4. By amending newly designated Part I of Appendix F of Part 25 by removing the words "of this appendix" wherever they appear and inserting, in their place, the words "Part I of this appendix".

PART 29—AIRWORTHINESS STANDARDS: TRANSPORT CATEGORY ROTORCRAFT

5. By amending § 29.853 by adding a new paragraph (b) as follows:

§ 29.853 Compartment interiors.

* * * * *

(b) In addition to meeting the requirements of paragraph (a)(2), seat cushions, except those on flight crewmember seats, must meet the test requirements of Part II of Appendix F of Part 25 of this chapter, or equivalent.

* * * * *

PART 121—CERTIFICATION AND OPERATIONS: DOMESTIC, FLAG, AND SUPPLEMENTAL AIR CARRIERS AND COMMERCIAL OPERATORS OF LARGE AIRCRAFT

6. By amending § 121.312 by redesignating present paragraphs (a) and (b) as (1) and (2), by redesignating the introductory paragraph as (a), and by adding a new paragraph (b) to read as follows:

§ 121.312 Materials for compartment interiors.

* * * * *

(b) For airplanes type certificated after January 1, 1958, after November 26, 1987, seat cushions, except those on flight crewmember seats, in any compartment occupied by crew or passengers must comply with the requirements pertaining to fire protection of seat cushions in § 25.853(c), effective November 26, 1984, and Appendix F to Part 25 of this chapter, effective November 26, 1984.

(Secs. 313, 314, and 601 through 610, Federal Aviation Act of 1958, as amended (49 U.S.C. 1354, 1355, and 1421 through 1430); 49 U.S.C. 106(g) (Revised, Pub. L. 97–449, January 12, 1983))

Issued in Washington, D.C., on October 23, 1984.

Donald D. Engen,

Administrator.

[FR Doc. 84–28294 Filed 10–23–84; 2:10 pm]

BILLING CODE 4910–13–M

federal register

Friday
October 26, 1984

Part V

Environmental Protection Agency

40 CFR Parts 51 and 52

Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Final and Proposed Rules

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[AD-FRL 2683-1]

Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA here reaffirms its current requirements for the inclusion of fugitive emissions in calculations of whether a source is "major" for purposes of new source review under the Clean Air Act (the "Act"). EPA proposed to delete those requirements at 48 FR 38742 (August 25, 1983). In a companion notice in the **Federal Register**, EPA is proposing to extend the requirements for inclusion of fugitive emissions to surface coal mines, is reopening the comment period on the current list of sources to which these requirements apply, and is soliciting comments on an interpretive ruling regarding the underlying statutory provisions as they relate to consideration of fugitive emissions in the modification of existing sources.

DATES: This reaffirmation takes effect on November 26, 1984. Under section 307(b)(1) of the Act, 42 U.S.C. 7607(b)(1), petitions for judicial review must be filed on or before December 26, 1984, in the United States Court of Appeals for the District of Columbia Circuit.

FOR FURTHER INFORMATION CONTACT: Kirt Q. Cox, New Source Review Section, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711 (919-541-5591, FTS-629-5591).

SUPPLEMENTARY INFORMATION:

I. Introduction

EPA has various rules that regulate the construction of new stationary sources of air pollution and modifications to existing sources. In general, these rules apply only to sources and modifications that are "major." The rules define "major" in terms of annual rates of emissions, for example, 100 tons per year ("tpy"). They require the inclusion of "fugitive emissions" in quantifying emissions rate, but only for 30 listed source categories. "Fugitive emissions" are emissions that could not reasonably pass through a stack or other functionally equivalent opening.

On August 25, 1983, EPA proposed to delete entirely this requirement for the inclusion of fugitive emissions on the grounds that it rests on an incorrect interpretation of the Act (48 FR 38742). After reviewing the comments on the proposal, however, EPA has concluded that the interpretation in question is correct. EPA, therefore, has decided to retain the requirement, but to provide a further opportunity for comment on whether the requirement should not apply to one or more of the 30 categories already listed. In a companion notice in the **Federal Register**, EPA is soliciting comment on that question. In that notice, EPA is also proposing to add surface coal mines to the list and is soliciting comment on a new interpretation of the underlying statutory provisions as they apply to modifications involving fugitive emissions.

This preamble describes the statutory and regulatory background, the comments on the August 1983 proposal, and EPA's responses.

II. Background

A. Statute

Section 110 of the Clean Air Act, 42 U.S.C. 7410, requires each State to have a plan for (1) attaining and maintaining national ambient air quality standards (NAAQS) in all areas of the country, especially in areas that have yet to meet the standards ("nonattainment areas"); and (2) preventing significant deterioration in areas not classified as nonattainment ("PSD areas"). Section 110(a)(2)(D) requires each plan ("State implementation plan" or "SIP") to contain, among other measures, a program for regulating the construction of new stationary sources and modifications, including "a permit program as required in parts C and D * * * and a permit or equivalent program for any major emitting facility * * *." Section 110(a)(2)(I) requires each SIP to contain a ban on the construction or modification of any "major stationary source" in nonattainment areas that lack a SIP that meets the requirements of Part D.

Part C of the Act, 42 U.S.C. 7470-91, specifies a permit program that applies to the construction or modification of any "major emitting facility" in any PSD area. It defines "major emitting facility" as any stationary source that either emits 100 tpy of a pollutant and belongs to one of 28 listed industrial categories or else emits 250 tpy of a pollutant.

Part D of the Act, 42 U.S.C. 7501-08, specifies a permit program that applies to the construction or modification of any "major stationary source" in any nonattainment area. It contains no definition of "major stationary source."

Section 302(j) of the Act, 42 U.S.C. 7602(j), defines both "major stationary source" and "major emitting facility" as follows:

> Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, *as determined by rule by the Administrator*). [Emphasis added.]

B. Initial EPA Interpretation

Following the enactment of the bulk of these statutory provisions in 1977, EPA issued various regulations and guidelines that interpreted and elaborated upon them. In June 1978, EPA promulgated PSD regulations to implement Part C. The regulations appear now at 40 CFR 51.24 (1984) (the "Part 51 PSD regulations") and 40 CFR 52.21 (1984) (the "Part 52 PSD regulations"). In January 1979, EPA revised its Emissions Offset Interpretative Ruling (the "Offset Ruling"), which now appears at 40 CFR Part 51, Appendix S (1984), to conform it to Part D. Then, in April 1979, EPA issued a guideline entitled "General Preamble for Proposed Rulemaking on Approval of Revisions for Nonattainment Areas" that included guidance on the content of Part D permitting programs (*see* 44 FR 20372). Finally, in July 1979, EPA issued an interpretive rule on construction bans for nonattainment areas, which now appears at 40 CFR 52.24 (1984).

In each of these pronouncements, EPA assumed without discussion that the fugitive emissions of a source of modification were to be included in quantifying its emissions rate in order to determine whether it is "major" [*see, e.g.*, 43 FR 26 382-83, 26403-04 (June 19, 1978)]. (EPA refers to these quantifications of emissions rate as "threshold applicability determinations," since they determine whether a project is subject to all the PSD or nonattainment permit requirements or the construction ban.)[1]

[1] A threshold applicability determination is distinct from a pollutant applicability determination, which is a determination of which pollutant streams from a "major" source or "major" modification are subject to the substantive requirements of the regulations in question. The PSD requirements, for instance, apply to each regulated pollutant that a "major" source emits in "significant" amounts. *E.g.*, 40 CFR 52.21(j) (1984).

EPA regarded the Part C definition of "major emitting facility" as exclusively governing the meaning of that term for PSD purposes. Since that definition does not distinguish between fugitive and nonfugitive emissions, EPA concluded that fugitive emissions are as eligible for inclusion in the threshold determinations of PSD applicability as nonfugitive emissions.

One of the consequences of this assumption was that sources of predominately fugitive emissions, such as surface coal mines, could be "major" and hence subject to new source review permit requirements or the construction ban.

C. D.C. Circuit Interpretation

In December 1979, the U.S. Court of Appeals for the District of Columbia Circuit held that EPA may require the inclusion of fugitive emissions in threshold applicability determinations for projects in a particular category only if it has first satisfied the rulemaking requirement of section 302(j) as to that category (*see Alabama Power Company* v. *Costle*, 636 F.2d 325, 369). Unfortunately, the court did not specify what it thought EPA had to consider in such a rulemaking. It did say, however, that:

> EPA's regulation of fugitive emissions has been of special concern to the mining and forestry industries which contend, without serious opposition, that they are incapable of meeting the strict limitations on the emission of particulate matter set by the PSD provisions * * *.
>
> * * * * *
>
> The legislative history of this rulemaking provision [Section 302(j)] is sparse, but *it may well define a legislative response to the policy considerations presented by the regulation of sources where the predominant emissions are fugitive in origin, particularly fugitive dust.* Whatever the motivation of the "rule" provision of 302(j), its existence is unmistakable. Even if the origin of this provision is fortuitous, the provision may well be welcomed as serendipitous, *for it gives EPA flexibility to provide industry-by-industry consideration and appropriate tailoring of coverage.* [*Id.* (emphasis added).]

D. Revisions in Response to Alabama Power

In response to this holding, EPA proposed amendments to both the PSD and nonattainment regulations that would exclude fugitive emissions from threshold applicability determinations except as to 30 listed categories of sources [*e.g.*, 44 FR 51924, 51948 (September 5, 1979)]. Twenty-eight of the categories correspond generally to the categories in the Part C definition of "major emitting facility"; the remaining two categories encompassed any source subject on August 7, 1980, to an emission standard under either Section 111 or 112 of the Act, 42 U.S.C. 7411 or 7412. Surface coal mines were not among the 30 categories (*Id.* at 51931).[2] EPA explained that it was proposing to require the inclusion of fugitive emissions as to those categories because (1) emissions from sources in those categories deteriorate air quality regardless of how they emanate, and (2) the Agency's experience in quantifying fugitive emissions from such sources was in general greater than its experience in quantifying fugitive emissions from other sources (*Id.*).

During the comment period, various industry representatives attacked this test as too undemanding to satisfy the court's opinion. They contended that section 302(j) obliges EPA to determine with some precision and through rulemaking that reasonably satisfactory methods for the measurement, modeling, and control of fugitive emissions[3] from a particular category of sources exist before EPA requires those emissions to be included in threshold applicability determinations [45 FR 52676, 52692 (col. 2) (August 7, 1980)]. Indeed, some contended that EPA had to promulgate such methods in the form of regulations [*Id.* at 52690 (col. 3)].

In its response to comments, EPA pointed out that, according to the D.C. Circuit, Congress intended the substantive PSD requirements to be applied "with equal force" to the fugitive and nonfugitive emissions of any facility that would be "major" by virtue of its nonfugitive emissions, even if EPA has yet to determine that there are reasonably satisfactory measurement, modeling, or control methods for the fugitive emissions [*Id.* at 52691 (quoting 636 F.2d at 369)].[4] Thus, Congress consigned any problems of measurement, modeling, and control in those cases to each individual permit proceeding for resolution by the permitting authority. EPA reasoned that if Congress were willing to accept case-by-case resolution of such problems by the permitting authority in those circumstances, it must have been willing to do the same for projects that would be "major" only if their fugitive emissions were counted (*Id.* at 52691, 52692). Hence, the Agency took the position that section 303(j) obliges it simply to afford the public with an opportunity to oppose the inclusion of fugitive emissions as to particular category, once EPA has determined at the proposal stage that sources in the category could degrade air quality significantly:

> EPA * * * 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. [*Id.* at 52690 (col. 3) (emphasis in original).]

EPA did not specify the grounds on which it thought a commenter could oppose inclusion of fugitive emissions. But the possible candidates include adverse economic or social impacts relative to the benefits associated with the listing of the applicable category. EPA in harmony with its basic reasoning said that it thought that the adequacy of measurement and modeling methods is not by itself "critical in determining whether, as a general policy matter, it is appropriate to include fugitive emissions in the threshold calculations" [*Id.* at 52692 (col. 2)].

In sum, EPA's position was that section 302(j) requires it to determine only that (1) the sources in category could degrade air quality significantly and (2) there were no unreasonable costs compared to the benefits associated with listing the category that commenters raised during the comment period. If no commenter raised on objection, then EPA would have to make only the first determination.

EPA concluded finally that the rulemaking it was conducting had afforded sources the opportunity to comment on the proposed inclusion of fugitive emissions in their threshold calculations (*Id.* a 52961). Hence, in August 1980, it promulgated the substance of the amendments it had proposed (*e.g.*, 45 FR 52739).[5]

---

[2] EPA said it would consider later whether to add strip mines and other sources to the list [*Id.* (col. 2)].

[3] The phrase "measurement of fugitive emissions" refers in this notice to the quantification of the rate at which pollutants emanate "fugitively" from a particular activity at a source, for instance, the rate at which particulate matter emanates from an unpaved road at a surface mine due to truck traffic. The phrase "modeling of fugitive emissions" refers to the prediction through mathematical models of the concentrations of a pollutant in the ambient air that would result from fugitive emissions of the pollutant.

[4] The relevant language from the court's opinion is as follows: The term 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. However, a source emitting large quantities of fugitive emissions may remain outside the definition of major emitting facility and thus may not be subject to the requirements of section 165. [Emphasis added.]

[5] EPA simultaneously promulgated a wide array of other changes to the various new source review

Continued

EPA, however, put the changes into a different form. The new provisions on their face require fugitive emissions to be included in threshold applicability determinations for any project, but then exempt from the relevant PSD or nonattainment requirements any project that (1) would be "major" only if fugitive emissions were included and (2) does not belong to one of the 30 categories [*e.g.*, 40 CFR 52.21 (b)(4), (i)(4)(vii) (1981)].

E. Industry Challenges

In December 1980, the American Mining Congress and various individual mining companies (collectively, "AMC") petitioned EPA for reconsideration of the new PSD provisions. AMC pointed out that, even though the provisions would exempt a mining operation that would be "major" only if fugitive emissions were taken into account for the PSD permit requirements, nevertheless they could affect such an operation adversely in other ways.[6] AMC also observed that the preamble to the regulations strongly indicates that EPA did not intend these results [*see* Petition for Reconsideration of Regulations Relating to the Prevention of Significant Deterioration of Air Quality, Part I (December 1, 1980) hereinafter, "AMC Petition for Reconsideration")].

In a letter dated January 19, 1981, EPA granted the AMC petition. The Agency confirmed that it intended to establish that any project that would be "major" only if fugitive emissions were taken into account is not to be considered "major" for any PSD purpose, unless the project belongs to one of the 30 listed categories. EPA agreed to amend the regulations to conform then to that intention.

In late 1980, AMC and other industry organizations (collectively, the "industry petitioners") petitioned the D.C. Circuit to review the provisions that require the fugitive emissions of projects in the 30 listed categories to be taken into account in threshold applicability determinations. These challenges were subsequently consolidated into *Chemical Manufacturers Association ("CMA")* v. *EPA* (No. 79-1112).[7]

The industry petitioners argued that EPA, before it established those provisions, should have considered the problems of measuring, modeling, and controlling fugitive emissions that are peculiar to each category and then provided—in the words of the *Alabama Power* opinion—"appropriate tailoring of coverage." They also contended that the Act required the Agency to consider, on an industry-by-industry basis, the social, economic, health, and welfare impacts of including fugitive emissions in threshold applicability determinations. They suggested that EPA could decline to require the inclusion of fugitive emissions as to a particular category on the ground that growth in that industry was important to the economy and that the emissions posed low risks to human health and welfare. Finally, the industry petitioners asserted that EPA entirely failed to meet those requirements of the Act [*see* Petitioners Brief on Fugitive Emissions and Certain other Issues, at 12–19 (February 11, 1981) (hereinafter, "Fugitive Emissions Brief")].

In June 1981, EPA began negotiations with the industry petitioners to settle the issues relating to fugitive emissions in the *CMA* case. In February 1982, EPA entered into a settlement agreement with these petitioners in which it agreed to propose to delete the requirement for including fugitive emissions and to take final action on that proposal. Subsequently, the court granted a stay of the case pending implementation of the agreement.

F. D.C. Circuit Decision in Duquesne Light

In January 1983, the D.C. Circuit issued an opinion that is relevant here on EPA's noncompliance penalty regulations under section 120 of the Act (*Duquesne Light Company* v. *EPA*, 698 F.2d 456). The extent of liability for those penalties depends in large measure on whether a source qualifies as a "major stationary source," which is also defined by Section 302(j). The noncompliance penalty regulations simply required the inclusion of fugitive emissions in threshold applicability determinations to the extent they were "regulated by the applicable state implementation plan" [40 CFR 66.3(j)(1981)]. Industry challenged this requirement as failing to satisfy the rulemaking requirement in section 302(j). They asserted:

> To properly notify sources how emissions will be calculated requires the formal promulgation of measurement, modeling, or control techniques, or guidelines for determining the categories to which fugitive emissions will apply and the basis for quantifying such emissions.
>
> * * * * *
>
> EPA has not complied with this Court's command to "provide industry-by-industry consideration and the appropriate tailoring of coverage" [Joint Brief for Industry Petitioners on Applicability of the Regulations, at 48–49 (April 26, 1982)].

