

their applications will not be considered in the current grant cycle and will be returned.

NTIA requires that all applicants whose proposed projects need authorization from the Federal Communications Commission (FCC), must tender an application to the FCC for such authority on or before January 20, 1989. (An application is tendered to the FCC when it has been received by the Secretary of the FCC.) However, you

are urged to submit it with as much lead time before the PTFP closing date as possible. The greater the lead time, the better the chance your FCC application will be processed to coincide with NTIA's grant cycle. NTIA will return the application of any applicant which fails to tender an application to the FCC for any necessary authority on or before January 11, 1989.

Authority: The Public Telecommunications Financing Act of 1978, 47 U.S.C. 390-394, 397-

399b (Act); as amended by the Public Broadcasting Amendments of 1981, Pub. L. No. 97-35, 95 Stat. 725 (1981 Amendments), and the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, sec. 5001, 100 Stat. 82, 117 (1986).

(Catalog of Federal Domestic Assistance No. 11.550)

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Director, Office of Policy Coordination and Management.

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30 CFR Part 773

**Monday
October 3, 1988**

Part V

Department of the Interior

**Office of Surface Mining Reclamation and
Enforcement**

30 CFR Part 773

**Requirements for Surface Coal Mining
and Reclamation Permit Approval;
Ownership and Control; Final Rule**

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 773

Requirements for Surface Coal Mining and Reclamation Permit Approval; Ownership and Control

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) of the United States Department of the Interior (DOI) is amending its regulations dealing with the approval of a permit for surface coal mining operations. This rule adds definitions of the terms "owns or controls" and "owned or controlled" as these concepts are used in section 510(c) of the Surface Mining Control and Reclamation Act of 1977 (the Act, the Surface Mining Act, or SMCRA). It also revises the scope of review of a permit applicant's environmental compliance record prior to the issuance of a new permit. These revisions will greatly reduce the possibility of violators obtaining permits in violation of the permit approval provisions of the Act.

EFFECTIVE DATE: November 2, 1988.

FOR FURTHER INFORMATION CONTACT: Andrew F. DeVito, Office of Surface Mining Reclamation and Enforcement, U.S. Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202-343-5241 (Commercial or FTS).

SUPPLEMENTARY INFORMATION:

- I. Background
- II. Discussion of Final Rule and Comments
- III. Procedural Matters

I. Background

This rule amends OSMRE's regulations dealing with the permit approval process by adding definitions of the terms "owns or controls" and "owned or controlled" in 30 CFR Part 773 in conformance with the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.* The concepts of "ownership" and "control" are used in, but are not defined by, section 510(c) of the Act, 30 U.S.C. 1260(c).

The rule also revises 30 CFR 773.15, which specifies the review by the regulatory authority of the compliance record of the permit applicant and related parties with certain environmental laws which is required prior to the issuance of a permit for surface coal mining operations.

This rule also amends the regulations governing the permitting process by expanding the scope of the review that must be made prior to the issuance of a permit concerning any willful pattern of violations.

This rule is intended to secure greater compliance with the Act by preventing mining permits from being issued to persons who, either by themselves or through related persons, own or control violators of the Act. By defining the terms "owns or controls" and "owned or controlled" and by revising the scope of the compliance review, OSMRE will gain an effective tool to encourage persons who own or control a violator to ensure that all violations are abated or are in the process of being abated. Authority for the rule derives from sections 101, 102, 201(c)(1), 201(c)(2), 412(a), 501, 507(b), 510 and 701 of the Act.

In the past, some operators evaded the requirements of the Act and obtained a new permit while past violations remained unabated or money remained unpaid. In some instances, they formed new corporations, partnerships or other business entities, and through them applied for permits for new operations without correcting the violations or paying the fees and penalties resulting from old operations. If allowed to persist, these practices could seriously weaken enforcement of the Act and impede mine site reclamation. This could result in an unfair competitive advantage to operators who fail to comply with the requirements of the law and thereby lower their coal production costs.

This rule will also assist in implementing a court order in the case of *Save Our Cumberland Mountains, Inc. et al. v. Clark*, No. 81-2134 (D.D.C. January 31, 1985) (Parker J.), relating to enforcement measures that can be taken against operators with unabated cessation orders and unpaid civil penalties. Under the court order, the Secretary of the Interior is required to improve the enforcement and implementation of section 510(c) of the Act, and to establish a computerized Applicant Violator System which will match permit applicants and their owners and controllers with current violators of the Act. This rule establishes standards by which matches will be made by the computer.

This final rule contains revisions to § 773.15(b) which were proposed in two separate rulemaking actions. They are combined to assist readers in better comprehending the regulatory scheme being established.

A proposed rule amending 30 CFR 773.5 and 773.15(b)(1) was published on

April 5, 1985 (50 FR 13724). On June 7, 1985 (50 FR 24122), the comment period was extended to June 28, 1985. On April 16, 1986 (51 FR 12879), the comment period was reopened and extended to June 16, 1986. On June 25, 1986 (51 FR 23085), the comment period was reopened and extended until August 11, 1986. On May 4, 1987 (52 FR 16275), the comment period was again reopened and extended until June 3, 1987, and on October 5, 1987 the comment period was again reopened and extended until November 4, 1987. During the comment periods, four public hearings were held, one on June 20, 1985 and another on July 15, 1986 in Big Stone Gap, Virginia; one on June 21, 1985 in Columbus, Ohio; and one on July 29, 1986 in Denver, Colorado.

A proposed rule amending 30 CFR 773.15 (b)(1)(ii), (b)(2) and (b)(3) was published on July 16, 1986 (51 FR 25822). On September 24, 1986 (51 FR 33905), the comment period was extended to October 24, 1986. No request was received for a public hearing and none was held.

II. Discussion of Final Rule and Comments**A. Section 773.5—Definitions**

The proposal published on April 5, 1985 contained the following proposed definitions:

Control means ownership or any other relationship which gives one person express or implied authority to determine the manner in which that person or another person mines, handles, sells, or disposes of coal. Being an officer or director of a corporation shall constitute control. Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining shall establish a rebuttable presumption of control of such other person.

Ownership means holding the proprietary interest in a sole proprietorship, being a general partner in a partnership, being a contributor of capital or services in a joint venture, or having record or beneficial ownership of 10 percent or more of any class of voting stock in a corporation. In addition, being a limited partner owning 10 percent or more of the assets in a partnership creates a rebuttable presumption of ownership. 50 FR 13724.

The April 16, 1986, notice described an option for the definitions which would have contained the following features:

- (1) The rule would have contained a definition for "ownership" which would track through various levels of a corporate structure. Ownership would have been defined as holding the proprietary interest in a sole proprietorship, being a general partner in a partnership, or having a 10 percent or greater interest in an entity either

directly or indirectly through one or more intermediary companies. Under this definition, a 10 percent or greater interest in an entity would have constituted ownership regardless of the number of levels "up" or "down" through the corporate structure between the parent and the subsidiary.

(2) The rule would have contained a definition for "control" which would have included any relationship which gave one person authority to determine the manner in which an applicant, or an operator if other than an applicant, conducted surface coal mining operations. Being an operator would have constituted control. Being a chief executive officer or chief operating officer of a corporation would have constituted control of that corporation. Being a director or any other officer of a corporation would have created a rebuttable presumption of control of that corporation. Being a director or officer of a corporation would also have created a rebuttable presumption of control over other entities owned by that corporation. The rebuttable presumptions of control could be overcome by clear and convincing evidence that such person had no authority to determine the manner in which the surface coal mining and reclamation operations were conducted.

On May 4, 1987, in response to comments submitted on the April 16, 1986 option, OSMRE published another option for a final rule which addressed the many concerns raised by commenters. The May 4, 1987 option contained the following definition:

Owned or controlled and owns or controls mean any relationship which gives one person authority to determine the manner in which an applicant, or an operator if other than an applicant, conducts surface coal mining operations, and includes but is not limited to the following:

(1) Being a chief executive officer, chief operating officer, or chairman of the board of an entity constitutes control of the entity.

(2) Being an officer, director, operator of an entity, or having the ability to commit the financial or real property assets or working resources of an entity creates a presumption of control.

(3) Based on the instruments of ownership or the voting securities of an entity:

(a) Ownership in excess of 50 percent constitutes control;

(b) Ownership of 20 through 50 percent creates a presumption of control; and

(c) Ownership of less than 20 percent creates a presumption of noncontrol.

52 FR 16275.

On October, 1987, OSMRE published another option for the definitions which contained the following language:

Owned or controlled and owns or controls means—

(a)(1) Being a permittee of a surface coal mining operation;

(2) Based on instruments of ownership or voting securities, owning of record in excess of 50 percent of an entity; or

(3) Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations.

(b) The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

(1) Being an officer or director of an entity;

(2) Being the operator of a surface coal mining operation;

(3) Having the ability to commit the financial or real property assets or working resources of an entity;

(4) Being a general partner in a partnership; or

(5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity.

52 FR 37164.

The final definitions of the terms "owned or controlled" and "owns or controls" at 30 CFR 773.5 are based in large part on the October 5, 1987 proposal. The definition is being adopted over other options considered because it focuses on those relationships which allow one person to compel action by another person. It allows persons who would ordinarily exercise control because of their positions to prove they do not or cannot exercise control. Specific rule language has been added to cover certain control relationships discussed in the October 5, 1987 Federal Register notice, but for which rule language was not specifically delineated.

1. Introductory Language

Introductory language has been added to the definition. The addition clarifies that the definition applies to both directly or indirectly related entities. Where two entities are indirectly related, control is established using any appropriate combination of the relationships specified in the definition, including the presumptions in paragraph (b). For instance, a director of a parent company is presumed to control wholly owned subsidiaries of the parent company using the combination of the relationships specified in paragraph (b)(1) and (a)(2). This provides explicit regulatory language to implement the policy OSMRE proposed in preceding notices for this rulemaking.

2. Paragraph (a)

Paragraph (a)(1)—Permittees. Paragraph (a)(1) of the final rule expressly includes the permittee as a controller of a surface coal mining operation. This was implicit in the options published on April 5, 1985, April 16, 1986 and May 4, 1987, and was explicitly proposed in the October 5, 1987 option. No objections were received to this aspect of the proposal.

Paragraph (a)(2)—Majority Shareholders. Paragraph (a)(2) of the definition specifies that record ownership in an entity of greater than 50 percent, based upon instruments of ownership or voting securities, always constitutes ownership or control because a majority interest will always be a controlling interest. (As will be subsequently discussed, direct ownership interests of from 10 to 50 percent will only presumptively establish ownership or control.)

Inclusion of ownership only where control also exists has been done for a number of reasons. The definition should reflect the primary purpose for which the Congress enacted section 510(c) of the Act. Under section 510(c), where a permit applicant has a current violation, the regulatory authority cannot approve a permit unless the applicant "submits proof that such violation has been corrected or is in the process of being corrected * * *." Thus, by its own terms, section 510(c) is intended to induce persons to correct, or be in the process of correcting, violations. For the rules to accomplish that purpose, an applicant should be denied a permit when it, its owners or controllers, or the entities they own or control, are or have been in a position to have outstanding violations corrected, and did not do so. No compelling reason exists to block permit issuance, however, where control never existed.

No comments were received objecting to a determination of ownership or control when a majority interest is owned.

The specific references in the April 5, 1985 proposed ownership definition to sole proprietors, joint venturers and limited partners are not included in the final definition. Sole proprietors would be included in paragraph (a)(2). Joint venturers and limited partners will be regulated through whichever paragraphs of the rule are applicable and, if not covered elsewhere, can be included under paragraph (a)(3).

If approached in a literal sense, the term "owned" could have been defined to span a range from a few shares of common stock in a large publicly-held

corporation to a sole proprietorship. An all inclusive definition, however, would unfairly treat widely-held corporate applicants that could be denied permits based upon small holdings by persons with outstanding violations, and would be difficult to administer. Absent some reasonable minimum threshold of ownership, regulatory authorities would face the monumental task of tracing every applicant through every thread of common ownership with every current violator, no matter how small the interest involved. The number of remote ownership interests that could exist between applicants and violators under such a definition would be enormous. And absent some reasonable minimum threshold, mere chance occurrences, such as small investors purchasing stock in two otherwise unrelated coal mining companies, could play an unreasonably significant role in the withholding of permits under section 510(c).

Given the congressional finding that "effective and reasonable regulation of surface coal mining operations" is appropriate and necessary (emphasis added), 30 U.S.C. 1201(e), the Congress could not have intended to produce such cumbersome and inequitable results. Thus, OSMRE has concluded that the definition should not cover all degrees of ownership, but only those where control exists.

Paragraph (a)(3)—Any Other Relationships. Paragraph (a)(3) of the definition includes as ownership or control any relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations. This general functional category applies to persons who exercise control over a surface coal mining and reclamation operation without regard to title or official position. This category applies when persons are not otherwise covered by the definition. The primary difference between relationships that would be covered under this category and those relationships enumerated in paragraph (b) is that under paragraph (a)(3) the regulatory authority has to establish that control exists, whereas persons covered under paragraph (b) have to establish that control does not exist.

Some commenters objected to the use of the phrase "mines, handles, sells or disposes of coal" that was proposed in April 1985 (50 FR 13727) as the general functional requirement to determine whether control exists. They suggested that it was vague and could result in situations where coal brokers or others with no control over a surface coal mining operation would be considered

to exercise control over the operation. Other commenters stated that the definition of control should be based on total control of a surface coal mining operation, and not on control of one aspect such as handling or selling coal.

OSMRE agrees that paragraph (a)(3) should be written in terms of control over surface coal mining operations rather than control over specific activities, because section 510(c) of the Act addresses ownership or control over surface coal mining operations. Thus, instead of the phrase "mines, handles, sells or disposes of coal," OSMRE employs the phrase "conducts surface coal mining operations," the latter being a term defined at 50 CFR 700.5. In some instances, control over certain aspects of an operation, such as the manner or rate of mining, or the marketing, sale, or disposition of the coal can provide control over the conduct of surface coal mining operations.

Some commenters objected that the proposed phrase "any other relationship" (52 FR 37165) was too broad or inclusive and that its use undermined the credibility of (and the need for) the remainder of the definition.

OSMRE disagrees that the phrase "any other relationship" is too broad. The phrase is needed to cover extremely diverse patterns of ownership and control and consequently must be broadly inclusive. Whether a particular relationship provides authority to determine the manner in which a surface coal mining operation is conducted will be determined on a case-by-case basis after careful examination of the facts.

OSMRE intends that under paragraph (a)(3) the regulatory authority can examine any relationships and the facts surrounding them, such as informal agreements, personal relationships, and the mining history of the parties in question to determine if the relationship results in control over a surface coal mining operation. The regulatory authority may also consider any of the circumstances surrounding a surface coal mining operation to determine control. Such circumstances might include, for example, the fact that a person has financed the operation, or owns the equipment or the rights to the coal, or directs on-site operations.

One commenter requested that the final rule clarify that the examples given in the October 5, 1987 notice were examples of relationships that should be scrutinized for purposes of determining if ownership or control exists and should not be construed as relationships that always would constitute ownership or control.

OSMRE's statement in the October 5, 1987 notice (52 FR 37165) that "any relationship" can include one between family members, a lessor and a lessee, and an owner of coal and a contract miner was intended to be illustrative. The degree to which particular types of relationships will presumptively establish control is set forth in paragraph (b) of the definition. Examples of other relationships includable under paragraph (a)(3) are family relationships, contract mining situations not covered by paragraph (b)(6) and employees of business entities holding positions other than that of officer or director.

One commenter asserted that the rule should contain an irrebuttable presumption of control for mine managers, subcontractors, and mine foremen.

OSMRE agrees that in certain circumstances such persons could control a surface coal mining operation, but has chosen to regulate such persons under paragraph (a)(3) of the rule rather than establish specific presumptions. If OSMRE were to create a specific presumption for every possible relationship which might result in control of a surface coal mining operation, the definition would be longer than is reasonable. If OSMRE incorporated the terms "mine manager" or "foreman", new positions could easily be created to circumvent the rule. Furthermore, it would be incorrect to assume that such persons exercise control in all situations.

Actual Authority. As originally proposed, the rule would have defined "control" as "any relationship which gives one person *express or implied authority* to determine the manner in which that person or another person mines, handles, sells or disposes of coal * * *" (Emphasis added.) Some commenters stated that it was not clear what was meant by "express or implied authority." They suggested that control should turn on "actual" authority, as opposed to "express or implied" authority. OSMRE agrees, and has not included the phrase "expressed or implied" in the final definition. Paragraphs (a)(3) and (b) simply use the term "authority," which is intended to mean actual authority.

One commenter argued that the phrase "authority directly or indirectly to determine" used in paragraph (a)(3) should be changed for clarity to the phrase "control or have the power to control."

OSMRE did not adopt the suggestion. The language contained in the rule is

sufficient and is no less inclusive than the suggested phrase.

3. Paragraph (b)—Relationships Presumptively Establishing Ownership or Control

Paragraph (b) of the definition creates a presumption of control for certain relationships. Under paragraph (b) the following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

- (1) Being an officer or director of an entity;
- (2) Being the operator of a surface coal mining operation;
- (3) Having the ability to commit the financial or real property assets or working resources of an entity;
- (4) Being a general partner in a partnership;
- (5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity; or
- (6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation.

Paragraph (b) of the definition includes those persons who, by virtue of their relationship to an entity, would ordinarily be in a position to exercise control over that entity. Paragraphs (b)(1), (b)(2), (b)(4) and (b)(5) include persons required to be reported on a permit application pursuant to section 507(b)(4) of the Act. A primary purpose of establishing the presumptions is to shift the burden of persuasion from the regulatory authority to the persons more likely to have access to the information necessary to establish whether control exists.

Presumptions. If an applicant and a violator have a relationship specified in paragraph (b), the permit will be blocked unless the applicant can rebut the presumption of control. A person need not hold the same position in each entity to establish the presumptions, so long as he or she controls the applicant and also controls or controlled the violator. A person presumed to be in control of an entity can rebut the presumption by submitting evidence which establishes to the satisfaction of the regulatory authority that he or she has or had no control of the entity. For any entity with unabated violations or

unpaid penalties or fees, some person is responsible for the occurrence of the violation or the failure to abate the violation or to pay monies owed. In some cases, more than one person may be in control, such as in a partnership composed of two individuals.

The April 5, 1985 proposal would have established an irrebuttable determination of control for all officers, directors, general partners, and anyone having record or beneficial ownership of ten percent or more of any class of voting stock in a corporation. The April 16, 1986 option would have expanded this group to also include operators.

Many comments were received on these proposals. A few approved, but the majority objected to a conclusive presumption of control for such persons.

OSMRE agrees with commenters who asserted that not all officers, directors, general partners, operators and ten percent owners of record are in a position to exercise control over a surface coal mining operation. Rather than have an irrefutable standard, therefore, OSMRE has included rebuttable presumptions in paragraph (b) of the final rule.

OSMRE has concluded that an irrebuttable presumption of control for all officers, directors, general partners, operators and 10 percent shareholders would raise due process concerns. If the presumption of control is not necessarily or universally true for each member of a class and a reasonable alternative procedure for making the determination exists, an irrebuttable presumption should not be established. See *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); and *Vlandis v. Kline*, 412 U.S. 441 (1973).

Several commenters objected to the use of presumptions in the proposed definitions, criticized OSMRE's standards for presuming control, and argued that the presumptions were contrary to well-established business law and to the realities of the marketplace with regard to who actually exercises control of a business.

OSMRE does not agree. The presumptions in the definition do not determine who ultimately is responsible for the manner in which a surface coal mining operation is conducted. The presumptions determine who has the burden of proof, and have been established on the basis of those classes of persons who have apparent authority over the conduct of surface coal mining operations. The burden of proof properly should rest with those who have access to the information on which a control determination can be accurately made—the officers, directors, general partners, operators, those with the ability to

commit the financial or real property or working resources of an entity, owners of a ten through fifty percent interest, and owners and lessors of coal. Neither OSMRE nor regulatory authorities have easy access to the information which is needed to make an accurate determination of control in such circumstances, whereas persons subject to the presumptions would have better access to the information needed to show control does not exist.

One commenter stated that immediate family members should be the subject of rebuttable presumptions of control with the exception of minor children for which there should be an irrebuttable presumption. The commenter further stated that immediate family members should include members of the same household, husbands, wives, direct descendants and ancestors, siblings, aunts, uncles, nephews, nieces and first cousins, and include relationships by blood and adoption.

OSMRE disagrees. Such relationships can be effectively regulated under paragraph (a)(3), should the need arise. Under paragraph (a)(3), "any other relationship" can include family relationships. The regulatory authority may use paragraph (a)(3) to regulate family relationships if it has reason to believe that such relationships are being used to mask control of surface coal mining operations. Such information may come to the attention of the regulatory authority during the public participation process provided by 30 CFR 773.13.

Concerning minor children, OSMRE is unaware of any situation where a minor child has applied for a permit, and questions whether a minor child would be able to enter into a contract, or obtain the necessary bond, without the assistance and consent of a legal guardian, who would then be regulated under paragraph (a)(3).

Paragraph (b)(1)—Officers and Directors. Commenters asserted that while a corporate board of directors exercises general control over a corporation when acting as a unit, it may have little impact on day-to-day operations. The commenters stated that individual directors may exert little or no control, or may disagree with the board's majority, but under the corporate bylaws or standards may be unable to influence it. A commenter argued to the contrary that "complete" or "absolute" control over a company's activities should not be required before an officer or director is considered in control. By "complete" or "absolute" control the commenter meant control or an ownership interest large enough to

allow a person to compel compliance by his or her actions alone.

A person, such as a director, cannot escape responsibility merely by asserting that he or she is a member of a group, and the group, collectively, can exercise authority, but not any one individual. The information needed to establish whether a particular director can exercise control of a corporation likely relates to the internal workings of the corporation. A director may have access to such information. Access by a regulatory authority is likely to be difficult. OSMRE is establishing the presumption of control for directors to encourage such information to be brought forward to the regulatory authority if the director wishes to establish that control does not exist.

Commenters opposing the presumption of control for officers and directors asserted that it is unlikely as a general matter that a treasurer or junior officer of a corporation could exercise control.

As stated above, OSMRE agrees that every officer of a corporation may not control the relevant surface coal mining operation. An officer in a large corporation may rebut the presumption by demonstrating that his or her responsibilities preclude such control. In small closely held corporations, however, control can be exercised in a number of ways and the mere restatement of official responsibilities may be insufficient to overcome the presumption.

Irrebuttable Presumption Alternative For Officers Rejected. One commenter preferred a conclusive presumption of control for officers, but stated that if OSMRE rejects this approach, an alternative could be structured which establishes an irrebuttable presumption in the following three situations where an irrebuttable presumption for officers would be particularly compelling.

The first situation specified by the commenter would apply to businesses over a certain size, and include an irrebuttable presumption for "line of authority" officers dealing with surface coal mining and reclamation operations, and would always include the chief executive officer and the chief operating officer. Non-"line" officers would not be subject to any presumption, because in large corporations, non-"line" officers may not be involved with the conduct of surface coal mining and reclamation operations. The commenter suggested that "line of authority" officers could be initially identified by requiring companies to specify which of their officers are included, subject to the regulatory authority's discretion to add others.

OSMRE agrees that in most instances officers with "line" authority over a surface coal mining operation are in control of the operation. The problem with establishing an irrebuttable presumption, however, is twofold. First, within a particular entity, actual authority could be exercised by a person without "line" authority, and the person in apparent control should be given opportunity to demonstrate that he or she cannot exercise control. Second, a person with line authority in an entity which controls, but is not conducting, a surface coal mining operation perhaps can demonstrate that he or she does not control the activities of the surface coal mining operation. OSMRE does not expect in either situation that a person in a line position will generally rebut the control presumption.

OSMRE also agrees that non-"line" officers in large corporations often will not control the organization. OSMRE's problem in this regard was establishing the size standard for removing the presumption of control. Rather than selecting an arbitrary cutoff, OSMRE has decided to establish the control presumption for all officers, recognizing that for very large corporations a non-line officer will easily be able to provide adequate rebuttal.

The second situation would include corporations with less than 500 employees. The commenter suggested that all officers in such corporations should be subject to an irrebuttable presumption, because lines of authority are likely to be blurred, with all officers intimately involved in various aspects of business. The commenter selected the 500-employee threshold from the Small Business Administration size standard of five hundred employees for small businesses in coal mining, at 48 CFR 19.102(g).

OSMRE simply does not agree that a size threshold exists for corporations below which every officer will always control the corporation. OSMRE cannot justify an irrebuttable presumption, particularly with regard to officers who are not in the chain of command over the conduct of a surface coal mining operation.

