it in issuing a permit for the source under this Ruling which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(v) A decrease in actual emissions is creditable only to the extent that:

(*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(*b*) It is federally enforceable at and after the time that actual construction on the particular change begins;

(*c*) The reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR 51.18; and

(*d*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(vi) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

8. "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

9. "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 per cent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f) (1)–(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this Ruling. In determining lowest achievable emission rate for a reconstructed stationary source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a new source performance standard is applicable to such stationary source.

10. "Fixed capital cost" means the capital needed to provide all the depreciable components.

11. "Secondary emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this Ruling, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(i) Emissions from ships or trains coming to or from the new or modified stationary source and

(ii) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

12. "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

13.(i) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy

14. "Allowable emissions" means the emissions rate calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) Applicable standards as set forth in 40 CFR Parts 60 and 61;

(ii) Any applicable State Implementation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

15. "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to this Ruling, 40 CFR 52.21, or under regulations approved pursuant to 40 CFR 51.18 or 51.24.

16.(i) "Actual emissions" means the actual rate of emissions of a pollutant from an

emissions unit as determined in accordance with subparagraphs (ii)–(iv) below.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored or combusted during the selected time period.

(iii) The reviewing authority may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

17. "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

18. "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

19. "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

20. "Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operating this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

21. "Lowest achievable emission rate" means, for any source, the more stringent rate of emissions based on the following:

(i) The most stringent emissions limitation which is contained in the implementation plan of any state for such class or category of stationary source, unless the owner or operator of the proposed stationary source demonstrates that such limitations are not achievable; or

(ii) The most stringent emissions limitation which is achieved in practice by such class or category of stationary source. This limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within the stationary source. In no event shall the application of this term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

22. "Resource recovery facility" means any facility at which solid waste is processed for the purpose of extracting, converting to energy, or otherwise separating and preparing solid waste for reuse. Energy conversion facilities must utilize solid waste to provide more than 50 percent of the heat input to be considered a resource recovery facility under this Ruling.

C. By amending Section II, subsection C by deleting footnote 2 and the second paragraph. The first paragraph is revised to read as follows:

C. *Review of specified sources for air quality impact.*

In addition, the reviewing authority must determine whether the major stationary source or major modification would be constructed in an area designated in 40 CFR 81.300 *et seq.* as nonattainment for a pollutant for which the stationary source or modification is major.

D. By revising Section II, subsection F to read as follows:

F. *Fugitive emissions sources.* Section IV. A. of this Ruling shall not apply to a source or modification that would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(1) Coal cleaning plants (with thermal dryers);

(2) Kraft pulp mills;

(3) Portland cement plants;

(4) Primary zinc smelters;

(5) Iron and steel mills;

(6) Primary aluminum ore reduction plants;

(7) Primary copper smelters;

(8) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(9) Hydrofluoric, sulfuric, or nitric acid plants;

(10) Petroleum refineries;

(11) Lime plants;

(12) Phosphate rock processing plants;

(13) Coke oven batteries;

(14) Sulfur recovery plants;

(15) Carbon black plants (furnace process);

(16) Primary lead smelters;

(17) Fuel conversion plants;

(18) Sintering plants;

(19) Secondary metal production plants;

(20) Chemical process plants;

(21) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(22) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(23) Taconite ore processing plants;

(24) Glass fiber processing plants;

(25) Charcoal production plants;

(26) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(27) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

E. By deleting Footnote 3 of subsection C of Section III and revising the third paragraph as follows:

C. *Review of specified sources of air quality impact.*

* * * * *

For ozone, sources of volatile organic compounds, locating outside a designated ozone nonattainment area, will be presumed to have no significant impact on the designated nonattainment area. If ambient monitoring indicates that the area of source location is in fact nonattainment, then the source may be permitted under the provisions of any state plan adopted pursuant to section 110(a)(2)(D) of the Act until the area is designated nonattainment and a State Implementation Plan revision is approved. If no state plan pursuant to section 110(a)(2)(D) has been adopted and approved, then this Ruling shall apply.

* * * * *

F. By adding a new subsection F. to IV., to read as follows:

IV. Sources That Would Locate in a Designated Nonattainment Area

F. *Source Obligation.*

At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirements of this Ruling shall apply to the source or modification as though construction had not yet commenced on the source or modification.

State Plans For New Source Review For Nonattainment Purposes.

4. Section 40 CFR 51.18(j) is amended to read as follows:

§ 51.18 Review of new stationary sources modifications.

* * * * *

(j) State Implementation Plan provisions satisfying sections 172(b)(6) and 173 of the Act shall meet the following conditions:

(1) All such plans shall use the specific definitions. Deviations from the following wording will be approved only if the state specifically demonstrates that the submitted definition is more stringent, or at least as stringent, in all respects as the corresponding definition below:

(i) "Stationary source" means any building, structure, facility, or installation which emits or may emit

any air pollutant subject to regulation under the Act.

(ii) "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the *Standard Industrial Classification Manual,* 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101–0066 and 003–005–00176–0, respectively).

(iii) "Installation" means an identifiable piece of process equipment.

(iv) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(v)(*a*) "Major stationary source" means:

(*1*) Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act; or

(*2*) Any physical change that would occur at a stationary source not qualifying under paragraph (v)(*a*)(*1*) as a major stationary source, if the change would constitute a major stationary source by itself.

(*b*) A major stationary source that is major for volatile organic compounds shall be considered major for ozone.

(vi)(*a*) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(*b*) Any net emissions increase that is considered significant for volatile organic compounds shall be considered significant for ozone.

(*c*) A physical change or change in the method of operation shall not include:

(*1*) Routine maintenance, repair and replacement;

(*2*) Use of an alternative fuel or raw material by reason of an order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(*3*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*4*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*5*) Use of an alternative fuel or raw material by a stationary source which:

(*i*) The source was capable of accommodating before December 21, 1976, unless such change would be prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24; or

(*ii*) The source is approved to use under any permit issued under regulations approved pursuant to this section;

(*6*) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after December 21, 1976 pursuant to 40 CFR 52.21 or regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(*7*) Any change in ownership at a stationary source.

(vii)(*a*) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*1*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*2*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(*b*) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs before the date that the increase from the particular change occurs.

(*c*) An increase or decrease in actual emissions is creditable only if:

(*1*) It occurs within a reasonable period to be specified by the reviewing authority; and

(*2*) The reviewing authority has not relied on it in issuing a permit for the source under regulations approved pursuant to this section which permit is in effect when the increase in actual emissions from the particular change occurs.

(*d*) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(*e*) A decrease in actual emissions is creditable only to the extent that:

(*1*) The old level of actual emissions or the old level of allowable emissions, whichever, is lower, exceeds the new level of actual emissions;

(*2*) It is federally enforceable at and after the time that actual construction on the particular change begins; and

(*3*) The reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR 51.18 or the state has not relied on it in demonstrating attainment or reasonable further progress.

(*4*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(*f*) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(viii) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

(ix) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f) (1)–(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this subsection. In determining lowest achievable emission rate for a reconstructed stationary source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a new source performance standard is applicable to such stationary source.

(x) "Fixed capital cost" means the capital needed to provide all the depreciable components.

(xi) "Secondary emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must

be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(*a*) Emissions from ships or trains coming to or from the new or modified stationary source; and

(*b*) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

(xii) "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(xiii) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate

Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy

(xiv) "Allowable emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(*a*) The applicable standards set forth in 40 CFR Parts 60 or 61;

(*b*) Any applicable State Implementation Plan emissions limitation including those with a future compliance date; or

(*c*) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

(xv)(*a*) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit as determined in accordance with subparagraphs (*b*)–(*d*) below.

(*b*) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The reviewing authority shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(*c*) The reviewing authority may presume that the source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(*d*) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(xvi) "Lowest achievable emission rate" means, for any source, the more stringent rate of emissions based on the following:

(*a*) The most stringent emissions limitation which is contained in the implementation plan of any state for such class or category of stationary source, unless the owner or operator of the proposed stationary source demonstrates that such limitations are not achievable; or

(*b*) The most stringent emissions limitation which is achieved in practice by such class or category of stationary source. This limitation, when applied to a modification, means the lowest achievable emissions rate for the new or modified emissions units within the stationary source. In no event shall the application of this term permit a proposed new or modified stationary source to emit any pollutant in excess of the amount allowable under an applicable new source standard of performance.

(xvii) "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to this section, 40 CFR 51.18, or 51.24.

(xviii) "Begin actual construction" means in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operating this term refers to those on-site activities other than preparatory activities which mark the initiation of the change.