The court responded as follows:

> EPA's treatment of fugitive emissions is * * * reasonable. Section 120 penalties against major stationary sources are to be assessed for violations of state SIP's. The use of SIP's to determine whether fugitive emissions should be included in calculating a source's potential to emit reasonably links the noncompliance penalties against major sources with the SIP's that give rise to their assessment.
>
> Moreover, EPA has engaged in the rulemaking required for inclusion of fugitive emissions in the calculation of whether a source is major. [*See* § 302(j)]. In promulgating the PSD regulations, EPA assumed that the rulemaking requirement was inapposite. Here, by contrast, EPA followed SIP regulations in determining whether to include fugitive emissions. As we emphasized in *Alabama Power*, the purpose of the rulemaking requirement may have been to enable EPA to tailor the inclusion of fugitive emissions to particular industrial conditions. Adoption of a SIP involves an exploration of whether industrial conditions in the state warrant limiting fugitive emissions from a particular source. EPA's reliance on the SIP itself to determine whether to include fugitive emissions in the calculation of a source's potential to emit thus met the statutory rulemaking requirement, and we affirm that action. [698 F.2d at 474–75].

G. EPA Proposal

To meet the commitments on fugitive emissions that EPA made to AMC in January 1981 and to industry petitioners in February 1982, EPA proposed certain amendments to its regulations on August 25, 1983 (48 FR 38742). The main effect of these amendments would be (1) to delete the current requirements for including fugitive emissions in threshold applicability determinations, and (2) expressly to exempt from all substantive requirements applicable to "major" projects any project that would be "major" only if its fugitive emissions were included.

In the preamble to the proposal, EPA stated its "preliminary conclusion" that it had misinterpreted section 302(j) when it promulgated the current requirements

---

regulations in effect at the time: not only the Part 51 and 52 PSD regulations, the Offset Ruling, and the construction ban, but also 40 CFR 51.18(j), which set forth the requirements of the Part D permit program and which EPA had first promulgated in May 1980 (45 FR 31307).

EPA did not include strip mines on the list of 30 categories, although the Sierra Club in its comments had argued for their inclusion.

[6] For example, such an operation would consume increment even before the baseline date, if construction on it commenced after January 6, 1975 [*see* 40 CFR 52.21(b)(13)(ii)(a) (1981)].

[7] The Sierra Club challenged the apparent decision to postpone action on whether to list strip mines. The court considered this challenge separately from the challenges in *CMA*.

and hence had failed to go through the necessary rulemaking. EPA identified two new interpretations of how the rulemaking requirement of section 302(j) was to be conducted. One was that:

> [t]he parenthetical [in section 302(j)] obliges EPA, before it may require the inclusion of fugitive emissions in threshold applicability determinations for a particular Clean Air Act program and a particular category of sources, only to (1) identify those problems the sources would encounter in that program that are specifically due to the fugitive nature of their emissions, and (2) determine that reasonable solutions to those problems exist. For the PSD and nonattainment new source review programs and some source categories, those problems may include problems of measurement, modeling, and control (48 FR 38744–45).

The second interpretation was that:

> EPA, before it may require the inclusion of fugitive emissions in threshold applicability determinations [for a particular category of sources], need determine only that reasonable solutions exist for the problems of measurement that are endemic to the fugitive emissions from those sources [48 FR 38745 (col. 1)].

EPA said that it viewed these interpretations as stronger than the one it had adopted in 1980, the one industry had espoused in its brief, or the one that the Natural Resources Defense Council ("NRDC") raised in a September 1982 letter. The NRDC interpretation was that the parenthetical merely requires EPA to identify those sources that are substantial emitters of fugitive emissions [48 FR 38745 (col. 2–3)]. EPA asked commenters, in commenting on these various interpretations, to take the D.C. Circuit decision in *Duquesne Light* into account [*Id.* (col. 3)].

Another effect of the amendments EPA proposed would be to allow credit for net decreases in fugitive emissions in netting calculations under the definition of "major modification," even if EPA had yet to go through the necessary rulemaking for the source in question.[8]

EPA observed that disallowance of credit for net decreases "could result in a company having to obtain a permit [for a source alteration], but not having to satisfy any substantive requirements," and concluded that Congress could not have intended that (48 FR 38746).

In the preamble, EPA recognized that some environmentally significant projects that now would be subject to PSD or nonattainment requirements would escape those requirements if EPA were to make the proposed amendments final before completing the necessary section 302(j) rulemaking. In view of this, EPA said that, if it made the amendments final, it would probably not do so until it had completed the necessary rulemaking as to those projects [48 FR 38747 (col. 1)].[9]

III. Comments

The commenters on the proposal addressed mainly the various interpretations of section 302(j) that EPA had outlined. They also gave views on *Duquesne Light*, the crediting of net decreases in fugitive emissions under the definition of "major modification," the postponement of deletion pending the necessary rulemaking, and the inclusion of fugitive emissions in pollutant applicability determinations. This section summarizes the material comments in each of those areas.

A. Comments Favoring the Industry Interpretation

Many commenters supported roughly the interpretation industry had advanced in its briefs in the *CMA* case. They agreed that section 302(j) requires EPA to conduct a rulemaking to ascertain that reasonable techniques exist for measuring, modeling, and controlling fugitive emissions for each source category. Many commenters further contended that even if emissions from a source can be measured and modeled, there is little point in subjecting the source to PSD review if there is no economically and technically reasonable control methods.

Central to these arguments was *Alabama Power's* observation that section 302(j) contemplates a "legislative response to policy considerations" and gives "flexibility to provide industry-by-industry consideration and the appropriate tailoring of coverage." These commenters viewed such language as requiring EPA to engage in a broad rulemaking, not one limited to consideration of a single technical factor, such as measurement, in disregard of other considerations, such as modeling and control techniques, and important social and economic factors.

Finally, representatives of the mining industry submitted extensive comments on why fugitive dust emissions from mines should not be included in threshold applicability determinations. AMC said that, under the current definition of particulate matter, it would be impossible to permit any but the smallest new or modified mines if mines were brought under the PSD regulations, even if mining operations applied BACT, and even though their emissions present no substantial health or welfare concerns. It would be impossible, AMC asserted, because the mines would cause violations of the PSD increments for particulate matter.

B. Comments Favoring EPA's First Interpretation in the Proposal

EPA's first interpretation of section 302(j) was that it obliges the Agency, before it includes fugitive emissions in threshold applicability determinations, only to (1) identify those problems that sources would encounter in the program in question that are specifically due to the fugitive nature of emissions, and (2) determine that reasonable solutions to those problems exist. One commenter expressly agreed with this interpretation, stating that "emissions must be quantifiable and reasonable solutions must exist." Another commenter stated that its support of EPA's proposal was contingent on EPA's ability to actually resolve within some reasonable time the problems arising from the inclusion of fugitive emissions. This commenter noted that health and welfare effects occur regardless of whether pollutants are emitted from stacks or are fugitive.

C. Comments Favoring EPA's Alternative Interpretation

As noted above, an alternative interpretation that EPA proposed was that section 302(j) requires EPA to determine only that reasonable solutions exist for problems of measurement that are endemic to the fugitive emissions from a source category before it may require inclusion

[8] Specifically, EPA proposed to delete the current exclusion for projects that fall outside the 30 categories and to add a new paragraph to the definitions of "major stationary source" and a similar paragraph to the definition of "major modification." This first paragraph would provide that the "fugitive emissions of a stationary source shall not be included in determining for any of the purposes of [the regulations in question] whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources: [Reserved]" [*See, e.g.*, 48 FR 38753 (col. 2) (Section A(1))]. The second paragraph would provide that "[a]ny net increase in fugitive emissions from a change at a stationary source shall not be included in determining for any of the purposes of [the regulations in question] whether the change is a major modification, unless the source belongs to one of the following categories of stationary sources: [Reserved]" [*See, e.g.*, 48 FR 38753 (col. 3) (Section A(4))].

[9] The day after the publication of this proposal, August 26, 1983, the D.C. circuit issued its decision in *Sierra Club* v. *EPA*, the challenge to EPA's postponement of a decision on whether to add strip mines to the list of 30 categories. The court remanded the postponement, ruling that EPA under the logic of its 1980 action appeared to have no good reason for listing the 30 categories but not strip mines (715 F.2d 653). EPA subsequently agreed, and committed to propose to list or not to list strip mines. The court then ordered EPA to propose one way or the other by a specific date. In a companion notice in the **Federal Register**, EPA is proposing to list strip mines.

of fugitive emissions in threshold applicability determinations.

A State agency strongly supported this interpretation, noting that "the only real difference between fugitive emissions is in the degree of difficulty in measuring emissions rates." This commenter stated that once emission levels are known, there is no important difference in either controlling or modeling fugitive emissions. Modeling fugitive emissions, this commenter stated, is often simply a matter of including deposition factors in the models in order to account for the settling of larger particles.

D. Comments Favoring EPA's 1980 Interpretation

While no commenter directly focused on EPA's 1980 interpretation, several did offer general support for it. For example, the San Diego Air Pollution Control District concluded that Congress did not have in mind the "cumbersome administrative process" that the industry and the proposed EPA interpretations would entail. The District concluded that "Congress * * * provided EPA with the flexibility to subject fugitive emissions to the same requirements as those for nonfugitive emissions if that is deemed appropriate." In addition, the California Air Resources Board expressed support for the existing regulations and recommended that EPA begin work to add to the current list of 30 categories for which fugitive emissions are known to be significant. Other commenters, while not expressly supporting the approach taken in the 1980 rulemaking, strongly supported retention of the coverage of fugitive emissions that it provided. These commenters, such as the Association of Local Air Pollution Control Officials, also generally stressed that "[f]ugitive emissions represent a very significant component of total air pollution emissions for many industrial categories * * *," and that these fugitive emissions have as great an impact on health and welfare as stack emissions.

E. Comments Favoring the NRDC Interpretation

Many commenters favored the NRDC interpretation, which is that section 302(j) requires EPA merely to identify those sources that are substantial emitters of fugitive emissions. They contended that to exclude figitive emissions from threshold applicability determinations would have substantial adverse air quality effects. According to these commenters, section 302(j) performs a sorting function, telling permitting agencies on a category-by-category basis which sources must count fugitive emissions and which need not. The commenters noted that there is nothing in the Act's legislative history that would require a more complicated test. Since Congress was very specific in detailing permit processes, as in sections 165 and 173, it is highly unlikely that Congress, by use of the unadorned word "rule" in section 302(j), intended to establish difficult hurdles for EPA to jump before requiring sources to account for great amounts of fugitive emissions. The only legislative comment on the parenthetical in section 302(j) is the House Report which says simply that "the major stationary source definition is clarified to indicate inclusion of major sources of fugitive emissions. Last year's bill was unclear in this respect." This reflects Congress' appreciation that fugitive emissions, no less than stack emissions, are real pollution.

NRDC added that interpretations that would require EPA to do more than conclude that fugitive emissions can be measured for a source category have absolutely no support in the Act, since section 302(j) relates only to one issue, whether a source emits more than 100 tons per year. Modeling, control technology, and economic and social impacts have nothing to do with this, the commenter noted, and indeed EPA has properly left room for handling the measurement issue in allowing sources to make hardship determinations at the applicability stage.

In rebuttal comments, the American Petroleum Institute (API) criticized NRDC's interpretation on the grounds that it (1) makes the rulemaking requirement of section 302(j) meaningless; (2) violates *Alabama Power's* construction of section 302(j); (3) fails to recognize that the Act distinguishes between fugitive and stack emissions; (4) would unreasonably preclude consideration of measurement, modeling, and control issues which are necessary to apply the PSD requirements and can best be dealt within in the context of national rulemakings rather than individual permit proceedings where individual source owners cannot marshall the same resources and broad-based unput; and (5) would effectively eliminate the "impossibility of compliance" criterion sanctioned by *Alabama Power.*

F. Interpretation of Duquesne Light

Commenters who considered *Duquesne Light* differed in their view of the significance of that court's holding according to the interpretation of section 302(j) that then endorsed.

AMC argued that *Duquesne Light* is not controlling here, despite its "superficial similarity," because the fugitive emissions issue in that case was minor and peripheral. The purpose of including fugitive dust emissions in applicability determinations under Section 120 was simply to impose penalties on companies that it did not comply with State fugitive emissions requirements. But the consequences of including fugitive emissions in PSD determinations, AMC argued, are far more significant, amounting in some cases to a bar on new sources.

Another commenter stated that *Duquesne Light* reaffirms that section 302(j) rulemaking allows EPA to tailor inclusion of fugitive emissions to particular industry conditions, but stated that the same outcome should not necessarily follow for PSD as for the very different section 120 program.

Another commenter stated that *Duquesne Light* supports a view of section 302(j) that requires EPA to determine that "reasonable controls" exist for fugitive source categories. The court limited its holding to sources subject to SIP requirements, which, according to the commenter, generally entail only reasonable controls.

On the other hand, one commenter stated that EPA's proposal goes far beyond any requirement imposed under *Duquesne Light* by placing a heavy burden on EPA both to identify industry fugitive emissions and to come up with reasonable solutions to the problems of modeling and measurement before requiring inclusion of fugitive emissions in threshold applicability determinations. Similarly, NRDC stated that *Duquesne Light* rejected precisely the contentions industry makes in this rulemaking, and upheld the same type of simple sorting determinations that NRDC says are all that section 302(j) requires.

G. Crediting of Decreases in Fugitive Emissions

Most commenters opposed EPA's proposal to credit net decreases in fugitive emissions, but not net increases. These commenters agreed that the proposal in this respect is "anomalous," and stated that increases and decreases should be treated similarly.

One State agency stated that both increases and decreases in fugitive emissions should be taken into account and that it was feasible to quantify most fugitive emissions. Another State agency, in noting that logic would require equal treatment of fugitive emissions increases and decreases, stated that the aim of section 302(j) is not to relax requirements with respect to nonfugitive emissions.

Several commenters stated that EPA should follow the terms of the settlement agreement, which provided for equal treatment of increases and decreases.

The Department of the Interior (DOI) commented that:

> EPA's rationale for allowing credit for decreases in fugitive emissions while excluding increases in determining whether a source is major is flawed. EPA states that if both increases and decreases in fugitive emissions are excluded in determining if a source is a major modification, the result could be that a company might be required to obtain a permit, but not have to satisfy any substantive requirements, if the sum of contemporaneous increases and decreases are less than the values considered "significant" under 40 CFR 52.21(b)(23)(i) * * * Although this could occur in some instances, it is not necessarily true for all situations. For example, this is not true in the case when the sum of contemporaneous fugitive increases and nonfugitive increases exceed fugitive decreases by more than the specific significant pollutant levels. The following example illustrates this point:

	Nonfugitive VOC (TPY)	Fugitive VOC (TPY)
First modification	+39	+2,000
Second modification	+2,039	−2,000
(Contemporaneous with first modification)	+2,078	0

> If increases in fugitive emissions are not included in the PSD applicability determination, the first modification, although increasing emissions by 2039 TPY would be exempt from PSD review (significant VOC level is 40 TPY). The second modification would also be exempt from review if the fugitive decreases are credited. [Note that under current EPA policy, if the sum of increases and decreases resulting directly from a proposed alteration is not "significant," then the alteration cannot be a "major modification," regardless of other contemporaneous emission increases.] However, if fugitive decreases could not be credited, the second modification would trigger the substantive PSD requirements by virtue of a net 2078 TPY increase in contemporaneous emissions. Suppose further that a different source proposes a modification resulting in a 40 TPY increase in nonfugitive VOC emissions. This modification, assuming no contemporaneous decreases, would require PSD review, whereas the first modification emitting 2039 TPY would require no PSD review whatsoever under the proposed revision. These examples illustrate the inconsistency and inequity of crediting decreases while ignoring fugitive emission increases. [Footnote omitted.]

DOI agreed that creditable decreases in fugitive emissions should be allowed, but only if increases are also counted and the decreases result from an enforcement control strategy. It follows logically, DOI stated, that any source category using quantifiable decreases in fugitive emissions should be held liable for any fugitive emissions increase quantified in the same way. DOI noted that past State permitting has produced much information in estimating fugitive emissions from various source categories. Finally, DOI noted that the EPA proposal would encourage piecemeal project development since a source, by breaking a project in two, could get the fugitive sources exempt under the new provisions and then apply for its nonfugitive sources, thereby eliminating review of the fugitive emissions.

In supporting DOI's comments, another commenter noted that it is important that the permit continue to be the authoritative record of the current obligations of each major source because permits are the only reference point for (1) enforcement by EPA and the public; and (2) modeling by subsequent permit applicants in areas to assess the cumulative impact of all PSD sources on increments, NAAQS, and air quality related values of Class I areas. Moreover, this commenter stated, the EPA scenario illustrates why its proposal not to count increases in fugitive emissions is faulty; since Congress did not intend meaningless permits, then it must have intended fugitives to be counted, both increases and decreases.

The American Iron and Steel Institute (AISI) commented that EPA's proposal, though perhaps lacking in symmetrical logic, is justifiable as a practical, realistic interim approach to a short-term problem and, as such, is a reasonable exercise of EPA's discretionary authority. AISI noted that the superficially inconsistent treatment of fugitive emissions increases and decreases is temporary, and will last only until EPA undertakes category-by-category 302(j) rulemaking. In addition, AISI stated that by allowing credit for decreases, EPA provided a strong incentive for companies to develop fugitive emissions measuring, modeling, and control techniques, and this added experience gained during the interim period may aid EPA in making section 302(j) category-by-category determinations.