The commenter's suggested size threshold is based on the Federal Acquisition Regulations (FAR) at 48 CFR Part 19. Part 19 implements the acquisition-related sections of the Small Business Act, the purposes of which are different from SMCRA. Although the FAR address whether entities are affiliated or under common control, they do not establish an irrebuttable presumption of control for all officers of small corporations. To the contrary, instead of conclusively providing that an

individual who serves as an officer of two corporations controls both corporations, the FAR require interlocking management so that the officers, directors, employees, or principal stockholders of one concern serve as a working majority of the board of directors or officers of another concern. (48 CFR 19.101(f)(1)).

Although the commenter focused on particular aspects of the FAR, in many ways OSMRE's regulatory scheme will result in greater scrutiny of an applicant than would the provisions of the FAR. For instance, although the commenter asserted that OSMRE must collect extensive information on all officers, the FAR simply requires that an offeror represent in good faith that it is a small business, without the requirement to submit supporting information. 48 CFR 19.301.

In the third situation suggested by the commenters, the following officers would be subject to an irrebuttable presumption of control: (1) Those who serve as directors ("inside directors"); (2) those who own substantial amounts of a corporation's stock or debt; (3) those who rent facilities or equipment to or from a corporation; (4) those who "share" employees with a corporation; (5) those who organized a corporation; (6) those who commingle their assets with those of a corporation; or (7) those who work for a corporation that is undercapitalized or that disregards corporate formalities. The commenter asserted that the above standards would cover situations where an officer is the driving force behind a "shell" company, or has such a relationship with a company that he or she is in control.

OSMRE rejects these suggestions for several reasons. The complexity of the commenter's suggestions would make implementation extremely difficult. Implementation of any regulatory scheme is dependent upon the quality and availability of the information needed. The two principal sources of information for compliance review are OSMRE's Applicant Violator System and permit applications. With the exception of officers who are also directors or large shareholders, neither source can presently provide information needed to establish the third set of categories suggested by the commenter. Information on items such as the commingling of assets, undercapitalization of corporations, corporate organizers or sharing of employees is not easily collectible. Future modification of permit application requirements is not likely to make such information available,

particularly with regard to the owners or controllers of permit applicants.

The commenter's suggested alternative would unreasonably increase the information collection burden imposed on the public. Under the Federal Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*, Federal agencies are required to minimize or, where possible, reduce the information collection burden it imposes on the public. In addition each Federal agency is given an information collection "budget." Although statutory information collection requirements, such as mandated by 507 of SMCRA, must be satisfied, OSMRE must consider the amount of information to be collected from the public when imposing discretionary requirements.

As to the exception where information is likely to be available, the rebuttable presumption established by this final rule satisfactorily deals with officers who are also directors or large shareholders. In such situations, the aggregation of factors that tend to establish control will make rebuttal difficult. Factors, such as an officer being both an officer and director, or financing the operation, will be considered when the officer or director attempts to rebut the presumption. Thus a rebuttable presumption in such cases will likely yield the same result as the proposal suggested by the commenters, but will be more fair and provide individuals a chance to show that control does not exist.

In addition, OSMRE is not sure what the commenter meant by the concept of corporations that disregard corporate formalities or officers who organized the corporation, which could include persons who performed technical tasks. A rebuttable presumption will allow persons to come forward to demonstrate whether he or she is in control in such circumstances.

OSMRE agrees that many of the factors the commenter enumerated are valuable indications of control which will certainly be considered during the permitting process. This rule will prove no less effective than the commenter's suggested alternative, however, without imposing undue complexity.

Finally, many of the commenter's suggestions are significant departures from the options proposed by OSMRE, which would have required an additional opportunity for public comment. This would have further delayed the adoption of a final rule.

Paragraph (b)(2)—Operators. As described earlier, the definition establishes a rebuttable presumption of control for operators. This has been a difficult and controversial issue for

OSMRE, and one about which members of Congress inquired as to the basis the agency had for proposing an irrebuttable presumption of control for operators and the basis for changing that position.

Prior to promulgating this rule, OSMRE considered several alternatives. In the April 5, 1985, proposal (50 FR 13724), operators were not specifically mentioned in the definition, but would have been regulated under the phrase "any other relationship." The second alternative was published on April 16, 1986 (51 FR 12879). It did not contain specific rule language but stated that being an operator would constitute control. This option was added in response to comments which argued that the person really controlling the mining operation is the operator (administrative record document no. 6). Under another alternative, published on May 4, 1987 (52 FR 16275); reiterated on October 5, 1987 (52 FR 37164), and included in this final rule, being an operator creates a presumption of control.

Part of OSMRE's difficulty in determining the degree to which an operator controls a surface coal mining operation results from ambiguities in the Act. Even though the terms "permittee" and "operator" are defined in the Act, the Act sometimes uses the terms interchangeably from one section or subsection to another. For example, "permittee" in section 518(a) and "operator" in section 518(c) appear to be used interchangeably.

OSMRE is concerned about the inequities that could result from a conclusive presumption for operators that may not always be true. Although permittees are responsible for everything that happens on the site, non-permittee operators are responsible only for their own conduct. Thus an operator may be able to show that a violation was caused by the permittee or someone else other than itself.

Further, courts have construed operators to include entities which do not physically engage in coal removal. See *United States v. Rapoca Energy Co.*, 613 F. Supp. 1161 (1985) (*Rapoca*). Thus although OSMRE agrees that entities physically engaged in surface coal mining operations will almost universally control such operations, the term operator includes more than such entities.

The proper focus of a compliance review inquiry should be whether a person controls the operation, not whether the person is the "operator." Therefore OSMRE is reluctant to establish an irrebuttable presumption based upon the definition in section 701(13).

One commenter asked whether the rule would apply to the owners and controllers of operators in the same fashion as to the owners and controllers of permittees.

The ownership and control definition provides a means of evaluating the relationship between any two entities, regardless of whether a permittee or operator is involved. When an operator controls a surface coal mining operation, the compliance review must consider the owners and controllers of the operator.

Paragraph (b)(3)—Persons Who Can Commit Assets or Resources. Paragraph (b)(3) creates a presumption for anyone having the ability to commit the financial or real property assets or working resources of an entity. OSMRE considers such an ability sufficient to imply control and therefore has included a rebuttable presumption for such persons.

Paragraph (b)(4)—General Partners. Paragraph (b)(4) establishes a rebuttable presumption of control for each general partner in a partnership.

Several commenters pointed out that while it is true that general partners control a partnership as a group, an individual partner may have only a small voice in management. The commenters pointed out that under sections 18 (e) and (h) of the Uniform Partnership Act, unless the partners agree otherwise, all partners have an equal voice in management. Therefore, unless a provision covering voting exists in the partnership agreement, ordinary matters are decided by a majority vote of the partners.

Under the commenters' reasoning, no partner will be a controller. OSMRE rejects this position on the basis that individuals cannot escape responsibility merely because a group collectively has control and the person is but a part of the group. OSMRE has established a presumption to enable a partner to show that he or she cannot exercise control. Mere assertion of group responsibility is insufficient to overcome the presumption.

Paragraph (b)(5)—10 to 50 Percent Owners. Paragraph (b)(5) presumes control in situations where a person owns less than a majority interest in an entity (*i.e.*, ten through fifty percent). This is consistent with rulings in which several courts have found that actual control can exist when the largest shareholder owns less than half of the voting stock in a corporation. See *Securities and Exchange Commission v. R. A. Holman & Co.*, 377 F.2d 665, 667 (2d Cir. 1967); *Gottesman v. General Motors Corp.*, 279 F. Supp. 361, 368 (S.D.N.Y.

1967). If a person with a ten through fifty percent interest in an entity believes that his interest does not constitute control, then he will be given an opportunity to submit evidence rebutting the presumption. For example, the presumption of control can be rebutted by evidence which establishes that the shareholder in question has consistently been denied control of the entity by block voting of other shareholders, or that there is a majority shareholder who controls the entity.

The presumption in paragraph (b)(5) will be used in determining whether control exists between indirectly related corporate entities and will apply at each level of a corporate structure. For example, if Company "A" owns a forty-five percent interest in Company "B," and Company "B" owns a twenty percent interest in Company "C" (the applicant), then Company "A" will be presumed to own or control the applicant, even though Company "A" has an indirect interest in the applicant of only nine percent. The determining factor is not the percentage owned, but whether control exists. In such an example, if company "A" owned or controlled Company "D" which had a violation, the applicant will not be issued a permit unless it submits evidence proving that it is not controlled by Company "B," Company "B" is not controlled by Company "A", Company "A" does not own or control Company "D", or Company "D" is not a violator.

As originally proposed in April 1985, "ownership" would have been defined as, among other things, "ownership of 10 percent or more of any class of voting stock in a corporation." In the corresponding definition of "control," the proposed rule stated that "Control means ownership * * *." Because of this linkage between the definitions, a ten percent interest in a corporation would have resulted in a determination of control under the rule. OSMRE received numerous comments objecting to a definition of "ownership based on an interest that was insufficient to establish any control over a violating entity. Several commenters asked OSMRE to explain how a ten percent interest resulted in control, and requested examples of such situations. They stated that ten percent stock ownership generally does not constitute control of a corporation, and that a higher standard such as fifty percent should be adopted. The commenters asserted that the purpose of the permit blocking provisions of section 510(c) is to compel compliance with the Act and certain other environmental laws by withholding approval of a permit until

outstanding violations under an old permit are corrected. They argued that it would serve no useful purpose to block a permit merely because someone listed in the permit application owned, directly or indirectly, a ten percent or greater interest in a violator if that interest gave insufficient control to effect compliance.

Several commenters objecting to the ten percent option stated that under the rules of statutory construction, words should be given their common meaning in the absence of evidence that some other meaning was intended or manifested. Since the Congress did not define the term "owned" in section 510(c) of the Act, they argued, it is appropriate to assume that the Congress intended the term to be used in its usual and ordinary sense. As one commenter pointed out, the term "own" is defined by the American Heritage Dictionary as "to have or possess," while "control" is defined as "to exercise authority or dominating influence over." Therefore, as used together in the Act, the commenter concluded both of these terms should be defined to imply an ability to direct the manner in which a company conducts the surface mining of coal.

For the reasons described earlier, OSMRE agrees with the commenters' conclusion that only controlling ownership interests should block permits. OSMRE also agrees with the comments that ownership of less than fifty percent may not always constitute control. The definition adopted today addresses these concerns by eliminating a mandatory determination of ownership and control for ownership interests of less than fifty percent.

In addition, no presumption is included in paragraph (b)(5) for ownership of less than 10 percent because it is unlikely that an ownership interest of less than ten percent would generally be sufficient to give control of an operation without other factors. A situation involving less than 10 percent ownership can constitute control under paragraph (a)(3), if the regulatory authority can establish the necessary facts.

Several commenters, citing "11 Fletcher, Cyclopaedia of the Law of Private Corporations (rev. perm. ed. 1986)" as authority, stated that a ten percent shareholder does not "own" a corporation; he merely owns one-tenth of its shares, and has the rights to vote one-tenth of its shares and to collect one-tenth of its dividends. In the commenter's view, the shareholder does not own any of the corporation's assets or capital directly, and therefore does

not "own" the corporation as that term is used in section 510(c).

OSMRE disagrees with the commenters' analysis. The commenter's focus on direct ownership of assets and capital is not determinative as to whether a certain percentage ownership of a corporation's shares can establish control of the corporation. If direct ownership of assets and capital had to exist, a majority shareholder would not necessarily be considered an owner of the corporation. That result is not plausible.

Relation to section 507(b)(4) of the Act. Section 507(b)(4) requires an applicant which is a partnership, corporation, association, or other business entity to include in its application for a surface coal mining and reclamation permit:

[T]he names and addresses of every officer, partner, director, or person performing a function similar to a director, of the applicant, together with the name and address of any person owning, of record 10 percentum or more of any class of voting stock of the applicant and a list of all names under which the applicant, partner, or principal shareholder previously operated a surface mining operation * * * within the five-year period preceding the date of submission of the application.

Some commenters argued that the legislative history of section 507(b)(4) indicates that the Congress did not intend that all persons named by an applicant under section 507(b)(4) should be held ultimately responsible as owners or controllers. They argued that the information submitted pursuant to section 507(b)(4) does not define who owns or controls an applicant for the purposes of section 510(c) permit blocking, but simply requires the submission of data from which OSMRE must determine those ultimately responsible for the mining operation, either because of their official position or because of their controlling ownership interest in a corporation. OSMRE agrees.

One commenter favoring the position that ten percent ownership establishes ownership or control asserted that the information reporting requirements of section 507(b)(4) indicate who the Congress considered "ultimately responsible" for a mining operation, and therefore everyone named by an applicant pursuant to section 507(b)(4) should be considered either an "owner" or a "controller" for permit blocking under section 510(c). OSMRE initially was inclined to adopt this position. However, a careful reading of the legislative history and the inequitable results that would flow from such a

position has led OSMRE to a different conclusion.

The legislative history of section 507(b)(4) includes the statement that "[t]he information required by [section 507(b)(4)] is a key element of the operator's affirmative demonstration that the environmental protection provisions of the Act can be met as stipulated in Section 510 and includes: (1) Identification of all parties, corporations, and officials involved to allow identification of parties ultimately responsible * * *." H.R. Rep. No. 94-896, 94th Cong., 2nd Sess. 111 (1976). (Emphasis added.) See also S. Rep. No. 94-28, 94th Cong., 1st Sess. 206 (1975). The report does not state that the information submitted pursuant to section 507(b)(4) identifies all parties ultimately responsible, but only that it is collected "to allow identification" of such parties. Thus, the Congress intended to give the regulatory authority discretion to determine whether any person named under section 507(b)(4) owns or controls the applicant.

In the April 5, 1985 proposed rule, OSMRE requested comments as to how far up and down the vertical chain of corporate ownership the rule should apply. Some commenters stated that it should apply up and down the ownership chain until all ten percent stock owners were identified.

Commenters opposed to a rule including indirect owners pointed out that section 507(b)(4) of the Act required only the applicant's shareholders of record to be listed on a permit application, but not indirect owners. The commenters argued that this indicated that the Congress intended that a permit should be blocked only for direct ownership.

OSMRE disagrees with the latter commenters' conclusion. Their focus on the scope of section 507(b)(4) of the Act does not answer the question of the proper reach of OSMRE's rule. Section 507(b)(4) is an information collection provision that does not govern the scope of the compliance review under section 510(c) of the Act. This rule, moreover, is an exercise of authority under more than just section 510(c). For instance, sections 201(c)(1), 201(c)(2), 412(a) and 501, provide ample authority for the Secretary to include as many corporate levels as necessary within the concepts of ownership or control. Thus, the proper reach of OSMRE's rule is a matter for the exercise of its discretion in a reasonable manner.

OSMRE views the primary purpose of the withholding of permits based upon ownership or control to be the correction of violations and the payment of monies owed. Accordingly, OSMRE

has adopted a rule which focuses on the ability to achieve these goals, rather than on a specific number of indirect ownership levels and will track ownership up and down a corporate chain so long as control is present.

As required by section 507(b)(4), OSMRE and state regulatory authorities will collect information on persons holding at least a ten percent interest in the applicant, and will use the information to determine who in fact is ultimately responsible for the operation. OSMRE also will include such information in the Applicant Violator System. Under the rule, a person holding an ownership interest of between ten and fifty percent will be presumed to qualify as an owner or controller unless it can be demonstrated that the person's relationship to the entity does not provide control over the conduct of the relevant surface coal mining operation. Based upon such a demonstration, the regulatory authority lawfully may conclude that a person named under section 507(b)(4) does not own or control the applicant.

One commenter objected to the rule and stated that it incorrectly interpreted the informational requirements of section 507 as establishing a new class of persons subject to penalties, both in the form of civil or criminal penalties and of permit blocking under the Act. The commenter argued that section 507 should not be read as defining "ownership or control" for penal purposes under section 510(c). The commenter argued that section 507 sets forth only a comprehensive informational requirement that is broad enough to cover all of the Act's informational needs, such as the conflict of interest provisions, the inspection and enforcement provisions, and the provisions setting forth certain exemptions from the Act's requirements such as the small operator exemption. The commenter further argued that the rule subjected a new class of persons to liability for civil penalties and reclamation work incurred by another separate, and possibly unrelated, corporate permittee.

OSMRE agrees in part and disagrees in part. Certainly OSMRE may use the information furnished pursuant to section 507(b)(4) of the Act to perform the compliance review required by section 510(c) of the Act. The House Report quoted earlier links the reporting requirements of section 507 with the compliance review required by section 510. Similarly, the information reported pursuant to section 507(b)(4) of the Act may be used for more than the compliance review required by section 510(c) of the Act. For example, section

518(f) of the Act authorizes the assessment of individual civil penalties against officers, directors and agents of a corporate permittee who knowingly and willfully authorize violations of the Act. The information supplied pursuant to section 507(b)(4) may be used to identify the officers, directors and agents of the corporate permittee against whom an individual civil penalty may be assessed.

OSMRE disagrees with the commenter's assertion that the rule will subject a new class of persons to liability for civil penalties and reclamation work incurred by another separate, and possibly unrelated, corporate permittee. The rule does not transfer liability for civil penalties and reclamation work to the permit applicant. Those responsibilities remain with the persons who originally incurred the obligation. If the commenter intended the term "liability" to mean that an applicant would be unable to receive a permit until reclamation is performed and penalties and fees paid, the commenter is correct. The rule is justified because it is a powerful means of inducing remedial action in situations where such action is possible.

Relation to section 518 of the Act. A commenter asserted that section 518 of the Act establishes the class of persons and entities subject to penalties and responsible for violations of the Act's provisions. The commenter argued that section 510(c) must be read as requiring the regulatory authority to withhold the privilege of obtaining a surface mining permit only from individuals or entities determined to be in violation of the Act's requirements pursuant to the penalty provisions of section 518 or under similar provisions of other environmental laws. As an example, the commenter argued that section 518(f) establishes clear standards for when a corporate officer, director or agent is in violation of the Act's requirements. The commenter argued that the officer, director or agent must have willfully and knowingly authorized, ordered or carried out the violation before he or she can be held personally liable and a permit be denied because of a common link between a permit applicant and a violator.

OSMRE disagrees. Section 518 establishes the civil and criminal penalty provisions of the Act; it does not establish the criteria for permit blocking under section 510(c). For example, section 518(f) specifies the type of conduct, knowing and willful, for which a corporate official will be assessed an individual civil penalty. No such

requirement is set forth in the relevant portion of section 510(c).

Moreover, OSMRE has discretion to use a range of enforcement options to achieve compliance and may find it more effective to take action against a corporate entity rather than to assess an individual civil penalty under section 518(f). Therefore, a determination that an individual is in violation of section 518 is not a prerequisite to blocking a permit under section 510(c) or under this rule. The determining factors under final § 773.15(b)(1) are: (1) Whether the common officer was in control of the violator at the time the violation occurred and is therefore responsible for the violation; or (2) whether the common officer presently controls the violator and, therefore, can order abatement.

Successor Responsibility. In the notice of proposed rulemaking, OSMRE requested comments as to whether parent corporations which acquire subsidiaries should be responsible for violations committed by the subsidiaries prior to their acquisition. Some commenters opposed making parent corporations responsible for the violations. Other commenters favored responsibility. Commenters opposing responsibility argued that it might have a negative effect on an acquisition even though the acquisition could result in any acquiring company abating a violation or reclaiming an abandoned mine site. Commenters favoring responsibility stated that it was reasonable for the acquiring parent to assume the liabilities of a subsidiary as well as its assets. One commenter favored responsibility after a grace period in which the parent could bring the subsidiary into compliance.

OSMRE concludes that it is reasonable and proper to hold an acquiring company liable for the violations for which a subsidiary was responsible prior to its acquisition in a number of circumstances. When the acquiring company acquires a share in excess of 10 percent of an entity, under the rule it will presumptively own or control the entity and therefore can compel the correction of a violation in the same manner as its predecessors in interest.

When a company acquires only assets of an entity, its responsibilities will depend upon a number of factors. For instance, if the assets purchased include the mine site and equipment where outstanding violations exist, the acquiring company would be responsible for the violations under the theory that the acquiring company has purchased the liabilities in connection with the transferred assets of the other entity and that the purchase price for the

entity would reflect any liabilities transferred. In other instances, assets may be transferred without transferring responsibility for violations. However in these instances the contract of sale or other legal instrument must clearly establish that responsibility remains with the selling entity.

The law of successor liability is complex. Although the general rule is that where a corporation sells all its assets to another company, the buyer is not liable for the obligations of the seller, significant exceptions exist. As one Federal Court stated:

Four exceptions to the general rule of nonliability are widely recognized * * *. Thus, where (1) the purchaser of assets expressly or impliedly agrees to assume obligations of the transferor; (2) the transaction amounts to a consolidation or de facto merger; (3) the purchasing corporation is merely a continuation of the transferor corporation; or (4) the transaction is fraudulently entered into to escape liability, a successor corporation may be held responsible for the debts and liabilities of its predecessor. See *Shane v. Hobam, Inc.*, 332 F. Supp. 526 (E.D. Pa. 1971); *Grantham v. Textile Machine Works*, 230 Pa. Super. 199, 326 A.2d 449 (1974). See generally 15 W. Fletcher, *Cyclopedia of the Law of Private Corporations* section 7122 (rev. perm. ed. 1983). A fifth circumstance, sometimes included as an exception to the general rule, is where the transfer was without adequate consideration and provisions were not made for creditors of the transferor. *Husak v. Berkel, Inc.*, 234 Pa. Super. 452, 341 A.2d 174, 176 (1975) * * *.

Philadelphia Electric Co. v. Hercules, Inc., 762 F.2d 303, 308-309, (3d Cir. 1985). See also *Pulis v. United States Electrical Tool Co.*, 561 P.2d 68 (OK. 1977); *Kemos, Inc. v. Bader*, 545 F.2d 913 (5th Cir. 1977); *Golden State Bottling Company, Inc. v. National Labor Relations Board*, 414 U.S. 168 (1973). Each of these exceptions may be applicable, alone or in combination, to possible ownership or control relationships where a successor may be held responsible under the Act.

The "grace" period suggested by the commenter is unnecessary because a regulatory authority may conditionally issue a permit under 30 CFR 773.15(b)(1)(i), if a violation is being abated to the satisfaction of the regulatory authority. Consequently, any company which has acquired a subsidiary with an outstanding violation may receive a conditional permit in appropriate circumstances.

Paragraph (b)(6)—Contract Mining. Paragraph (b)(6) covers contract mining operations in which the person controlling the mining operation may be neither the permittee nor the operator, but instead is the owner or lessor of the coal. Specific regulatory language

governing contract mining operations was added in response to comments discussed below.

As proposed on April 5, 1985, the rule contained a rebuttable presumption of control for those with the right to receive coal to be mined by another under a lease, sublease or other contract. (50 FR 13727.) Numerous comments were received on this proposal.

The constituent positions surrounding contract mining are not surprising. Citizen and environmental groups desire that reclamation and other responsibilities arising under the Act be as wide-ranging as possible and that *de facto* control by one entity over another, through a contract or other means, is sufficient to establish responsibility by the controlling entity. These groups prefer such widespread responsibility because, typically, the controlling entity has greater resources, stability, and the ability to abate violations than does the entity controlled.

Industry groups take the opposite view and assert that an entity mining under a contract is an independent entity who should bear sole responsibility for its actions. Several industry commenters objected to a rebuttable presumption of control by the owner or lessor of the coal in a contract mining operation, asserting that contract mining is a legitimate business arrangement that has been utilized for generations to finance and mine coal and in the majority of cases is not used to evade the requirements of the Act. One commenter stated that it was unfair to make a coal company responsible for the conduct of its contract operators, especially with regard to past unpaid fines and fees.

In paragraph (b)(6) of the final definition of "owned or controlled," OSMRE has established a rebuttable presumption of control for "captive" contractors of coal owners or lessors. Control over the conduct of a surface coal mining operation will exist by those "[o]wning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation." In situations covered by paragraph (b)(6), applicants would have to prove that a contract mining relationship with a coal lessor does not establish control. In situations involving contract mining where paragraph (b)(6) does not apply, control can be established under one of the other paragraphs of the definition.

OSMRE has adopted the presumption because, in contract mining operations, the owner or lessor of the coal more often than not is controlling the mining operation even though the owner or lessor of the coal purportedly employs "independent contractors." This was the situation in *Rapoca*, *supra*, discussed below. To the extent that a coal company controls or can exercise control over a contract operator it should be held responsible for any outstanding violations of the Act which it could have prevented or corrected.

Rapoca. The *Rapoca* case support the presumption in paragraph (b)(6). In *Rapoca*, OSMRE sued under section 402(a) of the Act, 30 U.S.C. 1232(a), to collect reclamation fees from the Rapoca Energy Company, which had contracted with others to mine the coal it owned. The issue was "whether a large coal company that contracts with independent companies to produce coal that it owns or leases is an 'operator' responsible for the payment of [such] fees." *Id.* at 1163.