(xix) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(*a*) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(*b*) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(xx) "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(xxi) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification of an emissions unit) which would result in a change in actual emissions.

(2) Each plan shall adopt a preconstruction review program to satisfy the requirements of sections 172(b)(6) and 173 of the Act for any area designated nonattainment for any national ambient air quality standard under 40 CFR 81.300 *et seq.* Such a program shall apply to any new major stationary source or major modification that is major for the pollutant for which the area is designated nonattainment, if the stationary source or modification would locate anywhere in the designated nonattainment area.

(3)(i) Each plan shall provide that for sources and modifications subject to any preconstruction review program adopted pursuant to this subsection the baseline for determining credit for emissions reductions is the emissions limit under the applicable State Implementation Plan in effect at the time the application to construct is filed, except that the offset baseline shall be the actual emissions of the source from which offset credit is obtained where:

(*a*) The demonstration of reasonable further progress and attainment of ambient air quality standards is based upon the actual emissions of sources located within a designated nonattainment area for which the preconstruction review program was adopted; or

(*b*) The applicable State Implementation Plan does not contain an emissions limitation for that source or source category.

(ii) The plan shall further provide that:

(*a*) Where the emissions limit under the applicable State Implementation

Plan allows greater emissions than the potential to emit of the source, emissions offset credit will be allowed only for control below this potential;

(*b*) For an existing fuel combustion source, credit shall be based on the allowable emissions under the applicable State Implementation Plan for the type of fuel being burned at the time the application to construct is filed. If the existing source commits to switch to a cleaner fuel at some future date, emissions offset credit based on the allowable (or actual) emissions for the fuels involved is not acceptable, unless the permit is conditioned to require the use of a specified alternative control measure which would achieve the same degree of emissions reduction should the source switch back to a dirtier fuel at some later date. The reviewing authority should ensure that adequate long-term supplies of the new fuel are available before granting emissions offset credit for fuel switches;

(*c*) Emissions reductions achieved by shutting down an existing source or permanently curtailing production or operating hours below baseline levels may be credited, provided that the work force to be affected has been notified of the proposed shutdown or curtailment. Source shutdowns and curtailments in production or operating hours occurring prior to the date the new source application is filed generally may not be used for emissions offset credit. However, where an applicant can establish that it shut down or curtailed production after August 7, 1977, or less than one year prior to the date of permit application, whichever is earlier, and the proposed new source is a replacement for the shutdown or curtailment credit for such shutdown or curtailment may be applied to offset emissions from the new source;

(*d*) No emissions credit may be allowed for replacing one hydrocarbon compound with another of lesser reactivity, except for those compounds listed in Table 1 of EPA's "Recommended Policy on Control of Volatile Organic Compounds." (42 FR 35314, July 8, 1977);

(*e*) All emission reductions claimed as offset credit shall be federally enforceable;

(*f*) Procedures relating to the permissible location of offsetting emissions shall be followed which are at least as stringent as those set out in 40 CFR Part 51 Appendix S, section IV.D.

(*g*) Credit for an emissions reduction can be claimed to the extent that the reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR 51.18 or the state has not relied on it in demonstrating attainment or reasonable further progress.

(4) Each plan may provide that the provisions of this subsection do not apply to a source or modification that would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(*a*) Coal cleaning plants (with thermal dryers);

(*b*) Kraft pulp mills;

(*c*) Portland cement plants;

(*d*) Primary zinc smelters;

(*e*) Iron and steel mills;

(*f*) Primary aluminum ore reduction plants;

(*g*) Primary copper smelters;

(*h*) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(*i*) Hydrofluoric, sulfuric, or nitric acid plants;

(*j*) Petroleum refineries;

(*k*) Lime plants;

(*l*) Phosphate rock processing plants;

(*m*) Coke oven batteries;

(*n*) Sulfur recovery plants;

(*o*) Carbon black plants (furnace process);

(*p*) Primary lead smelters;

(*q*) Fuel conversion plants;

(*r*) Sintering plants;

(*s*) Secondary metal production plants;

(*t*) Chemical process plants;

(*u*) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(*v*) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(*w*) Taconite ore processing plants;

(*x*) Glass fiber processing plants;

(*y*) Charcoal production plants;

(*z*) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(*aa*) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(5) Each plan shall include enforceable procedures to provide that:

(i) Approval to construct shall not relieve any owner or operator of the responsibility to comply fully with applicable provision of the plan and any other requirements under local, state or federal law.

(ii) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforcement limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then the requirments of regulations approved pursuant to this section shall apply to the source or modification as though construction had not yet commenced on the source or modification.

Restrictions on Construction For Nonattainment Areas

5. 40 CFR 52.24 is amended by adding new paragraphs (f), (g), (h) and (i) to read as follows:

§ 52.24 Statutory restriction on new stationary sources.

* * * * *

(f) The following definitions shall apply under this section.

(1) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act.

(2) "Building, structure, or facility" means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control). Pollutant-emitting activities shall be considered as part of the same industrial grouping if they belong to the same "Major Group" (i.e., which have the same two-digit code) as described in the following document, *Standard Industrial Classification Manual, 1972,* as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101–0066 and 003–005–00176–0, respectively).

(3) "Installation" means an identifiable piece of process equipment.

(4) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on amount of material combusted, stored, or processed, shall be treated as part of its design only if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the potential to emit of a stationary source.

(5)(i) "Major stationary source" means:

(*a*) Any stationary source of air pollutants which emits, or has the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act; or

(*b*) Any physical change that would occur at a stationary source not qualifying under paragraph (5)(i)(*a*) as a major stationary source, if the change would constitute a major stationary source by itself.

(ii) A major stationary source that is major for volatile for organic compounds shall be considered major for ozone.

(6)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.

(ii) Any net emissions increase that is considered significant for volatile organic compounds shall be considered significant for ozone.

(iii) A physical change or change in the method of operation shall not include:

(*a*) Routine maintenance, repair, and replacement;

(*b*) Use of an alternative fuel or raw material by reason of an order under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation) or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(*c*) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(*d*) Use of an alternative fuel at a steam generating unit to the extent that the fuel is generated from municipal solid waste;

(*e*) Use of an alternative fuel or raw material by a stationary source which:

(*1*) The source was capable of accommodating before July 1, 1979, unless such change would be prohibited under any federally enforceable permit condition which was established after July 1, 1979 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24; or

(*2*) The source is approved to use under any permit issued under regulations approved pursuant to 40 CFR 51.18;

(*f*) An increase in the hours of operation or in the production rate, unless such change is prohibited under any federally enforceable permit condition which was established after July 1, 1979 pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 or 40 CFR 51.24.

(*g*) Any change in ownership at a stationary source.

(7)(i) "Net emissions increase" means the amount by which the sum of the following exceeds zero:

(*a*) Any increase in actual emissions from a particular physical change or change in the method of operation at a stationary source; and

(*b*) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable.

(ii) An increase or decrease in actual emissions is contemporaneous with the increase from the particular change only if it occurs between:

(*a*) The date five years before construction on the particular change commences and

(*b*) The date that the increase from the particular change occurs.

(iii) An increase or decrease in actual emissions is creditable only if the Administrator has not relied on it in issuing a permit for the source under regulations approved pursuant to 40 CFR 51.18 which permit is in effect when the increase in actual emissions from the particular change occurs.

(iv) An increase in actual emissions is creditable only to the extent that the new level of actual emissions exceeds the old level.

(v) A decrease in actual emissions is creditable only to the extent that:

(*a*) The old level of actual emissions or the old level of allowable emissions, whichever is lower, exceeds the new level of actual emissions;

(*b*) It is federally enforceable at and after the time that construction on the particular change begins; and

(*c*) The Administrator or reviewing authority has not relied on it in issuing any permit under regulations approved pursuant to 40 CFR 51.18 or the State has not relied on it in demonstrating attainment or reasonable further progress.

(*d*) It has approximately the same qualitative significance for public health and welfare as that attributed to the increase from the particular change.

(vi) An increase that results from a physical change at a source occurs when the emissions unit on which construction occurred becomes operational and begins to emit a particular pollutant. Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days.

(8) "Emissions unit" means any part of a stationary source which emits or would have the potential to emit any pollutant subject to regulation under the Act.

(9) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. Any final decision as to whether reconstruction has occurred shall be made in accordance with the provisions of 40 CFR 60.15(f) (1)–(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this subsection.

(10) "Fixed capital cost" means the capital needed to provide all the depreciable components.