H. Future Rulemaking on Fugitive Emissions

EPA stated that it planned, if it were still inclined after reviewing comments to delete the current requirements, to withhold final deletion until it completed the necessary rulemaking to reestablish the requirement as to at least some of the 30 categories presently listed.

Many commenters disagreed with this approach and stated that EPA should delete the 30 source categories in accordance with the *CMA* settlement agreement. Some stated that EPA needed to delete the 30 categories now because, under the holding in *Alabama Power*, it simply had no authority to keep them in effect until after it had instituted industry-by-industry rulemaking. API stated that NRDC grossly overestimated the impact of delisting fugitive emissions until completion of an adequate rulemaking.

NRDC stated that while this proposal was an improvement, it had two concerns: (1) That EPA had not indicated how many or which categories are encompassed by the phrase "at least some," and (2) that the entire exercise would be a waste of time since it is clear that EPA will be able to make determinations that fugitive emissions should be included for nearly every source category.

DOI supported withholding immediate deletion because it would avoid the permitting loophole for large sources of fugitive emissions that could adversely affect Class I areas such as national parks.

Other commenters also supported the EPA proposal to avoid confusion, to avoid a rush of applications for permits during the time between this amendment and promulgation of the section 302(j) list, and to avoid the incongruity of reviewing sources subject to PSD under different sets of rules before and after section 302(j) rulemaking.

I. Inclusion of Fugitive Emissions in Pollutant Applicability Determinations

Two commenters stated that, as with threshold applicability determinations, EPA should not include fugitive emissions in pollutant applicability determinations before acting under section 302(j). API stated that applicability determinations, whether for an entire source or an individual pollutant, involve the same function; each examines emissions at a particular stage in the process to determine whether PSD review will be triggered. Any problems relating to quantification, control, and increment compliance which arise in such an inquiry—and are cognizable in section 302(j) rulemakings—will exist irrespective of the context in which fugitives are being considered.

IV. Response to Comments

A. Interpretation of Section 302(j)

EPA has concluded that its 1980 interpretation regarding the nature of the section 302(j) rulemaking requirement was correct. Congress intended that EPA make only two determinations before it required fugitive emissions to be included in threshold applicability determinations for sources in a particular category: (1) That the sources have the potential to degrade air quality significantly and (2) that no unreasonable socioeconomic impacts relative to the benefits would result from subjecting the sources to the relevant PSD or nonattainment programs. Thus, a finding that the sources in a category pose a threat of significant air quality degradation is enough to propose listing, though EPA must consider broader-based objections raised by commenters during the rulemaking before taking final action.[10]

The intention behind section 302(j) is difficult to discern. On the one hand, the "by rule" requirement plainly evidences an intention (1) to shift the policy decision on whether new sources of predominantly fugitive emissions should be subject to PSD and nonattainment review to EPA, and (2) to ensure that EPA makes that decision only after it hears from the general public and the target industries. Contrary to the contentions of NRDC, it is unlikely that Congress intended EPA to determine merely that the sources in a category are substantial emitters, since to determine that requires little expertise and public participation.

On the other hand, the statute and the legislative history strongly suggest that Congress did not intend to require EPA to shoulder the burden of intense, industry-by-industry rulemaking. First, as EPA observed in 1980, the statute does not expressly require EPA to go through rulemaking to require the inclusion of fugitive emissions in pollutant applicability determinations. In fact, section 165(a), 42 U.S.C. 7575(a), by its own terms requires the inclusion of fugitives in such determinations. In addition, the committee report on the bill that first contained the "by rule" requirement completely ignores it, saying only that "the 'major stationary source' definition is clarified to indicate the inclusion of major surces of fugitive emissons (last year's bill was unclear in this respect)." H.R. Rep. No. 95–294, 95th Cong., 1st Sess. at 4 (1977). Similarly, the conference report completely fails to mention the requirement, even though it purports to summarize the definition of "major stationary source" in the House bill. H.R. Report No. 95–564, 95th Cong., 1st Sess. at 192 (1977). If Congress had intended to require the sort of rulemaking effort that industry contends it did, it would have shown at least some recognition of the intensity and massiveness of that effort.

The interpretation of section 302(j) that EPA espoused in 1980 reasonably harmonizes these discordant Congressional signals. A determination by EPA that the sources in a category pose a threat of significant air quality degradation in effect establishes a presumption that the sources should be subject to PSD and nonattainment review. This is because the primary purpose of that review is to prevent the construction of new projects that would interfere materially with timely attainment and maintenance of NAAQS and PSD increments. Commenters then may seek to rebut this presumption by producing a record that unreasonable social or economic costs relative to the anticipated benefits would occur if PSD or nonattainment review were applied to a particular category of sources.[11] In the end, it is EPA's role to resolve any clash of views. Thus, EPA engages in a deliberative process that can go far beyond the virtually ministerial decision-making that NRDC advocates, but that need go beyond it only if and to the extent that there are legitimate, cost/benefit concerns. Under this interpretation, section 302(j) functions as a useful "safety valve," while at the same time minimizing the expenditure of Agency resources.

This "safety valve" interpretation not only harmonizes the signals from Congress, it also is consistent with the relevant case law. It affords EPA precisely the "flexibility to provide industry-by-industry consideration and appropriate tailoring of coverage" that Judge Leventhal had in mind in *Alabama Power*. In addition, it assures that EPA will establish as to each category of sources that rational nexus between the listing and the purposes of the program in question that the D.C. Circuit found essential in *Duquesne Light*. Moreover, the rulemaking potentially "involves an exploration of whether industrial conditions * * * warrant limiting fugitive emissions from a particular source." *Duquesne Light Company* v. *EPA*, 698 F.2d at 475.[12] Finally, the D.C. Circuit has offered a similar approach in an analogous setting. *See Portland Cement Assoc.* v. *Ruckelshaus*, 486 F.2d 375, 387 (col. 2) (1973).[13]

B. Crediting of Decreases in Fugitive Emissions

EPA agrees that its rationale for allowing credit for net decreases in fugitive emissions was flawed primarily for the reasons DOI gave in the comments quoted above.

C. Proposal to Postpone Deletion of the Current Listing Pending Rulemaking

Since EPA has decided to reaffirm the current listing, its proposal to postpone deletion of the listing, and the comments on it, are moot.

D. Inclusion of Fugitive Emissions in Pollutant Applicability Determinations

As EPA indicated above in sections II.D. and IV.A., it does not agree that Congress must have intended the rulemaking requirement of section 302(j) to apply to pollutant applicability determinations.

V. Final Action

In light of its conclusion that its 1980 interpretation was correct, EPA has decided to retain its current requirements for the inclusion of fugitive emissions and, to reconfigure those requirements as they relate to major stationary sources in a form that as to those sources will satisfy its commitment to AMC in January 1981.

---

[10] In adopting this "safety valve" interpretation, EPA does not intend to suggest that it views section 302(j) as prohibiting it from gathering and analyzing cost/benefit data prior to a proposal or a final action under that section. To the contrary, while EPA has concluded that Congress did not intend to require a cost/benefit analysis before proposal, it has also concluded that Congress did not intend to prohibit it, either. Consequently, EPA intends to adhere in the future to applicable requriements for cost/benefit analyses under E.O. 12291 not only with respect to proposals but also with respect to final actions. 46 FR 13193 (1981).

This reaffirmation of the 1980 interpretation goes primarily to the content of the rulemaking requirement in section 302(j) as opposed to the *applicability* of the requirement. As indicated in the companion notice, EPA is inclined to view the requirement as not applying to modifications. For this reason, EPA is withholding final action with respect to that portion of the rulemaking regarding the definition of "major modification" pending a final decision on the new applicability interpretation. EPA is taking final action on the change in the definition of "major stationary source," but is retaining current provisions concerning the treatment of fugitive emissions from modifications.

[11] EPA will consider all available information regarding socioeconomic impacts and associated benefits in arriving at a final decision whether to list or not to list the given source category. EPA will consider a broad range of cost/benefit concerns, including economic efficiency, societal costs and benefits, and distributive costs such as changes in price, employment, and balance in trade.

[12] Further, the court in *Duquesne Light* rejected industry arguments, identical to those made in this proceeding, that EPA should make a much more searching inquiry into the availability of measurement, modeling, and control techniques.

[13] See Footnote, 10.

The amendments EPA is promulgating today are intended to implement this decision. As mentioned, the Agency, elsewhere in today's **Federal Register**, is proposing an interpretive ruling regarding the applicability of the section 302(j) rulemaking requirement to modifications. EPA anticipates final action on the interpretive ruling, after the public comment period, in the form of promulgating, as proposed in the August 25, 1983 **Federal Register**, the amendments to 40 CFR 51.24(i)(4)(ii); 52.21(i)(4)(vii); 51.18(j)(4); Part 51, Appendix S, II.G.; 52.24(h). This will also take the form of not promulgating the changes identified as 40 CFR 51.24(b)(2)(iv); 52.21(b)(2)(iv); 51.18(j)(1)(v)(d); Part 51, Appendix S, II.A.5(iv); 52.24(f)(5)(iv) in the August 25, 1983, proposal.

VI. Parallel Actions

EPA's review of the 1980 rulemaking record has made it aware that that rulemaking could have given fuller notice of EPA's interpretation of section 302(j). Though EPA believes its 1980 rulemaking met the applicable legal standards, section 307(d)(8), 42 U.S.C. 7607(d)(8), as a matter of policy it is soliciting further comment on the listing of the 30 categories in a parallel notice in the "Proposed Rules" section of the **Federal Register**. If EPA receives significant comment on any source category, it will reconsider the listing of that category.

In the same parallel notice, EPA is also proposing to add strip mines to the list of 30 categories and to adopt a new interpretation of Section 302(j) as it relates to modifications.

VII. Miscellaneous

The final actions here are nationally applicable and based on determinations of nationwide scope and effect. Therefore, under section 307(b)(1) of the Act, 42 U.S.C. 7607(b)(1), judicial review may be sought only in the United States Court of Appeals for the District of Columbia Circuit. Petitions for judicial rule must be filed on or before December 26, 1984.

VIII. Regulatory Flexibility Act

As required by section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), I certify that this regulation will not have a significant impact on a substantial number of small entities. This action reaffirms the current requirements and imposes no new costs on any entities, small or large.

IX. E.O. 12291

Under Executive Order 12291, this action is not considered "major." This action reaffirms the current requirements and therefore, does not have an annual effect on the economy of $100 million or more. This action has been submitted to the Office of Management and Budget for review under Executive Order 12291.

List of Subjects

40 CFR Part 51

Administrative practice and procedures, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Ozone, Sulfur oxides, Nitrogen dioxide, Lead, Particulate matter, Hydrocarbon, Carbon monoxide.

40 CFR Part 52

Air pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Lead, Particulate matter, Carbon monoxide, Hydrocarbons.

Authority: Section 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, 7470–79, 7501–08 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: October 19, 1984.

Alvin L. Alm,

Deputy Administrator.

A. Requirements for State PSD Plans

Section 51.24 of Title 40 of the Code of Federal Regulations is amended as follows:

1. By adding a new paragraph (b)(1)(iii) to read as follows: "(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(*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 that 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."

B. New Source Review for PSD Purposes

Section 52.21 of Title 40 of the Code of Federal Regulations is amended as follows:

1. By adding a new paragraph (b)(1)(iii) to read as follows: "(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(*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 that 250 million British thermal units per hour heat input." and
(*aa*) Any other stationary source category which, as of August 7, 1980, is being regulated under Section 111 or 112 of the Act."

C. State Plans for New Source Review for Nonattainment Purposes

Section 51.18 of Title 40 of the Code of Federal Regulations is amended as follows:

1. By adding a new paragraph (j)(l)(iv)(*c*) to read as follows: "(*c*) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this subsection whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(*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."

D. Emission Offset Interpretative Ruling

Appendix S of Part 51 of Title 40 of the Code of Federal Regulations is amended as follows:

1. By adding a new paragraph II.A.4(iii) to read as follows: "(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this ruling whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(*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."

E. Restrictions on Construction for Nonattainment Areas

Section 52.24 of Title 40 of the Code of Federal Regulations is amended as follows:

1. By adding a new paragraph (f)(4)(iii) to read as follows: "(iii) The fugitive emissions of a stationary source shall not be included in determining for any of the purposes of this section whether it is a major stationary source, unless the source belongs to one of the following categories of stationary sources:

(*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."

[FR Doc. 84-28197 Filed 10-25-84; 8:45 am]
BILLING CODE 6560-50-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[AD-FRL 2683-1a]

Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposal of amendments to regulations.

SUMMARY: The various EPA regulations that govern new construction under the Clean Air Act (the "Act") generally apply to "major" new stationary sources of air pollution and "major" modifications of existing sources. They require fugitive emissions to be included in threshold applicability determinations of whether a new project is "major," but only for 30 categories of sources. EPA here proposes to add surface coal mines to the current list of 30 categories and reopens the comment period on the current list. EPA is also soliciting public comment on an interpretive ruling regarding section 302(j) of the Act, 42 U.S.C. 7602(j), as it relates to the review of modifications involving fugitive emissions. In a parallel notice, EPA is announcing its reaffirmation of the current list and the legal interpretation behind it.

DATES: The period for initial comment on the addition of surface coal mines to the current list, on the list itself, and on EPA's legal interpretation of Section 302(j) with respect to modification closes on December 26, 1984. A public hearing on these items will be held in Washington, D.C., on December 3, 1984, and in Denver, Colorado, on December 7, 1984. EPA will hold the public docket for this rulemaking open for 30 days after the close of the initial comment period for the submission of written rebuttal and supplementary information.

ADDRESSES: Comments should be submitted (in triplicate, if possible) to: Central Docket Section (LE-131A), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, Attention: Docket No. A-84-33.

Public Hearing: Room 2126/2409, Waterside Mall, 401 M Street, S.W., Washington, D.C. and EPA Regional Administrator's Conference Room, 9th Floor, 1860 Lincoln Street, Denver, Colorado.

Docket: EPA has established a docket for this rulemaking, Docket No. A-84-33, in accordance with section 307(d) of the Clean Air Act, 42 U.S.C. 7607(d). The docket is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section, West Tower Lobby, Gallery I, 401 M Street, S.W., Washington, D.C. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Kirt Q. Cox, New Source Review Section, Office of Air Quality Planning and Standards, Research Triangle Park, North Carolina 27711, (919-541-5591, FTS-629-5591).

SUPPLEMENTARY INFORMATION:

I. Background

In 1980, EPA overhauled its regulations governing the construction of new stationary sources of air pollution and modifications to existing sources in response to *Alabama Power Company* v. *Costle*, 636 F.2d 323 (D.C. Cir. 1979) [*see* 45 FR 52676 (August 7, 1980)]. The various regulations [1] that emerged from the overhaul apply generally to "major stationary sources" and "major modifications." In addition, they require "fugitive emissions" [2] to be included in threshold applicability determinations of whether a project is "major," but only for 30 source categories.[3] Those categories do not include surface coal mines. EPA said that it would decide at a future time whether to add such mines to the list of 30 categories. The effect of this postponement was to exempt at least temporarily most surface coal mines from the substantive requirements of the relevant PSD and nonattainment regulations.

In requiring the inclusion of fugitive emissions for 30 source categories, EPA took account of section 302(j) of the Clean Air Act, 42 U.S.C. 7602(j), which provides:

> Except as otherwise expressly provided, the terms "major stationary source" and "major emitting facility" mean any stationary facility or source of air pollutants which directly emits, or has the potential (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).

The D.C. Circuit, in *Alabama Power*, held in light of this section that EPA may require the inclusions of fugitive emissions in threshold applicability determinations for a particular source only if it has first established through rulemaking that fugitives are to be included for that class of sources. The court did not specifically list what factors it thought EPA had to consider in such a rulemaking. EPA took the position that the section obliges it, in proposing to require inclusion for a particular category of sources, to determine at least that the sources pose a significant threat of air quality degradation and then, in taking final action, to consider, if commenters objected to the proposal, whether inclusion for the category would produce unreasonable social and economic impacts relative to the anticipated benefits. EPA added that the adequacy of methods of measuring and modeling the fugitive emissions was not by itself a decisive factor in determining whether to require inclusion, suggesting that the potential of social or economic disruption and damage to national security would have much greater weight (*see generally* 44 FR 52690-92).

Various industry and environmental groups, including the Sierra Club, petitioned the D.C. Circuit to review the 1980 regulations, including the provisions relating to fugitive emissions. Industry contended that EPA, in requiring the inclusion of fugitive emissions for the 30 categories, had failed to conduct the rulemaking the court had contemplated. The Sierra Club contended that EPA, in postponing a decision on strip mines, had acted arbitrarily and capriciously. The court consolidated the industry challenges under *Chemical Manufacturers Association (CMA)* v. *EPA*, No. 79-1112, and kept the Sierra Club challenge on its own track.

In 1982, EPA entered into a settlement agreement with the industry petitioners in the *CMA* case. EPA committed to propose, among other things, to delete the requirement for including fugitive emissions for the 30 categories and to take final action on the proposal. The court stayed the litigation pending implementation of the agreement.