Finding the *Rapoca* was liable for payment of the fees, the court stated:

Because of the degree of control which Rapoca Energy Company exerts over the mining companies with respect to crucial aspects of the mining process, along with the corresponding lack of freedom regarding the mining companies ability to sell to anyone other than Rapoca, this court must conclude that the "independent contractors" are no more than Rapoca's agents.

Id. at 1164.

Proof Needed To Rebut Contract Mining Presumption; Relevance of Contract Terms. Commenters objected to OSMRE's statement in the 1985 preamble to the proposed rule (50 FR 13726) that the terms of the contract may not be sufficient to rebut the presumption of control in a contract mining operation and argued that permit applicant would be required to submit "negative" proof to rebut the presumption. The commenters asserted that, by considering factors other than contract terms, OSMRE ignores the integrity of small business entities, and stated that contract miners are often utilized for small coal reserves that cannot be mined economically by larger companies, or by the landowners who own the coal but lack the means to mine it. The commenter stated that the contracts are very precisely worded to specify the responsibilities of all the parties involved.

OSMRE disagrees. The terms of a contract may establish the rights of the parties among themselves, but are not a conclusive determination of the responsibility of the parties under the Act. OSMRE will look to the actual

relationship between the parties. Important factors to be considered in determining the actual relationship of the parties include whether the mining company is free to sell the coal it extracts to whenever it wishes and the degree of involvement of the coal owner or lessor in the mining operation. Information which can be used to rebut a presumption of control can include, but is not limited to, data on who provides engineering services, who determines the placement and method of driving entries or making cuts, and to whom the coal may be sold and at what price. As with all of the presumptions contained in the rule, submission of adequate information that is available to the parties involved will suffice to rebut the presumption.

Some commenters objected to the rebuttable presumption of contract mining operations on the grounds that it would allow OSMRE to modify or annual the terms of contracts.

OSMRE disagrees. Contract terms many continue to govern rights as among the parties to a contract. However, the terms of private contracts are not necessarily determinative of obligations under the Act.

Relation to Two-Acre Definition of Control. One commenter asked why, with regard to contract mining, OSMRE has deviated from the position it has taken on control in the "two-acre rulemaking."

The final rule on the two-acre exemption, to which the question relates, appears at 30 CFR 700.11(b), and was promulgated on August 2, 1982 (47 FR 33431). The two-acre rule derives from former section 528(2) of the Act, which was repealed by the Congress on May 7, 1987, Pub. L. 100-34, 100 Stat. 300. For purposes of the two-acre exemption, section 700.11(b)(2)(iii) defines control as:

[O]wnership of 50 percent or more of the voting shares of, or general partnership in, an entity; any relationship which gives one person the ability in fact or law to direct what the other does; or any relationship which gives one person express or implied authority to determine the manner in which coal at different sites will be mined, handled, sold or disposed of.

The definition of control in section 700(b)(2)(iii), with an exception related to general partners, is consistent with the definition adopted by this rule. The principal difference as to contract mining relates to the manner of proving control, not to the relationship covered. In 1982, OSMRE elected not to include any rebuttable presumptions, choosing instead that the regulatory authority has to establish control. Clearly, however, under the two-acre definition of control

a contract mining relationship could constitute control. In the preamble to § 700.11(b)(2)(iii), OSMRE explained that:

If one person exercises sufficient authority over another (whether by contract, lease, other agreement, or implied authority) to determine how that person mines, handles, sells or disposes of coal from a site, there is "control."

47 FR 33428 (August 2, 1982).

As to general partners, OSMRE has decided to allow such persons to attempt to rebut a presumption, rather than to create a conclusive determination of ownership or control.

One commenter cited an example in the preamble to the proposed two-acre definition in support of its assertion that OSMRE had changed its position on control for contract miners. In the two-acre proposal, OSMRE stated that

if company A, by agreement with operators X, Y, and Z, requires all coal mined at those sites to be sold to company A and delivered to a prescribed tipple, then company A would "control" the operation under the proposed definition.

47 FR 52 (January 4, 1982). The commenter concluded that this example raised an irrebuttable presumption of control which was lacking in the May 4, 1987 and October 5, 1987 options, and therefore OSMRE had changed its position with respect to contract miners.

OSMRE disagrees. The two-acre definition does not contain an irrebuttable presumption of control for contract miners. The regulatory language specifies in general terms the circumstances which constitute control. The cited passage was not intended to establish an irrebuttable presumption, but was intended to be an example of the application of the proposed definition under particular circumstances. One salient fact missing from the example was how Company A derived the authority, such as by being the coal owner or lessor, to require where the coal was to be sold. Depending upon all of the circumstances, the same conclusion would likely result from applying this rule.

Relation to IBLA Decision. One commenter inquired as to how the standards set forth in *S & M Coal Co. and Jewell Smokeless Coal Co. V. Office of Surface Mining Reclamation and Enforcement*, 79 IBLA 350 (1984) (*S & M Coal*) relate to this rule.

The *S & M Coal* decision supports the presumption established by paragraph (b)(6) of the "owned or controlled" definition. In the *S & M Coal* case, the DOI Office of Hearings and Appeals (OHA) held a lessor of coal liable for

violations at a mining site even though the coal produced at that site was mined by another party pursuant to an oral contract. In reaching its decision, OHA noted that the lessor's employees took an active part in the planning and engineering functions in support of the mining operations. OHA also held that while the amount of control actually exercised is indicative of the relationship between the owner of the coal and the company or individual extracting the coal, the determination regarding exercise of control should not solely be based on past exercise of control and that it is important to determine the extent that a party can exercise control.

Irrebuttable and Broader Presumptions Rejected. One commenter wanted an irrebuttable presumption of control in contract mining situations. The commenter argued that contract mining is a major method of mining in various regions of the country. The commenter argued that contract mining has caused untold environmental damage through irresponsible conduct on the part of both the contractor and the entity arranging to have the coal extracted. The commenter further argued that while contract mining is a legitimate method of mining, and in certain cases plainly desirable, there is no question but that contracting has been and is being used on a widespread basis to evade compliance with the Act. The commenter objected to leaving open the issue of lessor/owner liability through a rebuttable presumption when in fact total or almost total control exists in contracting mining situations.

OSMRE does not agree that an irrebuttable presumption is warranted. If in all contract mining operations, the conduct of the relevant surface coal mining operation were controlled by the coal owner or lessor, then a conclusive presumption would be warranted. However, such is not the case. OSMRE agrees that when an owner or lessor of coal controls salient features of an operation performed by a contractor, a determination of control over the whole surface coal mining operation is justified and should be established. This is a reasonable position, which will accomplish the goals which were contemplated by the Act. Because control by the owner or lessor does not always exist, however, it would be inequitable for OSMRE to adopt a rule which conclusively presumes control in all situations.

One commenter suggested that having the right to receive coal under a lease, sublease, or other contract is too restrictive a standard to use to

determine control and suggested that a standard using any benefit received from mining and/or marketing of the coal would be more appropriate to determine control.

OSMRE has decided not to establish a standard whereby a coal owner or lessor would be presumed to control the conduct of a surface coal mining operation if it receives any economic benefit from the mining or marketing of coal. Such a presumption would be too broad because in almost every contract mining situation the coal owner or lessor derives some economic benefit from the mining and marketing of the coal produced. What is more relevant is whether the coal owner or lessor can control the manner in which the surface coal mining operation is conducted. A coal lease combined with the right to receive the coal generally establishes such control.

In-Kind Royalties. One commenter asked for clarification of the rebuttable presumption as it applied to lease situations, especially where payment for the lease was in-kind.

OSMRE does not intend that the reference to the right to receive coal in the rebuttable presumption contained in paragraph (b)(6) be construed as applying to royalty payments, such as those received by the Federal government on Federal coal leases. However, simply labeling the receipt of coal as an in-kind royalty payment will not automatically except the operation from the provisions of (b)(6) if the payment is more than a simple royalty or if the lessor otherwise controls the conduct of the surface coal mining operation.

Effect on Business Practices. Some commenters pointed out that the rule might cause companies to eliminate contract mining operations to avoid liability for the violations of the contract miners at other unrelated sites.

OSMRE agrees that this may happen in specific instances. OSMRE does not believe, and no evidence has been presented, that this rule will eliminate contract mining as a business practice in the coal industry. As with any rule of law, many companies seek prudent ways to comply. One way would be not to contract with companies with outstanding violations. This rule does not preclude any company, however, from entering into a contract with any other entity. Whether this rule affects the ability of a particular contract miner to enter into contracts with coal owners or lessors could be dependent on the business reputation of the contract operator. Those who have reputations

for operating in compliance with the law should have few problems.

One commenter said the rule would be unfair to a contract miner who may have had difficulties in the past and was trying to rehabilitate himself.

OSMRE disagrees. The rule is necessary to prevent violators from obtaining new permits. The contract miner wishing to rehabilitate himself and obtain a new permit may always enter into an abatement agreement or payment schedule with the regulatory authority.

One commenter stated that the proposed rule might discourage companies from buying coal from other companies because the purchaser might be deemed in control of that company, and thus be liable for any outstanding violations the latter might have.

OSMRE disagrees that the rule will establish responsibility for violations without ownership or control of the violator. In situations covered by Paragraph (b)(6), the rule provides the opportunity to show that control does not exist. In situations covered by paragraph (a)(3), the regulatory authority would have to establish that control does exist. The existence of a contract to purchase coal, without any other relevant factors, would be unlikely to establish control.

Procedures. One commenter was concerned because the proposed rule did not discuss the manner, standard or forum for rebutting the presumptions, and requested clarification.

OSMRE recognizes that the reasonableness of the ownership and control definition and of the compliance review required by revised § 773.15(b) is dependent upon the rules being implemented in a fair and effective manner. OSMRE also realizes that permitting decisions by both OSMRE and state regulatory authorities will be based in part upon the information contained in OSMRE's computerized Applicant Violator System (AVS). To assure that recommendations by the AVS are correct, OSMRE has established a clearinghouse to verify recommendations and to respond to queries. Moreover, OSMRE has taken system-wide measures to verify the AVS information. Notwithstanding these precautions, additional procedures exist for adversely affected persons to ensure that determinations of ownership or control and other compliance review related issues are properly made. These are described below.

OSMRE As Regulatory Authority. In applying the rule in situations where OSMRE is the regulatory authority, OSMRE will use the procedures it

currently has in place for reviewing permit applications. When a permit application is received, a preliminary check is made for outstanding violations or unpaid fees or penalties incurred by the applicant, its owners or controllers, or entities they own or control. If a present or past ownership or control link to a violator exists, or if other circumstances exist which would block permit issuance, notice is sent to the permit applicant. The applicant is informed of the links to the violator and that the relationship will result in withholding issuance of a permit unless the violation is abated or is on appeal, or is in the process of being abated, or the permit applicant can demonstrate that the requisite ownership or control relationships between the owners and controllers of the applicant and the violator do not exist. Upon receiving such a notice, the applicant may submit evidence concerning any relevant factors which would rebut an applicable presumption.

The measure of proof needed to rebut a presumption under this rule is a preponderance of the evidence, the standard ordinarily required in civil matters. Any applicant denied a permit by OSMRE may file a request for review with the Hearings Division of the Department of the Interior's Office of Hearings and Appeals in accordance with 43 CFR 4.1360 *et seq.*

States As Regulatory Authorities. When a permit application is filed with a State regulatory authority, the Applicant Violator System is checked by the regulatory authority to determine whether an ownership or control relationship exists between the permit applicant and a current violator. If the permit is denied by the regulatory authority based on a determination that a relationship to a current violator exists, the permit applicant may petition the regulatory authority for review of the permit denial. The petitioner may challenge any basis for the denial, including an outstanding violation or the relationship to the violator. If the petition challenges a State regulatory authority's determination that a relationship to a violator exists, the petition shall be reviewed in a State forum. Challenges to State determinations of ownership or control should be reviewed in a State forum, because rebutting the presumptions in 30 CFR 773.5(b) may be dependent on State laws.

In some cases, Federal review may be required. OSMRE intends that challenges to determinations that Federal violations exist or that monies are owed to the Federal government be

resolved in a Federal forum using national standards. The Department of the Interior is prepared to address any problems which may arise on a case-by-case if existing procedures prove insufficient to ensure due process.

Procedures to Amend Applicant Violator System Information. In addition to the procedures described above, both individuals and organizations may seek to amend the information in the Applicant Violator System, independent of the existence of a permit application if they believe that the records are not accurate, relevant, timely or complete. A notice describing the Applicant Violator System, the categories of records contained in the system and the procedures for reviewing those records was published in the Federal Register on August 10, 1987 (52 FR 29570), and an amendment to that notice was published on June 16, 1988 (53 FR 22575).

A determination which OSMRE makes on a request for amending information contained in the Applicant Violator System will be subject to administrative review within DOI. If the request is made by an entity other than an individual, an adverse determination will be subject to review by the Department's Office of Hearings and Appeals. Under different Department of the Interior procedures developed under the Privacy Act of 1974, if the request is filed by an individual, an adverse determination can be appealed to the Assistant Secretary—Policy Budget and Administration, DOI, under 43 CFR 2.74. OSMRE will inform any persons requesting a review and amendment of this information of the proper forum for appeal.

Standards For Rebutting Presumptions. OSMRE published a draft set of guidelines for rebutting the proposed presumptions in the October 5, 1987 notice (52 FR 37164). The guidelines were not extensive and were included in the notice as a starting point for public comment. Public meetings were held on the guidelines at which representatives from the environmental community and the coal industry were present. At the meetings the participants acknowledged that it probably was not possible to achieve a comprehensive agreement on guidelines for rebutting presumptions prior to the issuance of a final rule.

Written comments were also submitted. One commenter stated that standards for rebutting presumptions constitute "rules" within the meaning of the Administrative Procedure Act and therefore cannot be advisory. The same commenter also argued that different guidelines/rules should be developed for

large and small companies. It suggested that officers and directors of small companies (those with less than five hundred employees) should be held to a stricter standard of proof for rebutting presumptions, on the theory that in a small company all officers and directors are intimately involved in the management of the business.

A commenter had the following detailed suggestions for inclusion in the guidelines, reasoning that the actions specified would either bring about abatement or show that the officer or director was not in control: Any officer or director who wishes to rebut the presumption should show that he or she did everything within his or her legal authority to bring about abatement of the violation. A director should show that he or she brought the matter to the attention of the chief executive officer and the board of directors (or the partnership) and proposed abatement, including requesting a vote for compliance. This action should then be communicated promptly to the regulatory authority by the director. The communication could be a simple statement of the director's activities. An officer would be required to do everything in his legal authority to bring about abatement, and then promptly notify the regulatory authority of this action. At a minimum, all officers should bring the matter to the attention of the chief executive officer and the board of directors, in writing, advocating abatement of the violation, and should communicate the action taken to the regulatory authority.

Other commenters objected to guidelines. A state regulatory authority wanted the guidelines withdrawn or else to have it stated in the rule that they were advisory and did not have to be used by a State regulatory authority. One commenter objected on the grounds that—

[O]nce in place, it is likely that the guidelines will operate much like final rules with one difference—there will be little or no opportunity for the regulated industry to assure itself that the guidelines are not changed unilaterally prior to notice and comment. Nor is there any certainty that the guidelines will be "advisory only" and not subject to rigid, inflexible application by regulatory authorities who are overworked and are looking for a formula approach to regulation.

Although OSMRE appreciates the detailed guidelines suggested by commenters, OSMRE does not believe that it is necessary or possible at this time to incorporate guidelines into the definition. As with any rule, an agency must determine just how prescriptive

and detailed the rule must be and how much discretion must be afforded the implementing authorities. In this instance, neither the statute nor OSMRE's prior rules specify the relationships on which to deny permits. The rule adopted today in large measure fills the gaps and sets sufficient standards for regulatory authorities to follow.

In addition, it is difficult for OSMRE to establish guidelines specifying elements such as precisely how many employees a company need have for the directors to be in control, or the percentage of stock ownership less than 50 percent that would always constitute control. Moreover, it is unlikely that such specific standards would guide private conduct, except as to persons who may seek to use the rules to their advantage. The establishment of the presumptions themselves will impel persons wishing to rebut them to bring all relevant factors to the attention of the regulatory authority, regardless of whether OSMRE specifies such factors.

For the present, however, the proof needed to rebut the presumptions will be determined case-by-case. The data available to OSMRE for predicting what evidence might rebut the presumptions are limited, and until sufficient experience has been gained in processing permit applications under the rule, guidelines are premature.

One commenter asked whether the type of violation, and therefore the remedial action required, alter the factors which will be considered in determining whether the presumption of control has been rebutted.

All pertinent factors should be considered when making determinations of control. If the type of violation and remedial action required affect that determination, then it should be taken into consideration. To date, however, OSMRE has not encountered a permit application where the type of violation or the remedial action was a factor in determining control.

One commenter asked if the requirements for rebutting a presumption would change with different control relationships.

The factual requirements for rebutting a presumption will change depending on the particular situation. For instance, the amount of proof required to rebut a presumption of control for a chief executive officer will likely be greater than that for a junior vice-president of a corporation. Likewise, the amount and kind of proof would vary where different presumptions apply.

Other Comments. Some commenters stated that the proposed rule was not a clarification, but a substantive change in

the requirements of the Act. OSMRE disagrees. As stated earlier in this preamble, the rule implements authority granted to OSMRE under a number of sections of the Act and was promulgated in conformity with the requirements of the Administrative Procedure Act.

One commenter objected to the iterative comment periods and referred to the rule as a "rolling" proposal. OSMRE believes that the rule satisfies procedural requirements. The differing options on which OSMRE solicited comments were based upon evolving considerations in response to previous comments. The final rule is substantially like the option described in the October 5, 1987, Federal Register notice, and also embodies features from the earlier notices.

One commenter suggested defining the term "party or parties." The commenter did not explain how the definition should be used or why it was needed. The commenter proposed defining the term as follows:

"Party" or "parties" includes, but is not limited to, two or more persons with an identity of interest such as members of the same family or person with common investments in more than one concern. In determining who controls or has the power to control a concern, persons with an identity of interests may be treated as though they were one person.

Administrative Record, Document No. 162(a), page 33.

OSMRE did not adopt the suggestion because it considered such a definition unnecessary for the regulatory scheme being adopted. The term "party" or "parties" is not used in OSMRE's rule and therefore need not be defined.

The same commenter also suggested adding a definition for the term "entity," and defining the term as follows:

"Entity" includes but is not limited to a partnership, incorporated or unincorporated association, society, joint stock company, firm, company, or cooperative, corporation, joint venture or other business organization, whether organized for profit or not.

Administrative Record, Document No. 162(a).

The commenter argued that such a definition is necessary to avoid any questions of whether an unincorporated association constitutes an entity under a particular state's law. The commenter stated that the definition would be in accord with provisions of the Act, such as the definition of "person" in § 701(19).

OSMRE did not adopt the suggestion because it was considered unnecessary. The compliance review at § 773.15(b)(1) uses the term "person," which is defined in § 701(19) of the Act to mean "an

individual, partnership, association, society, joint stock company, firm, company, corporation, or other business organization," and covers the organizations included in the commenter's suggested definition.

B. § 773.15(b)

Section 773.15(b)(1)—Compliance Review

Section 510(c) of the Act requires that if "any surface coal mining operation owned or controlled by the applicant is currently in violation of the Act * * * the permit shall not be issued * * *". Final § 773.1-5(b)(1) implements section 510(c), as well as other provisions of SMCRA. Former § 773.15(b)(1) required the regulatory authority to make a finding that any surface coal mining and reclamation operation owned or controlled by the applicant was not currently in violation of the Act or certain other environmental laws. It did not, however, expressly require the withholding of a permit when persons who own or control the applicant own or control operations in violation of such provisions.

Under a court order in the case of *Save our Cumberland Mountains, Inc. et al. v. Clark*, No. 81-2134 (D.D.C. January 31, 1985), the Secretary of the Interior is required to strengthen the enforcement and implementation of section 510(c) of the Act by withholding a permit when persons who own or control the applicant own or control operations in violation of the Act or certain other environmental laws. This rule imposes such a requirement. Any expanding the scope of the compliance review, OSMRE will gain an effective tool to ensure that persons who own or control an operation will have to abate or be in the process of abating all violations before any other operation they own or control is issued a permit.

On April 5, 1985 (50 FR 13724) OSMRE published a proposed rule to revise the scope of the compliance review and to require the withholding of a permit when persons who own or control the applicant own or control an operation in violation of the Act or certain other environmental laws. On April 16, 1985 (51 FR 12879), OSMRE published for comment another option for the revised compliance review. That option, like the April 1985 proposal, would have expanded the compliance review in § 773.15(b)(1) to entities owning or controlling the applicant. It also included a statement in § 773.15(b)(1) that in the absence of a failure-to-abate cessation order, a notice of violation, except a notice of violation issued for

non-payment of AML fees or civil penalties, would be presumed to be in the process of being corrected to the satisfaction of the agency that had jurisdiction over the violation.

On October 5, 1987, OSMRE published another option for the compliance review, which contained the following proposed language:

Section 773.15 Review of permit applications. (b)(1) Based on available information concerning Federal and State failure-to-abate cessation orders, unabated Federal and State imminent harm cessation order, delinquent civil penalties issued pursuant to section 518(h) of the Act, bond forfeitures, delinquent abandoned mine reclamation fees, and unabated violations of Federal and State laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation, the regulatory authority shall not issue the permit if any surface coal mining reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act or such other law, rule or regulation referred to in this paragraph. In the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation issued pursuant to 843.12 of this chapter or under a Federal of State program, except a notice of violation issued for nonpayment of abandoned mine reclamation fees or civil penalties, is being corrected to the satisfaction of the agency with jurisdiction over the violation. If a current violation exists, the regulatory authority shall require the applicant or person who owns or controls the applicant, before the issuance of the permit, to either—[submit proof that the violation has been or is in the process of being corrected, or that an appeal has been filed and is being pursued in good faith.]

52 FR 37165.

The revisions to § 773.15(b)(1) contained in this rule are based for the most part on the option published on October 5, 1987. To assist the regulatory authority in making the compliance review required by section 510(c) of the Act, OSMRE is including in § 773.15(b)(1) a list of violations which the regulatory authority will consider. The list of violations includes Federal and State failure-to-abate cessation orders, unabated Federal and State imminent harm cessation orders, delinquent civil penalties assessed pursuant to section 518 of the Act (including penalties assessed under derivative State and Federal programs), bond forfeitures, delinquent abandoned mine reclamation fees, and unabated violations of Federal and derivative State laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation. The list of violations contained in

§ 773.15(b)(1) includes all outstanding violations, regardless of whether they occurred under the interim or permanent regulatory program.

Statutory Authority for Compliance Review Including Owners and Controllers of Applicant. The scope of the compliance review required by final § 773.15(b)(1) includes surface coal mining operations owned or controlled by owners or controllers of the applicant.

Commenters asserted that the rule goes beyond congressional intent because section 510(c) of the Act refers only to persons owned or controlled by an applicant, and not to those who own or control the applicant. Some commenters suggested that the legislative history of the Act does not support the proposed change, and that the rule is an inappropriate extension of section 510(c). Other commenters favored the rule, asserting that it was necessary to prevent evasion of the Act through the creation of new business entities or contractual agreements.

Contrary to commenters' assertions, the final rule is not just an exercise of authority under section 510(c) of the Act. Rather it is authorized by multiple sections of the Surface Mining Act, including sections 101, 102, 201(c)(1), 201(c)(2), 412(a), 501(b), 507(b)(4), 510(a), (b) and (c), 511, 701(16) and 701(19). It is supported by the January 1985 district court order in *Save our Cumberland Mountains, supra*, and avoids the major potential for abuse that would result from examination only of operations controlled by the applicant.

Section 201(c)(1) of the Act provides that:

The Secretary acting through [OSMRE] shall * * * order the suspension, revocation, or withholding of any permit for failure to comply with any of the provisions of this Act or any rules and regulations adopted pursuant thereto. * * *

(Emphasis added.)

Section 201(c)(1) authorizes the withholding of any permit for failure to comply and is not limited to operations owned or controlled by a permit applicant.

In addition, section 201(c)(2) contains a general grant of rulemaking authority and empowers OSMRE to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act."

* * * Section 412(a) establishes rulemaking authority to administer the provisions of Title IV of SMCRA, which includes the collection of AML fees. Section 501(b) requires the Secretary to publish regulations governing the requirements of State and Federal

programs. The other sections enumerated above also lend support.

It is thus proper for the Secretary acting through OSMRE to use this authority to insure that all persons comply with the Act. OSMRE has chosen to implement this authority by withholding a permit where the named "applicant" is owned or controlled by others who own or control surface coal mining and reclamation operations which are in violation of the Act and certain other environmental laws.