(11) "Secondary emissions" means emissions which would occur as a result of the construction or operation of a major stationary source or major modification, but do not come from the major stationary source or major modification itself. For the purpose of this section, secondary emissions must be specific, well defined, quantifiable, and impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions may include, but are not limited to:

(i) Emissions from ships or trains coming to or from the new or modified stationary source and

(ii) Emissions from any offsite support facility which would not otherwise be constructed or increase its emissions as a result of the construction or operation of the major stationary source or major modification.

(12) "Fugitive emissions" means those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally equivalent opening.

(13) "Significant" means, in reference to a net emissions increase or the potential of a source to emit any of the following pollutants, a rate of emissions that would equal or exceed any of the following rates:

Pollutant and Emissions Rate
Carbon monoxide: 100 tons per year (tpy)
Nitrogen oxides: 40 tpy
Sulfur dioxide: 40 tpy
Particulate matter: 25 tpy
Ozone: 40 tpy of volatile organic compounds
Lead: 0.6 tpy

(14) "Allowable emissions" means the emissions rate of a stationary source calculated using the maximum rated capacity of the source (unless the source is subject to federally enforceable limits which restrict the operating rate, or hours of operation, or both) and the most stringent of the following:

(i) The applicable standards set forth in 40 CFR Parts 60 and 61;

(ii) Any applicable State Implementation Plan emissions limitation, including those with a future compliance date; or

(iii) The emissions rate specified as a federally enforceable permit condition, including those with a future compliance date.

(15) "Federally enforceable" means all limitations and conditions which are

enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State Implementation Plan, and any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR 51.18 and 51.24.

(16)(i) "Actual emissions" means the actual rate of emissions of a pollutant from an emissions unit, as determined in accordance with subparagraphs (ii)–(iv) below.

(ii) In general, actual emissions as of a particular date shall equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operation. The Administrator shall allow the use of a different time period upon a determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the selected time period.

(iii) The Administrator may presume that source-specific allowable emissions for the unit are equivalent to the actual emissions of the unit.

(iv) For any emissions unit which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(17) "Construction" means any physical change or change in the method of operation (including fabrication, erection, installation, demolition, or modification) of an emissions unit which would result in a change in actual emissions.

(18) "Commence" as applied to construction of a major stationary source or major modification means that the owner or operator has all necessary preconstruction approvals or permits and either has:

(i) Begun, or caused to begin, a continuous program of actual on-site construction of the source, to be completed within a reasonable time; or

(ii) Entered into binding agreements or contractual obligations, which cannot be cancelled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.

(19) "Necessary preconstruction approvals or permits" means those permits or approvals required under federal air quality control laws and regulations and those air quality control laws and regulations which are part of the applicable State Implementation Plan.

(20) "Begin actual construction" means, in general, initiation of physical on-site construction activities on an emissions unit which are of a permanent nature. Such activities include, but are not limited to, installation of building supports and foundations, laying of underground pipework, and construction of permanent storage structures. With respect to a change in method of operations, this term refers to those on-site activities other than preparatory activities which mark the initiation of the change..

(g) This section shall not apply to a major stationary source or major modification if the source or modification was not subject to 40 CFR Part 51 Appendix S, as in effect on January 16, 1979, and the owner or operator:

(1) Obtained all final federal, state, and local preconstruction approvals or permits necessary under the applicable State Implementation Plan before August 7, 1980;

(2) Commenced construction within 18 months from August 7, 1980, or any earlier time required under the applicable State Implementation Plan; and

(3) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

(h) This section shall not apply to a source or modification that would be a major stationary source or major modification only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit of the stationary source or modification and the source does not belong to any of the following categories:

(1) Coal cleaning plants (with thermal dryers);

(2) Kraft pulp mills;

(3) Portland cement plants;

(4) Primary zinc smelters;

(5) Iron and steel mills;

(6) Primary aluminum ore reduction plants;

(7) Primary copper smelters;

(8) Municipal incinerators capable of charging more than 250 tons of refuse per day;

(9) Hydrofluoric, sulfuric, or nitric acid plants;

(10) Petroleum refineries;

(11) Lime plants;

(12) Phosphate rock processing plants;

(13) Coke oven batteries;

(14) Sulfur recovery plants;

(15) Carbon black plants (furnace process);

(16) Primary lead smelters;

(17) Fuel conversion plants;

(18) Sintering plants;

(19) Secondary metal production plants;

(20) Chemical process plants;

(21) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input;

(22) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels;

(23) Taconite ore processing plants;

(24) Glass fiber processing plants;

(25) Charcoal production plants;

(26) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input;

(27) Any other stationary source category which, as of August 7, 1980, is being regulated under section 111 or 112 of the Act.

(i) At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980, on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then:

(1) If the construction moratorium imposed pursuant to this section is still in effect for the nonattainment area in which the source or modification is located, then the permit may not be so revised; or

(2) If the construction moratorium is no longer in effect in that area, then the requirements of 40 CFR 51.18(j) shall apply to the source or modification as though construction had not yet commenced on the source or modification.

Consolidated Permit Regulations

6. 40 CFR Part 124 is amended as follows:

a. 40 CFR 124.3(b) is deleted and reserved as follows:

§ 124.3 Application for a permit.

* * * * *

(b) [Reserved]

* * * * *

§ 124.5 [Amended]

b. 40 CFR 124.5(g)(2) is revised as follows:

* * * * *

(g) * * *

(2) PSD permits may be terminated only by rescission under § 52.21(w) or by automatic expiration under § 52.21(r). Applications for rescission shall be processed under § 52.21(w) and are not subject to this Part.

§ 124.42 [Amended]

c. The first sentence of 40 CFR 124.42(b) is amended by substituting "submitted" for "requested."

[FR Doc. 80-23788 Filed 8-6-80; 8:45 am]

BILLING CODE 6560-01-M

federal register

Thursday
August 7, 1980

Part IV

Federal Trade Commission

Sale of Used Motor Vehicles; Disclosure and Other Regulation

FEDERAL TRADE COMMISSION

16 CFR Part 455

Sale of Used Motor Vehicles; Disclosure and Other Regulation

AGENCY: Federal Trade Commission.

ACTION: Proposed rule.

SUMMARY: On May 16, 1980, the Federal Trade Commission tentatively adopted the proposed Trade Regulation Rule concerning the Sale of Used Motor Vehicles. The proposed Rule would require dealers to post a window sticker ("Buyers Guide") on used cars offered for sale to consumers. The window sticker would explain to consumers that spoken promises may not be enforceable, and that consumers should ask that all promises be put in writing. The sticker would also list 14 systems of the car (for example, "frame and body", "engine", "transmission and drive shaft".) Dealers would be required to check off the condition of each of these systems as "OK", "Not OK" or "We Don't Know". Additionally, the sticker would inform consumers whether or not a warranty or service contract was offered with the car, and how the warranty, service contract, or the lack of such protection affected the consumer's right to have the dealer make repairs on the car after sale.

An earlier version of the proposal would have required dealers to inspect all used cars that they offered for sale and to report the inspection results on the sticker. The Commission has determined not to adopt a Rule mandating dealers to inspect all vehicles. The proposed Rule as tentatively adopted would not require dealers to inspect all used cars prior to sale, but would require dealers who do not inspect to notify consumers that they have not done so by checking "We Don't Know" on the window sticker. Additionally, dealers would have to disclose all known defects, whether or not they inspect the vehicles.

The proposed Rule has been revised in Section 455.1(a) to include a listing of the acts or practices in the sale of used motor vehicles which are unfair or deceptive in order that the Rule may "define with specificity" the illegal practices in a manner that complies with the decision in *Katharine Gibbs, Inc. v. F.T.C.*, 612 F.2d 658 (2nd Cir. 1979). Before the Commission promulgates the final Rule, it will determine whether compliance with §§ 455.2–455.7 of the Rule constitutes full compliance with the Rule.

The Commission has determined not to require written disclosures concerning repair cost estimates on the window sticker unless the dealer has chosen to make such estimates to the consumer, and has also determined not to require disclosure of whether a vehicle has ever been declared a total insurance loss. These provisions had been included in an earlier version of the proposed Rule.

DATES: Comments will be accepted through October 7, 1980.

ADDRESS: Send comments to Secretary, Federal Trade Commission, 6th Street and Pennsylvania Avenue, NW., Washington, D.C. 20580. Submissions should be labeled "Sale of Used Motor Vehicles."

FOR FURTHER INFORMATION CONTACT: Michael A. Katz or Wallace W. Lovejoy, Federal Trade Commission, 6th and Pennsylvania Ave. NW., Washington, D.C. 20580, (202) 523–1670.