On August 25, 1983, 48 FR 38742, EPA proposed to delete that requirement. EPA stated that it had concluded preliminarily that its original

---

[1] One set, 40 CFR 51.24, specifies the minimum requirements that a prevention of significant deterioration (PSD) permit program must contain to warrant approval by EPA as a revision to a State implementation plan (SIP). Another set, 40 CFR 52.21, delineates the Federal PSD permit program, which currently applies in a majority of the States as part of their SIP's. Another set, 40 CFR 51.18(j), specifies the elements of an approvable state permit program for reconstruction review for nonattainment purposes. A fourth set, 40 CFR Part 51, Appendix S, embodies the "Emissions Offset Interpretative Ruling" for certain nonattainment situations. A fifth set, 40 CFR 52.24, embodies the construction moratorium for certain nonattainment areas. A sixth set, 40 CFR 51.18(k), embodies the basic requirement of section 110(a)(2)(D) that each SIP contain a permit program for "major" projects to assure they will not interfere with timely attainment and maintenance of the national ambient air quality standards (NAAQS).

[2] "Fugitive emissions" are emissions that would not pass through a stack or other functionally equivalent opening [*e.g.*, 40 CFR 52.21(b)(20) (1984)].

[3] *See, e.g.*, 40 CFR 52.21 (b)(4), (i)(4)(vii) (1984).

interpretation of section 302(j) was wrong.

In a **Federal Register** notice that parallels this one, EPA is announcing a final action on that proposal which reaffirms the current requirements. EPA states that it has concluded that its original interpretation was correct after all. Thus, EPA continues to view section 302(j) as requiring it to determine only that (1) the sources in a category could degrade air quality significantly, and (2) no factors raised by commenters during the comment period indicate that listing the category would produce unreasonable social and economic impacts when compared to the benefits of listing. In performing rulemaking for a particular source catagory, the Agency regards the first determination as establishing a presumption in favor of listing the category that could be rebutted only by an analysis which proves that unreasonable costs would result taking into account all positive aspects of the listing. The reader should see the companion notice for a more detailed explanation of this "safety valve" interpretation of Section 302(j) and the reaffirmation of the current listing.

Meanwile, on August 26, 1983, in the *Sierra Club* case, the D.C. Circuit remanded EPA's postponement of action on strip mines, ruling that EPA under the logic of its 1980 action appeared to have no good reason for listing the 30 categories but not strip mines (715 F. 2d 653). In EPA's response to the remand, it agreed with that ruling and committed to propose to list or not list strip mines. The court then ordered EPA to propose one way or the other by October 22, 1984.

II. Proposal to List Surface Coal Mines

EPA has concluded on the basis of various studies [4] that surface coal mines do pose a threat of significant air quality degradation. Most such mines of an economically viable size emit in excess of 250 tons per year, the volume of emissions that Congress found significant in section 169(1) of the Act, 42 U.S.C. 7479(1), for sources outside the 28 categories listed in that section. EPA therefore proposed to add surface coal mines to the current list of 30 categories of sources whose fugitive emissions are to be included in threshold applicability determinations. EPA solicits comments on this proposal.[5]

EPA fully expects that weighty objections to the listing of surface coal mines will be raised. EPA expects these to include claims that such mines simply cannot meet PSD requirements if they are listed, and that to prevent the opening of new surface mines by subjecting them to PSD requirements would not serve either the cause of a sound energy policy or the broader national interest. Moreover, surface mines differ from many other sources of pollution in that they must be located where the mineral deposit on which they depend is found, and therefore have limited geographical mobility.

The fact that EPA is proposing to list surface coal mines does not mean that it has determined that these factors lack merit, or that it is in some way unlikely to give weight to them at the time of final promulgation. Rather, as today's companion notice makes clear, EPA believes that the "safety valve" function of section 302(j) is best served if these broader issues are first raised in public comments and thereafter considered by EPA in making its final decision.

Because of particular concern with longstanding problems arising from the regulation of surface mining and the requirements of Executive Order 12291, EPA is independently preparing an analysis of the effects of adding strip mines to the current list.[6] EPA intends to make the results of the study available to the public for comment before the Agency takes final action on today's proposal.

EPA is analyzing the nature of the surface coal mining industry and is assembling information regarding the size, number, location, and lifespan of mines, and the rate, size and location of industry growth. After addressing the population of mines that could be subject to PSD permitting requirements, an analysis will be prepared of the costs of PSD review to them. This includes the cost of preparing a permit application and of applying best available control technology to mine operations. Most significantly, the study is addressing the costs that would accrue to the mining industry as a result of the constraints from the PSD increments. Analysis is also being prepared on the degree of emissions reductions that the increments and NAAQS might require and the estimated benefits to public health and welfare that would arise from it.

This study will also address potential impact on Class I areas. Protection of Class I areas, such as national parks, has long been a special concern and may present a rationale for regulation of mines which would affect them that is considerably stronger than it is for mines locating in order areas. EPA therefore solicits comments on the possibility of restricting the applicability of the relevant regulations to those surface coal mines that would affect Class I areas and possibly the mandatory Class II areas [7] as well. One issue is whether section 302(j) provides authority to list only a subclass of surface coal mines. EPA is inclined to conclude that it does. Another issue is whether the balance of benefits and costs to society justify a distinction along those lines.

In addition, EPA also solicits comment on whether the existing strip mines that the proposed listing would render "major" should consume PSD increment. Section 169(4) of the Act provides that all major emitting facilities on which construction commenced after January 6, 1975, are not to be included in the baseline concentration and instead consume the available PSD increment. A listing of surface coal mines pursuant to section 302(j) would cause many of them to be classified as major sources. This raises the issue whether section 169(4) would require all large mines that commenced construction (even though not then as "major" stationary sources) since January 6, 1975, but prior to today, to retroactively consume increment instead of continuing to contribute to baseline concentration. EPA does not believe that the Congress intended such a disruption to occur. Instead, the Agency believes that it should "grandfather" existing mines from retroactive consumption of increment but seeks public comment on this matter. The effects of not doing so will be addressed to a limited degree in EPA's study.

---

[4] Characterization of PM_{10} and TSP Air Quality Around Western Surface Coal Mines, PEDCo Environmental, Inc., and TRC Environmental Consultants [EPA Contract No. 68-02-3512 (August 1982)].

[5] EPA is obligated to propose visibility new source review SIP's for numerous States under a statement agreement in EDF v. EPA, N.D. Calif. No. C82-6850 RPA. EPA anticipates that such SIP's will contain similar lists of source categories whose fugitive emissions would be included in threshold applicability determinations. EPA also proposed to add surface coal mines to those lists if and when these are promulgated. EPA solicits comment on such an action at this time.

[6] As EPA stated in the companion notice, it does not view section 302(j) as barring the preparation of a cost/benefit analysis prior to a proposal or final action under the section, but rather as allowing EPA not to prepare one. Under normal circumstances, EPA would have prepared such an analysis under E.O. 12291 for the strip mines proposal here. EPA is constrained by the court ordered deadline of October 22, 1984, to propose action on strip mines without having completed such an analysis. Nevertheless, that analysis will be completed prior to final action. Moreover, for future proposals as to other source categories, if any, EPA intends to adhere to the applicable requirements for cost benefit analysis under the Executive Order.

[7] Such areas are described in section 164(a) of the Act, 42 U.S.C. 7474(a).

Any grandfathering from increment consumption granted must be reasonably bounded. The Agency proposes that this exemption be granted to all mines which have commenced construction prior to the date of final action on this notice. "Commencement of construction" is the key term. For the pruposes of this action, EPA suggests that the term includes the receipt of all necessary permits plus certain other activities evidencing a commitment to the project. These may include on-site activity or site specific contracts. Because of the location specific nature of mining permits and possibility that factors other than those applicable to a conventional industrial source may be germaine, EPA solicits comment on an appropriate policy for addressing the potential grandfathering of mines within the presently applicable definitions of commencement of construction. EPA also proposes to extend an exemption from PSD permitting requirements to these same sources. Today's notice contains proposed regulations to accomplish both of these grandfathering actions. Public comment is also solicited on these proposed regulations.

III. Reopening of Comment Period on the List of Thirty Categories

As explained in detail in the companion notice, although EPA has reaffirmed the list of 30 source categories and the underlying statutory interpretation, it recognizes it could have provided a fuller opportunity to comment on the original listing. Therefore, as a policy matter, EPA is reopening the comment period for the current list of 30 categories, and solicits comments on that list.

Consistent with its "safety valve" interpretation of Section 302(j), however, EPA is inclined not to remove a category from the list unless a commenter shows adverse consequences to the board national interest in continuing the listing.

IV. Nonapplicability of Section 302(j) to Modifications

In overhauling its new source review regulations in 1980 and in proposing further amendments in 1983, EPA assumed that the rulemaking requirement in section 302(j) applies to modifications as well as to sources. The litigants and commenters have all carried that assumption into their communications, without evidencing any examination of it. Drawn by the latest round of proposal and comment into examining the assumption, EPA has concluded that it appears to be incorrect. This section of this notice outlines the reasons for that conclusion and solicits comment on it. After evaluating any comments, EPA may translate the conclusion directly without further comment into regulatory amendments.[8]

The literal language of the Act strongly suggests that Congress did not intend the rulemaking requirement in section 302(j) to apply to modifications. First, section 302(j) on its face applies only to new and existing emissions units and, hence, not to modifications. It provides that:

> the terms "major stationary source" and "major emitting facility" mean any *stationary facility or source* [that has a certain pollution potential] (including any major emitting facility or source of fugitive emission * * *, as determined by rule by the Administrator). [42 U.S.C. 7602(j) (emphasis added)].

Plainly, this language explicitly attached the rulemaking requirement only to proposed or actual units; it says nothing about modifications to such units.

In contrast, Parts C and D, the provisions that detail the applicability and content of the PSD and nonattainment new source review program, expressly define the term "modification" by reference to a parallel definition which appears to require the inclusion of fugitive emissions in threshold applicability determinations for modifications. Section 169(2)(C), 42 U.S.C. 7479(2)(C), states, for purposes of Part C, that:

> [t]he term "construction" when used in connection with any source or facility, includes the modification (*as defined in section 111(a) of this title*) of any source or facility. [Emphasis added.]

Similarly, section 171(4), 42 U.S.C. 7501(4), provides, for purposes of both Part D and the construction ban in section 100(a)(2)(I), that:

> [t]he terms "modification" and "modified" mean the same as the term "modification" *as used in section 111(a)(4) of this title.* [Emphasis added.]

Section 111(a)(4), 42 U.S.C. 7411(a)(4), in turn provides that:

> [t]he term "modification" means any physical change in, or change in the method of operation of, a stationary source *which increases the amount of any air pollutant emitted by such source or which results in the emissions of any air pollutant not previously emitted.* [Emphasis added.]

In defining "modification" solely in terms of the total amount of pollution that a source change would produce, section 111(a)(4) suggests that Congress intended to establish here no qualitative distinction between emissions, and, hence, to require the inclusion of fugitive emissions for modifications, without any intermediate rulemaking step.

The legislative history strongly supports this view that Congress intended the section 302(j) rulemaking requirement not to apply to modifications. First, the passages in the relevant House and conference reports that focus on section 302(j) refer, as does section 302(j), only to proposed and existing emissions units, and not at all to modifications [*see* H.R. Report No. 95–294, 95th Cong., 1st Sess. 4, 9, 144 (1977); H.S. Rep. No. 95–564, 95th Cong., 1st Sess. 172 (1977)]. In addition, the explanation by the conference committee of section 169(2)(C) states that it:

> [i]mplements conference agreement to cover "modification" as well as "construction" by defining "construction" in Part C *to conform to usage in other parts of the Act.* [123 Cong. Rec. H 11957, col. 3 (daily ed.) (November 1, 1977) (emphasis added).]

The phrase "usage in other parts of the Act" most probably refers, not only to section 111(a)(4), but also to the EPA regulations implementing section 111 that were in effect at the time. Like section 111(a)(4), those regulations on their face require the inclusion of fugitive emissions in section 111 applicability determination, inasmuch as they concern themselves only with the quantity of the emissions in question [*see* 40 CFR 60.14(a) (1977)]. Finally, EPA and the States prior to enactment of section 302(j) in 1977 made no distinction between fugitive and nonfugitive emissions in threshold applicability determinations [*see, e.g.*, 40 CFR 51.18 (1977); 41 FR 55528 (December 21, 1976) (the original Offset Ruling), 40 CFR 51.21(d)(1) (1977) (original PSD regulations)]. Section 302(j), therefore, ran against the grain of longstanding practice. If Congress had intended a change as to modifications, it probably would have said so explicitly, yet it said nothing.

EPA's new interpretation as to the applicability of the section 302(j) rulemaking requirement is consistent with Congress' purposes. Requiring fugitive emissions to be included in threshold applicability determinations for modifications would not frustrate the protections from the burdens of new source review that the rulemaking requirement affords. Under the Act and EPA regulations, a modification is

[8] Specifically, EPA would not promulgate the amendment to the definition of "major modification" that was proposed on August 25, 1983, namely those proposed as §§ 51.24(b)(2)(iv), 52.21(b)(2)(iv), 51.18(j)(1)(v)(d), II.A.5(iv) of Appendix S to Part 51, and 52.24(f)(5)(iv). EPA would also add a provision to the relevant regulations that would "grandfather" any modifications that (1) would not have been subject to review but for the deletion of those amendments and (2) commenced construction before the final deletion.

"major" and subject to review only if the source at which it would occur is also "major" [*see, e.g.*, 40 CFR 52.21(b)[2](i) (1984)]. Hence, a modification to a source of predominantly fugitive emissions that does not belong to a currently listed category, for instance a surface coal mine, could not be subject to review, even if its fugitive emissions were taken into account, because the source would not be "major". In addition, requiring fugitive emissions to be included in threshold applicability determinations would promote the Congressional goal of minimizing unnecessary burdens. As discussed at length in the preamble to the 1983 proposal and in the comments (*see, e.g.*, 48 FR 38746), the exclusion of fugitive emissions decreases, as well as increases, in threshold applicability determinations for modifications can result in a company having to obtain a permit, but not having to meet any substantive requirements to obtain it. The universal inclusion of fugitive emissions increases and decreases would cure this problem of an empty proceeding. Finally, universal inclusion removes any incentive a company would otherwise have to artifically sequence the construction of a group of modifications so that the modifications that produce only fugitive emissions might escape review on the theory that they are separate and not "major."

V. Miscellaneous

A. Docket

EPA has established a docket for this rulemaking, Docket No. A–84–33. The docket is an organized and complete file of all significant information submitted to or otherwise considered by EPA during this proceeding. The contents of the docket will serve as the record in the case of judicial review under section 307(b) of the Act, 42 U.S.C. 7607(b). The docket is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section, West Tower Lobby, Gallery I, 401 M Street, S.W., Washington, D.C. A reasonable fee may be charged for copying.

B. Public Hearing

EPA will hold a public hearing on December 4, 1984, at 10:00 a.m., in Room 2126/2409, Waterside Mall, 401 M Street, S.W., Washington, D.C., and on December 6, 1984, at 10:00 a.m., in EPA Regional Administrator's Conference Room, 9th Floor, 1860 Lincoln Street, Denver, Colorado. The hearings will be informal. A panel of EPA staff will hear the oral presentations. There will be no cross-examination and no requirement that any person be under oath. Each member of the panel may seek clarification or amplification of any presentation. The presiding officer of the panel may set a time limit for each presentation and may restrict any presentation that would be irrelevant or repetitious. A transcript of each hearing will be made and placed in the rulemaking docket.

Any person who wishes to speak at a hearing should as soon as possible send written notice of this to EPA, give name, address, telephone number, and the length of the presentation. Anyone stating that his or her presentation would be longer than 20 minutes should also state why it need be longer. Each notice should be sent to Kirt Q. Cox, at the address given at the beginning of this notice. EPA will develop a schedule for presentations based on the notices it receives. Anyone who fails to submit a notice, but wishes nevertheless to speak at the hearing should so notify the presiding officer immediately before the hearing. The presiding officer will decide whether, when, and for how long the person may speak. Each speaker should bring extra copies of his or her presentation for the convenience of the hearing panel, the hearing reporter, the press, and other participants. The hearings will be open to the public.

C. Executive Order 12291

Under Executive Order 12291, EPA must prepare a regulatory impact analysis for any regulation that qualifies as a "major rule." A major rule is defined as any regulation that is likely to result in an annual effect on the economy of $100 million or more. EPA has determined that the proposal to list strip mines might have an annual effect on the economy of $100 million or more, and EPA is therefore preparing the economic analysis described above in section II. EPA has determined, on the other hand, that the proposed new interpretation of section 302(j) as it relates to modifications will not have sufficient economic effect to be considered a major rule. The new interpretation will not require large numbers of additional modifications to obtain permits because there are relatively few modifications involving fugitive emissions at major sources other than those sources already on the current list of 30 source categories. Those modifications must presently obtain permits under the existing regulations; therefore, EPA is not preparing a regulatory impact analysis for this portion of the rulemaking.

These regulations have been submitted to the Office of Management and Budget for review under Executive Order 12291. Any comments from the office, and EPA's responses to any such comments, will be placed in the docket for this proceeding and are available for public inspection at the times and place described earlier in this preamble.

D. Economic Impact Assessment

Section 317 of the Clean Air Act, 42 U.S.C. 7617, requires EPA to prepare an economic impact assessment in connection with proposal of any substantial revisions to existing regulations. The economic analysis concerning strip mines that EPA is preparing in order to comply with Executive Order 12291 will also satisfy the requirement for preparation of an economic impact assessment on the proposal to list strip mines. This analysis will be available to the public within the next few months. The comment period on these proposed regulations will be provided to allow the public sufficient time to comment on the analysis. EPA will not be preparing an economic analysis on the new interpretation of section 302(j) as it relates to modifications because this is not a substantial revision. As discussed above, this interpretation will not bring many additional modifications under review.