Moreover, this rule may be justified as an exercise of authority under section 510(c) by construing the term applicant, as used in that section, to mean more than just the entity whose name appears on the permit application. The legislative history of the Act strongly implies that the Congress intended the purview of section 510(c) to be broader than just the entity identified as the applicant.

As discussed earlier in this preamble, the legislative history of the Act connects the informational requirements in section 507(b)(4) of the Act to the permit approval provisions of section 510(c) to allow identification of the parties ultimately responsible for the operation. See H.R. Rep. No. 94-896, 94th Cong., 2nd Sess. 111 (1976). See also S. Rep. No. 94-28, 94th Cong., 1st Sess. 206 (1976). By allowing identification in section 507(b)(4) of the "parties ultimately responsible" for purposes of section 510(c), Congress clearly contemplated that the term applicant as used in section 510(c) would not be limited to the entity named as the "applicant" in the permit application and could include persons by whom the applicant is owned or controlled.

One commenter pointed to the definition of "applicant" in section 701(16) of the Act as evidence that the Congress intended to limit responsibility for violations. Another suggested that as an alternative to the proposed rule, OSMRE should define the term "applicant" more broadly to include persons who own or control the applicant. OSMRE disagrees with the former commenter, and agrees in principle with the latter.

The definition of "applicant" does not limit the Secretary's authority under sections 201(c)(1) and (c)(2) of the Act. The definitions of "applicant" and "person" in sections 701(16) and 701(19) of the Act indicate that the Congress intended these terms to be broadly construed. Section 701(16) defines "applicant" to mean "a person applying for a permit." "Person" is defined by section 701(19) to mean "an individual,

partnership, association, society, joint stock company, firm, company, corporation, or other business organization." Together, these two definitions cover an unlimited range of individuals and organizations which, under appropriate circumstances, OSMRE properly may construe as an applicant. Rather than redefine applicant, however, OSMRE has chosen a regulatory scheme describing persons owned or controlled by the applicant.

Several commenters pointed out that section 507(b)(5) of the Act requires a statement whether the *applicant, any subsidiary, affiliate, or persons controlled by or under common control with the applicant*, has ever held a Federal or State mining permit which is the five-year period prior to the date of submission of the application has been suspended or revoked or has had a mining bond or similar security deposit forfeited. The commenters argued that the use of different language in section 510(c) limits the allowable review under that section to companies owned or controlled by the applicant.

The inclusion of a specific requirement in section 507 does not limit the Secretary's broad authority under sections 201(c)(1) and (c)(2). OSMRE also disagrees with the commenters' interpretation of section 510(c). Although neither section 507(b)(4) nor section 507(b)(5) uses the same language as set forth in section 510(c), both provide regulatory authorities with information that may be used in the compliance review. The fact that the Congress required information on affiliates, subsidiaries and companies under common control indicates that the Congress intended such information to be examined by the regulatory authority when reviewing permit applications. This rule makes use of all of the information included under section 507(b), which the Congress considered necessary for processing a permit application.

In support of their interpretation of section 510(c), several commenters pointed out that in the preamble to the 1979 permanent program regulations OSMRE rejected a suggestion that 30 CFR 778.14(c) (1979), the rule requiring a listing of violation notices in permit applications, should require information on the same parties listed in § 778.14(a) (1979). This latter section required a permit applicant to submit information on permit revocations, suspensions and bond forfeitures of the applicant and any subsidiary, affiliate, or persons controlled by or under common control with the applicant. In rejecting this suggestion OSMRE stated in 1979 that

the informational requirements of § 778.14(c) are restricted by section 510(c) of the Act, which requires a listing of violations committed by the applicant, while the informational requirements in § 778.14(a) are governed by section 507(b)(5). 44 FR 15025 (March 13, 1979).

The 1979 statement concerning § 778.14(c) was superseded by a later revision to that section. On September 28, 1983, OSMRE revised § 778.14(c) and expanded the amount of information to be included in permit applications (48 FR 44399). Those regulations, which were not challenged and, pending further revision, are currently in effect, require permit applicants to submit a list of all violations committed by the applicant and by any subsidiary, affiliate or persons controlled by or under common control with the applicant. Thus, although the terminology is not the same, the scope of the compliance review in § 773.15(b)(1) is consistent with the current information submission requirements in existing § 778.14.

Some commenters objected to OSMRE's use of the Secretary's general authority under section 201(c)(1) to deny the issuance of a permit to entities owned or controlled by persons with outstanding violations. The commenters argued that the language of section 510(c) is clear, and that permits should only be blocked if an operation owned or controlled by the applicant is in violation.

OSMRE disagrees. So long as he acts reasonably, the Secretary may exercise all of the authority provided to him by the Congress under the Act, including that of section 201(c)(1). Regardless of whether this rule may be viewed as an exercise of authority under sections 101, 102, 201(c)(1), 201(c)(2), 412(a), 501(b), 507(b)(4), 510 or 701 of the Act, or a combination thereof, its adoption is rational, closely related to the purposes of the Act, and a reasonable exercise of the Secretary's discretion. Such secretarial discretion recently was strongly reaffirmed by the United States Court of Appeals for the District of Columbia Circuit in numerous instances in its January 29, 1988 decision in *NWF v. Hodel*, No. 84-5743 (D.C. Cir. 1988).

Delinquent Civil Penalties and AML Fees Included As Violations. This list of violations is identical to the proposal published on October 5, 1987 (52 FR 37164), with one exception. The October 5, 1987 list referred only to delinquent civil penalties issued pursuant to section 518(h) of the Act. The final rule includes all delinquent civil penalties assessed pursuant to § 518 of the Act, including

those issued under section 518(a). This addition makes explicit the OSMRE position that nonpayment of a civil penalty within thirty days of becoming due, like the nonpayment of delinquent AML reclamation fees, is a violation of the Act.

This was proposed as a rule on July 16, 1986 (51 FR 25822) in proposed § 773.15(a)(3), which stated that nonpayment of Federal and State civil penalties within thirty days of a final order shall be considered a violation of the Act for purposes of the compliance review required by § 773.15(b)(1). Although proposed as § 773.15(a)(3), the provision has been modified and logically included in the list of violations in final § 773.15(b)(1).

The inclusion of all delinquent civil penalties in the list of violations will assure that prior to permit issuance the regulatory authority makes a determination that the applicant, and any entity owned or controlled by either the applicant or by any person who owns or controls the applicant, has paid all civil penalties arising from a violation of the Act for which a final order has been issued.

Several comments were received on proposed § 773.15(a)(3) concerning the non-payment of penalties. One commenter suggested that the language be amended by adding language indicating that the nonpayment of AML fees is a violation of the Act requiring permit denial. As proposed on July 16, 1986, § 773.15(a)(3) stated that nonpayment of Federal and State civil penalties is a violation of the Act, but did not mention AML fees. Failure to pay AML fees was covered by proposed § 773.15(c)(7). The same commenter also suggested that language clarifying what constitutes a violation be added to § 773.15(b)(1) rather than being included in § 773.15(a)(3). In response to the comment, OSMRE has included in § 773.15(b)(1) references to both delinquent civil penalties and delinquent abandoned mine reclamation fees, the non-payment of which would be violations that would bar permit issuance.

One commenter requested clarification as to whether the reference to Federal and State civil penalties in proposed § 773.15(a)(3) meant only those civil penalties that arise from violations of the Act, its implementing regulations, and approved State programs, and not civil penalties which may be assessed against a person pursuant to other laws.

OSMRE intends to construe the references to civil penalties in final § 773.15(b)(1) as referring only to those civil penalties that arise from violations

of the Act, its implementing regulations and approved state or Federal programs. The inclusion of a reference to section 518 of the Act in 30 CFR 773.15(b)(1) should eliminate any confusion. Whether failure to pay civil penalties arising under other laws is covered depends upon whether such failure constitutes an unabated violation of other law pertaining to air or water environmental protection.

One commenter suggested that proposed § 773.15(a)(3) be revised to clarify that a person is not in violation for nonpayment of penalties if the person is complying with an approved payment schedule. The commenter stated that if the suggestion were not adopted, then the applicant would be required to submit proof under existing § 773.15(b)(1)(i) that the violation, in this case the nonpayment of civil penalty, was in the process of being corrected.

OSMRE did not adopt the suggestion. If a person has entered into a payment schedule, the violation has not been corrected, but is only in the process of being corrected and the requirements of § 773.15(b)(1)(i) apply. Where a violation is the subject of a payment schedule, a permit may be conditionally approved in accordance with final § 773.15(b)(2).

One commenter suggested that the term "violation" in section 510(c) of the Act be interpreted to include Federal notices of violation, cessation orders, unpaid civil or criminal penalties, and violations of all other laws, rules or regulations pertaining to air or water environmental protection.

OSMRE agrees in part and disagrees in part. As discussed, OSMRE considers the nonpayment of delinquent civil penalties a violation of the Act. Moreover, § 773.15(b)(1) applies to cessation orders and to other Federal and derivative State laws, rules and regulations pertaining to air or water environmental protection. A notice of violation, however, although considered a violation, may be presumed to have been abated or to be in the process of correction unless a failure-to-abate cessation order is issued, or where evidence to the contrary is set forth in the permit application. This presumption is discussed below.

No "Finding" Required. As originally proposed on April 5, 1985, the rule would have required the regulatory authority to make a finding that any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant was not currently in violation of the Act. The proposal to require a finding of compliance prior to the issuance of a permit was based on previous

§ 773.15(b)(1) that was adopted in 1983. The preceding 1979 rule did not include a finding in the counterpart regulation, 30 CFR 786.17(c) (1979).

This rule revises § 773.15(b)(1) to require a review of available information, including the schedule of violations submitted by the permit applicant and the information contained in the Applicant Violator System. Based on that review, the regulatory authority shall not issue a permit if there is an outstanding violation. The prohibition against issuing the permit, as compared to the previous requirement for a finding, was adopted to conform the rule with the language of section 510(c) of the Act, which does not require a finding, but instead states that "the permit shall not be issued. * * * This change is a matter of procedure rather than substance. The compliance review will be conducted for every permit. Although no finding is required, unless one of the exceptions applies no permit will be issued where a violation exists.

One commenter objected to the removal of the findings and argued that the rule should require an investigatory finding to insure a thorough and complete review and determination that there are no current violations. The commenter quoted the following legislative history of the Act in support of his position:

[T]he regulatory authority must find * * * that any operation under the applicant's ownership or control currently in violation of the act * * * is in the process of being corrected in a satisfactory manner to [the] respective regulatory agency. (H.R. Rep. No. 95-218, 95th Cong., 1st Sess. 92 (1977)).

OSMRE disagrees with the commenter's interpretation. The legislative history quoted above simply requires that the regulatory authority determine that any violation of an operation owned or controlled by the applicant is in the process of being corrected. The rule does just that. The use of a "finding" is an artifice and is not needed as long as the rules embody the substantive requirement. The requirement referred to in the House Report is included in 30 CFR 773.15(b)(i). That section requires that the permit applicant submit to the regulatory authority proof that the current violation has been or is in the process of being corrected to the satisfaction of the agency that has jurisdiction over the violation.

Presumption of Abatement of NOV's. Under the final rule, in the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation has been or is being corrected, except where evidence to the

contrary is set forth in the permit application, or where the notice of violation is issued for nonpayment of abandoned mine reclamation fees or civil penalties. A presumption concerning the abatement of a notice of violation was first proposed in the April 16, 1986, Federal Register notice which reopened and extended the comment period (51 FR 12879) and was included in subsequent notices.

The exception concerning contrary information in the permit application has been added to the language in the October 5, 1987, notice to ensure that presumptions made by the regulatory authority do not conflict with the information included in the violations schedule required to be submitted by the applicant under section 510(c) of SMCRA. The presumption may be rebutted based upon submission of specific proof by interested persons that an NOV has not been or is not being abated.

The exception concerning Abandoned Mine Land fees or civil penalties is included to ensure that money owed the government is paid in a timely fashion. Ordinarily, NOV's are not issued with regard to monies owed unless the delinquency is clear.

Commenters were concerned that an expanded compliance review under § 773.15(b)(1) could result in delays in the issuance of a permit where an applicant or an owner or controller of the applicant had insufficient time to complete abatement of a recently issued notice of violation at another site.

This concern is valid. One of the primary purposes for this presumption is to eliminate the disproportionate effect of NOV's issued to a related entity following application but prior to permit issuance. This is of particular concern in cases where the applicant is a subsidiary of a large corporation with many other subsidiaries under common control. In such cases, the applicant may not have ready access to information concerning specific plans to abate NOV's issued to related entities.

One commenter stated that a permit issued subject to the presumption should be issued conditioned on the abatement of the underlying violation for which the notice of violation was written. Then, if the permittee failed to abate the previous violation within the abatement period set forth in the notice of violation, the permit just received should be revoked for failing to meet the permit condition.

OSMRE agrees that where a permit is issued subject to a showing that the notice of violation is being corrected, if the notice of violation is not abated

within the time specified, the permit should be subject to remedial action. As a backup to the NOV presumption, OSMRE included in its July 16, 1986, proposal (51 FR 25822) a section that would authorize a regulatory authority to rescind a permit where a notice of violation existed at the time the permit was issued and a failure-to-abate cessation order subsequently was issued under 30 CFR 840.12 and 843.13. This provision, which OSMRE expects to publish shortly, would provide for permit suspension and rescission. Under a revised proposal published on August 4, 1988 (53 FR 29343), a determination whether to suspend or rescind a permit would be based upon the ownership and control standards of the applicable regulatory program at the time the permit was issued.

Two commenters objected to the proposed presumption because they maintained that it would weaken enforcement measures under the Act, and because the violation should not be considered abated until abatement has been achieved.

OSMRE disagrees. In the absence of evidence to the contrary, it is reasonable for a regulatory authority to presume that a violation subject to an NOV has been abated, or is being corrected to the satisfaction of the agency with jurisdiction over the violation. If a violation is not abated within the time specified in the NOVs, a regulatory authority must issue a failure-to-abate cessation order, which would block permit issuance.

Effect of Bond Forfeiture. One commenter was concerned that the reference in § 773.15(b)(1) to bond forfeitures would result in the denial of a permit if a bond forfeiture had ever occurred.

OSMRE does not intend such a result under the rule. If a bond forfeiture has occurred but the permit site has been reclaimed and no violations remain, the person responsible for the bond forfeiture is not precluded from receiving another permit. The guiding principle is whether any unabated violation remains. The language in § 773.15(b)(1) reflects this policy.

Extent of Regulatory Authority Review. One commenter stated that state regulatory authorities will need guidance on the extent of the compliance review required for a corporate structure.

The rules does not require an investigation beyond the information in the permit application and the Applicant Violator System, or otherwise available to the regulatory authority. OSMRE intends that the regulatory authority evaluate all available information,

including: (1) Possible ownership or control relationships listed in an Applicant Violator System report, and (2) possible ownership or control relationships which the regulatory authority may become aware of through its field inspectors, knowledge of local mining practices, and information it receives through public participation in the permitting process under the State program.

One commenter objected to the burden on regulatory authorities resulting from the revised compliance review. The commenter stated that the rule will result in increased administrative burdens and delays in permitting.

OSMRE disagrees. The final rule will not impose a substantial burden on regulatory authorities, and will not result in significant delays in the permitting process. Access to the Applicant Violator System should facilitate compliance with this rule.

Effect of Bankruptcy. One commenter asserted that permits cannot be withheld or revoked for outstanding civil penalties owed by a company which has filed for liquidation or reorganization under the bankruptcy code (11 U.S.C. 101 *et seq.*) because an attempt to collect penalties or AML fees through a permit block under section 510(c) was nothing more than an attempt to circumvent an automatic stay under 11 U.S.C. 362(a), which precludes the commencement or continuation of any judicial or other proceeding "that was or could have been commenced before the commencement of the bankruptcy case." The commenter suggested that OSMRE clarify the effect that a petition for liquidation or reorganization under the bankruptcy code would have on the issuance or revocation of a permit.

Under the bankruptcy code, certain actions are exempt from an automatic stay. They include:

(4) * * * the commencement or continuation of an action or proceeding by a government unit to enforce such governmental unit's police or regulatory power;

(5) * * * the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; [or]

(9) * * * the issuance to the debtor by a governmental unit of a notice of tax deficiency * * * (11 U.S.C. 362(b) (1982 & Supplement III, 1985).)

Thus, some actions, while otherwise within the scope of activities stayed by 11 U.S.C. 362(a), are exempt from a stay under 11 U.S.C. 362(b). The effect that a petition for liquidation or reorganization will have on a particular permit

application will depend on the facts surrounding the violation and the application. Because of the complexity of the bankruptcy laws and the multitude of factual situations that are possible, regulatory authorities will deal with such applications on a case-by-case basis as they arise. In situations where a petition for liquidation or reorganization has been filed and the automatic stay does not apply, as in the case of post-petition indebtedness, the regulatory authority will perform the compliance review required by § 773.15(b)(1) and deny the permit. However, in situations where the automatic stay does apply, so that the issuance of a permit cannot be blocked on account of pre-petition indebtedness, the permit will be issued, conditioned on the payment, once the stay has expired, of any amount not discharged in bankruptcy.

Effect of Statute of Limitations on Collection Actions. A commenter asserted that permit blocking cannot occur for any civil penalty which has not been reduced to judgment within the applicable statute of limitations in 28 U.S.C. 2462 (barring an action, suit or proceeding for enforcement of any civil fine, penalty unless commenced within five years).

OSMRE disagrees with the commenter's position. Although the statute of limitations may provide a defense to suit for the collection of money filed five years following the entry of a final order, it does not invalidate the final order or cancel the underlying debt, which will continue to be listed in the Applicant Violator System and will result in blocking the issuance of a permit. Also, under Rule 8(c) of the Federal Rules of Civil Procedure, a defense based on the statute of limitations is an affirmative defense which may be waived, and it therefore does not automatically prohibit an action for the collection of unpaid civil penalties.

Violation Pattern Unnecessary for § 773.15(b)(1). One commenter suggested that to eliminate the possibility of permit block due to a remote ownership interest in an affiliated corporation, OSMRE should incorporate into the rule a "triggering mechanism" based on a clearly defined violation pattern with "successive ownerships" present.

OSMRE has not adopted this suggestion. Section 510(c) contains two prohibitions against permit issuance. One prohibition is based on the existence of an outstanding violation (one is sufficient) and requires the blocking of a permit until the violation has been corrected or is in the process

of being corrected. The other is based on a pattern of violations and specifies that "no permit shall be issued" where the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of the Act of such a nature and duration and with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of the Act. The first prohibition is implemented by regulation at 30 CFR 773.15(b)(1). The other, based on a pattern of violations, is implemented by regulation at 30 CFR 773.15(b)(3). To require a pattern of violations in all instances would substantially weaken the rule and contravene the intent of section 510(c).

No Transfer of Corporate Liability. Some commenters stated that the proposed definition would modify established corporate law with regard to limited liability and corporate separateness. The commenters argued that under the "alter ego" doctrine, any disregarding of the corporate entity must occur on a case-by-case basis and not under a formula similar to OSMRE's proposal. The commenter argued that the presumption should remain that each corporation is separate for purposes of liability, and the burden for displacing that presumption should rest with those who seek to disregard the corporate form.

It is not OSMRE's intent to alter established principles of corporate and business law. This rule does not alter the doctrine of limited liability and does not attempt to "pierce the corporate veil" and shift liability for unabated violations or unpaid money from a corporation or business entity to its owners or controllers. Instead, the rule requires regulatory authorities to consider the compliance history of those who own or control a permit applicant prior to deciding whether to issue a new permit for future mining.

Several commenters asserted that the rule, if finalized, eventually would be expanded to make those deemed to be owners or controllers responsible for reclamation.

OSMRE disagrees with the commenters' characterization. Although this rule provides an incentive for owners and controllers of the applicant to have unabated violations corrected, such persons are not compelled to conduct reclamation. The responsibility for reclamation will continue to fall on the permittee and its agents, as the law requires. This rule does not change that responsibility. OSMRE does intend, however, to encourage owners and controllers of permit applicants to take a

more active role in assuring that related entities reclaim in accordance with the Act.

Due Process Provided. Commenters argued that the proposed rule was unconstitutional because remotely related or unrelated companies would be subject to sanctions for the alleged violations of other companies, but would not be afforded due process through the opportunity for a hearing to contest the alleged violations.

OSMRE disagrees. The rule provides due process. As part of the permitting process, a permit applicant may submit information germane to any of the findings necessary for permit issuance. If a permit is denied because of an ownership or control link between the applicant and a violator, the applicant may contest the basis for the denial. If the applicant has not been previously provided an opportunity for review, it may contest the ownership or control link and also the existence of the violation. If companies are either totally unrelated or remotely related, then the applicant may show that no control exists. In some instances, however, an applicant may be prohibited from relitigating an issue that has already been decided. For example, an applicant who has been a party to an earlier administrative or judicial proceeding would be bound by the results of the initial challenge. Further, an applicant cannot create a right of review if earlier it had failed to exhaust its administrative remedies.

Basis and Purpose Not Limited. One commenter objected to the proposed rule on the basis that its only purpose was to satisfy an agreement entered into by OSMRE and private environmental groups.

OSMRE disagrees. As stated previously, this rule will help OSMRE implement a court order in the case of *Save Our Cumberland Mountains, Inc., et al. v. Clark*, No. 81-2134 (D.D.C. January 31, 1985), relating to enforcement measures that can be taken against certain entities with unabated Federal cessation orders and unpaid civil penalties. In addition to satisfying this court order, however, the rule provides an additional means to bring about more effective enforcement of the Act.

One commenter stated that the court order in *Save Our Cumberland Mountains, supra*, only requires OSMRE to track companies with unabated cessation orders and that OSMRE has failed to distinguish between unabated cessation orders and failure-to-abate cessation orders. The commenter stated that OSMRE should only block a permit for unabated cessation orders, and not

for an outstanding failure-to-abate cessation order which has not run for thirty days.

OSMRE disagrees. A cessation order may be issued either for the failure to abate a violation for which a notice of violation has been issued, or for a situation which creates imminent danger to the health or safety of the public, or is causing or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources. In either case the violation represented by the cessation order is a sufficient basis for withholding a permit pursuant to the Act until the violation has been abated even if the period for abatement has not expired.

Responsibility of Applicants. One commenter suggested that the applicant should not bear the burden of investigating the conduct of persons who own or control it.

OSMRE disagrees that the rule will make this happen. Neither this rule nor existing permitting rules require the investigation of the conduct of related entities. Although 30 CFR 778.14(c) requires an applicant to furnish information concerning the compliance history of related entities, such information should be obtainable from the applicant's owners or controllers. OSMRE proposed a separate rulemaking on May 28, 1987 (52 FR 20032), which would revise the amount of information that must be included in permit applications. OSMRE expects this rule to be published in final shortly.

Some commenters objected to the proposed rule on the grounds that it would be physically impossible for a large company to provide a daily listing of all violations nationwide. They stated that the rule would result in the erroneous issuance of permits and their eventual invalidation by any group opposed to their issuance.

OSMRE disagrees with the commenters' assertions. Because the compliance review will not be based on notices of violation unless failure-to-abate cessation orders are issued, an applicant, and its owners and controllers, will have time to learn of and abate violations which might affect the issuance of a permit.

Proposed Alternative Not Adopted. In April 1985, OSMRE specifically requested comments on a less expansive alternative to the proposed rule. 50 FR 13726. The alternative would have included in § 773.15(b)(1) a requirement for a finding pertaining to mining operations owned or controlled by the applicant, but the finding would have applied to those who own or control the applicant only with respect to

outstanding failure-to-abate cessation orders, unpaid civil penalties imposed by OSMRE, and unpaid AML fees.

Commenters favoring the alternative proposal stated that it would be easier to implement, and therefore would lessen the administrative burden on State regulatory authorities.

OSMRE has decided to adopt the language proposed for § 773.15(b)(1), and not the less expansive alternative to maintain a consistent permit blocking policy with regard to all violations encompassed in the compliance review. No justification exists for limiting the review of violations of particular entities, but not others. Also, confusion would have resulted from examining a different set of violations for the applicant than for its owners or controllers.

Relation to § 778.14(a). Some commenters stated that 30 CFR 778.14(a) provides sufficient information to prevent fraud, and therefore this rule was not needed.

OSMRE disagrees. This rule establishes a mechanism for the withholding of permits based on all information available to OSMRE. Section 778.14(a), which governs the submission of information pertaining to the previous suspension or revocation of permits, and the forfeiture of bonds or similar securities, is not a substitute for this rule. In deciding whether to issue a permit, the regulatory authority is not restricted in its investigation by 30 CFR 778.14 (a), (b) or (c). Where the record indicates that it is necessary, a regulatory authority may request from an applicant additional information or clarification.

Statistical Support For Rule. Some commenters questioned whether there were any data indicating that a problem exists and that a rule is needed to solve it.