Section A. Invitation to Comment

The Commission believes that this rulemaking has provided interested persons full opportunity to make submissions and presentations on all issues relevant to the tentatively adopted proposed rule. (41 FR 1089; 10233; 20896; 26032; 39337, January 6; March 10; May 21; June 24; September 15, 1976.)

The Commission also believes that the question of whether the remedy selected is reasonably related to the violations found to exist is a matter largely within the Commission's expertise, subject to judicial review. However, the Commission has decided in its discretion, and pursuant to § 1.14(a) of its Rules of Practice, that it would benefit from additional written comments on certain remedial and drafting issues.

Comments are sought on whether the proposed Rule is likely to prevent, diminish the incidence of, or reduce the injury to consumers from the unfair or deceptive acts or practices in the sale of used motor vehicles listed in § 455.1(a) of the Rule. Comments on the format of the window sticker and comments identifying drafting errors are also sought. Comments on issues other than these remedial and drafting issues will not be considered. Written comments will be accepted through October 7, 1980. The Commission does not intend to conduct informal hearings or to permit rebuttal submissions on these issues.

Following the close of the comment period, the Commission will determine whether revisions should be made in the proposed Rule, including the window sticker. An effective date, that provides for a period of congressional review as required by Section 21 of the Federal Trade Commission Improvements Act of 1980, will be announced when the Commission promulgates a final Rule.

Section B. Questions

Interested persons are urged to submit comments on the following questions. Although the proposed Rule (including the window sticker) is drafted in specific language, the Commission retains its authority to promulgate a final Rule in ways suggested by the responses to these questions and based on the rulemaking record. Comments should indicate by number which question(s) are being addressed.

Questions: 1. Is the "Buyers Guide" likely to reduce the incidence of oral misrepresentations by dealers about the mechanical condition of or warranty coverage offered in connection with the sale of used cars? For example, will dealers be less likely than at present to make oral misrepresentations about the mechanical condition of the systems of a used car if the "We Don't Know" box is checked? Will the disclosure of warranty terms on the "Buyers Guide" make it less likely than at present that dealers will orally misrepresent the nature and extent of warranty coverage offered? For what reasons?

2. What are the incentives for dealers to mark "OK", "Not OK", or "We Don't Know"? If some dealers mark the disclosure form "OK," will that put competitive pressure on other dealers to inspect and offer "OK" vehicles as well?

3. When a vehicle's systems are marked "We Don't Know" or "Not OK" on the "Buyers Guide", will buyers be more cautious than at present about relying on oral promises by a dealer that a vehicle is in good mechanical condition? Will it be difficult or easy for dealers to explain away the fact that a vehicle's system is marked "We Don't Know", for example, by stating that they are saving buyers the cost of the inspection? Will buyers believe that a used car marked "OK" is in better condition than a used car marked "We Don't Know"? Will buyers be more or less likely than at present to demand that a dealer perform an inspection or to independently arrange for an inspection if there is a "Buyers Guide" posted on which "We Don't Know" has been marked? Will buyers be less likely than at present to rely on oral promises by a dealer to repair defects after sale if the "No Warranty—'As Is'" disclosure is marked on the "Buyers Guide"? For what reasons?

4. Does the "Buyers Guide" make clear and will buyers understand that the "OK" disclosure is not a promise by the dealer concerning future performance but a description of the condition of 14 vehicle systems at the time of sale? How often will dealers mistakenly mark a system "OK" that is, in fact, "Not OK"? When this occurs, will buyers be misled to their detriment? If a dealer marks a system "OK" and the system breaks down shortly after sale, is the dealer more likely than at present to pay the costs of repair? Will dealers be able to avoid liability by claiming that the system was "OK" when it left the lot? Will buyers be able to show that a defect existed at the time of sale because of the severity of the defect and the short time span between sale and discovery of the defect? Will it be more difficult for buyers to show that the defect existed at the time of sale when the defect first manifests itself after several months? If a dealer marks a system "OK" and then refuses to pay the cost of repair, is it more likely than at present that the dealer will be sued for breach of warranty by an injured consumer or groups of consumers (perhaps represented by legal aid or public interest law groups)? Will it be worthwhile for buyers to bring lawsuits, perhaps in small claims courts, if only $100 or $200 is at stake? Even if it is not likely that a dealer will be sued, will an "OK" disclosure put a buyer in a sufficiently better negotiating position than at present so that a dealer will pay for repairs that become necessary shortly after sale without resort to the courts? Will the "Buyers Guide" make it more difficult than at present for a consumer or groups of consumers to succeed in litigation against a dealer who sold a seriously defective car marked "We Don't Know" or "No Warranty—'As Is' "?

5. Would a "Buyers Guide" that clearly discloses the meaning of "as is" and also clearly discloses the terms of any warranty that is offered, but does not contain a mechanical condition checklist, reduce the incidence of oral misrepresentations by dealers about the condition of used vehicles? Would such a "Buyers Guide" reduce the incidence of buyer reliance on oral promises by a dealer that a vehicle is in good condition? Would such a "Buyers Guide" be more or less effective than the proposed "Buyers Guide" in reducing the incidence of oral misrepresentations by dealers and in reducing the incidence of buyer reliance on oral promises concerning mechanical condition by the dealer?

6. Does the "Buyers Guide" provide information to buyers in a useful and understandable manner? What revisions in format or wording would improve its ability to do so?

7. Are there any technical errors in the wording of the Rule or "Buyers Guide"?

Section C

It is proposed to amend 16 CFR by adding a new Part 455—Used Motor Vehicle Trade Regulation Rule to read as follows:

PART 455—USED MOTOR VEHICLE TRADE REGULATION

Sec.

Authority: 38 Stat. 717, as amended (15 U.S.C. 41 et seq.)

§ 455.1 General duties of a used vehicle dealer; definitions

(a) It is an unfair or deceptive act or practice for any used vehicle dealer, when that dealer sells or offers for sale a used vehicle in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act:

(1) To misrepresent the mechanical condition of a used vehicle;

(2) To fail to disclose, prior to sale, any material defect in mechanical condition of the used vehicle known to the dealer;

(3) To represent that a used vehicle, or any system thereof, is free from material defects in mechanical condition at the time of sale unless the dealer had a reasonable basis for such representation at the time it is made;

(4) To fail to make available, prior to sale, the terms of any express or implied warranty offered in connection with the sale of a used vehicle;

(5) To misrepresent the terms of any express or implied warranty offered in connection with the sale of a used vehicle;

(6) To fail to disclose, prior to sale, that a used vehicle is sold without an express or implied warranty.

(b) In order to prevent the unfair or deceptive acts or practices listed in paragraph (a) of this section, but regardless of whether any such acts or practices have been committed by an individual used vehicle dealer, it is an unfair or deceptive act or practice for any used vehicle dealer to fail to comply with §§ 455.2 through 455.7 of this rule when that dealer sells or offers for sale a used vehicle in or affecting commerce as "commerce" is defined in the Federal Trade Commission Act.

(c) The following definitions shall apply for purposes of this part:

(1) "Vehicle" means any motorized vehicle, other than a motorcycle, with a gross vehicle weight rating (GVWR) of less than 8500 lbs., a curb weight of less than 6000 lbs., and a frontal area of less than 46 sq. ft.

(2) "Used Vehicle" means any vehicle driven more than the limited use necessary in moving or road testing a new vehicle prior to delivery to a consumer, but does not include any vehicle sold only for scrap or parts (title documents surrendered to the state and a salvage certificate issued).

(3) "Dealer" means any person or business which sells or offers for sale a used vehicle after selling or offering for sale five (5) or more used vehicles in the previous twelve (12) month period, but does not include a bank or financial institution, a business selling a used vehicle to an employee of that business, or a lessor selling a leased vehicle to that vehicle's lessee or an employee of the lessee.

(4) "Consumer" means any person who is not a used vehicle dealer.

(5) "Warranty" means any undertaking in writing in connection with the sale by a dealer of a used vehicle to refund, repair, replace, maintain or take other action with respect to such used vehicle and provided at no extra charge beyond the price of the used vehicle.

(6) "Service contract" means a contract in writing for any period of time or any specific mileage to refund, repair, replace, maintain or take other action with respect to a used vehicle and provided at an extra charge beyond the price of the used vehicle.

(7) "Repair insurance" means a contract in writing for any period of time or any specific mileage to refund, repair, replace, maintain or take other action with respect to a used vehicle and which is regulated in your state as the business of insurance.

(8) "You" means any dealer, or any agent or employee of a dealer, except where the term appears on the window form required by § 455.2(a).

§ 455.2 Consumer sales—window form.