E. Regulatory Flexibility Act Certification

As required by section 3(a) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), I certify that this regulation will not have a significant adverse impact on a substantial number of small entities. The proposal to list strip mines will primarily effect large mining operations. The proposed new interpretation of section 302(j) as it relates to modifications will not bring a large number of additional modifications into the permitting system.

F. Paperwork Reduction Act

The Office of Management and Budget (OMB) has approved some of the information collection requirements contained in this proposed rule under the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* and has assigned OMB control number 2060–0003. This proposed rule also introduces additional requirements, and these have been transmitted to OMB. Comments on these requirements should be submitted to the office of Information and Regulatory Affairs of OMB, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements.

List of Subjects

40 CFR Part 51

Administrative practice and procedures, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements, Ozone, Sulfur Oxides, Nitrogen dioxide, Lead, particulate matter, Hydrocarbon, Carbon monoxide.

40 CFR Part 52

Air pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Lead, Particulate matter, Carbon monoxide, Hydrocarbons.

Authority: Sections 101(b)(1), 160–169, 171–178, and 301(a) of the Clean Air Act as amended [42 U.S.C. 7401(b)(1), 7410, 7470–79, 7501–08 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: October 19, 1984.

Alvin L. Alm,

Deputy Administrator.

Title 40 of the Code of Federal Regulations, as amended, is proposed to be amended, as follows:

PARTS 51 AND 52—[AMENDED]

A. Requirements for State PSD Plans

§ 51.24 [Amended]

Section 51.24 of Title 40 of the Code of Federal Regulations is proposed to be amended as follows:

1. By redesignating paragraph (aa) of § 51.24(b)(1)(iii), as (bb) to and adding a new paragraph (aa) to read as follows: "(aa) Surface coal mines,";

2. By adding a new paragraph (b)(13)(iii) to read as follows: "(iii) The actual emissions of coal surface mines on which construction commenced prior to [the date that final action for the listing of surface coal mines is published in the **Federal Register**] will not affect the applicable maximum allowable increase, unless such emissions occurred after an applicable baseline date has been established for the affected area."; and

3. By adding a new paragraph (i)(4)(iv) to read as follows: "(iv) The source or modification is a surface coal mine otherwise qualifying as a new or modified major stationary source under this section 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 [the date that final action for the listing of surface coal mines is published in the **Federal Register**];

(*b*) Commenced construction within 18 months from [the date that final action for the listing of surface coal mines is published in the **Federal Register**], or any earlier time required under the 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. New Source Review for PSD Purposes

§ 52.21 [Amended]

Section 52.21 of Title 40 of the Code of Federal Regulations is proposed to be amended as follows:

1. By redesignating paragraph (aa) of § 52.21(b)(1)(iii), as (bb) and adding a new paragraph (aa) to read as follows: "(aa) Surface coal mines,";

2. By adding a new paragraph (b)(13)(iii) to read as follows: "(iii) The actual emissions of coal surface mines on which construction commenced prior to [the date that final action for the listing of surface coal mines is published in the **Federal Register**] will not affect the applicable maximum allowable increase, unless such emissions occurred after an applicable baseline date has been established for the affected area."; and

3. By adding a new paragraph (i)(4)(ix) to read as follows: "(ix) The source or modification is a surface coal mine otherwise qualifying as a new or modified major stationary source under this section 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 [the date that final action for the listing of surface coal mines is published in the **Federal Register**];

(*b*) Commenced construction within 18 months from [the date that final action for the listing of surface coal mines is published in the **Federal Register**], or any earlier time required under the State implementation plan; and

(*c*) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

C. State Plans for New Source Review for Nonattainment Purposes

§ 51.18 [Amended]

Section 51.18 of Title 40 of the Code of Federal Regulations is proposed to be amended as follows:

1. By redesignating paragraph "(27) of § 51.18(j)(1)(iv)(*c*) as (28) and adding a new paragraph (27) to read as follows: "(27) Surface Coal Mines"; and

2. By adding a new paragraph (j)(6) to read as follows: "(6) Each plan may provide that the requirements of this subsection do not apply to the construction of a surface coal mine otherwise qualifying as a new or modified major stationary source under this section if the owner or operator:

(i) Obtained all final federal, state, and local preconstruction approvals or permits necessary under the applicable State implementation plan before [the date that final action for the listing of surface coal mines is published in the **Federal Register**];

(ii) Commenced construction within 18 months from [the date that final action for the listing of surface coal mines is published in the **Federal Register**], or any earlier time required under the State implementation plan; and

(iii) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

D. Emission Offset Interpretative Ruling

Appendix S [Amended]

Appendix S of Part 51 of Title 40 of the Code of Federal Regulations is proposed to be amended as follows:

1. By redesignating paragraph (aa) of II.A.4(iii) as (bb) and adding a new paragraph (aa) to read as follows: "(aa) Surface Coal Mines,"; and

2. By adding a new paragraph II.E. to read as follows: "II.E. Section IV.A. of this Ruling shall not apply to the construction of a coal surface mine otherwise qualifying as a new or modified major stationary source under this section 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 [the date that final action for the listing of surface coal mines is published in the **Federal Register**];

(b) Commenced construction within 18 months from [the date that final action for the listing of surface coal mines is published in the **Federal Register**], or any earlier time required under the State implementation plan; and

(c) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

E. Restrictions on Construction for Nonattainment Areas

§ 52.24 [Amended]

Section 52.24 of Title 40 of the Code of Federal Regulations is proposed to be amended as follows:

1. By redesignating paragraph (aa) of § 52.24(f)(4)(iii) as (bb) and adding a new paragraph (aa) to read as follows: "(aa) Surface Coal Mines,"; and

2. By adding a new paragraph (e) to read as follows: "(e) This section shall not apply to the construction of a surface coal mine otherwise qualifying as a new or modified major stationary source under this section if the owner or operator:

(1) Obtained all final federal, state, and local preconstruction approvals or permits necessary under the applicable State implementation plan before [the data that final action for the listing of surface coal mines is published in the **Federal Register**];

(2) Commenced construction within 18 months from [the date that final action for the listing of surface coal mines is published in the **Federal Register**], or any earlier time required under the State implementation plan; and

(3) Did not discontinue construction for a period of 18 months or more and completed construction within a reasonable time.

[FR Doc. 84-28200 Filed 10-25-84; 8:45 am]
BILLING CODE 6560-50-M

federal register

Friday
October 26, 1984

Part VI

Department of Transportation

Urban Mass Transportation Administration

Fiscal Year 1985 UMTA Formula Grant Apportionments; Notice

DEPARTMENT OF TRANSPORTATION

Urban Mass Transportation Administration

Fiscal Year 1985 UMTA Formula Grant Apportionments

AGENCY: Urban Mass Transportation Administration (UMTA), DOT.

ACTION: Notice.

SUMMARY: The Federal Public Transportation Act of 1982 (Pub. L. 97–424) established a formula grant program for Fiscal Years 1984, 1985 and 1986 under Section 9 and Section 18 of The Urban Mass Transportation Act of 1964, as amended. This Notice provides the Fiscal Year 1985 apportionment of funds to each urbanized area over 200,000 in population, and to State Governors for apportionment to urbanized areas under 200,000 in population and to rural areas.

FOR FURTHER INFORMATION CONTACT: Edward R. Fleischman, Chief, Resource Management Division, (202) 426–2053, 400 Seventh Street, SW., Washington, DC. 20590.

SUPPLEMENTARY INFORMATION: A program of federal assistance to urban mass transportation systems by means of formula grants for capital and operating assistance was enacted January 6, 1983, under the Federal Public Transportation Act of 1982 (Pub. L. 97–424). The legislation is authorized for Fiscal Years 1984, 1985, and 1986. Funds for Fiscal Year 1985 were appropriated by Pub. L. 98–473.

This Notice, based on Census information and operating and financial data contained in the section 15 Report, provides the Fiscal Year 1985 apportionment of section 9 and section 18 funds for urbanized and nonurbanized areas. Applications for section 9 funds should be submitted in conformance with UMTA Circular 9030.1, published June 27, 1983. Applications for section 18 funds should be submitted in conformance with UMTA Circular 9040.1, published September 26, 1983.

The funds shown in this Notice apportioned to urbanized areas will remain available to be obligated by UMTA to recipients for three (3) fiscal years following Fiscal Year 1985, after which time any unobligated funds will become available for reapportionment under section 9. Funds apportioned to nonurbanized areas will remain available to be obligated by UMTA to recipients for two (2) years following Fiscal Year 1985, after which time any unobligated funds will become available for reapportionment under section 18.

Corrections have been made to the data from certain urbanized areas that were used to compute the Fiscal Year 1984 formula grant apportionments published in the **Federal Register** of November 2, 1983 (48 FR 50656). Differences between corrected apportionments and previously published apportionments have been determined, and necessary adjustments have been made by adding to or subtracting from, as appropriate, the apportionments calculated for Fiscal Year 1985.

For urbanized areas over 200,000 in population, funds apportioned under section 9 are based, in part, on data collected through the section 15 reporting system. In the process of collecing these data, there have been repeated problems with late reports, missing certifications and the inclusion of possible erroneous data in vehicle revenue miles (see UMTA Circular 9030.1 for definitions). The issues are summarized below:

Late reports. UMTA regulations require transit agencies to submit section 15 reports within 120 calendar days of the end of their fiscal year. Many agencies have been delinquent in submitting their section 15 report or have submitted incomplete reports. This makes it difficult for UMTA to validate the data and increases the risk of erroneous data being used in the apportionment.

Independent certification. All reporters in urbanized areas of 200,000 or more are required to submit with their section 15 reports a certification by an independent auditor of the recordkeeping system and definitions used to collect data used in the Section 9 apportionment formula. When reporters fail to comply with this requirement, it calls into question the validity of the data submitted.

Deadhead mileage. Certain agencies have not made the appropriate adjustment between total vehicle mileage and vehicle revenue mileage as required. The difference between these two figures represents deadhead mileage, which is not included in the data used for the apportionment. Those urbanized areas that include deadhead mileage in the vehicle revenue mileage reported receive a greater apportionment than they are entitled to while reducing the apportionments of those reporters who follow the definition of revenue vehicle mileage.

These issues have resulted in problems in the timeliness of UMTA's publication of apportionment data, and in some cases raise questions about the validity of certain submitted data. In this connection, UMTA is planning to issue a notice of proposed rulemaking that would propose penalties to address this problem. These penalties could affect an area's ability to receive apportioned funds for failure to report in a timely manner, provide certifications, or submit data which are in accordance with UMTA definitions.

Issued on: October 17, 1984.

Ralph L. Stanley,

Administrator.

BILLING CODE 84-28322-M

FISCAL YEAR 1985 UMTA SECTION 9 FORMULA APPORTIONMENTS
AMOUNTS APPORTIONED TO URBANIZED AREAS OVER 200,000 POPULATION

URBANIZED AREA	APPORTIONMENT
Akron, Ohio	$ 4,929,697
Albany-Schenectady-Troy, New York	8,374,270
Albuquerque, New Mexico	4,312,685
Allentown-Bethlehem-Easton, Pa.-N.J.	3,537,492
Ann Arbor, Michigan	2,323,863
Atlanta, Georgia	25,488,902
Augusta, Georgia-South Carolina	1,613,077
Austin, Texas	3,827,942
Bakersfield, California	2,247,405
Baltimore, Maryland	27,077,092
Baton Rouge, Louisiana	2,919,220
Birmingham, Alabama	4,533,656
Boston, Massachusetts	67,359,107
Bridgeport, Connecticut	5,642,655
Buffalo, New York	10,658,219
Canton, Ohio	1,917,281
Charleston, South Carolina	1,349,742
Charlotte, North Carolina	3,403,943
Chattanooga, Tennessee-Georgia	2,225,477
Chicago, Illinois-Northwestern Indiana	181,648,252
Cincinnati, Ohio-Kentucky	12,524,229
Cleveland, Ohio	25,322,268
Colorado Springs, Colorado	2,510,731
Columbia, South Carolina	1,361,130
Columbus, Georgia-Alabama	1,846,178
Columbus, Ohio	10,713,064
Corpus Christi, Texas	1,846,770
Dallas-Fort Worth, Texas	21,231,745
Davenport-Rock Island-Moline, Iowa-Illinois	2,662,927
Dayton, Ohio	12,563,622
Denver, Colorado	16,865,486
Des Moines, Iowa	2,615,319
Detroit, Michigan	46,240,969
El Paso, Texas	5,691,747
Fayetteville, North Carolina	1,257,625
Flint, Michigan	2,796,941
Fort Lauderdale-Hollywood, Florida	9,082,408
Fort Wayne, Indiana	2,331,787
Fresno, California	3,796,942
Grand Rapids, Michigan	3,794,004
Greenville, South Carolina	1,255,915
Harrisburg, Pennsylvania	2,732,046
Hartford, Connecticut	7,449,961
Honolulu, Hawaii	18,311,649
Houston, Texas	27,272,483
Indianapolis, Indiana	8,029,277
Jackson, Mississippi	1,727,578
Jacksonville, Florida	5,969,070
Kansas City, Missouri-Kansas	8,523,728
Knoxville, Tennessee	2,743,631
Lansing, Michigan	2,631,203
Las Vegas, Nevada	3,164,311
Lawrence-Haverhill, Mass.-New Hampshire	2,765,605
Little Rock-North Little Rock, Arkansas	2,406,903
Lorain-Elyria, Ohio	994,410
Los Angeles-Long Beach, California	142,139,674
Louisville, Kentucky-Indiana	9,456,354
Madison, Wisconsin	$ 4,346,370
Melbourne-Cocoa, Florida	1,128,920
Memphis, Tennessee-Arkansas-Mississippi	7,829,691
Miami, Florida	22,087,236
Milwaukee, Wisconsin	17,224,234
Minneapolis-St. Paul, Minnesota	19,784,348
Mobile, Alabama	1,901,700
Nashville-Davidson, Tennessee	4,608,676
New Haven, Connecticut	6,440,623
New Orleans, Louisiana	14,990,274
Newport News-Hampton, Virginia	3,164,708
New York, N.Y.-Northeastern New Jersey	605,064,321
Norfolk-Portsmouth, Virginia	8,879,475
Ogden, Utah	2,536,128
Oklahoma City, Oklahoma	4,148,307
Omaha, Nebraska-Iowa	6,274,493
Orlando, Florida	4,271,798
Oxnard-Ventura-Thousand Oaks, California	3,692,403
Pensacola, Florida	1,391,021
Peoria, Illinois	2,285,278
Philadelphia, Pennsylvania-New Jersey	108,609,372
Phoenix, Arizona	11,356,875
Pittsburgh, Pennsylvania	33,979,415
Portland, Oregon-Washington	17,405,100
Providence-Pawtucket-Warwick, R.I.-Mass.	13,875,854
Raleigh, North Carolina	1,871,219
Richmond, Virginia	5,557,753
Rochester, New York	7,323,171
Rockford, Illinois	1,995,552
Sacramento, California	8,995,978
St. Louis, Missouri-Illinois	19,985,924
St. Petersburg, Florida	7,537,603
Salt Lake City, Utah	8,889,233
San Antonio, Texas	13,749,546
San Bernardino-Riverside, California	7,792,108
San Diego, California	28,129,504
San Francisco-Oakland, California	103,691,323
San Jose, California	20,909,604
San Juan, Puerto Rico	15,507,178
Sarasota-Bradenton, Florida	2,450,187
Scranton-Wilkes-Barre, Pennsylvania	3,708,253
Seattle-Everett, Washington	34,531,593
Shreveport, Louisiana	2,553,883
South Bend, Indiana-Michigan	2,366,123
Spokane, Washington	4,334,020
Springfield-Chicopee-Holyoke, Mass.-Conn.	5,305,326
Syracuse, New York	5,231,074
Tacoma, Washington	6,002,007
Tampa, Florida	5,540,712
Toledo, Ohio-Michigan	6,501,565
Trenton, New Jersey-Pennsylvania	6,854,298
Tucson, Arizona	5,647,661
Tulsa, Oklahoma	3,730,245
Washington, D.C.-Maryland-Virginia	68,252,428
West Palm Beach, Florida	3,826,276
Wichita, Kansas	2,739,869
Wilmington, Delaware-New Jersey-Maryland	4,147,679
Worcester, Massachusetts	2,795,342
Youngstown-Warren, Ohio	2,574,154