The statistics available to OSMRE indicate that there indeed has been a problem, and that without close scrutiny permits could be issued to applicants owned or controlled by persons with outstanding violations. For instance, from March 1985 to April 1986 it was found during the permit review process that approximately fifty-six percent of all Federal permit applicants had problems such as unpaid AML fees, unabated violations, or unpaid penalties, or were the subject of a pending appeal. Operation of the Applicant Violator System since October 1987 has also shown that in a number of instances at the state level, permit applicants have been related to violators.

Self-Enforcement Encouraged. Regardless of statistical support, this

rule is intended, in part, to foster a future self-enforcement policy whereby actual and potential applicants will strive to ensure that entities which they own or control operate in compliance with the Act. This deterrent aspect of the rule, as much as any permits actually withheld, will contribute to overall compliance with the Act.

One commenter stated that any OSMRE intent for industry to police itself by refusing to enter into business with violators of the Act exceeded OSMRE's statutory authority.

OSMRE disagrees with the commenter's characterization of the rule. Although the rule may affect private conduct, OSMRE is not directing any person to refuse to enter into business with any other person.

Consideration of Past Violations. Some commenters opposed applying the rule to violations that occurred prior to its promulgation. One commenter favored this approach.

OSMRE intends this rule to apply prospectively to pending permit applications whenever it becomes effective in particular States. Although not based upon the time violations first occurred, the rule will apply only to those violations that remain unabated at the time the regulatory authority performs the compliance review required by § 773.15(b)(1). A violation may be abated and debts may be paid at any time, and once the violation is abated and debts are paid, their past existence will not prevent the regulatory authority from issuing a permit.

The Act requires regulatory authorities to consider past conduct in the permitting process. For example, sections 507 (b)(4) and (b)(5) require information from an applicant concerning the five-year period prior to the submission of the application and section 510(c) requires violation information for the three years preceding the date of the application. In view of these provisions of the Act, it is clear that the Congress both contemplated and authorized holding applicants accountable for past violations.

Remedy For Improvidently Issued Permits. One commenter suggested that the rule should contain a provision allowing for the revocation of a permit if an outstanding violation existed at the time the permit was issued.

OSMRE agrees that a rule addressing the issue is appropriate. On July 16, 1986 (51 FR 25822), OSMRE proposed a rule under which regulatory authorities could rescind certain improvidently issued permits. OSMRE expects to publish this proposal in final shortly.

Bond to Guarantee Payment of Penalties and Fees Rejected. One commenter suggested that OSMRE impose an incremental bond to guarantee payment of penalties and AML fees as a method to correct abuses.

The Act requires the submission of a reclamation performance bond prior to the issuance of a permit. Requiring operators to post a bond to cover the payment of fees and penalties is outside the scope of the proposal.

§ 773.15(b)(1)(ii)—Good Faith Appeal. This rule amends § 773.15(b)(1)(ii) by deleting the provision terminating the conditional approval of a permit upon the denial of a stay, and by requiring the submission of proof by the applicant within thirty days of a judicial decision that the violation has been or is in the process of being corrected. These revisions were proposed on July 16, 1986 (51 FR 25822). In addition, the rule adds language to clarify that the responsibility for appealing the violation may lie with another person who is owned or controlled by the applicant, or who owns or controls the applicant.

Conditional Permit Not Affected By Denial of Stay. Section 510(c) of the Act requires with regard to a surface coal mining operation currently in violation of the Act:

the permit shall not be issued until the applicant submits proof that the violation has been corrected or is in the process of being corrected to the satisfaction of the regulatory authority.

By previous regulation at 30 CFR 773.15(b)(1)(ii) OSMRE allowed a regulatory authority to conditionally approve and issue a permit where an applicant established that an outstanding violation was the subject of a good faith administrative or judicial appeal. This regulation implemented the intent of the Congress as expressed in the following excerpt from the Act's legislative history:

It is not the intention of the Committee that an operator who is charged with the types of violation described in section 510(c) be collaterally penalized through denial of a mining permit if he is availing himself, in good faith, of whatever administrative and judicial remedies may be available to him. S. Rep. No. 95-128, 95th Cong., 1st Sess. 79 (1977).

Previous § 773.15(b)(1)(ii) required the permittee to promptly submit proof that the violation under appeal had been or was in the process of being corrected if "the initial judicial review authority under § 775.13 either denie[d] a stay applied for in the appeal or affirmed the violation." (Emphasis added.) The provision requiring proof upon the

denial of a stay treated such a denial as strongly indicating that the violation would be affirmed. However, the denial of a stay should not be considered a determination that the operator is not acting in good faith in pursuing administrative or judicial review. Moreover, the previous provision may have unfairly discouraged the filing of a request for a stay. In the interest of fairness, this final rule allows a conditionally approved permit to remain in force pending the initial judicial affirmation of the violation, regardless of the result of any request for a stay.

One commenter objected to the elimination of a denial of a stay as a trigger for requiring the submission of proof that the violation has been or is being corrected. The commenter argued that elimination of the stay provision would encourage violators to request a stay to protract the administrative process. As an alternative, the commenter suggested that where a stay is denied because the applicant cannot demonstrate a substantial likelihood of prevailing on the merits, the denial should trigger the submission of proof requirement under § 773.15(b)(1)(i).

OSMRE declined to adopt these suggestions. Discouraging a person from applying for a stay is inconsistent with congressional intent in enacting section 525(c) which authorizes stays. As discussed above, § 773.15(b)(1)(ii) implements congressional intent that permits not be blocked where a violation is the subject of a good faith appeal. Whether a stay is granted or denied, or even whether one has been applied for, is not determinative of whether a good faith appeal exists. OSMRE believes, therefore, that the revision is justified.

Thirty-Day Period Imposed. Revised § 773.15(b)(1)(ii) also requires that if the initial judicial review authority affirms the violation, then the holder of a conditional permit shall within thirty days of such decision submit to the regulatory authority proof that the violation has been or is in the process of being corrected to the satisfaction of the agency with jurisdiction over the violation. The previous rule required submission "promptly" but did not impose a specific deadline. Requiring operators to submit proof within thirty days will preserve a permittee's conditional right to mine while a violation is being appealed, but will put a definite limit on the duration of that right. The thirty-day period requests the time reasonably required for an applicant to demonstrate to the regulatory authority that the violation has been or is being corrected.

One commenter approved of the substitution of a definite time period for the term "promptly," but suggested that the period of time allowed for submission of proof be fifteen days instead of thirty. The commenter stated that thirty days is acceptable for submitting proof that the violation is in the process of being corrected, but that fifteen days is sufficient for the submission of proof that the violation has been corrected. The commenter also stated that fifteen days is a more accurate substitution for the term "promptly" because OSMRE has interpreted "promptly" as meaning "immediately."

OSMRE disagrees. Since the thirty days allowed for the submission of proof will begin to run from the date of the decision, part of the time allowed will be lost in transmitting the decision to the applicant. Consequently, the fifteen days proposed by the commenter might be insufficient time for the submission of proof, especially if the respondent is a large corporation with numerous offices and departments. Having two different time periods, fifteen days for the submission of proof that the violation has been corrected, and thirty days if the violation is in the process of being corrected, would unnecessarily complicate the regulatory scheme.

Another commenter agreed with the substitution of the thirty day period for the term "promptly," but suggested that the thirty days should run from the date of receipt of the judicial decision, because of delays that might result between the date the decision is issued and the date it is received by the appellant.

OSMRE has declined to adopt this suggestion because the regulatory authority would have no way of knowing when the decision was received by the applicant, and therefore could not keep accurate count of the thirty day period.

Conditional Permit Allowed For Appeals By Owners or Controllers. One commenter pointed out that the proposed revision overlooked the expanded ownership or control concept in § 773.15(b)(1), and that not only the applicant, but also any person who owns or controls the applicant or who is owned or controlled by the applicant might be pursuing a good faith administrative or judicial appeal of an applicable violation.

OSMRE agrees and has incorporated the commenter's suggestion into the final rule. OSMRE has added language allowing the conditional issuance of a permit not just where the applicant has

filed an appeal, but also where an appeal has been filed by any person owned or controlled by either the applicant or any person who owns or controls the applicant. Where any such person is pursuing a good faith appeal, conditional permit issuance should be authorized.

Other Comments. One commenter suggested that a good faith appeal of a violation should also include a proceeding contesting the amount of the penalty.

OSMRE did not adopt the suggestion. Before a person may contest the amount of a penalty, 30 CFR 845.19 requires that an amount equal to the penalty be paid into an escrow account. Therefore, in such circumstances, the amount in dispute would not be considered an unpaid civil penalty and would not result in permit blocking. Appeals of individual civil penalties, for which no prepayment requirement exists, will allow conditional permit issuance.

A commenter suggested that a provision be added to § 773.15(b)(1)(ii) requiring OSMRE to carefully examine those situations where an administrative or judicial appeal is pending to ensure that such appeals are not frivolous efforts to avoid the requirements of section 520(c).

OSMRE did not adopt the suggested provision because § 773.15(b)(1)(ii) already requires the applicant to establish that the administrative or judicial appeal was filed in good faith. Any appeal which is clearly frivolous and which was filed merely for the sake of avoiding the requirements of section 510(c) would not be considered to have been filed in good faith, and in such circumstances the regulatory authority could block the issuance of a permit. OSMRE does not expect regulatory authorities to conduct extensive inquiries, however, on the collateral issue of whether pending appeals were filed in good faith. Typically such appeals could be pending in other forums outside of the jurisdiction in which the permit application was filed, and the intent of the appellant could be difficult to establish.

One commenter suggested that OSMRE include a provision delaying the requirement for the submission of proof if an appeals court grants a stay from a lower court decision affirming the violation. OSMRE declined to adopt the suggestion because it is outside the scope of the proposed revisions. Also, OSMRE continues to believe that a conditional approval of a permit should terminate following affirmation of the violation at both the administrative and initial judicial levels. Allowing the

conditional approval to continue beyond that time could enable operators to complete their operations prior to a ruling in the appellate judicial proceeding.

§ 773.15(b)(2)—*Conditional Issuance of a Permit.* Previous § 773.15(b)(2) allowed conditional permit issuance when a violation which would otherwise prevent permit issuance is subject to a good faith appeal. This rule revises § 773.15(b)(2) to allow the conditional issuance of a permit also whenever an existing violation is being corrected to the satisfaction of the appropriate agency. Previous § 773.15(b)(2) provided that the regulatory authority "may issue a permit conditionally pending the outcome of an appeal * * *." (Emphasis added.) Confusion has arisen regarding the meaning of the term "may." The intent of the previous rule was to allow the issuance of a permit under the circumstance of a good faith appeal, while recognizing that the regulatory authority has other obligations associated with the review of a permit, and thus is not required to issue a permit if other problems exist. To clarify the intent, revised § 773.15(b)(2) provides that any permit issued pending the outcome of a good faith appeal shall be conditionally approved.

The proposed rule would have revised § 773.15(b)(2) to specify that the regulatory authority will issue a notice of rescission, requiring the immediate cessation of mining operations and the commencement of reclamation of all areas for which a reclamation obligation exists.

This portion of the proposal has not been adopted because it is not needed. Even without a specific rule, a conditional approval implies that if the condition is not satisfied, the approval will be withdrawn. This is not a new concept and was expressly recognized when § 773.15(b)(2) was initially adopted in 1983. See 48 FR 44365.

Several comments were received on proposed § 773.15(b)(2).

One commenter stated that the proposed revision failed to follow through on the ownership and control concept, and that where the rule states that the applicant who is issued such a permit fails to comply with the provisions of paragraph (b)(1)(i) or (b)(1)(ii), it should include "the applicant or anyone who owns or controls the applicant or who is owned or controlled by the applicant."

OSMRE disagrees. Although another person may be responsible for correcting the violation, the applicant must comply with paragraphs (b)(1)(i) and (b)(1)(ii). Under paragraph (b)(1)(i), the applicant is responsible for submitting proof that

the violation is being corrected, whether or not the applicant is directly responsible for the corrective activities. Similarly, when the violation is affirmed, under paragraph (b)(1)(ii) the applicant is responsible for demonstrating to the regulatory authority within thirty days that the violation is in the process of being corrected, whether or not the applicant is directly responsible for the corrective measures.

One State regulatory authority objected to this provision allowing the conditional issuance of a permit because under its State program a good faith appeal of an existing violation does not allow the conditional permit issuance. The commenter was concerned that requiring conditional permit issuance would eliminate an effective tool the State has to obtain compliance before a permit is issued.

A change in the rule is not needed to address the commenter's concerns. The final rule does not require that a permit has to be issued in the situation addressed by the commenter. It just provides that if a permit is issued at all, the permit must be conditional. Additionally, a State program need not provide for conditional approval of a permit pending appeal of a violation. Pursuant to 30 CFR 730.5(b), the laws and regulations of a State must be no less effective than the Secretary's regulations in meeting the requirements of the Act, and pursuant to section 505(b) of the Act may be more stringent. A State program without a provision for conditional permit approval would be more stringent and no less effective than § 773.15(b)(2).

One commenter suggested that a conditionally issued permit should specify that it is conditionally issued, should list the conditions, and should specify that it is subject to rescission.

OSMRE agrees, and already has a policy of listing conditions in federally issued permits. However, this degree of detail need not be incorporated in the rule.

One commenter opposed conditional permit issuance if the violation that is being corrected is the payment of AML fees or civil penalties. The commenter asserted that no reason exists why an applicant cannot pay delinquent fees or fines prior to permit issuance. The commenter further stated that if the applicant is so insolvent that payment of penalties and fees is impossible prior to permit issuance, it may not be prudent to allow further surface disturbance under a new permit to generate moneys to pay such debts.

OSMRE disagrees. If an applicant is paying penalties or AML fees pursuant to a payment schedule, such a person is

in the process of correcting a violation to the satisfaction of the responsible agency. Such payment indicates that the applicant intends to comply with the requirements of a new permit. Paying money on an installment basis does not necessarily mean that a person is insolvent. It could represent many things, including, for instance, a tight cash flow situation resulting from start-up costs for a new operation. If the applicant does need the new permit to generate moneys to pay debts, then issuing a permit would be in the public interest.

One commenter said that the rule should be "modified to include a requirement that the State regulatory authority periodically review and update information on outstanding violations which led to the conditioning of a permit and any administrative or judicial proceedings regarding such violations, to assure that the violations have been abated, to monitor the compliance of the operator with the duty to submit proof of correction and to abate outstanding violations, and to allow for prompt rescission in the event of operator default in these duties."

No specific review requirement is needed because state regulatory authorities are ordinarily expected to monitor permits as part of their program implementation responsibilities.

A commenter requested that explicit requirements be incorporated into the rule to insure that State regulatory authorities comply with the permit rescission provisions in § 773.15(b)(2).

State regulatory authorities are required to comply with all provisions of their state programs, including those in § 773.15(b)(2). Moreover, OSMRE verifies such compliance as part of its permitting oversight activities.

Section 773.15(b)(3)—Pattern of Violations. On July 16, 1986 (51 FR 25826), OSMRE proposed a revision to 30 CFR 73.15(b)(3), concerning applicants and operators with patterns of violations. Section 773.15(b)(3) implements the part of section 510(c) of the Act which states:

[N]o permit shall be issued to an applicant after a finding by the regulatory authority, after opportunity for hearing, that the applicant, or the operator specified in the application, controls or has controlled mining operations with a demonstrated pattern of willful violations of this Act of such nature and duration with such resulting irreparable damage to the environment as to indicate an intent not to comply with the provisions of this Act.

The previous rule required the regulatory authority to withhold the granting of a permit if it made a finding

corresponding with the above-quoted provision. This rule amends § 773.15(b)(3) by expanding the scope of the finding to include anyone who owns or controls the applicant. The purpose of this revision is to prevent evasion of the requirements of section 510(c) and to enhance overall compliance with the Act. OSMRE also has revised the previous phrase, "the application shall not be granted," to read "no permit shall be issued" to track the language of section 510(c).

Several comments were received on the proposed revision. One commenter approved of the change. Several commenters objected to the revised finding on the grounds that it exceeded the authority granted by the Act.

OSMRE's response to this objection is similar to its response to objections to its authority to promulgate revised § 773.15(b)(1). See the earlier discussion of § 773.15(b)(1).

Another commenter objected to the lack of criteria for making a determination that there is a demonstrated pattern of willful violations of the Act of such nature and duration, and with such resulting irreparable damage to the environment as to indicate an intent not to comply with the Act. The commenter did not suggest any criteria.

OSMRE has not included criteria in this rulemaking because such criteria are addressed by 30 CFR 843.13 and are not within the scope of the proposal.

One commenter requested that OSMRE clarify that nonpayment of AML fees cannot provide the basis for a determination under § 773.15(b)(3), since it does not fall within the criteria for irreparable damage to the environment.

OSMRE agrees. The nonpayment of AML fees, alone, would not be sufficient to make such a determination. Nevertheless, under the compliance review required by § 773.15(b)(1), a current failure to pay AML fees is sufficient to block permit issuance.

Miscellaneous Comments. One commenter considered the rule too broad and vague, and questioned how the States would implement it.

The rule is neither too broad nor too vague. The rule clearly specifies what regulatory authorities must examine during the compliance review and the standards for determining owners or controllers. In most instances, the compliance review will require case-by-case determinations, to insure that permit decisions are supported by the facts which is essential to insure due process is provided. In addition, OSMRE has met with the States on a regular basis to answer questions and provide guidance.

Some commenters argued that OSMRE did not comply with Executive Order 12291 in proposing the rule. Others stated that OSMRE did not comply with the requirements of the Regulatory Flexibility Act.

The requirements of Executive Order 12291 and the Regulatory Flexibility Act were complied with in promulgating the rule. The conclusions reached as a result of the analyses required by Executive Order 12291 and the Regulatory Flexibility Act are discussed in the Procedural Matters portion of this preamble.

Some commenters argued that the proposed rule would make it more difficult for United States-based industry to meet foreign competition, and would impose major new costs on the coal industry and on consumers.

OSMRE disagrees. Because the rule imposes no new regulatory burden on operators, who are already required to comply with the Act, it will not affect the ability of United States-based industry to compete with foreign operators, and will not add to the costs of industry or of consumers.

Another commenter stated that the rule would cost jobs. OSMRE has analyzed the effects of the rule on jobs, small entities, and on other economic factors, and found that the effects will be minimal, if any.

Effect of the Rule in Federal Program States and on Indian Lands. The rule will apply through cross-referencing to the following Federal program States: California, Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee and Washington. The Federal programs for these States appear at 30 CFR Parts 905, 910, 912, 921, 922, 933, 937, 939, 941, 942 and 947, respectively. No comments were received concerning any unique conditions which exist in any of these States which would have required changes to the national rules or a State-specific amendment to any or all of the Federal programs.

The rule will also apply through cross-referencing in 30 CFR Part 750 to surface coal mining and reclamation operations on Indian lands.

Effect of the Rule on State Programs. Following promulgation of this rule, OSMRE will evaluate State programs to determine whether any changes in these programs will be necessary. If the Director determines that any State program will be necessary. If the Director determines that any State program provisions should be amended to be made no less effective than the revised Federal rules, the individual

States will be notified in accordance with of 30 CFR 732.17.

III. Procedural Matters

Federal Paperwork Reduction Act

This rule does not contain information collection requirements which require approval by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.*

Executive Order 12291

The DOI has examined this rule according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not a major rule and does not require a regulatory impact analysis because it will impose only minor costs, if any, on the coal industry and coal consumers. This rule will not add new regulatory burdens on operators. It will provide regulatory authorities with definitions to be used in performing the compliance review required by section 510(c) of the Act prior to the issuance of a permit. Therefore, the rule will not add to the cost of operating a mine in compliance with an approved regulatory program.

Regulatory Flexibility Act

The DOI also has determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the proposed rule will not have a significant economic impact on a substantial number of small entities for the same reasons as discussed in the previous paragraph.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA), and has made a finding (FONSI) that the rule will not significantly affect the quality of the human environment under section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). The rule should result in better compliance with the environmental standards of the Act, and therefore result in better protection of the environment. The EA and the FONSI are on file in the OSMRE Administrative Record at the address specified previously (see "ADDRESSES").

Author

The principal author of this final rule is Andrew F. DeVito, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: 202-343-5241.

List of Subjects in 30 CFR Part 773

Administrative practice and procedure, Reporting and record-

keeping requirements, Surface mining, Underground mining.

Accordingly, 30 CFR Part 773 is amended as follows:

Dated: August 9, 1988.

J. Steven Griles,

Assistant Secretary, Land and Minerals Management.

PART 773—REQUIREMENTS FOR PERMITS AND PERMIT PROCESSING

1. The authority citation for Part 773 is revised to read as follows:

Authority: 30 U.S.C. 1201 *et seq.*, 16 U.S.C. 470 *et seq.*, 16 U.S.C. 1531 *et seq.*, 16 U.S.C. 661 *et seq.*, 16 U.S.C. 703 *et seq.*, 16 U.S.C. 668a *et seq.*, 16 U.S.C. 469 *et seq.*, 16 U.S.C. 470aa *et seq.*, and Pub. L. 100-34.

2. Section 773.5 is added to read as follows:

§ 773.5 Definitions.

For purposes of this subchapter:

Owned or controlled and owns or controls mean any one or a combination of the relationships specified in paragraphs (a) and (b) of this definition—

(a)(1) Being a permittee of a surface coal mining operation; (2) Based on instrument of ownership or voting securities, owning of record in excess of 50 percent of an entity; or (3) Having any other relationship which gives one person authority directly or indirectly to determine the manner in which an applicant, an operator, or other entity conducts surface coal mining operations.

(b) The following relationships are presumed to constitute ownership or control unless a person can demonstrate that the person subject to the presumption does not in fact have the authority directly or indirectly to determine the manner in which the relevant surface coal mining operation is conducted:

(1) Being an officer or director of an entity;

(2) Being the operator of a surface coal mining operation;

(3) Having the ability to commit the financial or real property assets or working resources of an entity;

(4) Being a general partner in a partnership;

(5) Based on the instruments of ownership or the voting securities of a corporate entity, owning of record 10 through 50 percent of the entity; or

(6) Owning or controlling coal to be mined by another person under a lease, sublease or other contract and having the right to receive such coal after mining or having authority to determine the manner in which that person or another person conducts a surface coal mining operation;

3. Section 773.15 is amended by revising paragraphs (b)(1) introductory text, (b)(1)(ii), (b)(2) and (b)(3) to read as follows:

§ 773.15 Review of permit applications.

(b) *Review of violations.* (1) Based on available information concerning Federal and State failure-to-abate cessation orders, unabated Federal and State imminent harm cessation orders, delinquent civil penalties issued pursuant to section 518 of the Act, bond forfeitures where violations upon which the forfeitures were based have not been corrected, delinquent abandoned mine reclamation fees, and unabated violations of Federal and State laws, rules, and regulations pertaining to air or water environmental protection incurred in connection with any surface coal mining operation, the regulatory authority shall not issue the permit if any surface coal mining and reclamation operation owned or controlled by either the applicant or by any person who owns or controls the applicant is currently in violation of the Act or any other law, rule or regulation referred to in this paragraph. In the absence of a failure-to-abate cessation order, the regulatory authority may presume that a notice of violation issued pursuant to § 843.12 of this chapter or under a Federal or State program has been or is being corrected to the satisfaction of the

agency with jurisdiction over the violation, except where evidence to the contrary is set forth in the permit application, or where the notice of violation is issued for nonpayment of abandoned mine reclamation fees or civil penalties. If a current violation exists, the regulatory authority shall require the applicant or person who owns or controls the applicant, before the issuance of the permit, to either—

(ii) Establish for the regulatory authority that the applicant, or any person owned or controlled by either the applicant or any person who owns or controls the applicant, has filed and is presently pursuing, in good faith, a direct administrative or judicial appeal to contest the validity of the current violation. If the initial judicial review authority under § 775.13 of this chapter affirms the violation, then the applicant shall within 30 days of the judicial action submit the proof required under paragraph (b)(1)(i) of this section.

(2) Any permit that is issued on the basis of proof submitted under paragraph (b)(1)(i) of this section that a violation is in the process of being corrected, or pending the outcome of an appeal described in paragraph (b)(1)(ii) of this section, shall be conditionally issued.

(3) If the regulatory authority makes a finding that the applicant, anyone who owns or controls the applicant, or the operator specified in the application, controls or has controlled surface coal mining and reclamation operations with a demonstrated pattern of willful violations of the Act of such nature and duration, and with resulting irreparable damage to the environment as to indicate an intent not to comply with the Act, no permit shall be issued. Before such a finding becomes final, the applicant or operator shall be afforded an opportunity for an adjudicatory hearing on the determination as provided for in § 775.11 of this chapter.