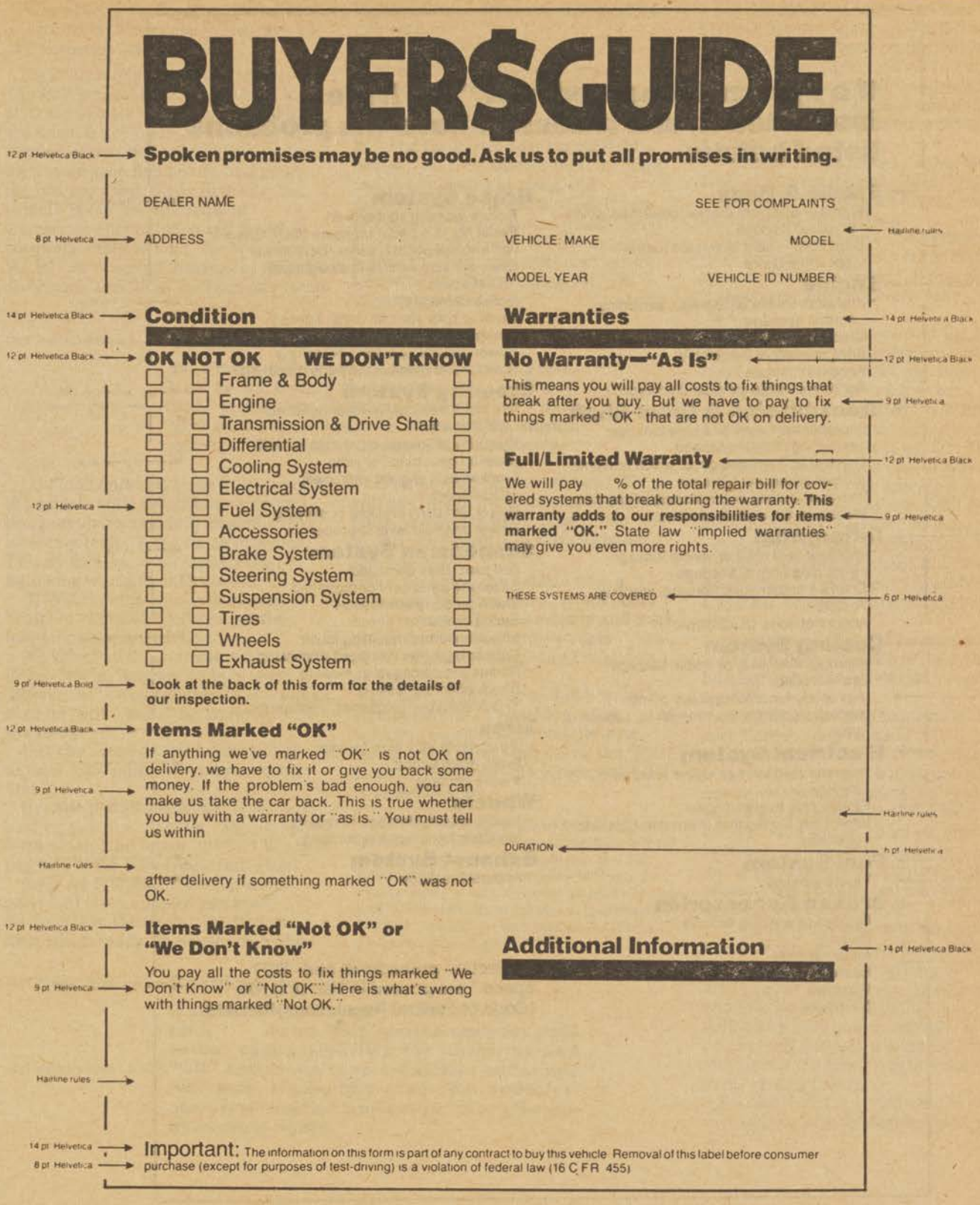
(a) *General duty.* Before you offer a used vehicle for sale to a consumer, you must prepare, fill in as applicable and display on that vehicle a used vehicle "Buyers Guide" as required by this rule.

(1) Use a side window to display the form so both sides of the form can be read, with the title "Buyers Guide" to the

outside. You may remove a form temporarily from the window during any test drive, but you must return it as soon as the test drive is over.

(2) The capitalization, punctuation and wording of all items, headings, and text on the form must be exactly as required by this Rule. The entire form must be printed in 100% black ink on a white stock no smaller than 10.5 inches high by 8.5 inches wide in the type styles, sizes and format indicated.

BILLING CODE 6750-01-M


BUYER$GUIDE
12 pt Helvetica Black
Spoken promises may be no good. Ask us to put all promises in writing.
DEALER NAME
8 pt Helvetica
ADDRESS
SEE FOR COMPLAINTS
Hairline rules
VEHICLE MAKE
MODEL
MODEL YEAR
VEHICLE ID NUMBER
14 pt Helvetica Black
Condition
12 pt Helvetica Black
OK NOT OK WE DON'T KNOW
Frame & Body
Engine
Transmission & Drive Shaft
Differential
Cooling System
Electrical System
12 pt Helvetica
Fuel System
Accessories
Brake System
Steering System
Suspension System
Tires
Wheels
Exhaust System
9 pt Helvetica Bold
Look at the back of this form for the details of our inspection.
12 pt Helvetica Black
Items Marked "OK"
9 pt Helvetica
If anything we've marked "OK" is not OK on delivery, we have to fix it or give you back some money. If the problem's bad enough, you can make us take the car back. This is true whether you buy with a warranty or "as is." You must tell us within
Hairline rules
after delivery if something marked "OK" was not OK.
12 pt Helvetica Black
Items Marked "Not OK" or "We Don't Know"
9 pt Helvetica
You pay all the costs to fix things marked "We Don't Know" or "Not OK." Here is what's wrong with things marked "Not OK."
Hairline rules
14 pt Helvetica
8 pt Helvetica
Important: The information on this form is part of any contract to buy this vehicle. Removal of this label before consumer purchase (except for purposes of test-driving) is a violation of federal law (16 C.F.R. 455)
Warranties
14 pt Helvetica Black
No Warranty—"As Is"
12 pt Helvetica Black
This means you will pay all costs to fix things that break after you buy. But we have to pay to fix things marked "OK" that are not OK on delivery.
9 pt Helvetica
Full/Limited Warranty
12 pt Helvetica Black
We will pay % of the total repair bill for covered systems that break during the warranty. This warranty adds to our responsibilities for items marked "OK." State law "implied warranties" may give you even more rights.
9 pt Helvetica
THESE SYSTEMS ARE COVERED
6 pt Helvetica
Hairline rules
DURATION
6 pt Helvetica
Additional Information
14 pt Helvetica Black

If a system is marked "OK," we have inspected it, and it doesn't have the problems listed below:

Frame & Body
- Frame—apparent cracks, corrective welds, or rusted through
- Dogtracks—bent or twisted frame
- Inoperative doors

Engine
- Known or visible oil leakage, excluding normal seepage
- Cracked block or head
- Belts missing or inoperable
- Knocks or misses
- Abnormal visible exhaust discharge

Transmission & Drive Shaft
- Improper fluid level or visible leakage, excluding normal seepage
- Cracked or damaged case, which is visible
- Abnormal noise or vibration
- Improper shifting or functioning in any gear
- Manual clutch slips or chatters

Differential
- Improper fluid level or visible leakage, excluding normal seepage
- Cracked or damaged housing, which is visible
- Abnormal noise or vibration

Cooling System
- Improper fluid level or visible leakage
- Leaky radiator
- Improperly functioning water pump
- Inadequate antifreeze strength for season of year

Electrical System
- Improper fluid level or visible leakage of battery
- Battery fails to start engine
- Improperly functioning alternator, generator, or starter

Fuel System
- Visible leakage

Broken Accessories
- Gauges or warning devices
- Radio
- Air conditioner
- Heater & defroster
- Windows
- Dash lights

Brake System
- Failure warning light broken
- Pedal not firm under pressure (DOT specs.)
- Not enough pedal reserve (DOT specs.)
- Does not stop vehicle in straight line (DOT specs.)
- Hoses damaged
- Drum or rotor too thin (mfgr. specs.)
- Lining or pad thickness less than 1/32 inch
- Power unit not operating or leaking
- Structural or mechanical parts damaged

Steering System
- Too much free play at steering wheel (DOT specs.)
- Free play in linkage more than 1/4 inch
- Steering gear binds or jams
- Front wheels aligned improperly (DOT specs.)
- Power unit belts cracked or slipping
- Power unit fluid level improper

Suspension System
- Ball joint seals damaged
- Structural parts bent or damaged
- Stabilizer bar disconnected
- Spring broken
- Shock absorber mounting loose
- Rubber bushings damaged or missing
- Radius rod damaged or missing
- Shock absorber leaking
- Shock absorber functioning improperly

Tires
- Tread depth less than 2/32 inch
- Sizes mismatched
- Visible damage

Wheels
- Visible cracks, damage or repairs
- Mounting bolts loose or missing

Exhaust System
- Apparent leakage

Inspection procedures and "DOT specs." are printed in Vol. 16 C.F.R. (Code of Federal Regulations) Part 455.