FISCAL YEAR 1985 UMTA SECTION 9 FORMULA APPORTIONMENTS AMOUNTS APPORTIONED TO AREAS UNDER 200,000 POPULATION

STATE/URBANIZED AREA	APPORTIONMENT
ALABAMA:	
Governor's apportionment for areas 50,000 to 200,000 population	$ 5,779,318
Anniston	501,775
Auburn-Opelika	311,952
Decatur	365,425
Dothan	320,267
Florence	490,772
Gadsden	462,476
Huntsville	1,031,991
Montgomery	1,539,604
Tuscaloosa	755,056
Non-urbanized	***1,714,383***
ALASKA:	
Governor's apportionment for areas 50,000 to 200,000 population	***1,171,880***
Anchorage	1,171,880
Non-urbanized	***186,550***
ARIZONA:	
Governor's apportionment for areas 50,000 to 200,000 population	***504,708***
Yuma, Ariz.-Calif.	504,708
Non-urbanized	***648,105***
ARKANSAS:	
Governor's apportionment for areas 50,000 to 200,00 population	***1,702,972***
Fayetteville-Springdale	405,109
Fort Smith, Ark.-Okla.	605,737
Pine Bluff	555,429
Texarkana, Tex.-Ark.	136,697
Non-urbanized	***1,387,894***
CALIFORNIA:	
Governor's apportionment for areas 50,000 to 200,000 population	***17,287,920***
Antioch-Pittsburg	970,617
Chico	449,498
Fairfield	612,068
Hemet	468,180
Lancaster	391,909
Modesto	1,838,887
Napa	640,717
Palm Springs	435,084
Redding	359,436
Salinas	1,188,955
Santa Barbara	1,690,384
Santa Cruz	962,285
Santa Maria	544,206
Santa Rosa	1,344,011
Seaside-Monterey	1,247,299
Simi Valley	837,491
Stockton	2,196,533
Visalia	544,636
Yuba City	563,490
Yuma, Ariz.-Calif.	2,234
Non-urbanized	***3,138,108***
COLORADO:	
Governor's apportionment for areas 50,000 to 200,000 population	$ 3,820,739
Boulder	947,106
Fort Collins	703,674
Grand Junction	457,107
Greeley	672,717
Pueblo	1,040,135
Non-urbanized	***703,095***
CONNECTICUT:	
Governor's apportionment for areas 50,000 to 200,000 population	***16,187,091***
Bristol	666,121
Danbury, Conn.-N.Y.	2,602,453
Meriden	542,368
New Britain	1,340,061
New London-Norwich	1,099,013
Norwalk	2,909,631
Stamford	3,627,840
Waterbury	3,399,604
Non-urbanized	***638,541***
DELAWARE:	
Non-urbanized	***182,661***
FLORIDA:	
Governor's apportionment for areas 50,000 to 200,000 population	***7,987,616***
Daytona Beach	1,319,668
Fort Myers	1,048,156
Fort Pierce	494,377
Fort Walton Beach	619,468
Gainesville	881,149
Lakeland	850,610
Naples	353,753
Ocala	352,607
Panama City	566,425
Tallahassee	947,939
Winter Haven	553,464
Non-urbanized	***1,866,939***
GEORGIA:	
Governor's apportionment for areas 50,000 to 200,000 population	***4,448,850***
Albany	641,762
Athens	474,175
Macon	1,142,323
Rome	361,518
Savannah	1,381,376
Warner Robins	447,696
Non-urbanized	***2,303,529***
HAWAII:	
Governor's apportionment for areas 50,000 to 200,000 population	***1,140,229***
Kailua-Kaneohe	1,140,229
Non-urbanized	***222,725***

FISCAL YEAR 1985 UMTA SECTION 9 AND SECTION 18 FORMULA APPORTIONMENTS AMOUNTS APPORTIONED TO AREAS UNDER 200,000 POPULATION—(*Continued*)

STATE/URBANIZED AREA	APPORTIONMENT
IDAHO:	
Governor's apportionment for areas 50,000 to 200,000 population	$ ***1,654,671***
Boise City	1,194,830
Pocatello	459,841
Non-urbanized	***608,682***
ILLINOIS:	
Governor's apportionment for areas 50,000 to 200,000 population	***10,975,638***
Alton	722,669
Aurora	1,449,977
Beloit, Wis.-Ill.	51,766
Bloomington-Normal	943,789
Champaign-Urbana	1,357,578
Danville	473,243
Decatur	971,748
Dubuque, Iowa-Ill.	19,745
Elgin	1,082,924
Joliet	1,559,194
Kankakee	639,637
Round Lake Beach	504,341
Springfield	1,199,027
Non-urbanized	***2,523,246***
INDIANA:	
Governor's apportionment for areas 50,000 to 200,000 population	***6,760,551***
Anderson	614,782
Bloomington	693,836
Elkhart-Goshen	697,210
Evansville, Ind.-Ky.	1,566,186
Kokomo	635,885
Lafayette-West Lafayette	993,554
Muncie	893,351
Terre Haute	665,747
Non-urbanized	***2,327,051***
IOWA:	
Governor's apportionment for areas 50,000 to 200,000 population	***3,770,914***
Cedar Rapids	1,179,170
Dubuque, Iowa-Ill.	633,129
Iowa City	501,182
Sioux City, Iowa-Nebr.-S.Dak.	626,699
Waterloo	830,734
Non-urbanized	***1,596,402***
KANSAS:	
Governor's apportionment for areas 50,000 to 200,000 population	***1,620,996***
Lawrence	533,689
St. Joseph, Mo.-Kans.	8,831
Topeka	1,078,476
Non-urbanized	***1,215,555***

STATE/URBANIZED AREA	APPORTIONMENT
KENTUCKY:	
Governor's apportionment for areas 50,000 to 200,000 population	$ ***3,429,414***
Clarksville, Tenn.-Ky.	190,232
Evansville, Ind.-Ky.	205,123
Huntington-Ashland, W.Va.-Ky.-Ohio	483,991
Lexington-Fayette	1,871,434
Owensboro	678,634
Non-urbanized	***1,955,756***
LOUISIANA:	
Governor's apportionment for areas 50,000 to 200,000 population	***4,005,619***
Alexandria	711,613
Houma	462,826
Lafayette	1,057,102
Lake Charles	913,826
Monroe	860,252
Non-urbanized	***1,614,353***
MAINE:	
Governor's apportionment for areas 50,000 to 200,000 population	***1,729,170***
Bangor	367,130
Lewiston-Auburn	435,028
Portland	844,076
Portsmouth-Dover-Rochester, N.H.-Maine	82,936
Non-urbanized	***705,181***
MARYLAND:	
Governor's apportionment for areas 50,000 to 200,000 population	***1,517,943***
Annapolis	549,645
Cumberland, Md.-W.Va.	440,300
Hagerstown, Md.-Pa.	527,998
Non-urbanized	***866,367***
MASSACHUSETTS:	
Governor's apportionment for areas 50,000 to 200,000 population	***7,565,099***
Brockton	1,796,287
Fall River, Mass.-R.I.	1,429,016
Fitchburg-Leominster	527,785
Lowell, Mass.-N.H.	1,535,136
New Bedford	1,546,875
Pittsfield	403,643
Taunton	326,357
Non-urbanized	***1,040,942***
MICHIGAN:	
Governor's apportionment for areas 50,000 to 200,000 population	***6,731,839***
Battle Creek	605,859
Bay City	695,318
Benton Harbor	509,917
Jackson	722,463
Kalamazoo	1,313,226
Muskegon-Muskegon Heights	865,851
Port Huron	522,972
Saginaw	1,496,233
Non-urbanized	***2,803,290***

FISCAL YEAR 1985 UMTA SECTION 9 AND SECTION 18 FORMULA APPORTIONMENTS AMOUNTS APPORTIONED TO AREAS UNDER 200,000 POPULATION—(*Continued*)

STATE/URBANIZED AREA	APPORTIONMENT
MINNESOTA:	
Governor's apportionment for areas 50,000 to 200,000 population	$ 2,286,805
Duluth-Superior, Minn.-Wis.	682,133
Fargo-Moorhead, N.Dak.-Minn.	323,287
Grand Forks, N.Dak.-Minn.	76,704
La Crosse, Wis.-Minn.	32,793
Rochester	623,722
St. Cloud	548,166
Non-urbanized	1,628,684
MISSISSIPPI:	
Governor's apportionment for areas 50,000 to 200,000 population	2,168,968
Biloxi-Gulfport	1,314,635
Hattiesburg	400,742
Pascagoula-Moss Point	453,591
Non-urbanized	1,556,077
MISSOURI:	
Governor's apportionment for areas 50,000 to 200,000 population	2,673,238
Columbia	486,432
Joplin	381,668
St. Joseph, Mo.-Kans.	627,428
Springfield	1,177,710
Non-urbanized	1,849,814
MONTANA:	
Governor's apportionment for areas 50,000 to 200,000 population	1,934,407
Billings	765,275
Great Falls	667,113
Missoula	502,019
Non-urbanized	465,618
NEBRASKA:	
Governor's apportionment for areas 50,000 to 200,000 population	1,820,643
Lincoln	1,729,893
Sioux City, Iowa-Nebr.-S.Dak.	90,750
Non-urbanized	753,658
NEVADA:	
Governor's apportionment for areas 50,000 to 200,000 population	1,464,378
Reno	1,464,378
Non-urbanized	165,389
NEW HAMPSHIRE:	
Governor's apportionment for areas 50,000 to 200,000 population	2,189,420
Lowell, Mass.-N.H.	5,339
Manchester	969,353
Nashua	663,466
Portsmouth-Dover-Rochester, N.H.-Maine	551,262
Non-urbanized	505,466

STATE/URBANIZED AREA	APPORTIONMENT
NEW JERSEY:	
Governor's apportionment for areas 50,000 to 200,000 population	$ 1,716,512
Atlantic City	1,202,718
Vineland-Millville	513,794
Non-urbanized	864,448
NEW MEXICO:	
Governor's apportionment for areas 50,000 to 200,000 population	830,083
Las Cruces	442,780
Santa Fe	387,303
Non-urbanized	626,312
NEW YORK:	
Governor's apportionment for areas 50,000 to 200,000 population	5,472,688
Binghamton	1,531,416
Danbury, Conn.-N.Y.	17,500
Elmira	667,687
Glens Falls	394,997
Newburgh	489,842
Poughkeepsie	1,078,323
Utica-Rome	1,292,923
Non-urbanized	3,033,154
NORTH CAROLINA:	
Governor's apportionment for areas 50,000 to 200,000 population	9,378,989
Asheville	708,661
Burlington	503,870
Concord	502,540
Durham	1,387,166
Gastonia	773,629
Goldsboro	392,329
Greensboro	1,555,328
Hickory	418,370
High Point	737,446
Jacksonville	492,872
Wilmington	599,463
Winston-Salem	1,307,315
Non-urbanized	3,125,013
NORTH DAKOTA:	
Governor's apportionment for areas 50,000 to 200,000 population	1,644,380
Bismarck-Mandan	524,040
Fargo-Moorhead, N.Dak.-Minn.	636,270
Grand Forks, N.Dak.-Minn.	484,070
Non-urbanized	383,301
OHIO:	
Governor's apportionment for areas 50,000 to 200,000 population	5,326,321
Hamilton	965,018
Huntington-Ashland, W.Va.-Ky.-Ohio	279,732

FISCAL YEAR 1985 UMTA SECTION 9 AND SECTION 18 FORMULA APPORTIONMENTS AMOUNTS APPORTIONED TO AREAS UNDER 200,000 POPULATION—(*Continued*)

STATE/URBANIZED AREA	APPORTIONMENT
OHIO—*Continued*:	
Lima	$ 613,790
Mansfield	607,724
Middletown	685,881
Newark	412,834
Parkersburg, W.Va.-Ohio	68,176
Sharon, Pa.-Ohio	40,935
Springfield	954,214
Steubenville-Weirton, Ohio-W.Va.-Pa.	376,243
Wheeling, W.Va.-Ohio	321,774
Non-urbanized	***3,430,836***
OKLAHOMA:	
Governor's apportionment for areas 50,000 to 200,000 population	***1,159,915***
Enid	372,302
Fort Smith, Ark.-Okla.	14,100
Lawton	773,513
Non-urbanized	***1,416,362***
OREGON:	
Governor's apportionment for areas 50,000 to 200,000 population	***3,706,638***
Eugene	1,905,967
Longview, Wash.-Oreg.	9,759
Medford	466,095
Salem	1,324,817
Non-urbanized	***1,099,368***
PENNSYLVANIA:	
Governor's apportionment for areas 50,000 to 200,000 population	***10,613,630***
Altoona	819,104
Erie	2,091,982
Hagerstown, Md.-Pa.	6,783
Johnstown	861,479
Lancaster	1,462,661
Monessen	506,617
Reading	1,952,038
Sharon, Pa.-Ohio	449,423
State College	612,006
Steubenville-Weirton, Ohio-W.Va.-Pa.	1,873
Williamsport	565,016
York	1,284,648
Non-urbanized	***3,782,198***
PUERTO RICO:	
Governor's apportionment for areas 50,000 to 200,000 population	***7,415,680***
Aguadilla	593,324
Arecibo	679,573
Caguas	1,591,575
Mayaguez	1,114,570
Ponce	2,619,528
Vega Baja-Manati	817,110
Non-urbanized	***1,189,688***
RHODE ISLAND:	
Governor's apportionment for areas 50,000 to 200,000 population	***590,068***
Fall River, Mass.-R.I.	128,553
Newport	461,515
Non-urbanized	***125,931***
SOUTH CAROLINA:	
Governor's apportionment for areas 50,000 to 200,000 population	***$ 1,853,926***
Anderson	381,020
Florence	401,385
Rock Hill	359,219
Spartanburg	712,302
Non-urbanized	***1,556,284***
SOUTH DAKOTA:	
Governor's apportionment for areas 50,000 to 200,000 population	***1,177,652***
Rapid City	427,975
Sioux City, Iowa-Nebr.-S.Dak.	12,321
Sioux Falls	737,356
Non-urbanized	***444,667***
TENNESSEE:	
Governor's apportionment for areas 50,000 to 200,000 population	***2,017,425***
Bristol, Tenn.-Bristol, Va.	195,679
Clarksville, Tenn.-Ky.	370,488
Jackson	357,809
Johnson City	551,487
Kingsport, Tenn.-Va.	541,962
Non-urbanized	***2,017,400***
TEXAS:	
Governor's apportionment for areas 50,000 to 200,000 population	***18,556,838***
Abilene	690,001
Amarillo	1,226,886
Beaumont	931,266
Brownsville	959,046
Bryan-College Station	659,565
Galveston	536,539
Harlingen-San Benito	515,657
Killeen	786,285
Laredo	1,260,572
Longview	494,548
Lubbock	1,443,414
McAllen-Pharr-Edinburg	1,500,013
Midland	607,011
Odessa	916,460
Port Arthur	827,111
San Angelo	620,847
Sherman-Denison	383,852
Temple	354,292
Texarkana, Tex.-Ark.	338,825
Texas City-La Marque	682,733
Tyler	623,772
Victoria	487,205
Waco	933,798
Wichita Falls	777,140
Non-urbanized	***4,108,567***

FISCAL YEAR 1985 UMTA SECTION 9 AND SECTION 18 FORMULA APPORTIONMENTS AMOUNTS APPORTIONED TO AREAS UNDER 200,000 POPULATION—(*Continued*)

STATE/URBANIZED AREA	APPORTIONMENT
UTAH:	
Governor's apportionment for areas 50,000 to 200,000 population	$ ***1,503,979***
Provo-Orem	1,503,979
Non-urbanized	***331,364***
VERMONT:	
Governor's apportionment for areas 50,000 to 200,000 population	***586,413***
Burlington	586,413
Non-urbanized	***350,321***
VIRGINIA:	
Governor's apportionment for areas 50,000 to 200,000 population	***4,203,228***
Bristol, Tenn.-Bristol, Va.	152,308
Charlottesville	624,030
Danville	439,696
Kingsport, Tenn.-Va.	29,444
Lynchburg	615,322
Petersburg-Colonial Heights	844,176
Roanoke	1,498,252
Non-urbanized	***1,854,473***
WASHINGTON:	
Governor's apportionment for areas 50,000 to 200,000 population	***3,542,365***
Bellingham	429,809
Bremerton	527,785
Longview, Wash.-Oreg.	420,790
Olympia	531,444
Richland-Kennewick	866,936
Yakima	765,601
Non-urbanized	***1,216,820***
WEST VIRGINIA:	
Governor's apportionment for areas 50,000 to 200,000 population	***3,870,711***
Charleston	1,409,599
Cumberland, Md.-W.Va.	20,943
Huntington-Ashland, W.Va.-Ky.-Ohio	$ 912,444
Parkersburg, W.Va.-Ohio	600,280
Steubenville-Weirton, Ohio-W.Va.-Pa.	238,036
Wheeling, W.Va.-Ohio	689,409
Non-urbanized	***1,245,470***
WISCONSIN:	
Governor's apportionment for areas 50,000 to 200,000 population	***8,801,229***
Appleton	1,472,307
Beloit, Wis.-Ill.	383,770
Duluth-Superior, Minn.-Wis.	172,554
Eau Claire	573,230
Green Bay	1,113,255
Janesville	465,039
Kenosha	1,064,126
La Crosse, Wis.-Minn.	617,347
Oshkosh	552,981
Racine	1,354,801
Sheboygan	577,265
Wausau	454,554
Non-urbanized	***1,908,239***
WYOMING:	
Governor's apportionment for areas 50,000 to 200,000 population	***1,105,266***
Casper	588,877
Cheyenne	516,389
Non-urbanized	***283,397***
AMERICAN SAMOA:	
Non-urbanized	***26,014***
GUAM:	
Non-urbanized	***85,363***
NORTHERN MARIANA ISLANDS:	
Non-urbanized	***13,516***
VIRGIN ISLANDS:	
Non-urbanized	***77,783***

[FR Doc. 84-28322 Filed 10-25-84; 8:45 am]
BILLING CODE 4910-57-C

federal register

Friday
October 26, 1984

Part VII

Department of Education

34 CFR Part 760

Secretary's Discretionary Program; Final Regulations

DEPARTMENT OF EDUCATION

34 CFR Part 760

Secretary's Discretionary Program

AGENCY: Department of Education.