[FR Doc. 88-22541 Filed 9-30-88; 8:45 am]

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Environmental Protection Agency

Monday
October 3, 1988

Part VI

Environmental Protection Agency

40 CFR Part 60

Standards of Performance for New
Stationary Sources; Magnetic Tape
Manufacturing Industry; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 60

[AD-FRL-3332-4]

Standards of Performance for New Stationary Sources; Magnetic Tape Manufacturing Industry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Standards of performance for new, modified, and reconstructed facilities that manufacture magnetic tape were proposed in the Federal Register on January 22, 1986 (51 FR 2996). This action promulgates the standards of performance for affected facilities that manufacture magnetic tape. These standards implement section 111 of the Clean Air Act (CAA) and are based on the Administrator's determination that emissions from industrial paper coating cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. Magnetic tape manufacturing is part of the industrial paper coating category, which includes coating of foil and plastic film. The intended effect of these standards is to require all new, modified, and reconstructed facilities that manufacture magnetic tape to control emissions of volatile organic compounds (VOC) to the level achievable by the best demonstrated system of continuous emission reduction, considering costs, nonair quality health and environmental impacts, and energy requirements.

EFFECTIVE DATE: October 3, 1988. These standards apply to affected facilities for which construction, reconstruction, or modification commenced after January 22, 1986.

Under section 307(b)(1) of the CAA, judicial review of the actions taken by this notice is available *only* by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this rule. Under section 307(b)(2) of the CAA, the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

ADDRESSES: *Background Information Document:* The background information document (BID) for the promulgated standards may be obtained from the U.S. EPA Library (MD-35), Research Triangle Park, North Carolina 27711, telephone number (919) 541-2777. Please

refer to "Magnetic Tape Manufacturing Industry—Background Information for Promulgated Standards" (EPA-450/3-85-029b). The BID contains (1) a summary of all of the public comments made on the proposed standards and EPA's response to the comments, (2) a summary of the changes made to the standards since proposal, and (3) the final Environmental Impact Statement, which summarizes the impacts of the standards.

Docket: Docket No. A-82-45, containing information considered by EPA in development of the promulgated standards, is available for public inspection between 8:00 a.m. and 3:30 p.m., Monday through Friday, at EPA's Central Docket Section (LE-131), South Conference Center, Room 4, Waterside Mall, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For further information and official interpretations of applicability, compliance requirements, enforcement decisions, and reporting aspects of the promulgated standard, contact the appropriate Regional, State, or local office contact as listed in 40 CFR 60.4. For technical information contact Ms. Karen Catlett (telephone (919) 541-0835) or Mr. James C. Berry (telephone (919) 541-5605), Chemicals and Petroleum Branch, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711. For information on compliance testing and monitoring provisions of the promulgated standard, contact Mr. Gary D. McAlister (telephone (919) 541-2237) or Mr. Joseph E. McCarley (telephone (919) 541-5546), Emission Measurement Branch, Technical Support Division (MD-14), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711. For information on the regulatory decisions in the promulgated standard, contact Mr. Sims L. Roy (telephone (919) 541-5263) or Mr. Gilbert H. Wood (telephone (919) 541-5625), Standards Development Branch, Emission Standards Division (MD-13), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: This section is organized as follows:

- I. Background
- II. The Standards
 - A. Requirements for Mix Equipment
 - B. Requirements for Coating Operations
 - C. Coating Formulation Alternative
 - D. Selection of the Format of the Standards
 - E. Enforcement Provisions
- III. Environmental Impacts
- IV. Energy Impacts

- V. Cost Impacts
- VI. Economic Impacts
- VII. Public Participation
- VIII. Significant Comments and Changes to the Proposed Standards
 - A. Level of the Standard
 - B. Best Demonstrated Technology
 - 1. Coating operations
 - 2. Mix equipment
 - C. Affected Facilities and Modification and Reconstruction
 - D. Solvent Storage Tanks
 - E. Compliance Provisions
 - F. Cost and Economic Assumptions and Impacts
 - G. Suspension of the Standards
- IX. Administrative

I. Background

The magnetic tape manufacturing industry is classified as a segment of the industrial paper coating stationary source category. Sources in this category emit VOC, which have been shown to take part in atmospheric reactions producing ozone and other compounds that are well established as having adverse effects on health and welfare.

Section 111 of the CAA requires the Administrator to publish a list of categories of major stationary sources that cause, or contribute significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare. The categories have been placed on the list (40 CFR 60.16) in order of priority based on the quantities of air pollutant emissions, the mobility and competitive nature of the sources within each category, and the extent to which the pollutants endanger public health and welfare. Industrial paper coating is fourth on the list. Today's action promulgates new source performance standards (NSPS or "standards") for the magnetic tape manufacturing segment of this source category as required by section 111 of the CAA.

The NSPS occupy a unique place in the management of air quality. They require new, modified, and reconstructed sources to meet uniform reasonable minimum emission limits nationwide. They are intended to reduce potential increases in air pollution from new sources and to improve air quality as older plants and equipment eventually are retired from service. State and local regulations applicable to the same sources and pollutants are designed to protect local air quality values and to ensure that air quality does not deteriorate significantly. They vary widely from place to place and are usually least stringent in areas with the cleanest air. The NSPS provide a minimum nationwide requirement for new, modified, and reconstructed sources, thereby lessening the incentive

to locate in areas with less-restrictive regulations.

The CAA stipulates that costs be considered in setting NSPS requirements. This evaluation of costs is carried out in the context of a nationwide program encompassing an entire class of sources without consideration of the local air quality conditions that must be considered in nonattainment areas or in prevention of significant deterioration (PSD) in accordance with permitting activities associated with the CAA. As a result, NSPS cost effectiveness and reasonable-cost analyses are inappropriate decision criteria where source-specific air quality (and related public health considerations) are important factors. Therefore, State standards, which may need to be more stringent than the NSPS, may need to be based on analyses that are specific to a particular air quality situation.

The regulation promulgated today is the culmination of a lengthy process. In the phase leading to proposal, several control options were studied for each type of emission source found at magnetic tape manufacturing plants. Environmental impact and cost analyses were performed on each control option for each type of emission source. A wide range of regulatory alternatives was developed representing combinations of the control options. The regulatory alternatives were analyzed for the economic impacts each would have on the industry nationwide. The control options and regulatory alternatives are presented in detail in the proposal BID. An extensive summary is in the proposal preamble.

In the proposed rule, two affected facilities were defined: each solvent storage tank less than 75 cubic meters (m^3) in capacity and each coating operation and its associated coating mix preparation equipment. The proposed standard for solvent storage tanks required a submerged fill pipe and a pressure relief valve with a setting of at least 103 kilopascals or the capture and ventilation of all emissions to a 95 percent efficient control device. Coating mix preparation equipment was to be controlled by capturing and venting all

emissions to a 95 percent efficient control device. The standard proposed for a coating operation required that emissions be controlled by recovering or destroying at least 93 percent of the VOC content of the coating applied at the coating applicator. These standards were based on the control options yielding the greatest reductions in emissions with reasonable cost effectiveness.

New information provided by industry during the public comment period has resulted in several changes in this regulation. All provisions pertaining to solvent storage tanks were withdrawn in a separate notice published in the *Federal Register* on November 25, 1986 (51 FR 42800). The final rule is summarized in section II below. Additional information on public participation can be found in section VII. The changes made to the standards between proposal and promulgation are summarized at the beginning of section VIII, followed by a presentation of the major comments and the Agency's response to each. The rationale for the changes made to the standards can be found in these responses.

II. The Standards

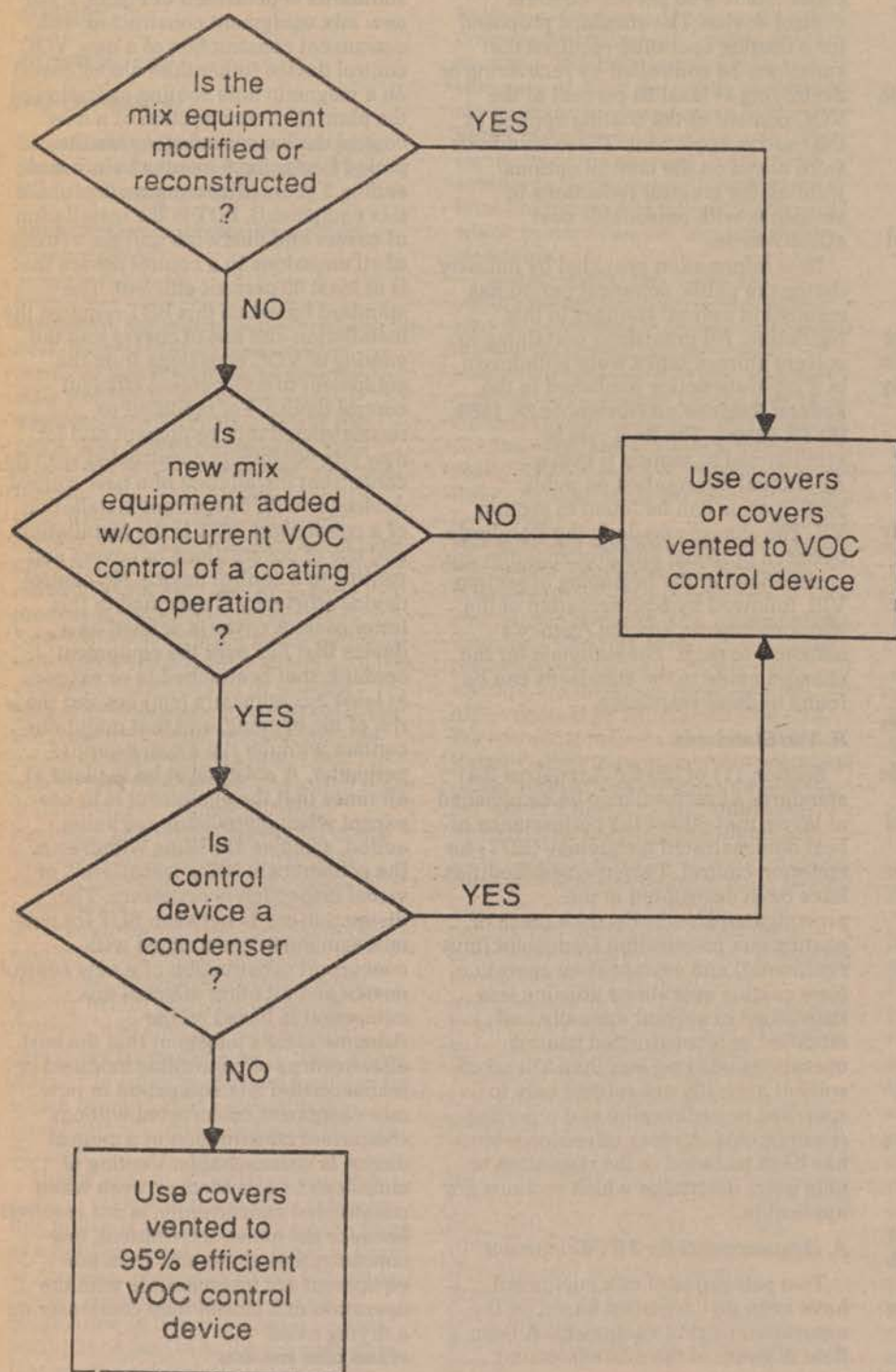
Section 111 of the CAA requires that standards of performance be established at levels that reflect the performance of best demonstrated technology (BDT) for emission control. Two affected facilities have been designated in the promulgated standards: each piece of coating mix preparation equipment (mix equipment) and each coating operation. New coating operations utilizing less than $38 m^3$ of solvent annually and modified or reconstructed coating operations utilizing less than $370 m^3$ of solvent annually are subject only to specified recordkeeping and reporting requirements. A cross reference table has been included in the regulation to help users determine which sections are applicable.

A. Requirements for Mix Equipment

Two categories of mix equipment have been distinguished based on the associated control equipment. A logic flow diagram of the mix equipment

standards is presented in Figure 1. For new mix equipment constructed with concurrent construction of a new VOC control device (other than a condenser) on a magnetic tape coating operation at the plant (i.e., construction of a new control device occurring within the period beginning 6 months before and ending 2 years after construction of the mix equipment), BDT is the installation of covers and ductwork and the venting of all emissions to a control device that is at least 95 percent efficient. The standard based on this BDT requires the installation and use of covers and the venting of VOC emissions from the equipment to a 95 percent efficient control device. For modified or reconstructed mix equipment and for new mix equipment constructed with no concurrent installation of a new control device (or with concurrent installation of a condenser), BDT is the installation and use of covers alone or covers and venting to a control device. No control device efficiency is specified in this latter case. A cover is defined as a device that lies over the equipment opening, that is attached to or extends at least 2 centimeters (cm) beyond the rim of the opening, and that maintains contact with the rim along its entire perimeter. A cover must be in place at all times that the equipment is in use except when ingredients are being added, samples are being withdrawn, the contents are being transferred, or visual inspection is necessary. The distinction made between BDT for new mix equipment constructed with concurrent construction of a new control device and all other affected mix equipment is based on the Administrator's judgment that the cost effectiveness of controlling modified or reconstructed mix equipment or new mix equipment constructed without concurrent construction of a control device is unreasonable. Venting of emissions to a condenser, even when constructed concurrently, is not required because the moist, intermittent, low-concentration airstreams from mix equipment are incompatible with the operation of a closed-loop condenser on a drying oven.

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MIX EQUIPMENT STANDARD

Figure 1. Logic flow diagram for Magnetic Tapes NSPS.

The compliance provisions of the standards for mix equipment require a demonstration that the mandated equipment is in use. The owner or operator of an affected facility required to cover the equipment and vent emissions to a 95 percent efficient control device must demonstrate to the Administrator's satisfaction that the covers meet specified criteria and are installed and used properly, the mix equipment is vented to a control device, and the control device efficiency is greater than or equal to 95 percent. The control device efficiency must be tested using EPA Methods 1 or 1A; 2, 2A, 2C, or 2D; 3; 4; and 18, 25, or 25A on both the inlet(s) and outlet(s) of the control device. A piece of mix equipment requiring only a cover or a cover and venting to a control device must demonstrate upon inspection that the cover meets the criteria specified in the standard. In addition, procedures for proper use of covers must be posted in areas of use. If the mix equipment is vented to a control device, this also must be demonstrated upon inspection.

Monitoring and reporting provisions are included in the standards for mix equipment that is required to be covered and vented to a 95 percent efficient control device. A monitor must be installed that continually measures and records a critical parameter of control device operation (e.g., the outlet

concentration level of organic compounds of a carbon adsorber). A baseline level of the monitored parameter is established during the required performance test. Any subsequent 3-hour period (or other stipulated period) of excessive variation in the monitored parameter must be reported quarterly. If no such periods occur, a report so stating is required semiannually. No monitoring or reporting requirements are required when mix equipment is required only to be covered or covered and vented to a control device, but enforcement personnel must make a determination of compliance status at every inspection.

B. Requirements for Coating Operations

The second affected facility covered by the promulgated standards is each coating operation. A coating operation includes any coating applicator, flashoff area, and drying oven located between a base film unwind station and a base film rewind station that together coat a continuous base film to produce magnetic tape. The promulgated standards differentiate among classes of coating operations. A logic flow diagram of the coating operation standards is presented in Figure 2. A new affected coating operation must be controlled such that at least 93 percent of the VOC content of the coating applied at the coating applicator(s) is recovered or

destroyed. (This is the overall level of control; it is the product of capture efficiency and control device efficiency.) This requirement applies also to any existing coating operation with less than 90 percent control that becomes affected when modified or reconstructed. However, an existing coating operation that demonstrates an overall control efficiency of 90 percent or greater before modification or reconstruction using the procedures specified in the compliance provisions of the regulation will not be required to add further controls but must maintain the demonstrated overall level of control or 93 percent, whichever is lower, after modification or reconstruction. If the owner or operator of a modified or reconstructed coating operation subsequently adds a new control device, the final standards requires that the control device be at least 95 percent efficient. In addition, the owner or operator must demonstrate that the overall level of control determined prior to installation of the new control device is still being achieved. If this demonstration shows that a higher overall efficiency is being achieved with the new control device than was previously demonstrated, then the coating operation must continue to meet either this higher demonstrated overall level of control or 93 percent, whichever is lower.

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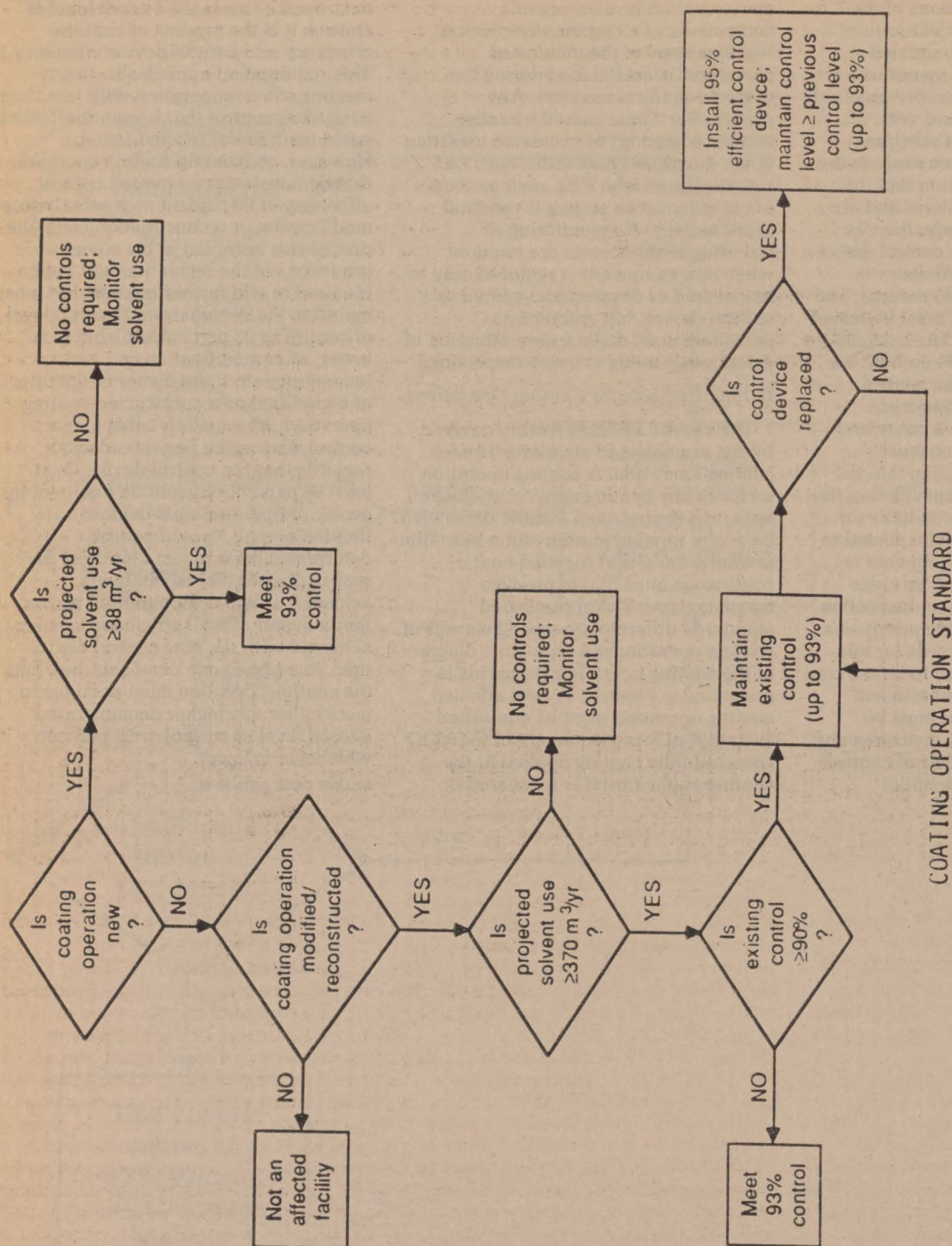


Figure 2. Logic flow diagram for Magnetic Tapes NSPS--Coating operation standard.

These standards are based on BDT for capture and reduction of VOC emissions. Theoretically, capture of all VOC emissions can be accomplished by use of a total enclosure around the coating operation; however, 100 percent capture at all times is probably never realized in practice. Extensive emission test data from many industries, including magnetic tape manufacturing and other web-coating industries, have demonstrated that carbon adsorbers can consistently achieve 95 percent efficiency. Thus, for new, modified, and reconstructed facilities, BDT consists of a total enclosure vented to a highly efficient control device. However, the overall level of control that must be met by new versus modified or reconstructed facilities differs. The distinction in the regulation between source types recognizes that unreasonable expense could be incurred if existing well-controlled facilities that undergo modification or reconstruction were required by a national standard to make sizeable capital outlays (e.g., replacement of an entire control device) to increase emission control only incrementally. Of course, additional control may well be warranted in specific circumstances under the requirements of PSD or new source review (NSR) regulations in attainment or nonattainment areas, respectively. In such circumstances, the cost-effectiveness and reasonable-cost analyses performed in development of the NSPS are not appropriate decision criteria. Additional detail on the considerations leading to these standards is contained in the proposal preamble, in Section VIII of this preamble, and in the promulgation BID.

Compliance with the standards for coating operations can be demonstrated in a variety of ways depending upon the control device in use and the configuration of affected and nonaffected facilities. For a solvent recovery device that controls only the affected coating operation, a liquid material balance is performed over each and every nominal 1-month period. Solvent use is determined from coating consumption and solvent content as measured by EPA Method 24. The quantity of solvent used is then compared to the solvent recovered. When a destruction device is used to control emissions or when a recovery device controls both affected and nonaffected facilities, a two-part gaseous emission test is used. Capture efficiency is measured by ducting fugitive emissions through a testable stack and comparing this measurement with the measured total captured

emissions. Control device efficiency is computed by testing the inlet and outlet VOC concentrations. The product of the capture efficiency and control efficiency is the total or overall efficiency of the system. The VOC flows are measured by EPA Methods 1 or 1A; 2, 2A, 2C, or 2D; 3; 4; and 18, 25, or 25A.

Compliance determinations using the liquid material balance procedures are made for each nominal 1-month period. Any months of noncompliance must be reported quarterly. Compliance under any other procedure is demonstrated initially, and continued compliance is indicated by monitoring critical parameters of the control system in use. If these parameters subsequently vary by a prescribed amount over a 3-hour period (or the stipulated period) from the values maintained during the performance test, periods of excess variation must be reported quarterly. When operations do not dictate quarterly reports, a semiannual report so stating is required.

There is an alternative means of demonstrating compliance with the standards for coating operations. Under this alternative, the owner or operator must first demonstrate that the coating operation is contained within a total enclosure. The owner or operator can demonstrate that an enclosure is a total enclosure by showing that it meets the requirements set out in the rule (see section VIII.E). If the enclosure does not meet the requirements, the owner or operator can gain approval on a case-by-case basis by demonstrating to the satisfaction of the Administrator that all VOC emissions within the enclosure are captured and vented to the control device. Second, a measurement of control device efficiency also must be made. All measurements are made using an appropriate combination of EPA Methods 1 or 1A; 2, 2A, 2C, or 2D; 3; 4; and 18, 25, or 25A. The control device must be 95 percent efficient for those coating operations required to recover or destroy 93 percent of the applied VOC. For those owners or operators of existing coating operations wishing to demonstrate the applicability of the lower standard prior to modification or reconstruction, the control device must be at least 92 percent efficient. After modification or reconstruction, the control device efficiency must be maintained at or above the level demonstrated prior to modification or reconstruction (up to 95 percent). The lower control device efficiency has been specified for existing well-controlled facilities because the cost to remove an existing control device and to add a new control device to control the incremental

emissions is considered unreasonable. However, if the owner replaces the existing control device, the owner or operator must install at least a 95 percent efficient control device to demonstrate compliance with the standard. Therefore, the owner or operator can defer replacing an existing control device with a new control device when the modification is made, but must consider the consequences of meeting the standard in the future when the existing control device is replaced. With the replacement of the control device, the cost of controlling the incremental emissions is reasonable.

C. Coating Formulation Alternative

A low-solvent coating cutoff for both affected facilities is based on a high-solids coating formulation, defined as coatings that contain a maximum of 0.20 kilogram of VOC per liter (kg VOC/l) of coating solids. This cutoff was calculated to be the level above which add-on controls become cost effective. Demonstration of the use of high-solids coatings can be made in lieu of the other compliance provisions for both affected mix equipment and affected coating operations. If this method of compliance demonstration is selected, the owner or operator must calculate the weighted average kg VOC/l coating solids for each nominal 1-month period. The weighted average is computed from the VOC content of each coating as determined by EPA Method 24 and the quantity of each coating used during the period in question. Any nominal 1-month period of noncompliance must be reported quarterly. Compliance must be reported semiannually.