BILLING CODE 6750-01-C

When filling out the form, follow the directions in paragraphs (b) through (g) of this section and § 455.4.

(b) *Warranties.*—(1) *No Warranty—"As Is"/Implied Warranties Only.* If you offer the vehicle "as is," mark the box provided. If you offer the vehicle with implied warranties only, substitute the disclosure specified below, and mark the box provided. If you first offer the vehicle "as is" or with implied warranties only but then sell it with a warranty, cross out the "No Warranty—'As Is' " or "Implied Warranties Only" disclosure, and fill in the warranty terms in accordance with paragraph (b)(2) of this section.

If your state limits or prohibits "as is" sales of vehicles, that state law overrides this part and this rule does not give you the right to sell "as is." In such states, the heading "No Warranty—'As Is' " and the paragraph immediately below it must be deleted from the form, and the following heading and paragraph must be substituted. If you sell vehicles in states that permit "as is" sales, but you choose to offer implied warranties only, you must also use the following disclosure instead of "No Warranty—'As Is' ".

12 pt Helvetica Black → **Implied Warranties Only**

This means that we do not make any promises to fix things that break after you buy.

9 pt Helvetica Black → **But, state law "implied warranties" may give you some rights to have us fix things marked "OK" if they are not OK on delivery.**

(2) *Full/Limited Warranty.* If you offer the vehicle with a warranty, mark the box provided and briefly describe the warranty terms in the space provided. This description must include the following warranty information:

(i) Whether the warranty offered is "Full" or "Limited." [1] Cross out the inappropriate designation.

(ii) Which of the systems are covered (for example, "engine, transmission, differential"—you cannot use shorthand, such as "drive train," for covered systems);

(iii) The duration (for example, "30 days or 1,000 miles, whichever occurs first");

(iv) The percentage of the repair cost paid by you (for example, "We will pay 100% of the total repair bill" or "We will pay 60% of the total repair bill"); and

(v) If the warranty does not cover parts and labor equally, you must disclose this. Delete the line from the form which reads "We pay —% of the total repair bill." and substitute "We will pay —% of the labor and —% of the parts." Fill in the percentage of the cost of parts and labor you will pay under the warranty.

If you first offer the vehicle with a warranty, but then sell it without one, cross out the offered warranty and mark either the "No Warranty—'As Is' " box or the "Implied Warranties Only" box, as appropriate.

(3) *Service Contracts.* If you make a service contract available on the vehicle, you must add the following heading and paragraph below the "Full/Limited Warranty" disclosure and fill it in as applicable.

[1] A "Full" warranty is defined by the Federal Minimum Standards for Warranty set forth in § 104 of the Magnuson-Moss Warranty Act, 15 U.S.C. § 2304 (1975). The Magnuson-Moss Warranty Act does not apply to vehicles manufactured before July 4, 1975. Therefore, if you choose not to designate "Full" or "Limited" for such cars, cross out both designations, leaving only "Warranty".

12 pt Helvetica Black → **Service Contract**

A services contract is available from for $ extra. This service contract adds to our responsibilities for items marked "OK" and to our responsibilities under any warranty. If you buy a service contract, state law "implied warranties" may give you even more rights.

9 pt Helvetica Black →

(c) *Condition—Inspections.* You may inspect, at your option, any or all of the vehicle systems listed on the front side of the "Buyers Guide" form. You may choose your own inspection procedure, but that procedure must produce the same results as the procedure set out in § 455.7.

For each system listed on the "Buyers Guide," you must mark either "OK," "Not OK," or "We Don't Know" as explained in this section.

(1) "OK": If all parts of a system pass your inspection you may mark that system "OK" on the form. If you do not inspect, you must not mark the system "OK."

(2) "Not OK": If any part of the system does not pass your inspection, and you don't repair the problem, you must mark the system "Not OK" on the form; you must not mark the system "We Don't Know." Also, you must mark a system "Not OK" if you know it would fail an inspection, even if you do not perform an inspection. Use the space provided to explain briefly the problem with each system marked "Not OK." If you give an estimate of the cost to repair the problem, you must provide it in writing on the form. If you repair all problems in a system, you may mark the system "OK."

Examples of "Not OK" explanations:

(i) Sufficient: "Brake master cylinder leaking." Insufficient: "Brakes need work."

(ii) Sufficient: "Engine burns oil." Insufficient: "Engine bad."

(3) "We Don't Know": If you have not inspected all parts of a system and do not know that any part of the system would fail an inspection, you must mark it "We Don't Know." If all parts of a system pass your inspection, but you do not wish to certify the condition of the system to the buyer, you may mark the system "We Don't Know."

You may limit how long the buyer has to notify you about a problem with an item marked "OK" by writing the limitation in the spaces provided on the window form. The limitation may be defined by time and/or mileage. If you do not limit the period to notify, you must insert the term "a reasonable time" in the spaces provided.

(d) *Name and Address.* Put the name and address of your dealership in the

space provided. If you do not have a dealership, use the name and address of your place of business (for example, your service station) or your own name and home address.

(e) *Complaints.* Put the name and telephone number of the person who will settle any complaints after sale in the space provided. This person must have full authority to negotiate and settle complaints for you.

(f) *Make, Model, Model Year, VIN.* Put the vehicle's name (for example, "Chevrolet"), model (for example, "Vega"), model year, and Vehicle Identification Number (VIN) in the spaces provided.

(g) *Additional Information.* You may include in the space provided at the bottom of the form repair insurance information or any other information not prohibited by this rule. Lines or text may be preprinted on the form for this information.

§ 455.3 Window form.

(a) *Part of Contract.* You must incorporate the information on the window form into the contract of sale (sales agreement) for each used vehicle you sell to a consumer by using the following language in each consumer contract of sale:

"The information you see on the window form for this vehicle is part of this contract. If anything in this contract is different, the window form has the correct information."

The capitalization, punctuation and wording of this notice must appear exactly as shown above. The notice must be printed in 12 point extra-boldface type using Roman letters with 100% black ink.

(b) *Copy to Buyer.* Give the buyer of a used vehicle sold by you the original of the window form displayed under § 455.2. If the original cannot be removed from the window without damage, give the buyer a second copy, completed just like the original.

§ 455.4 Contrary statements.

You may not make any statements, oral or written, or do anything which takes away from or contradicts the disclosures in §§ 455.2 and 455.3. You may still negotiate over warranty coverage, as provided in § 455.2(b) of this part, as long as the final warranty terms are identified in the contract of sale and summarized on the copy of the window form you give to the buyer.

§ 455.5 Foreign languages.

(a) *General duty.* If you conduct a sale in a language other than English, the window form required by § 455.2 and the contract disclosures required by § 455.3 must be in that language. You may display on a vehicle both an English language window form and foreign language translation(s) of that form. Where possible, follow the layout requirements of §§ 455.2 and 455.3 (type, type size, color and format) for foreign language forms.

(b) *Spanish language sales.* Use the following translation for Spanish language sales:

BILLING CODE 6750-01-M

GUIA DEL COMPRADOR

12 pt Helvetica Black → **Promesas verbales podrian resultar sin valor. Solicite hagamos todas nuestras promesas por escrito.**

Hairline rules →

DISTRIBUIDOR NOMBRE

8 pt Helvetica → DIRECCION

PARA QUEJAS VER A:

VEHICULO: MARCA MODELO

AÑO NUMERO DE IDENTIFICACIÓN

14 pt Helvetica Black → **Condición**

12 pt Helvetica Black →

OK	No Esta OK		No Sabemos
☐	☐	Chasis y Carroceria	☐
☐	☐	Motor	☐
☐	☐	Transmisión y Eje del motor	☐
☐	☐	Diferencial	☐
☐	☐	Sistema de Enfriamiento	☐
☐	☐	Sistema Eléctrico	☐
☐	☐	Sistema de Combustible	☐
☐	☐	Accessorios	☐
☐	☐	Sistema de Frenos	☐
☐	☐	Sistema de Conducción	☐
☐	☐	Sistema de Suspensión	☐
☐	☐	Llantas	☐
☐	☐	Ruedas	☐
☐	☐	Sistema de Escape	

12 pt Helvetica →

9 pt Helvetica Bold → **Vea en el reverso de ésta forma los detalles de nuestra inspección.**

12 pt Helvetica Black → **Articulos Marcados "O.K."**

9 pt Helvetica → Si algún articulo marcado "O.K." resulta defectuoso a la entrega nosotros tenemos que repararlo o devolverle parte de su dinero. Si el defecto es grave, usted tiene derecho a devolvernos el vehiculo. Esto aplica independientemente de si usted compró el vehiculo con garantia o no. Debe notificarnos dentro de un término de _____ después de la entrega si algo marcado O.K. no lo está.