ACTION: Final regulations.

SUMMARY: The Secretary issues regulations for the implementation of the Secretary's Discretionary Program. The Secretary's Discretionary Program supports research, demonstration, dissemination, training, and technical assistance projects designed to meet special educational needs of educationally deprived children or to improve elementary and secondary education for children consistent with the purposes of the Education Consolidation and Improvement Act of 1981.

DATE: These regulations will take effect either 45 days after they are published in the **Federal Register** or later if Congress takes certain adjournments. If you want to know the effective date of these regulations, write or call the Department of Education contact person.

FOR FURTHER INFORMATION CONTACT: Dr. Thomas E. Enderlein, 400 Maryland Avenue, SW., Room 4181, Washington, D.C. 20202. Telephone: (202) 472–1762.

SUPPLEMENTARY INFORMATION:

Background

The Education Consolidation and Improvement Act of 1981 (ECIA) (20 U.S.C. 3801 *et seq.*) was enacted as Title V of the Omnibus Budget Reconciliation Act of 1981 (Pub. L. 97–35). The ECIA has two principal purposes: Chapter 1 provides financial assistance to State and local educational agencies (SEA's and LEA's) to meet the special needs of educationally deprived children, and Chapter 2 consolidates 28 elementary and secondary level education grant programs into a single authorization of grants to States for the same purposes contained in the consolidated programs.

Section 583(a) of Chapter 2 authorizes the Secretary to carry out directly, or through grants or contracts, programs and projects that: (1) Provide a national source for gathering and disseminating information on the effectiveness of programs designed to meet the special educational needs of educationally deprived children and others served by the ECIA, and for assessing the needs of such individuals; (2) carry out research and demonstrations related to the purposes of the ECIA; (3) are designed to improve the training of teachers and other instructional personnel needed to carry out the purposes of the ECIA; or (4) are designed to assist SEA's and LEA's in the implementation of programs under the ECIA.

Public Comments

The Secretary published in the **Federal Register** on February 29, 1984 (49 FR 7546), a Notice of Proposed Rulemaking (NPRM) and invited public comment on the proposed regulations. A summary of all substantive comments received on the NPRM and the Secretary's response can be found in the Appendix to these final regulations.

Summary of Changes From the NPRM

Only one change was made in the final regulations after the review of the NPRM. Section 760.11(e) has been revised to clarify that the Secretary may decline to fund a project that is eligible for funding under another "specific Department of Education grant competition." This provision implements the Secretary's policy to use limited resources available under the Discretionary Program for activities that cannot be assisted under other grant competitions.

Summary of Major Provisions

(1) Projects Eligible for Funding

Section 760.10 implements the statutory restrictions on the types of projects that may be funded under the Secretary's Discretionary Program. To be eligible for funding under this program, a project must relate to the purposes of the ECIA, and must be limited to one or more of the following: gathering and disseminating information, assessing the effectiveness of programs, research, demonstration, training of teachers or other instructional personnel, or technical assistance to SEA's or LEA's.

Section 583 of the ECIA does not authorize the Secretary to provide general operating revenue to any applicant, including a local school district, an institution of higher education, or other agencies that need or wish additional resources to meet local needs.

(2) Establishing Priorities

Section 760.11 of the regulations permits the Secretary to announce funding priorities for the Discretionary Program in one or more notices published in the **Federal Register** each year. The regulations incorporate the statutorily broad discretion of the Secretary in order to permit the Secretary to exercise leadership in education by focusing national attention on unmet national needs within the educational areas addressed by the ECIA.

Under the final regulations, the Secretary would select funding priorities by taking into consideration any unmet national needs within the scope of the ECIA. For example, in fiscal year 1983, the Secretary established as funding priorities for this program: (1) Expanding parental choice in education, (2) improving teacher quality through incentives, (3) strengthening local school boards, and (4) improving education through the application of technology. For fiscal year 1984, the Secretary has made planning teacher incentive structures a funding priority for this program. See "Notice of Final Annual Funding Priorities, Required Activities, and Geographical Distribution for Fiscal Year 1984" published in 48 FR 56257 (December 20, 1983).

In addition to or instead of establishing funding priorities, the Secretary could invite applicants to propose projects in any area of education within the purposes of the ECIA. For example, in fiscal year 1983, the Secretary funded unsolicited applications on topics that included follow-up activities to the National Commission on Excellence in Education, literacy in the school-age population, school violence, and training school board members in the area of special education.

The ECIA generally addresses meeting the special educational needs of educationally deprived children and improving elementary and secondary education for children. However, also included within the scope of the ECIA are the purposes of the programs consolidated in section 561 of the ECIA. Accordingly, subject to other requirements of the ECIA and the final regulations, the Secretary could fund any project that would involve the same activities as formerly authorized by one of the programs consolidated into the ECIA, some of which included specific activities beyond the elementary and secondary level.

For example, the Secretary could fund a demonstration project on consumer education that benefitted the public as a whole because consumer education was authorized to be provided to the public under Title III, Part E of the Elementary and Secondary Education Act (ESEA), one of the authorities consolidated into the ECIA.

The only exception is that although Title II of the ESEA authorized activities beyond the elementary and secondary education level, Chapter 2 of the ECIA limits basic skills to activities relating to elementary and secondary school instruction.

(3) Selection Criteria

Section 760.31 of the regulations establishes selection criteria for this program and indicates the maximum number of points that an application could score for each criterion. Additionally, under 760.30, the Secretary will distribute a reserved 15 points among the criteria for each grant competition. The Secretary will announce, in a notice published in the Federal Register, how the reserved points would be distributed for each competition.

(4) Geographical Distribution

Under § 760.32 of the regulations, the Secretary could fund applications other than the most highly rated applications if doing so would improve the geographical distribution of projects receiving funding in a particular competition.

(5) Private School Children Participation

Section 760.20 requires an LEA to provide an assurance that it will comply with the provisions of section 586 of the ECIA, governing the equitable participation of private school children, if the LEA submits an application for funding to provide services, materials, or equipment for the benefit of public school students. Specific requirements are established in EDGAR, 34 CFR 75.650. Applicants other than LEA's as described above are not subject to the equitable participation requirements in section 586 of the ECIA or in EDGAR.

(6) Scope of the Final Regulations

Under § 760.3, the regulations will apply to grants awarded under the Secretary's Discretionary Program, except for grants awarded under any grant program, such as the National Diffusion Network, for which the Secretary issues separate regulations. The regulations do not apply to contracts awarded under the Secretary's Discretionary Program.

Executive Order 12291

These regulations have been reviewed in accordance with Executive Order 12291.

They are classified as non-major because they do not meet the criteria for major regulations established in the Order.

Paperwork Reduction Act of 1980

Information collection requirements contained in these regulations (Sections 760.20; 760.30–760.32) have been approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96–511) and have been assigned OMB Control No. 1880–0505. This control number appears as a citation at the end of each applicable section.

Assessment of Educational Impact

In the notice of proposed rulemaking, the Secretary requested comments on whether the proposed regulations would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

Based on the comments on the proposed rules and the Department's own review, it has been determined that the regulations in this document do not require information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects in 34 CFR Part 760

Education, Education of disadvantaged, Elementary and secondary education, Grant programs—education, Reporting and recordkeeping requirements.

Citation of Legal Authority

A citation of statutory or other legal authority is placed in parentheses on the line following each substantive provision of these final regulations.

Dated: October 22, 1984.

(Catalog of Federal Domestic Assistance Number 84.122, Secretary's Discretionary Program)

T.H. Bell,

Secretary of Education.

The Secretary amends Title 34 of the Code of Federal Regulations by adding a new Part 760 to read as follows:

PART 760—SECRETARY'S DISCRETIONARY PROGRAM

Subpart A—General

Sec.

760.1 What is the Secretary's Discretionary Program?
760.2 Who is eligible for a grant under the Secretary's Discretionary Program?
760.3 What regulations apply to the Secretary's Discretionary Program?
760.4 What definitions apply to this program?

Subpart B—What Types of Projects Does the Secretary Assist Under This Program?

760.10 What types of projects does the Secretary assist under this program?
760.11 Does the Secretary establish priorities for this program?

Subpart C—How Does One Apply for a Grant?

760.20 What assurance must an applicant make?

Subpart D—How Does the Secretary Make a Grant?

Sec.

760.30 How does the Secretary evaluate an application?
760.31 What selection criteria does the Secretary use?
760.32 How does the Secretary select an application for funding?

Subpart E—What Conditions Must Be Met by the Grantee?

760.40 May the Secretary restrict the use of funds under this program?
760.41 May program funds be used for construction purposes?

Authority: Sec. 583 of the Education Consolidation and Improvement Act of 1981 (20 U.S.C. 3851), unless otherwise noted.

Subpart A—General

§ 760.1 What is the Secretary's Discretionary Program?

The Secretary's Discretionary Program supports projects designed to meet the special educational needs of educationally deprived children or to improve elementary and secondary education for children consistent with the purposes of the Education Consolidation and Improvement Act of 1981.

(20 U.S.C. 3851)

§ 760.2 Who is eligible for a grant under the Secretary's Discretionary Program?

State educational agencies (SEA's), local educational agencies (LEA's), institutions of higher education, and other public and private agencies, organizations, and institutions are eligible for a grant under the Secretary's Discretionary Program.

(20 U.S.C. 3851)

§ 760.3 What regulations apply to the Secretary's Discretionary Program?

(a) The following regulations apply to grants made under the Secretary's Discretionary Program:

(1) The Education Department General Administrative Regulations (EDGAR) established in Title 34 of the Code of Federal Regulations in Part 74 (Administration of Grants), Part 75 (Direct Grant Programs), Part 77 (Definitions), and Part 78 (Education Appeal Board).

(2) The regulations in this Part 760.

(b) The regulations in this Part 760 do not apply to—

(1) Contracts awarded under the Secretary's Discretionary Program; and

(2) Grants and contracts awarded under any grant program, such as the National Diffusion Network, for which the Secretary issues separate regulations.

Note.—Grants awarded under the National Diffusion Network are subject to the regulations in 34 CFR Part 796.

(20 U.S.C. 3851; 3474)

§ 760.4 What definitions apply to this program?

(a) *Definitions in EDGAR.* The following terms used in these regulations are defined in 34 CFR Part 77:

Applicant
Application
Award
Budget
Department
EDGAR
Local educational agency
Minor remodeling
Nonprofit
Private
Project
Public
Secretary
State education agency

(b) *Definitions that apply to this Part.* The following definitions apply to this Part:

"Children" means persons—

(1) Up to age 21 who are entitled to a free public education not above grade 12; or

(2) Who are of preschool age.

"Construction" means the preparation of drawings and specifications for school facilities; erecting, building, acquiring, altering, remodeling, improving, or extending school facilities; and the inspection and supervision of the construction of school facilities.

(20 U.S.C. 3875)

"ECIA" means Education Consolidation and Improvement Act of 1981.

"Educationally deprived children" means children whose educational attainment is below the level that is appropriate for children of their age.

(20 U.S.C. 3851; 3474)

Subpart B—What Types of Projects Does the Secretary Assist Under This Program?

§ 760.10 What types of projects does the Secretary assist under this program?

(a) The Secretary may fund projects that—

(1) Provide a national source for gathering and disseminating information on the effectiveness of programs designed to meet the special educational needs of educationally deprived children and others served by the ECIA, and for assessing the needs of such individuals;

(2) Carry out research and demonstrations related to the purposes of the ECIA;

(3) Are designed to improve the training of teachers and other instructional personnel needed to carry out the purposes of the ECIA; or

(4) Provide technical assistance to SEA's and LEA's in the implementation of programs under the ECIA.

(b) The Secretary may not provide general operating revenue to meet local needs to any applicant under this program.

(20 U.S.C. 3851)

§760.11 Does the Secretary establish priorities for this program?

(a) Each year, through one or more notices published in the **Federal Register**, the Secretary announces the priorities for this program, if any, and the manner in which those priorities will be implemented.

(b) The Secretary selects priorities by taking into consideration unmet national needs within the scope of the ECIA.

(c) The Secretary may also fund any project that does not meet an established priority if the project—

(1) Is limited to activities—

(i) That are at the elementary or secondary education level; or

(ii) That were specifically authorized by one of the programs consolidated in the ECIA as listed in section 561 of the ECIA except as limited by the ECIA; and

(2) Satisfies all other requirements for funding under this program.

(d) If the Secretary selects priorities, the Secretary may establish a separate competition for each priority selected. If a separate competition is established for a priority, the Secretary may reserve all applications that relate to that priority for review under the separate competition.

(e) The Secretary may decline to fund a project that is eligible for funding under a specific Department of Education grant competition.

Note.—EDGAR establishes the method for applying priorities. See 34 CFR 75.105 (Annual priorities).

(20 U.S.C. 3851; 3474)

Subpart C—How Does One Apply for a Grant?

§ 760.20 What assurance must an applicant make?

An applicant must make an assurance in its application that it will comply with the provisions of section 586 of the ECIA, governing equitable participation of private school children in the purposes and benefits of Chapter 2, if the applicant—

(a) Is an LEA; and

(b) Proposes to use grant funds to provide—for the benefit of public school students—services, materials, or equipment (including training for teachers or other personnel serving the school children).

Note.—EDGAR establishes requirements for private school children participation. See 34 CFR 75.650.

(20 U.S.C. 3862)

(Approved by the Office of Management and Budget under control number 1880–0505)

Subpart D—How Does The Secretary Make a Grant?

§ 760.30 How does the Secretary evaluate an application?

(a) The Secretary evaluates an application submitted under this program on the basis of the criteria in § 760.31 of this part.

(b) The Secretary may award up to 100 points, including a reserved 15 points to be distributed in accordance with paragraph (d) of this section, based on the criteria in § 760.31.

(c) Subject to paragraph (d) of this section, the maximum possible points for each criterion is indicated in parentheses after the heading for each criterion.

(d) For each competition, as announced through a notice published in the **Federal Register**, The Secretary may distribute the reserved 15 points among the criteria listed in § 760.31.

(20 U.S.C. 3851; 3774)

(Approved by the Office of Management and Budget under control number 1880–0505)

§ 760.31 What selection criteria does the Secretary use?

The Secretary uses the following criteria in evaluating each application:

(a) *Plan of operation.* (20 points)

(1) The Secretary reviews each application for information that shows the quality of the plan of operation for the project.

(2) The Secretary looks for information that shows—

(i) High quality in the design of the project;

(ii) An effective plan of management that insures proper and efficient administration of the project;

(iii) A clear description of how the objectives of the project relate to the purposes of the program;

(iv) The way the applicant plans to use its resources and personnel to achieve each objective;

(v) A clear description of how the applicant will provide equal access and treatment for eligible project participants who are members of groups that have been traditionally underrepresented, such as—

(A) Members of racial or ethnic minority groups;

(B) Women;
(C) Handicapped persons; and
(D) The elderly; and
(vi) For applicants required to provide an opportunity for participation of students enrolled in private schools—a clear description of how the applicant will provide that opportunity.
(b) *Quality of key personnel.* (15 Points)
(1) The Secretary reviews each application for information that shows the quality of the key personnel the applicant plans to use on the project.
(2) The Secretary looks for information that shows—
(i) The qualifications of the project director (if one is to be used);
(ii) The qualifications of each of the other key personnel to be used in the project;
(iii) The time that each person referred to in paragraphs (b)(2) (i) and (ii) of this section plans to commit to the project;
(iv) The extent to which the applicant, as a part of its nondiscriminatory employment practices, encourages applications for employment from persons who are members of groups that have been traditionally underrepresented, such as—
(A) Members of racial or ethnic minority groups;
(B) Women;
(C) Handicapped persons; and
(D) The elderly.
(3) To determine the qualifications of a person, the Secretary considers evidence of past experience and training, in fields related to the objectives of the project, as well as other information that the applicant provides.
(c) *Budget and cost effectiveness.* (5 Points)
(1) The Secretary reviews each application for information that shows that the project has an adequate budget and is cost effective.
(2) The Secretary looks for information that shows—
(i) The budget for the project is adequate to support the project activities; and
(ii) Costs are reasonable in relation to the objectives of the project.
(d) *Evaluation plan.* (5 Points)
(1) The Secretary reviews each application for information that shows the quality of the evaluation plan for the project. Cross-reference—See EDGAR 34 CFR 75.590 (Evaluation by the grantee).
(2) The Secretary looks for information that shows methods of evaluation that are appropriate for the project and, to the extent possible, are objective and produce data that are quantifiable.
(e) *Adequacy of resources.* (5 Points)
(1) The Secretary reviews each application for information that shows that the applicant plans to devote adequate resources to the project.
(2) The Secretary looks for information that shows—
(i) The facilities that the applicant plans to use are adequate; and
(ii) The equipment and supplies that the applicant plans to use are adequate.
(f) *Improving elementary and secondary education.* (10 Points)
(1) The Secretary reviews each application for information that shows the extent to which the project contributes to the improvement of elementary and secondary education.
(2) The Secretary looks for information such as—
(i) The objectives of the project; and
(ii) The manner in which the objectives of the project further the purpose of improving elementary and secondary education.
(g) *National significance.* (15 Points)
(1) The Secretary reviews each application for information that shows the national significance of the project.
(2) The Secretary looks for information that shows the extent to which the project makes a contribution of national significance, as measured by factors such as—
(i) The extent to which the project addesses educational problems of national significance;
(ii) The extent to which the project meets specific national needs as shown by—
(A) The needs addressed by the project;
(B) The manner in which the applicant identified those needs;
(C) The manner in which those needs are met by the project; and
(D) The benefits to be gained by meeting those needs;
(iii) The extent to which the project involves techniques that are innovative;
(iv) The extent to which the project builds upon and adds to current educational information and research; and
(v) The extent to which the project provides a model or other information that could be used by others to solve educational problems.
(h) *Applicant's commitment and capacity.* (10 Points)
The Secretary looks for information that shows the extent of the applicant's commitment to the project, its capacity to continue the project, and the likelihood that it will build upon the project when Federal assistance ends.