The averaging period for this compliance method has been designated as each nominal 1-month period to afford the source some flexibility in coating formulations. Magnetic tape manufacturers typically manufacture a variety of products, often on the same coating line. The solvent content of the coatings generally varies somewhat by product. In addition, ambient conditions or variations in other raw materials may necessitate slight variations in solvent content between batches of coating for a single product. While no coatings are now in use that approach the compliance coating formulation, it is expected that, if and when they are developed, they will similarly vary in solvent content. Because the coating formulation standard is very stringent, it is likely that some formulations in this range will be slightly below the cutoff and that others will be slightly above. The monthly averaging period will allow greater flexibility in formulations and

production than would a shorter averaging period, adding to the incentive to pursue the development of high-solids coatings.

A switch to high-solids coating technology would be environmentally beneficial because the prescribed average formulation (0.20 kg VOC/l coating solids) corresponds to a greater emission reduction than does 93 percent control of the solvent applied in traditional coating formulations and because the adverse secondary environmental and energy impacts that normally result from add-on controls would be avoided. In any case, the coating formulation standard is so stringent that it is very unlikely that coatings with appreciably lower solvent content will be developed. Thus, in order to maintain an average solvent content that complies with the standard, all coatings used by a source will have to be near the prescribed solvent content. For this reason, sources complying with the NSPS by this method are not expected to experience the type of high emission rate over a short period that leads to significant local ambient air quality impacts and that shorter averaging periods are meant to discourage.

D. Selection of the Format of the Standards

As discussed in the proposal preamble, an emission standard is not feasible for mix equipment. Because mix equipment is generally operated for relatively short periods, airflow rates are relatively low and intermittent, making representative emission measurements expensive and difficult, if not impossible. Therefore, equipment standards have been promulgated for mix equipment. The CAA requires that equipment standards include procedures for ensuring proper operation and maintenance. The procedures developed for mix equipment are described in detail in Section II.A. of this preamble.

A "percent reduction" standard has been promulgated for coating operations. This type of emission standard was deemed appropriate because it consistently reflects the application of BDT at all facilities yet allows flexibility in the methods selected to achieve the standard.

The use of high-solids coatings has been promulgated as an alternative standard for both affected facilities. Although no such coatings are known to be in use commercially, the standard will allow their use should they become available.

E. Enforcement Provisions

The provisions of today's rule that require initial performance tests and subsequent monitoring and reporting will ensure that the compliance status of affected coating operations can be tracked. Most coating mix preparation equipment will require periodic inspection to determine compliance status. Enforcement may be delegated to State and local agencies, but the Agency retains the right to act. When it is determined that the owner or operator of a stationary source is violating the NSPS or has failed to comply with the applicable testing, recordkeeping, or reporting requirements, the Agency may bring an enforcement action under section 113 of the CAA. The Agency may issue an administrative order to comply under section 113(a); initiate a civil action under section 113(b) seeking a court order to comply and civil penalties; or, where appropriate, initiate a criminal action under section 113(c). Section 120 of the CAA authorizes the Agency or a State to assess and collect noncompliance penalties against any owner or operator of a stationary source that is not in compliance with any requirement established under Section 111 of the CAA. Noncompliance penalties are to be an amount that is no less than the economic value that the owner has derived from noncompliance. Regulations governing their assessment and collection of noncompliance penalties have previously been promulgated in 40 CFR Part 66 and 40 CFR Part 67.

III. Environmental Impacts

Since the time of proposal, revised growth projections for the magnetic tape manufacturing industry and revisions to the standards applicable to some emission points have resulted in changes in the anticipated impacts of the standard. Based on recent information received from industry representatives, the projected number of coating lines (coating operations and associated mix equipment) to become affected by the fifth year of applicability (1991) has been revised downward from 21 to 16. Of these, 5 will be new, and 11 will be modified or reconstructed. However, one new line and two modified lines are expected to fall below the applicable minimum annual solvent utilization cutoffs and, thus, are not expected to be required by today's rule to control emissions. In addition, under today's standards, two of the modified and reconstructed coating operations are not expected to be required to increase control efficiency. Of the remaining 11 projected lines, one

new and three modified or reconstructed lines are expected to be 0.33 meter (m) wide, and three new and four modified or reconstructed lines are expected to be 0.66 m wide (the "typical" production size discussed in this preamble). The proposed standard for solvent storage tanks has been deleted from the final rule.

The reduction in the number of facilities to become affected and in the level of control required for some equipment has reduced both the beneficial and adverse environmental impacts estimated at the time of proposal. The nationwide VOC emissions in the fifth year after promulgation from affected facilities controlled to the level of the standards is now expected to be about 960 megagrams (Mg) (60 percent) below the regulatory baseline, the emission level required by the typical State implementation plan (SIP). The typical new coating line subject to NSPS emission reductions will emit about 131 Mg less VOC than would a line subject to the typical SIP. This represents a decrease in emissions of about 73 percent. The typical modified or reconstructed coating line will emit about 92 Mg less VOC than a line at baseline control, a decrease of about 51 percent.

Estimates of the other environmental impacts are based on the use of fixed-bed carbon adsorbers (the most common control device) to control coating operation emissions. This assumption results in worst-case estimates for wastewater and solid waste impacts. Under the final rule, annual wastewater discharges from the typical new coating line will increase by about 380 m³ or 24 percent over the level resulting from control under the SIP's. Discharges from a typical modified or reconstructed coating line will exceed the baseline control level by 190 m³ or 12 percent. Nationwide wastewater discharges in the fifth year after promulgation will increase by a total of about 2,400 m³ (17 percent). Solid waste (spent carbon) generated by the typical new and modified or reconstructed coating lines as a result of the final regulation is expected to exceed the amount attributable to SIP control by 120 kg (17 percent) and 70 kg (10 percent), respectively, for a nationwide total of 800 kg (13 percent) in the fifth year after promulgation.

The secondary environmental impacts of the NSPS will also be lower than estimated at proposal. The typical new coating line is expected to discharge 35 kg more VOC annually in wastewater than a line controlled to the level of the

typical SIP. The typical modified or reconstructed line will discharge only 20 kg more. These increases (23 and 11 percent, respectively) will result in an estimated nationwide increase of 225 kg (16 percent) over the regulatory baseline in the fifth year after promulgation. These estimates should be considered as highly tentative, however, as the actual increased levels of VOC in wastewaters will be subject to the permitting actions of State and Federal regulatory officials charged with implementation of the Clean Water Act. Accordingly, the inclusion in this document of the above estimated increases in future discharges of VOC in wastewaters does not constitute a determination or finding, either express or implicit, that such a discharge from any particular point source will comply with applicable water quality or technology based effluent standards. This judgment can only be made by the applicable local, State, or Federal regulatory agency on a case-by-case basis.

The adverse environmental impacts of the small increases in wastewater discharges and solid waste generation resulting from the NSPS are minor in comparison to the environmental benefits of the resulting reduction in VOC emissions. Proper treatment and disposal techniques render wastewater and solid waste virtually harmless. Emissions of VOC contribute to the formation of ozone and other photochemical oxidants on the atmosphere. In light of the persistent nationwide problems with these air pollutants, the benefits to be derived from the NSPS far outweigh the adverse impacts.

IV. Energy Impacts

The anticipated impact of the standards on energy consumption has been revised downward for the same reasons that environmental impacts were revised. A typical coating line that is controlled to the level required by typical SIP's would consume about 10.5 terajoules (TJ) for emission control. As a result of the standards, this energy usage will increase 13 percent to about 12 TJ for a typical new coating line and 6 percent to about 11 TJ for a typical modified or reconstructed line. Total nationwide energy consumption in the fifth year will exceed that due to control at the level of the typical SIP's by approximately 8 TJ. These energy requirements will have negligible effect on the cost and availability of energy.

V. Cost Impacts

The estimates of the cost impacts of the standards promulgated today have

undergone extensive revision since proposal. Information received from industry on the type of equipment purchases that may be needed to achieve compliance at modified facilities has been incorporated into the cost functions used in the Agency's analysis. The recalculated cost estimates reflect the current trend in the industry toward modification of existing coating lines.

The estimated costs of compliance for new coating lines have not changed since proposal. Control of a typical new line to the level mandated by the NSPS can be accomplished with a relatively small marginal capital expenditure (about \$32,000) over that required to meet the typical SIP. This increase includes the approximate cost of a total enclosure around the application/flashoff area (assuming that the drying oven itself functions as a total enclosure in the drying area), the ductwork associated with it, and the ductwork required to vent emissions from the mix equipment to the control device. The marginal annual capital recovery and operating costs for a typical new line equipped to meet the NSPS are more than offset by the value of the additional recovered solvent, however, and a net credit of about \$73,000 per year results.

Information received from industry sources since proposal indicates that, at times, some control equipment, although adequate to meet the typical SIP, will have to be replaced to meet the NSPS at modified or reconstructed coating lines. In some cases, existing control devices will be too old or will lack sufficient capacity to meet the standards. In others, old, leaky drying ovens or those currently operating under positive pressure will have to be replaced to ensure adequate capture efficiency to meet the standards. Based on contacts with the industry and the model plant parameters and costs developed prior to proposal, it is estimated that the average capital cost of compliance for a typical modified or reconstructed coating line will be about \$477,000. The average increase in annual costs for a typical modified or reconstructed coating line is expected to be approximately \$31,000.

Taken across all 11 coating lines expected to become subject to the emission limitations, the average capital cost for the equipment required to meet the standards promulgated today is expected to be approximately \$274,000 per coating line more than is required to comply with the typical SIP's. The annualized control cost for the average coating line (including capital recovery, utilities, raw materials, labor, and the value of the recovered solvent) is

expected to be below that of the SIP level of control by \$3,000 per year. In the fifth year after promulgation, it is estimated that cumulative nationwide capital costs will be \$3 million above the amount required to meet the SIP's. The total annualized cost in the fifth year is expected to be a credit of about \$32,000 per year. These figures represent an increase over the estimates at the time of proposal. At proposal, the expected fifth year totals were \$455,000 in capital costs over the expenditures necessary to meet the SIP's and a net credit of \$777,000 per year in annualized costs. As discussed in Section VI below, the economic impact of the standards on the magnetic tape manufacturing industry has been assessed, and the Administrator has concluded that those costs will result in negligible economic impact on the industry.

VI. Economic Impacts

The economic impacts of today's rule have been recalculated since proposal using information received from industry and current market prices. This recalculation has resulted in revised impacts but no change in the conclusion that the economic impacts are negligible.

Generally, new coating lines subject to the NSPS will experience a savings due to solvent recovery credits. An exception has been included for small lines for which these credits may not completely offset the cost of control. As a result, an annual solvent use cutoff of 38 m³ has been established below which new coating operations are subject only to recordkeeping and reporting requirements. This cutoff was discussed in the proposal preamble and has been retained in today's rule. In addition, an annual solvent use cutoff of 370 m³ has been added for modified or reconstructed coating operations because of the increased costs they may incur to comply with the standards. For coating lines above these cutoffs, the actual and relative cost increases are insignificant compared to the current production costs and retail prices. If all cost increases were passed through to the consumer, the retail price increase is predicted to be less than 0.5 percent.

Modification or reconstruction of coating lines typically results in increased production and, thus, reduced production costs. However, because these changes may also increase emissions, additional control costs will be incurred that will offset some of the reduction in production costs. To evaluate the probable production cost and price impact of added controls on modified lines, the Agency analyzed

several different cost and production line modification scenarios that were submitted by industry. Because of the limited data provided and its confidential nature, it was not possible to analyze the direct effect of compliance with the NSPS on actual production costs after modification. It was only possible to calculate the change in control costs that would result from the regulation and estimate the impact of these costs on retail prices. For the four different products manufactured at the plants that provided information, the average per-unit control cost increases range from less than \$0.01 to \$0.06. As a percentage of retail prices, the resulting cost increases represent less than 0.5 percent.

The environmental, energy, and economic impacts are discussed in greater detail in the BID for the promulgated standards ("Magnetic Tape Manufacturing Industry—Background Information for Promulgated Standards" [EPA-450/3-B5-029b]).

In addition to the economic impact analysis, an analysis also was made of the cost effectiveness of alternative standards to determine which alternative achieves the greatest emission reduction for a reasonable cost and to ensure that the controls required by this rule are reasonable relative to other regulations. In this case, the promulgated standards would reduce the operating costs of the affected facilities and produce an average 5-year total cost effectiveness savings of about \$30 per Mg of emission reduction. Annual solvent use cutoffs are being promulgated for new and modified or reconstructed coating operations so that small plants will not be forced to add controls that are not cost effective for a national standard of this type. Similarly, a baseline control efficiency cutoff for modified and reconstructed facilities is being promulgated. Additional details on costs can be found in the proposal and promulgation BID's.

VII. Public Participation

Prior to proposal of the standards, interested parties were advised by public notice in the Federal Register (49 FR 26807) (June 29, 1984) of a meeting of the National Air Pollution Control Techniques Advisory Committee to discuss the standards recommended for proposal for the magnetic tape manufacturing industry. This meeting was held on August 29, 1984. The meeting was open to the public, and each attendee was given an opportunity to comment on the standards recommended for proposal.

The proposed standards were published in the Federal Register on January 22, 1986 (51 FR 2996). The preamble to the proposed standards discussed the availability of the BID ("Magnetic Tape Manufacturing Industry—Background Information for Proposed Standards" [EPA-450/3-B5-029a]), which described in detail the regulatory alternatives considered and the impacts of those alternatives. Public comments were solicited at the time of proposal, and copies of the BID were distributed to interested parties.

To provide interested persons the opportunity for oral presentation of data, views, or arguments concerning the proposed standards, a public hearing was held on March 11, 1986, at Research Triangle Park, North Carolina. The hearing was open to the public and each attendee was given an opportunity to comment on the proposed standards.

The public comment period was from January 22 to September 5, 1986. Eighteen comment letters were received and 7 interested parties testified at the public hearing concerning issues relative to the proposed standards of performance for the magnetic tape manufacturing industry. The comments have been carefully considered, and, where determined to be appropriate by the Administrator, changes have been made in the proposed standards.

VIII. Significant Comments and Changes to the Proposed Standards

Comments on the proposed standards were received from industry. No State or local agencies, environmental groups, or other interested parties submitted comments. A detailed discussion of the comments and responses can be found in the promulgation BID, which is referenced in the ADDRESSES section of this preamble. The summary of comments and responses in the BID and the additional information contained in the docket that was gathered to supplement and verify the assertions made by the commenters serve as the basis for the revisions that have been made to the standards between proposal and promulgation.

Several changes have been made to the standards since proposal. All provisions pertaining to solvent storage tanks have been deleted after a reevaluation of costs. This change was accomplished prior to today's action through a notice published in the Federal Register on November 25, 1986 (51 FR 42800). The definition of affected facilities has been changed to define mix equipment and coating operations as separate affected facilities. The definition of "total enclosure" has been clarified, and requirements for

demonstrating that a structure qualifies as a total enclosure have been added. Associated monitoring, recordkeeping, and reporting requirements have been modified accordingly. Flexibility has been maintained by allowing structures not meeting the requirements to be approved by the Administrator on a case-by-case basis. One portion of a compliance test that might have been interpreted to allow the efficiency of a total enclosure to be assumed to be 100 percent has been deleted. An alternative compliance provision for coating operations that would have allowed apportionment of long-term liquid material balances based on a single short-term gaseous emission test has been deleted. A number of minor changes have been made to the monitoring and reporting provisions for clarity and consistency with other VOC standards. Minor changes also have been made to some test and compliance provisions and definitions to clarify that the standards for coating operations are intended to apply to the net quantity of VOC actually emitted from the coating operation in the gaseous phase. Thus, any dilution solvent added to the coatings must be accounted for, and any VOC contained in waste coatings or retained in the final product may be measured and subtracted from the total when performing a liquid-liquid VOC material balance. (These adjustments are not necessary for the gaseous emission test compliance procedures.) Also, EPA Methods 18 and 25 have been added as acceptable methods for determining VOC concentrations.

The performance testing and monitoring provisions for fixed-bed carbon adsorption systems have been revised to represent more accurately the performance of multibed systems. This revision was an indirect result of a public comment concerning the performance of fixed-bed carbon adsorbers. Performance tests are the direct means of determining the compliance status of an affected facility and serve as the basis for legal enforcement actions against noncomplying sources. In contrast, the monitoring devices required by these standards serve only as indicators of control device performance to aid enforcement agencies in targeting inspections and performance tests toward potential violators. The revised procedures will ensure that the performance test runs and monitoring averaging periods will parallel the adsorption cycles of all the individual adsorber vessels or the system's complete sequential rotation through the adsorption cycles of all the vessels. Use

of a testing or monitoring period that does not correspond to an integral number of adsorber vessel cycles or system rotations could bias the results slightly in either direction. Efficiencies would be biased high if the test run or monitoring period did not include the elevated emissions typical at the beginning and end of a vessel's adsorption cycle; efficiencies would be biased low if the period included a disproportionate number of these emission peaks.

The revised carbon adsorption system performance testing provisions include separate requirements for systems with a single common exhaust stack and for systems with individual stacks for each adsorber vessel. The Agency believes that a common exhaust stack allows simpler performance testing that is more representative of the entire system's performance but has included provisions for individual exhaust stacks because this is currently the more typical configuration.

For adsorption systems with a common exhaust stack serving all the adsorber vessels, the entire system must be tested. Three test runs are required; each run must correspond to one or more complete rotations through the sequential adsorption cycles of all the adsorber vessels.

For adsorption systems with individual exhaust stacks, each adsorber vessel must be tested individually. Three test runs are required for each vessel; each run must correspond to one or more complete adsorption cycles. A procedure has been added to the compliance provisions for computing a system efficiency from the individual adsorber vessel efficiencies.

The final adsorber monitoring provisions parallel the final performance testing provisions. Again, separate provisions apply to systems with a common exhaust stack and those with individual stacks. No increase in monitoring costs is anticipated.

For adsorption systems with a common exhaust stack, a monitoring device must be installed on the common exhaust stack and one also may be installed on the common inlet duct. The owner or operator must report each occurrence when the average emission level or system efficiency (depending on whether the outlet only, or the inlet and outlet gas streams are monitored) over three successive system rotations varies outside the specified range.

For adsorption systems with individual vessel exhaust stacks, a monitoring device must be installed on each individual exhaust stack, and a monitoring device also may be installed on the common inlet duct or on each

individual inlet duct. Each adsorber vessel must be monitored for a minimum of one complete adsorption cycle per day. A 3-day rolling average emission level or efficiency for each vessel (depending on whether the outlet only, or the inlet and outlet gas streams are monitored) must be computed each day from the daily averages, and these 3-day rolling averages must be reported when they vary outside the specified ranges.

Significant changes also have been made to the standards as a result of comments on the costs involved in retrofitting modified or reconstructed equipment. Several companies submitted modification scenarios that were evaluated by the Agency. It was concluded that in some cases, the costs to meet the proposed standards would be unreasonable for a national standard in light of the relatively small reduction in emissions obtained. This finding has prompted changes to the standards for both mix equipment and coating operations.

New mix equipment that is constructed with concurrent construction of a new VOC control device (other than a condenser) on a magnetic tape coating operation at the plant requires the installation and use of covers on each piece of mix equipment and the venting of the equipment to a 95 percent efficient control device. The wording of this standard has been modified to reflect more closely the practical application of BDT for this category of mix equipment. Construction of the control device is considered concurrent if it occurs within the period beginning 6 months before and ending 2 years after construction of the mix equipment. All modified or reconstructed mix equipment, new mix equipment that is constructed without concurrent construction of a control device, and new mix equipment that is constructed with concurrent construction of a condenser is simply required to be fitted with covers alone or fitted with covers and vented to a control device. Venting of emissions to a control device is not required on new mix equipment constructed with concurrent construction of a condenser because the moist, intermittent, low-concentration airstreams from mix equipment are incompatible with the operation of a closed-loop condenser on a drying oven.

The standards applicable to new coating operations remain unchanged from those proposed. The same is true of modified or reconstructed coating operations recovering or destroying less than 90 percent of the VOC applied at the coating applicator prior to modification or reconstruction.

However, an existing coating operation that demonstrates recovery or destruction efficiency equal to or greater than 90 percent will be required only to maintain the existing level of control or 93 percent, whichever is lower, upon modification or reconstruction. If a new control device is subsequently added to a modified or reconstructed coating operation, the new control device must be 95 percent efficient. Also, if a higher overall control efficiency is achieved with the new control device, this higher level of control or 93 percent, whichever is lower, must be maintained. In addition, modified or reconstructed coating operations utilizing less than 370 m³ of solvent annually will be subject only to certain recordkeeping and reporting requirements. Appropriate revisions have been made to the regulation reflecting these changes.

The major comments and responses are summarized in this preamble. Most of the comment letters contained multiple comments. The comments have been divided into the following areas: Level of the Standard, Best Demonstrated Technology, Affected Facilities and Modification and Reconstruction, Solvent Storage Tanks, Compliance Provisions, Cost and Economic Assumptions and Impacts, and Suspension of the Standards. All comments and responses are included in the promulgation BID.

A. Level of the Standard

Two commenters said that EPA did not properly consider the normal process variability associated with carbon adsorbers in proposing a standard requiring 93 percent control of the coating operation. One commenter reviewed the long-term operating data for three carbon adsorbers presented in Tables C-6 and C-8 of the proposal BID and concluded that the standard deviation for all three systems exceeds 2 percent. According to this commenter, if the long-term operational variability results in a normal distribution of monthly measurements, two-thirds of all results would be expected to be within plus or minus one standard deviation from the mean, and 95.5 percent of all results would fall within plus or minus two standard deviations from the mean. The commenter concluded that for a control system functioning at an average long-term efficiency of 95 percent and with a standard deviation of 2 percent, a point would be expected to fall below 91 percent about once every 4 years. If so, a 100 percent efficient capture device ducting emissions to a control device with a long-term average efficiency of 95 percent would be expected to fail the

proposed standard of 93 percent control efficiency for each and every month at least once and possibly twice every year. The two commenters recommended that the standard be established at 90 percent for the coating operation in order to take process variability into account.

The commenter is correct in stating that the standard deviations of the monthly efficiency data presented in Tables C-6 and C-8 of the proposal BID exceed 2 percent. The EPA undertook additional investigation into the circumstances of the reported efficiencies to determine if these variations were indeed the result of normal process variability.

The data in Table C-6 are from an IBM Corporation facility. A representative of IBM Corporation indicated that the first 4 months of data listed in Table C-8 (January through April 1982) coincide with the startup phase of both the carbon adsorber and the process equipment it serves. These months should, therefore, be deleted from consideration of the normal variability of the system. The data from the remaining 8 months in 1982 have a mean efficiency of 98.7 percent with a standard deviation of 0.53 percent. Assuming a normal distribution of monthly measurements, the probability of this carbon adsorber falling below an efficiency of 95 percent due to random variability would be less than 10^{-9} , i.e., one chance in a billion. These data show that with the use of BDT, i.e., a total enclosure and a carbon adsorber, the standard of 93 percent overall reduction is achievable.

Information on this subject also was sought from carbon adsorber manufacturers. The representatives unanimously agreed that if properly designed and operated, fixed-bed carbon adsorption systems can achieve efficiencies of 95 percent or above at all times. The operation of such systems must be coordinated with production, and adsorption/desorption cycles must be based on monitored outlet concentrations rather than elapsed time. Also, a program of regular maintenance must be established and carried out. Magnetic tape manufacturers adhering to these operation and maintenance principles should have little difficulty maintaining the necessary adsorber efficiency.

In light of the information at hand, EPA has determined that proper consideration has been given to carbon adsorber performance capabilities. The data from the industry derived from a period of normal operation indicate that continuous long-term efficiency in excess of 95 percent is achievable even

with variations in operation. Thus, based on these data, which vendors support, the Agency concludes that the standard as proposed provides sufficient margin to account for the normal variability of control devices.

One commenter questioned whether any supporting data exist for the Agency's position that 95 percent VOC removal efficiency can be achieved continuously by carbon adsorption systems over all averaging periods, including short-term periods. The commenter submitted information indicating that 24-hour averages of efficiency of his adsorption system vary dramatically from day to day. Days when the average efficiency was above 95 percent were followed quickly by days with an average efficiency of less than 90 percent. It was this information that caused the commenter to question the Agency's decision to determine compliance and assess adsorber operation and maintenance based on short-term measurements of adsorber performance.

In response to this comment, EPA has evaluated existing short-term performance data; collected additional design, operation, and performance data from plants inside and outside the magnetic tape industry; and reexamined, with the help of carbon manufacturers and custom carbon adsorption equipment designers, the elements that could affect short-term adsorber efficiency. This analysis has reinforced the Agency's original conclusion that a properly designed, operated, and maintained carbon adsorption system can continuously maintain a VOC removal efficiency of 95 percent or greater. The promulgation BID, Section 2.1.2, includes a detailed technical discussion of the issues raised by the commenter, and the data are in the project docket.