12 pt Helvetica Black → **Articulos Marcados "No Esta O.K." o "No Sabemos"**

9 pt Helvetica → Usted paga el costo de reparación de articulos marcados "No esta O.K." o "No sabemos". A continuación se encuentra el defecto.

Hairline rules →

Garantias

14 pt Helvetica Black ←

Sin Garantia ("Tal como esta")

12 pt Helvetica Black ←

Usted pagará la reparación de piezas o sistemas que se dañen despues de usted haber comprado el vehiculo. Nosotros tendremos que pagar el costo de la reparación de aquellos articulos que no se encuentren "O.K." a la entrega.

9 pt Helvetica ←

Garantia Completa/Parcial

12 pt Helvetica Black ←

Nosotros pagaremos % de la cuenta total de reparación por esos sistemas incluidos en la garantia si se quiebren. **Esta garantia aumenta nuestra responsabilidad por articulos marcados "O.K.".** Las "garantias implicitas" de la ley estatal podrian reconocerle hasta más derechos que esta garantia.

9 pt Helvetica ←

9 pt Helvetica Bold ←

9 pt Helvetica ←

SISTEMAS INCLUIDOS

6 pt Helvetica ←

Hairline rules ←

TERMINO DE LA GARANTIA

6 pt Helvetica ←

Hairline rules ←

Infórmacion Adicional

14 pt Helvetica Black ←

Hairline rules ←

14 pt Helvetica → **Importante:** La información en ésta forma es parte de cualquier contrato de compraventa de éste vehiculo. Remoción de

8 pt Helvetica → ésta etiqueta antes de la compra de éste vehiculo (excepto para conducción de prueba) constituye una violación a la reglamentación federal (16 C.F.R. 455).

Todo systema marcado "O.K." que hemos inspectado y no tiene los defectos enumerados a continuación

Chasis y Carroceria
Chasis-grietas, soldaduras correctivas, oxidado.
chasis doblado o torcido.
Puertas dañadas.

Motor
Escape de aceite visible, excluyendo gasto por uso normal.
Bloque o cabezal quebrado o trizado.
Correas dañadas o inoperantes.
Fallo o pistoneo.
Descarga excesiva de humo por sistema de escape.

Transmisión y Eje del Motor
Nivel de liquido insuficiente o escape visible, excluyendo filtración normal.
Cubierta aboyada o agrietada.
Vibración o ruido anormal.
Funcionamiento inadecuado o dificultad al cambiar de velocidad
Embriague mecánico patina o vibra.

Diferencial
Nivel de liquido insuficiente o escape visible, excluyendo filtración normal.
Aboyadura o grieta visible en la cubierta.
Vibracion o ruido anormal.

Sistema de Enfriamiento
Nivel de liquido insuficiente o escape visible
Escape en el radiador.
Bomba del agua defectuosa.
Liquido anti-congelante con concentración inadecuada para la estación del año.

Sistema Electrico
Nivel de liquido o escape visible en el acumulador.
Acumulador incapaz de arrancar el motor.
Alternador, generador o motor arrancador defectuoso.

Sistema de Combustible
Escape visible de combustible.

Accesorios Dañados
Relojes o instrumentos de advertencia
Radio
Aire acondicionado
Calentador y descarchador
Ventanas
Luces de la consola

Sistema de Frenos
Luz de advertencia dañadas.
Pedal no firme bajo presión. (Especificaciones Depto. Transportación)
Juego insuficiente en el pedal. (Especificaciones Depto. Transportación)
No detiene vehiculo en linea recta.
Mangas dañadas.
Tambor o rotor muy delgados. (Especificaciones del fabricante)
Espesor de bandas de frenos menor de 1/32 de pulgada.
Unidad motriz dañada o tiene escape.
Piezas dañadas.

Sistema de Dirección
Juego excesivo en la guia. (Especificaciones Depto. Transportación)
Juego en la conección en exceso de 1/4 de pulgada.
Guia se tranca.
Ruedas delanteras desalineadas. (Especificaciones Depto. Transportación)
Correas agrietadas o zafadas.
Nivel de liquido del recipiente al vacio inadequado.

Sistema de Suspensión
Sellos de conexión de bola defectuosos.
Piezas estructurales dobladas o dañadas
Barra de estabilización desconectada.
Resorte roto.
Amortiguador desconectado.
Gomas del amortiguador dañadas.
Bujes de goma dañado o no lo tiene.
Escape de liquido en el amortiguador.
Malfuncionamiento del amortiguador.

Llantas
Profundidad del caucho menor de 2/32 de pulgada.
Tamaño de llantas diferentes.
Daño visible

Ruedas
Trizaduras visibles, daños o reparaciones.
Pernos de montaje sueltos o que faltan.

Sistema de Escape
Escapes visibles.

Los procedimientos de inspección y las especificaciones del departamento de transportación estan publicadas en el volumen 16 C.F.R. (Código de Reglamentos Federales) Parte 455.

BILLING CODE 6750-01-C

§ 455.6 Records.

When you sell a used vehicle, keep a fully filled-in, legible copy of each document that you used or received under §§ 455.2, 455.3, and 455.5. Keep these copies for three years from the date of sale.

§ 455.7 Inspection standards.

To inspect any or all of the vehicle systems for § 455.2(c), use the following inspection procedure or any other procedure that would produce the same results. For non-safety systems (paragraphs (a)–(i) of this section), the inspection procedure includes a test drive, an examination under the chassis, an examination under the hood, and a walk-around inspection. For safety systems (paragraphs (j)–(n) of this section), additional inspection procedures accompany each system. When deciding whether an item is "OK" or "Not OK," treat all vehicles the same; do not use lower standards for older or cheaper vehicles.

(a) *Frame and body.* (1) Frame—apparent cracks, corrective welds or rusted through;

(2) Dogtracks—bent or twisted frame;

(3) Inoperative doors.

(b) *Engine.* (1) Known or visible oil leakage, excluding normal seepage;

(2) Cracked block or head;

(3) Belts missing or inoperable;

(4) Knocks or misses;

(5) Abnormal visible exhaust discharge.

(c) *Transmission and drive shaft.* (1) Improper fluid level or visible leakage, excluding normal seepage;

(2) Cracked or damaged case, which is visible;

(3) Abnormal noise or vibration;

(4) Improper shifting or functioning in any gear;

(5) Manual clutch slips or chatters.

(d) *Differential.* (1) Improper fluid level or visible leakage, excluding normal seepage;

(2) Cracked or damaged housing, which is visible;

(3) Abnormal noise or vibration.

(e) *Cooling system.* (1) Improper fluid level or visible leakage;

(2) Leaky radiator;

(3) Improperly functioning water pump;

(4) Inadequate antifreeze strength for season of year.

(f) *Electrical system.* (1) Improper fluid level or visible leakage of battery;

(2) Battery fails to start engine;

(3) Improperly functioning alternator, generator, or starter.

(g) *Fuel system.* (1) Visible leakage.

(h) *Broken accessories.* (1) Guages or warning devices;

(2) Radio;

(3) Air conditioner;

(4) Heater and defroster;

(5) Windows;

(6) Dash lights.

(i) *Exhaust system.* (1) Apparent leakage.

(j) *Brake system.—General procedure.* Use 25 lbs. of force to test power-assisted or full-power brakes (50 lbs. for non-power brakes) unless a different force is given below.

(1) *Failure warning light (if original equipment).* Procedure: Apply the parking brake and turn the ignition to "start" or test by other means set by the manufacturer to make sure the light works.

(2) *Brake system integrity.* Procedure: With the engine running on vehicles equipped with power brake systems, and the ignition turned to "on" in other vehicles, apply a force of 125 pounds to the brake pedal and hold for 10 seconds. Make sure that there is no decrease in pedal height and that the failure lamp does not light.