(20 U.S.C. 3851; 3474)

(Approved by the Office of Management and Budget under control number 1880–0505)

§ 760.32 How does the Secretary select an application for funding?

(a) After evaluating the applications according to the criteria contained in § 760.31, the Secretary may determine whether or not the most highly rated applications are broadly and equitably distributed throughout the Nation for each competition.
(b) The Secretary may select other applications for funding if doing so would improve the geographical distribution of projects funded under a particular competition.

(20 U.S.C. 3851; 3474)

(Approved by the Office of Management and Budget under control number 1880–0505)

Subpart E—What Conditions Must Be Met by the Grantee?

§ 760.40 May the Secretary restrict the use of funds under this program?

The Secretary may restrict the amount of funds made available through a grant under this program that may be used to purchase equipment.

(20 U.S.C. 3851)

§ 760.41 May program funds be used for construction purposes?

(a) No recipient may use grant funds for repairs, minor remodeling, or construction of private school facilities.
(b) To the extent necessary for an LEA to carry out its responsibility under section 596 of the ECIA to provide an opportunity for the equitable participation of private school children, an LEA may use grant funds for the construction of public facilities.
(c) Subject to the restrictions in paragraph (a) of this section, a recipient may use grant funds for repairs or minor remodeling only to the extent necessary to carry out an approved project under the regulations in this part.

(20 U.S.C. 3851; 3474)

Note.—This Appendix will not appear in the Code of Federal Regulations.

Appendix—Comments and Responses from NPRM

The following is a summary of the public comments received on the proposed regulations published on February 29, 1984 (49 FR 7546), and the Secretary's responses to those comments. Generally, the comments are presented according to the numbered order of the regulations.

During the 45 days allowed for comment, two letters and one informal response were received. The commenters generally requested

clarification of specific provisions of the regulations. However, one commenter, the Chicago Board of Education (Chicago)—in addition to making many of the specific comments summarized below—characterized the proposed rules as "a blatant misuse, if not abuse, of the administrative rulemaking powers delegated to the Department."

Chicago contended in its letter that one of the main "purposes of the proposed rules, if not the sole purpose, appears to be preventing the Chicago Board of Education from securing funding from the Discretionary Fund for implementation of its desegregation plan pursuant to the obligations of the Board and the United States under the Consent Decree of September 24, 1980." Chicago further stated, "The Department is attempting to accomplish through its rulemaking process what it cannot accomplish before a neutral judicial forum. . . . This is certainly a morally questionable and quite possibly a constitutionally questionable use of the power of the United States against a local Board of Education." Finally, after making many other comments (which are summarized below) on specific sections of the regulations, Chicago recommended "that this entire set of flawed regulations be redrafted pursuant to these comments and issued again in proposed form."

The rules of general applicability established by these final regulations—including the rules for selecting priorities and the selection criteria—are needed to govern competitive awards of grants with Discretionary Program funds. These regulations have been promulgated in accordance with the rulemaking requirements of section 431 of the General Education Provisions Act, 20 U.S.C. 1232, and of the Administrative Procedure Act, 5 U.S.C. 553, and are consistent with established statutory interpretations and practices under the Discretionary Program. See, for example, "The Secretary's Discretionary Program—Planning Grants to Develop Teacher Incentive Structures," 48 FR 56257 (December 20, 1983).

These regulations are not motivated by any attempt to deprive Chicago or any other potential applicant of its right to compete for funds under the statute. On the contrary, the Secretary is issuing these final regulations in accordance with the statute and its legislative history, as consistently interpreted by the Department since the beginning of this program.

General

Comment. One commenter questioned the Secretary's authority to issue regulations under the Secretary's Discretionary Program. The commenter cited section 591 of the ECIA, which authorizes the Secretary to issue regulations "relating to the discharge of duties specifically assigned to the Secretary under [the ECIA]," and which prohibits the Secretary from issuing regulations "in all other matters relating to the details of planning, developing, implementing, and evaluating programs and projects by State and local educational agencies * * *."

Response. No change has been made. In establishing the Secretary's Discretionary Program, section 583 of the ECIA specifically assigns to the Secretary the duty of carrying out the authorized activities directly or through grants or contracts. Beyond indicating in broad terms the types of activities that are eligible for funding, the statute does not prescribe the priorities, evaluation criteria, or procedures to be used by the Secretary in making these funding decisions. These are matters for the Secretary to determine under section 583, as opposed to details of State and local administration of programs. These regulations clearly are authorized by section 591.

Subpart A—General

Section 760.3(a)(1) What regulations apply to the Secretary's Discretionary Program?

Comment. One commenter questioned why the Secretary's Discretionary Program is not subject to 34 CFR Part 79, the implementing regulations for Executive Order 12372 (Intergovernmental Review of Federal Programs). The commenter contended that, in some cases, projects assisted under the Secretary's Discretionary Program may be of special interest to States.

Response. No change has been made. The Secretary's Discretionary Program is excluded from coverage under 34 CFR Part 79 because its purpose is not to support services to particular State or local jurisdictions, nor is it directly relevant to the governmental responsibilities of a State or local government. Nevertheless, as a courtesy in a case such as that described by the commenter, the Secretary may choose to notify the State single points of contact of competitions that may be of special interest to States.

Comment. One commenter noted that the regulations in 34 CFR Part 760 do not apply to contracts awarded under the Secretary's Discretionary Program and asked what regulations do apply.

Response. No change has been made. Contracts awarded after April 1, 1984 are subject to the government-wide Federal Acquisition Regulations, 48 CFR Chapter 1. Additionally, the Department will issue its own implementing regulations in the near future.

Subpart B—What Types of Projects Does the Secretary Assist under This Program?

Section 760.10 What types of projects does the Secretary assist under this program?

Comment. One commenter recommended that the language in proposed §§ 760.10(a) and 760.11(c) be changed to include "programs" as well as "projects" as being eligible for funding.

Response. No change has been made. Only the term "project" is used in the above-cited provisions of the final regulations to ensure consistency of terminology throughout the Department's regulations. In 34 CFR 77.1, "project" is defined as "the activity described in an application." In essence, a "project" consists of the specific activities that the Department assists. Nevertheless, those activities—if otherwise eligible—may be part of one or more larger programs conducted by a grantee.

Comment. One commenter questioned the use of the term "technical assistance" in § 760.10(a)(4), in describing the types of projects that may be funded under the Secretary's Discretionary Program. The commenter pointed out that section 583 of the ECIA authorizes the Secretary to carry out programs and projects which "are designed to assist State and local educational agencies in the implementation of programs under [the ECIA]."

Response. No change has been made. The term "technical assistance" reflects an interpretation of the activities Congress intended to authoriaze in section 583(a)(4) of the ECIA. The specific language of section 583(a)(4) supports this interpretation in that it authorizes projects which " * * * assist State and local educational agencies in the implementation of programs under [the ECIA]." Under section 583(a)(4), projects are eligible only if they assist programs funded under the ECIA. The only logical reading of this authority is as a technical assistance provision to help improve State and local programs receiving funds under other parts of the ECIA. The legislative history of the ECIA also supports the Department's conclusion that Congress, in section 583(a)(4), intended to assist activities in the nature of technical assistance to State and local educational agencies,

not direct funding of State and local programs. The Senate committee report on the language in the Senate Bill, which was enacted as the ECIA, provided: "Up to five percent of the funds under subpart 2 may be used at the discretion of the Secretary for national dissemination activities, research and demonstration programs, and technical assistance programs." S. Rep. 97-139, 97th Cong., 1st Sess. 897 (1981).

Comment. One commenter objected to the provision prohibiting the Secretary from providing operating revenue to meet local needs to any applicant under this program. The commenter argued that (1) rarely, if ever, does an applicant for a Federal grant propose a project for support which does not address a local need, (2) the purpose of the ECIA is to meet the special needs of certain categories of children, and (3) the grant assistance either adds to, or provides all of, the operating revenue to implement a grant project.

Response. No change has been made. The Secretary has consistently interpreted section 583 of the ECIA as not authorizing the Department to make a grant to an LEA or other applicant for general operating support. This is expressly authorized only by sections 561-582 of Chapter 2 of the ECIA (20 U.S.C. 3811-3842), governing funds allocated by formula to LEA's or reserved for State use. It would have been illogical for Congress to have established an authority for very limited direct funding by the Secretary at the national level—with a maximum of 6 percent of Chapter 2 funds—if that authority were to be used for direct funding to meet the general operating needs of a particular school district, thereby duplicating the authorized uses for the 94 percent of Chapter 2 funds allocated to the States. In fact, Congress did not intend to do so. The nature of the activities specifically authorized by section 583, including the mandated programs in section 583(b); the level of funds authorized; the overall structure of Chapter 2 of the ECIA; the consistent practice under section 583 and its antecedent authority, section 303(a) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 2943); and the legislative history of section 583 all lead to this conclusion.

Section 760.10(b) is consistent with previous notices for competitions under the Secretary's Discretionary Program which the Department has issued. *See* Application Notice for the Secretary's Discretionary Program Planning Grants to Develop Teacher Incentive Structures (48 FR 56257, December 20, 1983 at 56258, "Funding for projects under these grants will be limited to the cost of developing a workable plan."); Application Notice for the Secretary's Discretionary Program Grants—Improving Education through the Application of Technology (48 FR 30080, June 29, 1983 at 30081, "Funding under these awards will cover the cost of planning, administering, evaluating, and disseminating information about the project."); Application Notice for the Secretary's Discretionary Program Grants (48 FR 13220, March 30, 1983 at 13221, "Funding for demonstration projects under these awards will be limited to the cost of administering and evaluating the project," and at 13222, "Funding for projects under these awards will be limited to the cost of collecting and analyzing information to describe and assess the effects of the demonstration," and "Funding of projects under this award will not include stipends or travel costs for trainees.")

Moreover, the Catalog of Federal Domestic Assistance (CFDA) lists the Secretary's Discretionary Program, beginning with the 1983 update, and indicates in the description of "uses and use restrictions" that "[n]o awards can be made to provide general operating support to a local educational agency (LEA) or other eligible applicants." *See* CFDA No. 84.122. The CFDA—which is published by the Executive Office of the President, Office of Management and Budget—is a basic source of information on Federal programs and has as its primary purpose assisting potential applicants to identify Federal programs for which they may apply, and providing general information on these programs. See similar provisions, making operating costs ineligible for support under other research and demonstration programs in 34 CFR 709.12, 710.6, 716.11, 718.6, and 720.6.

Section 760.11(b) Does the Secretary establish priorities for this program?

Comment. One commenter objected to the provision which provides for the Secretary to select priorities by taking into consideration unmet national needs and asserted that the Secretary may not disable himself from the discretion to fund any project authorized by the statute. The commenter noted that the ECIA makes the Secretary's Discretionary Program funds available to support projects which relate to the purposes of the ECIA.

Response. No change has been made. The Secretary has the authority to issue regulations "relating to the discharge of the Secretary's duties specifically assigned under [the ECIA]." 20 U.S.C. 3871(a). One of those duties is to determine how monies appropriated by Congress for the Discretionary Program are spent. In carrying out this duty, consistently with the purposes of the Discretionary Program, the Secretary sets priorities for distribution of monies "taking into consideration unmet national needs within the scope of the ECIA." Selecting priorities does not preclude the Secretary from funding a project that does not meet an established priority provided that the project is within the scope of the ECIA and satisfies the requirements for funding described in the statute; namely, a project which relates to the purposes of the ECIA and the Discretionary Program's national perspective, and which involves dissemination of information, research, demonstration, training of instructional personnel, or technical assistance to State and local educational agencies.

Comment. One commenter questioned whether proposed § 760.11(c)(1)(ii) limits funding under the Secretary's Discretionary Program to those activities which are allowable under programs consolidated into the ECIA, and argued that the purposes and authorized activities contained in the ECIA itself are the controlling authority for permissible activities under the Secretary's Discretionary Program.

Response. No change has been made. Each of the activities specifically authorized by section 583(a)—namely, dissemination of information, research, demonstration, the training of instructional personnel, or technical assistance for State or local educational agencies—is tied by the language of section 583 to the purposes of the subtitle, children served by the subtitle, or programs under the subtitle. The subtitle is Subtitle D of the Omnibus Education Reconciliation Act of 1981 and includes Chapters 1 and 2 of the ECIA. As interpreted by the Secretary, the purposes and activities of the subtitle include—in addition to Chapter 1 programs—all of the purposes and activities that previously could have been funded under the antecedent programs consolidated by Chapter 2, except to the extent inconsistent with specific language in Chapter 2.

The only such inconsistency is that although the former basic skills program under Title II of the Elementary and Secondary Education Act authorized activities beyond the elementary and secondary level, Chapter 2 of the ECIA specifically limits basic skills activities to those relating to elementary and secondary school instruction. Of course, as indicated above, projects may be funded under the Secretary's

Discretionary Program only if they meet the specific authorizations in section 583.

Comment. One commenter questioned whether § 760.11(e) should enable the Secretary to decline to fund a project that is eligible for funding under another Department of Education program. The commenter noted that every activity eligible for support under the Secretary's Discretionary Program, by definition, can be funded under the Chapter 1 or Chapter 2 (block grant programs) of the ECIA.

Response. A change has been made. Section 760.11(e) has been revised to permit the Secretary to decline to fund a project that is eligible for funding under another "specific Department of Education grant competition." This change should eliminate the problem raised by the commenter while still carrying out the Secretary's policy of using limited resources available under the Discretionary Program for worthwhile activities that cannot be assisted under other grant competitions.

Subpart D—How Does the Secretary Make a Grant?

Section 760.31 What selection criteria does the Secretary use?

Comment. One commenter recommended that the Secretary delete the selection criterion related to the national significance of a project in proposed § 760.31(g). The commenter contended that any project which relates to the purposes of the ECIA may be funded. The commenter suggested that in an instance where national significance is an appropriate criterion, the Secretary could assign part of the reserved 15 points to that criterion.

Response. No change has been made. As noted above in response to a comment on § 760.11(b), § 760.11(c) permits the Secretary to fund any project that is within the scope of the ECIA and that involves dissemination of information, research, demonstration, training of instructional personnel, or technical assistance to State or local educational agencies related to programs implemented under the ECIA.

Chapter 2 of the ECIA essentially converted the categorical antecedent programs into State and local programs and reserved a small amount of appropriated funds for the Secretary to use under the Discretionary Program in identifying significant programs from a national perspective. Use of the criterion of "national significance" in making awards is designed to identify those projects which best carry out the purposes of the Discretionary Program. This criterion has been consistently used in selecting applications for funding under this program. The Catalog of Federal Domestic Assistance (CFDA) describes the objectives of the Secretary's Discretionary Program "to assist in research, dissemination, demonstration, improvement of training, and technical assistance activities, which address some national education priority as authorized by Section 583 of the [ECIA]." *See* CFDA No. 84.122.

Comment. One commenter questioned the usefulness of the capacity to continue a project as a criterion for evaluating an application for funds in view of the fact that there may be no need to continue some types of projects, for example, a teacher training project.

Response. No change has been made. Section 760.32(h) provides for the Secretary, in selecting applications for funding, to consider the extent of the applicant's commitment to, and capacity to continue, a project, as well as the likelihood that the applicant will build upon the project when Federal assistance ends. While the training phase of a project, for example, may end, the continued use of the training by those individuals that received it is a measure of the impact and usefulness of the project.

Section 760.32 How does the Secretary select an application for funding?

Comment. One commenter questioned the authority of the Secretary to consider geographic distribution of the most highly rated applications as a final factor in selecting applications for funding, because the ECIA does not mention geographic location.

Response. No change has been made. Section 760.32 of the final regulations enables the Secretary to select for funding those projects that are best located to serve as resources for solving educational problems nationwide. Because the ECIA does not contain any selection criteria for the Secretary to consider in making awards, it is necessary for the Secretary to issue regulations establishing selection criteria to be used in making competitive awards under the statute. The Secretary has the authority and discretion to "issue regulations * * * relating to the discharge of duties specifically assigned to the Secretary under [the ECIA]." 20 U.S.C. 3871(a).

With respect to demonstration projects, for example, the potential impact of a project may be greatest in the area in closest proximity to the location of the project. Therefore, in order to ensure nationwide impact of a competition limited to, for example, demonstration projects related to a particular educational priority, the Secretary believes it is appropriate to base the final selection of applications for funding, in part, on the geographic location of the applicant in order to ensure a broad and equitable distribution of projects throughout the Nation.

[FR Doc. 84-28319 Filed 10-25-84; 8:45 am]

BILLING CODE 4000-01-M