(3) *Brake pedal reserve.* Procedure: Depress the brake pedal fully (with the engine running in vehicles equipped with power assisted brakes). The pedal travel must not be more than 80 percent of the distance from the pedal's free position to the floorboard or pedal stop. This test is not needed for full power (central hydraulic) brake systems or for vehicles with brake systems designed to work with more than 80 percent of pedal travel.

(4) *Service brake performance.* Procedure: With the tire pressure at the manufacturer's specification, test by either procedure (a) or (b):

(i) Roller-type or drive-on platform procedure: Using either a drive-on platform or a roller-type brake analyzer which can measure equalization, make sure that the forces applied by the front brakes are within 20 percent of each other and that the forces applied by the rear brakes are within 20 percent of each other. Follow the directions of the maker of the test equipment.

(ii) Road test procedure: Drive on a road that is level (not more than one percent grade), dry, smooth, hard-surfaced and free from loose material, oil or grease. Make sure that the vehicle stops from 20 miles per hour within 25 feet staying in a 12 foot-wide lane.

(5) *Brake hoses and assemblies.* Procedure: Look at all the brake hoses to make sure that the hoses do not touch the vehicle's body or chassis and that the hoses are not cracked, chafed or flattened. Do not count a protective device like a "rub ring" as part of the hose or tubing. Examine the front brake hoses through all wheel positions from full left to right.

(6) *Disc and drum condition.* Procedure: Remove at least one front and one rear wheel and look (measure as needed) to see if the drum diameter and rotor thickness are within the manufacturer's specifications. (Vehicles built after January 1, 1971 and some earlier models have drums embossed with the maximum safe drum diameter dimension and the rotors embossed with the minimum safe rotor thickness dimension.)

(7) *Friction materials.* Procedure: With at least one front and one rear wheel removed, look to see if the brake linings or pads have cracks or breaks that extend to rivet holes, except minor cracks that do not impair attachment. See if the drum brake linings are securely attached to the brake shoes and the disc brake pads are securely attached to the shoe plate. Measure to see if there is at least one thirty-second of an inch of lining left. (With riveted linings, measure the thickness of the lining over the rivet heads. With bonded linings or pads, measure the lining thickness over the shoe surface at the thinnest point on the lining or pad.)

(8) *Brake structural and mechanical parts.* Procedure: With at least one front and one rear wheel removed, look to see if backing plates and caliper assemblies are deformed or cracked; whether system parts are broken, misaligned, missing, binding or severely worn; and if automatic adjusters and other parts are assembled and installed correctly.

(9) *Power brake unit.*

Procedure: With the engine running, look and listen to made sure vacuum hoses are not collapsed, scraped, broken, improperly mounted or leaking audibly. Stop the engine and apply the service brakes several times to destroy vacuum in the system. Depress the brake pedal with 25 pounds of force and start the engine while maintaining that force. The power assist is defective if the brake pedal does not fall slightly when the engine starts. (This test is not needed for vehicles with full power brake systems. The service brake performance test is enough for those vehicles.)

(k) Steering system.—(1) *System play.*

Procedure: With the engine on and the wheels in the straight ahead position, turn the steering wheel in one direction until there is a slight movement of a front wheel. Turn the steering wheel the other way until the same wheel again moves slightly. If you had to turn the steering wheel more than the distance shown in Table I, there is excessive lash or free play in the steering system.

Table I.—*Steering System Free Play Values*

[In inches]

Steering wheel diameter	Lash
16 or less	2
18	2¼
20	2½
22	2¾

(2) *Linkage play.*

Procedure: Elevate the front end of the vehicle to load the ball joints. Insure that the wheel bearings are correctly adjusted. Grasp the front and rear of a tire and attempt to turn the tire and wheel assembly left and right. If the free movement at the front or rear tread of the tire exceeds one-quarter inch there is excessive steering linkage play.

(3) *Free turning.*

Procedure: Turning the steering wheel through the limit of travel in both directions. Feel for binding or jamming in the steering gear mechanisms. (The wheel should turn freely.)

(4) *Alignment.*

Procedure: Toe-in or toe-out must not be greater than 1.5 times the values listed in the vehicle manufacturer's service specification for alignment settings as measured by a bar-type scuff gauge or other toe-in measuring device. Values to convert toe-in readings in inches to scuff gauge readings in feet/mile side-slip for different wheel sizes are provided in Table II. Tire diameters used in computing scuff gauge readings are based on the average maximum tire dimensions of grown tires in service for typical wheel and tire assemblies.

Table II.—*Toe-in settings from vehicle MFR's Service Specifications*

Wheel size (included)	Nominal tire diameter (inches)	Readings in feet per mile sideslip								
		1/16"	1/8"	3/16"	1/4"	5/16"	3/8"	7/16"	1/2"	9/16"
13	25.2	13.1	26.2	39.3	52.4	65.5	78.6	91.7	104.8	117.9
14	26.4	12.5	25.0	37.5	50.0	62.5	75.0	87.5	100.0	112.5
15	28.5	11.5	23.0	34.5	46.0	57.5	69.0	80.5	92.0	103.5
16	35.6	9.3	18.6	27.9	37.2	46.5	55.8	65.1	74.4	83.7

(5) *Power steering system.* Procedure: Examine the fluid reservoir to see that it has enough fluid. Check to see that the pump belts are not cracked or slipping.

(l) *Suspension system.*—(1) *Suspension.* Procedure: Examine the front and rear suspension parts to make sure that the ball joint seals are not cut or cracked; the structural parts are not bent or damaged; the stabilizer bars are connected; the springs are not broken or extended by spacers; the shock absorber mountings, shackles and U-bolts are securely attached; rubber bushings are not cracked, extruded out from or missing from suspension joints; and the radius rods are not missing or damaged.

(2) *Shock absorber.* Procedure: Look at the shock absorbers to make sure their seals are not leaking (oil on the housing leaking from within). Make sure the vehicle does not rock freely more than two cycles by pushing down on one end of the vehicle, releasing and counting the cycles. Repeat at the other end of the vehicle. Test on a level surface.

(m) *Tires.*—(1) *Tread depth.* Procedure: make sure that the tread on each tire is at least two thirty-seconds of an inch deep. On passenger cars look for exposed tread depth indicators (check two adjacent major grooves at three points about equally spaced around the tire). On other vehicles, you may have to measure tread depth with a tread gauge.

(2) *Type.* Procedure: Look to make sure that the tires on each axle are matched in tire size designation, construction and profile, and are not a major deviation in size from the manufacturer's recommendation. (Given on a glove box sign in 1968 or later passenger cars.)

(3) *General condition.* Procedure: Look to make sure that the tires are free from clunking, bumps, knots, or bulges evidencing cord, ply, or tread separation from the casing or other adjacent materials.

(4) *Damage.* Procedure: Look at the tires and use a blunt instrument (to probe cuts or abrasions) to make sure that the tire cords or belting materials are not exposed.

(n) *Wheels.*—(1) *Integrity.* Procedure: Look at the wheels (tire rim, wheel disc, and spider) to make sure that there are no visible cracks, elongated bolt holes, or signs of repair welding.

(2) *Deformation.* Procedure: Use a runout gauge and stand to make sure that the lateral and radial runout of each rim bead area is not more than one-eighth of an inch of total indicated runrout. (Measure each wheel through a full rotation.)

(3) *Mounting.* Procedure: Make sure all wheel nuts and bolts are in place and tight.

§ 455.8 Declaration of Commission intent.

(a) This rule is intended to prevent the unfair or deceptive acts or practices set forth in 455.1(a). By requiring the disclosures of this part, it is not the Commission's intent to preempt state or local laws, rules or regulations which relate to vehicle condition or warranties and which provide greater protection to the consumer than this part provides. It is also not the Commission's intent to preempt by this part other state or local laws, rules or regulations which govern aspects of used vehicle sales other than those regulated by this part.

(b) If, upon application of an appropriate state or local governmental agency, the Commission determines that any requirement of such state or local government (1) affords protection to consumers greater than the requirements of this rule and (2) does not unduly burden interstate commerce, then that requirement shall be applicable to the extent specified in the Commission's determination so long as the state or local government administers and enforces effectively any such greater requirement.

(c) Applications for exemption should be directed to the Secretary of the Commission. When appropriate, proceedings will be commenced in order to make a determination and will be conducted in accordance with Subpart C of Part 1 of the Commission's Rules of Practice.

(d) These Rules, requirements and declaration of intent and their application are each separate and severable.

By direction of the Commission.

Carol M. Thomas,

Secretary.

[FR Doc. 80-23908 Filed 8-6-80; 8:45 am]

BILLING CODE 6750-01-M