The Agency's analysis is based on the theory, design, and operation of carbon adsorption systems. It is well recognized in carbon adsorption theory that the affinity of activated carbon for organics is so great that carbon will collect essentially all organics from an airstream for a period of time. As the carbon begins to saturate, it will allow organics to escape (or break through). For adsorber vessels containing fresh (virgin) carbon, the quantity of organic-laden gases that may be treated and the time before breakthrough are functions of the carbon bed design and size. As the carbon undergoes successive cycles of adsorption and regenerating, fouling gradually decreases the active sites within the carbon bed available for adsorbing organics. This process reduces the total amount of organics the

carbon bed will adsorb in a single adsorption cycle (the "working capacity" of the bed). If the operator does not coincidentally reduce the duration of the adsorption cycle, the amount of organic allowed to pass through the system increases greatly as the bed operates in a post-breakthrough period. In such cases, the average efficiency over the adsorption cycle will drop significantly. Therefore, the air pollution control efficiency is a function of how long the carbon bed remains in service after breakthrough and before regeneration, and not necessarily the age of the carbon bed or its remaining working capacity. In a properly designed and operated adsorber, the volume of the carbon beds and the duration of the adsorption periods between regeneration cycles are established to accommodate the reduction in working capacity that occurs over time.

In actual operation, a properly designed adsorber vessel will achieve exceedingly high (99 percent) overall efficiency during the bulk of its adsorption cycle. Only after breakthrough does the instantaneous efficiency fall enough to influence the average efficiency of the entire cycle. Through proper operation and monitoring, breakthrough can be anticipated, and the adsorber vessel removed from adsorption service at or prior to breakthrough, resulting in a high average efficiency over the adsorption cycle. Continuous monitoring of the outlet concentration of organics from each bed provides a means of determining the appropriate moment to remove a bed from adsorption service regardless of the amount of time it takes to reach breakthrough for a particular adsorption cycle.

In summary, the performance factors that affect the efficiency of a carbon adsorber are controllable, and the system can be properly designed to handle the organic material actually delivered to it. A sudden or erratic decrease in the efficiency with which an adsorber removes organics from an airstream is a result of improper design, operation, and/or maintenance.

Because the carbon adsorber performance data supplied by the commenter have been claimed to be confidential, no specific details about the commenter's system are presented in this preamble or in the promulgation BID. The data were submitted after the comment period had closed. Nevertheless, a detailed study was conducted as a result of the comment, and the nonconfidential results of this study are discussed in more detail in the BID. In general, the carbon adsorber

system cited by the commenters to support their claims is significantly underdesigned for the actual solvent loading it is required to control. This results in the system being operated a significant portion of the time when the solvent-laden air (SLA) has already broken through one or more of the carbon beds. As a result, this system shows significantly reduced efficiency and also significant variations in efficiency from day to day and cycle to cycle. There is no evidence to show that the poor performance of this system stems from any inherent difficulty in absorbing the particular solvent blend in use. Therefore, the Agency has concluded that those data are not representative of a properly designed, operated, and maintained system and that the erratic performance of the commenter's adsorption system can be traced to these problems.

The Agency has found no basis for concluding that the standard cannot be achieved continuously and, hence, over both short-term and long-term averaging periods. For this reason, the standard requiring 93 percent overall VOC emission reduction for new coating operations and most modified or reconstructed coating operations has not been revised. However, review of information obtained in response to the comment has led the Agency to revise the averaging periods for the testing and monitoring requirements from periods of a fixed duration to periods that include an integral number of complete adsorber cycles. The revised periods remain short-term averaging periods. It is believed that these revisions will result in more accurate characterization of the performance of carbon adsorption systems. The new requirements are included in the promulgated standard and are discussed in more detail elsewhere in this preamble (see the general section on changes since proposal located at the beginning of Section VIII).

Three commenters noted that the standard for the pressure sensitive tapes and labels (PSTL) industry, which includes the plant that the Agency is relying on for technology transfer, was set at only 90 percent control. One commenter indicated that the standard for the magnetic tape industry should, therefore, be no higher. Another commenter believes that the standard should be less than 90 percent. The third commenter stated that EPA must justify the imposition of a stricter standard on the magnetic tape manufacturing industry.

The PSTL data were used in the development of the magnetic tape

manufacturing industry standard because these two industries are similar both in the processes used and in the controls determined to be BDT. However, some products manufactured at PSTL plants retain sufficient solvent in the dried web such that 93 percent control of applied solvent was judged not to be achievable in all cases. There is virtually no solvent retained in magnetic tape products after they leave the drying ovens; thus, all the applied solvent is available for capture by a well-designed capture device. If, however, an owner or operator submits specific information to the Administrator that justifies the need for retained solvent in the product, the revised standards now allow the fraction of retained solvent to be included in the material balance calculation as VOC recovered rather than as a fugitive emission. In addition, data gathered on the level of control of coating operations achieved at existing magnetic tape plants support the level of the promulgated standard. (Additional detail on this subject is presented in Section 2.1 of the promulgation BID. See section VIII.C of this preamble for further discussion of the level of control on new and modified coating operations.)

B. Best Demonstrated Technology

1. Coating Operations

Several commenters stated that magnetic tape products, particularly computer tape, cannot be produced in the type of negative-pressure total enclosure required by the proposed standard for the coating operation. One commenter stated that neither the proposal BID nor the proposal preamble adequately addresses the quality issue and that there is no information in the proposal BID about the actual use of negative-pressure enclosures at magnetic tape plants.

A meeting of EPA and industry representatives was held on May 7, 1988, to discuss industry concerns with the proposed NSPS. Attendees from industry included most of those who presented comments at the public hearing (IV-F-1). At the meeting, industry representatives agreed that all types of magnetic tapes can be manufactured at facilities equipped with BDT. The concern expressed by industry was the cost to achieve the standard at modified and reconstructed facilities (see section VIII.C), not the achievement of 93 percent control or problems with product quality. The air handling techniques designated as BDT are currently in use in the magnetic tape industry, including at least two plants

manufacturing computer tape. On this basis, the Agency concludes that BDT is practical and that the standard is technologically achievable for all segments of this industry.

Because of the concerns for product quality discussed above, some commenters said that BDT has not been demonstrated for the magnetic tape industry and that extensive development costs would be required by the industry to meet the proposed standard. One commenter said that the standards should be rewritten "using a BDT from the magnetic tape industry" (i.e., control of the oven only) and that "different BDT's might be needed for each segment" of the industry. Other commenters said that the PSTL plant that provided the data supporting the proposed standard would not be capable of producing high-quality magnetic tape and should, therefore, not be considered an adequate demonstration of BDT for the magnetic tape industry. One commenter said that according to his review of previous court cases, technology transfer should be based on specific equipment rather than a process.

This last commenter was contacted for additional information about the court cases to which he referred in his comments. He was unable to supply specific citations. The Agency has located several decisions that deal in part with appropriate considerations in the determination of BDT. In no case was the issue raised concerning a distinction between processes and specific pieces of equipment. The overriding concern voiced in these decisions is that the Administrator arrive at an achievable standard through a reasonable determination of BDT.

The NSPS for the magnetic tape manufacturing industry is an achievable standard based on a reasonably determined BDT. The control technology designated as BDT has been demonstrated at a PSTL plant to achieve the percent reduction required by this standard. These air handling and control technologies are currently in use in the magnetic tape industry, including the computer tape sector where product quality is critical. The equipment, solvents, and processes used in these two web coating industries are similar and would be expected to produce similar SLA streams. A technological system that can control the SLA streams of the PSTL industry to the required degree can be reasonably expected to do the same in the magnetic tape industry. Thus, having made a reasonable determination of BDT and

formulated an achievable standard, the Agency has satisfied the requirements mandated by the courts. (See related discussion of the level of the standard in section VIII.A of this preamble and the issue of product quality above. Additional detail on this subject is contained in section 2.2 of the promulgation BID.)

2. Mix Equipment

Two commenters addressed the selection of carbon adsorption as BDT for mix room emissions. According to one commenter the cost to install control equipment is not justified, particularly for an existing facility, because only 3 percent of plant-wide emissions are from the mix room. The commenter recommended that BDT for mix equipment be redefined as tight covers. A second commenter said that control costs for a separate carbon adsorber are significantly underestimated in the BID and result in unrealistic cost-effectiveness values.

The Agency's cost analysis presented in the proposal BID demonstrated that the cost to control mix room emissions with an add-on control device was reasonable only if the same control device could be used to control coating operation emissions and mix room emissions. The standard for the mix room and the proposed affected facility definition presented at proposal were selected so that carbon adsorption control of mix room emissions would occur only when there was also an affected coating operation, and, thus, emissions from the two sources could be controlled by the same control device. At that time, growth in the industry primarily resulted from construction of new lines. Thus, new or existing mix equipment would become subject to the NSPS when a new coating operation and its control devices were being constructed and capacity for the mix equipment could be included in the control device design.

Since proposal, EPA has accepted the industry's allegation that growth in the industry will occur primarily from modification or reconstruction of existing lines rather than construction of new lines (see section VIII.C). In this situation, existing mix equipment may be modified when there is no construction of a new control device and the existing control device may not have sufficient extra capacity to incorporate mix room emissions. Two modification scenarios were provided by industry after the public hearing, and the site-specific control costs were determined not to be reasonable because of high airflow rates. Older pieces of mix equipment frequently have

makeshift covers, and dry ingredients are added by open pouring rather than by closed pumping systems. Thus, older, modified mix equipment may require higher airflows than new mix equipment to keep the VOC concentrations in the work area at safe levels (below the threshold limit value and the lower explosive limit). These high airflows further exacerbate the problem of limited control device capacity.

The Agency's original analysis of BDT and the mix room standard at proposal were never intended to include the scenario of controlling the entire room ventilation air from the mix room. The original analysis was based on new mix equipment, which has covers that can be easily adapted to ventilation to a carbon adsorber at low airflows. After discussions with personnel at the two plants submitting comments, the Agency has concluded that there is no practical and cost-effective way to retrofit this type of low-airflow capture device to all existing modified mix equipment. Therefore, the Agency agrees that BDT for modified mix equipment should be covers instead of ventilation to a control device. However, the Agency still believes that control of new mix equipment can be achieved at a reasonable cost by carbon adsorption when a new control device is being constructed on a magnetic tape coating operation at the plant and the SLA from the mix equipment is considered in the design of the device.

The standard has been changed to require covers or covers and venting to a control device on all modified or reconstructed mix equipment and on new mix equipment when there is no concurrent construction of a control device on a coating operation at the plant or when the control device installed concurrently is a condenser. Covers alone are expected to reduce emissions by approximately 40 percent compared to open mix equipment. The use of covers and venting to a control device will provide additional control beyond 40 percent. If new mix equipment is installed at a time when there is concurrent construction of a control device (other than a condenser) on a coating operation at the plant, covers must be used on the mix equipment, and emissions must be vented to a control device that is 95 percent efficient. The Agency selected 95 percent for the control efficiency because carbon adsorption is part of the BDT selected for this industry. In its review of the operating data for carbon adsorbers in this and other industries, the Agency has concluded that 95 percent is achievable on a long-term

continuous basis for a properly designed device. Thus, any new carbon adsorber should be capable of maintaining this level of control. "Concurrent" means within the period from 6 months before until 2 years after the installation of the mix equipment. This period is designated because it is consistent with the normal planning and purchase cycles for equipment of this type. The 2-year period also coincides with the period for which records required under this standard must be retained. A definition of covers and compliance and reporting requirements for the covers have been added to the regulation.

A cover is defined as a device that (1) lies over the equipment opening, (2) either extends at least 2 cm beyond the rim of the equipment or is attached to the rim, (3) maintains contact with the rim for the entire perimeter, and (4) is opened as seldom as possible. A nonpermanent cover such as a polyethylene sheet may be used if it meets these criteria. A notification of actual startup is the only reporting requirement; all other monitoring, recordkeeping, and reporting requirements have been waived for plants with only mix equipment requiring covers.

According to one commenter, there is a strong bias in the proposal BID toward carbon adsorption control of mix room emissions that is unwarranted because of the problems that are encountered with the use of this technology to recover some solvents. In particular, cyclohexanone is unsuited for carbon bed recovery because of potential hot spot formation that would result in bed fires and plugging of the bed by oxidation products. According to the commenter, emissions from new or modified mix equipment cannot be added to the condenser controlling oven emissions without upsetting oven control because the oven and condenser have a closed-loop, steady-state gas balance that would be disrupted by intermittent and variable airflow and low VOC levels from the mix room.

The Agency reviewed the available data on types of solvent and associated control devices used in this industry. Plants using cyclohexanone as part of a blend of solvents have successfully controlled mix room and oven emissions with carbon adsorbers. However, those plants electing to use pure cyclohexanone have installed condensers for control of oven emissions. According to one vendor, bed fires did, in fact, occur in the carbon adsorber installed by his company at a magnetic tape plant using pure cyclohexanone. The vendors of

condensers used in this industry have agreed with the commenters' statements regarding the impact of venting mix room emissions to a closed-loop condenser on the oven. The moist, intermittent SLA streams from mix equipment are incompatible with finely tuned closed-loop oven/condenser systems. Use of a separate control device to control mix equipment emissions has been found not to be cost effective. Based on these data, the Agency will allow a different level of control for those plants using a condenser to control coating operation emissions. For such plants, covers that meet specific criteria must be used to control VOC emissions.

C. Affected Facilities and Modification and Reconstruction

Many comments were received on these interrelated subjects. Some commenters suggested that the affected facility definition be changed to separate mix equipment from coating operations. They were concerned that minor modifications to mix equipment would make existing coating operations subject to the NSPS, particularly at those plants that are already so highly controlled that an emission offset could not be achieved. It would also be difficult to determine the "comparable" capital value of an entirely new "facility" to determine if reconstruction has occurred when common mix equipment serves two coating operations.

These concerns were brought about by changes in this industry. At the time leading up to proposal, it was indicated by the industry that expansion would occur through the construction of new coating lines. However, after proposal, several commenters stated that the current trend is to modify existing equipment. These commenters stated that the costs to retrofit improved controls to existing equipment would be excessive and have not been adequately evaluated. Several suggested that the affected facility definition be changed to exclude existing equipment.

Six commenters submitted actual or theoretical scenarios for coating line modifications at their plants and the necessary control system changes and costs. Three of these scenarios involved changes to the coating line to increase production speed, two scenarios involved changes in the mix room equipment, and one scenario did not specify the type of modification. Four of the scenarios included the installation of new control devices for the entire modified line.

In addition to the six modification scenarios submitted by industry, EPA

surveyed the remaining plants in the industry and confirmed that the industry now believes that growth, at least in the next several years, will occur primarily as a result of modifications to both mix equipment and coating operations. The Agency performed detailed site-specific analyses of the control costs for the modification scenarios supplied by industry (see docket item IV-B-12). The details of these scenarios and the cost analyses will not be presented here because confidential treatment of all of the information submitted was requested by the plants. Three of the scenarios are likely modifications as defined under the criteria in 40 CFR 60.14. One scenario is not likely to be a modification. The remaining two scenarios were entirely hypothetical, and not enough information could be provided to make a modification determination despite the Agency's requests for further information. However, EPA conducted a cost analysis on the five scenarios for which sufficient data were supplied on the assumption that, even if the specific case was not a modification, the general concept might be valid in other cases. The cost analyses were performed for the control strategies presented by the commenters and for alternative strategies. Each cost analysis was specific for the operating practices and equipment at the plant.

As discussed in section VIII.B, based on these analyses and information from plant personnel regarding modification of mix equipment, EPA has revised BDT to be covers or covers and venting to a control device for modified mix equipment, new mix equipment at plants without concurrent construction of a control device, and for new mix equipment at plants with concurrent construction of a condenser. The BDT for new mix equipment at plants with concurrent construction of a control device (other than a condenser) on a magnetic tape coating operation remains control by that device. The control device must be operated at 95 percent efficiency. Because the standard for mix equipment is an equipment standard, these new BDT determinations are also the new standards for the mix equipment.

Three scenarios concerned increasing the level of control on the coating operation after a modification. The analyses showed that if the baseline overall level of control on an existing coating operation is 83 to 88 percent, the cost to achieve 93 percent overall control after modification is reasonable even if a new control device must be built. However, for the plant with a baseline overall level of control of 90

percent or greater, the cost of adding any control equipment, even a small carbon adsorber to control only the incremental airflow, is unreasonable. Based on these results, the Agency has revised the regulation to include different standards for new and modified or reconstructed coating operations. New coating operations and modified or reconstructed coating operations with a baseline overall level of control less than 90 percent prior to making the change must still achieve 93 percent overall control of applied solvent (see section VIII.A for the justification of this level). If an existing coating operation can be demonstrated to achieve 90 percent overall control or better, it must maintain the existing overall level of control or 93 percent, whichever is lower, following modification or reconstruction. If, following a modification or reconstruction, a new control device is installed, the final standards require that the control device be at least 95 percent efficient and that the overall level of control be maintained at or above the level demonstrated prior to modification or reconstruction. However, if the overall level of control demonstrated with the new control device is higher than was previously demonstrated with the old control device, then the higher overall level of control (up to 93 percent) must continue to be met. With the replacement of the control device, the cost of controlling the incremental emissions is reasonable.

The methods of demonstrating the baseline level of control prior to modification or reconstruction are (1) the performance tests described in the regulation or (2) the use of a total enclosure that meets the new definition (see Section VIII.E) and a control device that is demonstrated by the procedures in the regulation to be at least 92 percent efficient. The Agency considered requiring that the lower overall level of control required at modified facilities be contingent on the demonstration of both 90 percent overall control or greater and insufficient control device capacity to accommodate the increased VOC loading due to the modification. However, no practical method was found that industry and compliance officers could use to make capacity determinations easily and accurately.

An annual solvent utilization cutoff of 38 m³ for coating lines was included in the NSPS at proposal. The 38 m³ cutoff is the annual solvent throughput below which the control costs for new lines become unreasonable relative to the emission reduction achieved. This cutoff has been retained for new coating

operations in the final rule. However, the information received from industry on the compliance costs at modified or reconstructed coating operations prompted a review of the cutoff for these facilities. The EPA used cost information, emission data, and plant parameters for model lines developed prior to proposal plus information supplied by industry to determine the cutoff for modified or reconstructed lines. Even when the emission reduction achieved by a modified or reconstructed line is the same as that achieved by a new line, the incremental control costs above baseline can be greater for modified lines than for new lines. For new lines, most of the capital costs are incurred in reaching the baseline level of control, and only a small additional cost is needed to achieve the extra control required by the recommended standard. For modified or reconstructed lines, a complete new control system may be required, and the total cost of that system must be compared only to the incremental emission reduction above the baseline level of control. Therefore, the annual solvent throughput at which control costs are reasonable may be higher for modified lines than for new lines. Based on this analysis, an annual solvent utilization cutoff of 370 m³ has been added for modified or reconstructed coating operations (see docket item IV-B-7). Of the projected eight modified or reconstructed lines that would otherwise be required to reduce emissions by 1991, only one would be below this annual solvent use cutoff.

At proposal, each coating operation and its associated mix equipment were defined as a single affected facility. This definition was expected to result in a greater emission reduction than separate affected facilities for two reasons. First, it allowed the selection of common carbon adsorption control (i.e., a carbon adsorber that controls both mix room and coating operation emissions) as BDT, which would result in 93 and 95 percent control of emissions from the coating operation and mix room, respectively. (A separate carbon adsorber for mix room emissions was found not to be cost effective.) Second, the definition would have resulted in a greater emission reduction than separate affected facilities because more mix equipment would be brought under the standard at this high level of control, i.e., when a coating operation was constructed or modified, all new and existing associated mix equipment would become affected.

As described in section VIII.B, the Agency has revised its BDT

determination for mix equipment because it has been demonstrated that the cost and feasibility of retrofitting carbon adsorption control to mix equipment may not always be reasonable. As a result of the revised standards, emissions from affected coating operations will be 90 or 93 percent controlled, and emissions from most affected mix equipment will be about 40 percent controlled through the installation and use of covers. Because the level of control required by the standard for the coating operation is more than twice that required for the mix equipment, the greatest overall emission reduction will be achieved when the greatest possible number of coating operations become subject to the standard. Therefore, the Agency has selected the affected facility definition that would achieve this result. The Agency has decided to separate the coating operation and mix equipment into two separate affected facilities. This separation reduces the capital expenditure necessary to qualify as a modification or reconstruction, which increases the likelihood that a facility would be subject to the modification or reconstruction provisions. The following factors raised by commenters also were considered in changing the affected facility definition: (1) Interpretation of the regulation, particularly compliance, modification, and reconstruction determinations, is more straightforward and (2) the possibility is eliminated that a modification to one coating operation may cause an unchanged coating operation to become affected because they share common mix equipment, a result that was never intended with the definition at proposal.

For the mix equipment affected facility, the following possible definitions were considered: (1) Each piece of mix equipment and (2) all mix equipment at a plant. Under the presumption that the narrowest definition is the most desirable because it will result in including the most modifications and reconstructions and, thus, the greatest emission reductions, the affected facility was defined as individual mix tanks. This definition will also make compliance, modification, and reconstruction determinations easier at plants with many pieces of mix equipment.

The commenters' concerns that very minor modifications would cause existing facilities to become subject to the standards are unfounded. As discussed on the proposal BID, an increase in production that is accomplished without a capital expenditure is not considered a

modification. A "capital expenditure" is defined in 40 CFR 60.2 as an expenditure exceeding the product of the applicable "annual asset guideline repair allowance percentage" (specified in the latest addition of Internal Revenue Service Publication 534) and the existing facility's fixed capital cost. In addition, when emissions elsewhere within the same affected facility can be reduced by an amount equal to or greater than the increase caused by a modification, the facility does not become subject to the NSPS.

Additional detail on the comments received on these subjects and the Agency's response is contained in Section 2.3 of the promulgation BID.

D. Solvent Storage Tanks

Five commenters questioned several aspects of the storage tank cost analysis and proposed standard. Comments were made on the selection of the baseline tank, the cost of a pressure vessel relative to an atmospheric tank, the safety of pressure vessels, the justification for submerged fill pipes, underground tanks, selection of BDT, and the level of the standard. The details of these comments can be found in the docket.

Based on the cost issues raised by the commenters, a cost reevaluation was performed. The details of this cost analysis are contained in docket item IV-B-2. The new cost analysis demonstrates that there is no cost-effective control technology for solvent storage tanks in the magnetic tape manufacturing industry. As a result, a notice was published in the *Federal Register* on November 25, 1986, withdrawing the proposed standard for storage tanks (51 FR 42800). This notice was published separately rather than at the time of promulgation of the revised regulation so that facilities would not needlessly install tanks complying with the proposed standard in the interim between proposal and promulgation.

E. Compliance Provisions

Two commenters requested that EPA provide the criteria that would be used by the Administrator to evaluate enclosure designs submitted by industry as part of complying with the alternative means of emission limitation. One commenter noted that the technologies for testing such a total equipment enclosure do not exist or are not practical and that the standard as written is not capable of being administered.

The Agency agrees with the commenters that more complete criteria for total enclosures are needed.

Therefore, total enclosure requirements were developed after a review of air handling techniques already in use in this and other industries. The suggested physical structure of the total enclosure was developed from EPA's experience with enclosures in a wide range of industries. The relative positions of ducts and openings and the locations of measurement points were developed from this experience and from industrial hygiene measurement requirements.

The requirements have been included in the final rule. Those enclosures that conform to the requirements will receive automatic approval as total enclosures. An enclosure that does not conform to the requirements may be approved by the Administrator on a case-by-case basis provided that it is demonstrated that all VOC emissions from the coating operation are contained by the enclosure and vented to the control device. It should be noted that the Agency does not intend to limit the possible configurations of total enclosures. A total enclosure could range from a close-fitting structure around the application/flashoff area coupled with the drying oven all the way up to the room (or entire plant) housing the coating operation. Thus, where product quality concerns dictate an enclosure under positive pressure immediately around the coating operation, this enclosure may, in turn, be contained within a larger, negative-pressure total enclosure.

The current requirements and their bases are discussed below. The Agency is continuing its investigation of appropriate requirements for total enclosures and the related procedure for capture efficiency testing using temporary enclosures. The most up-to-date guidance on these matters may be obtained by contacting the individuals listed in this preamble under the heading **"FOR FURTHER INFORMATION CONTACT."** If necessary, the total enclosure requirements in the rule will be revised during the required 4-year reviews.

The Agency has selected average face velocity across the natural draft openings as the best indicator of complete capture. Natural draft openings are defined as any openings in the total enclosure that remain open during operation of the facility and that are not connected to a duct in which a fan is installed. An example of a natural draft opening is a slot where the base film (or "web") enters the total enclosure. The inward face velocity of the enclosure must be sufficient to overcome outward velocity due to dispersive forces. Because face velocity

cannot be measured directly and accurately while the enclosure is in operation, the Agency has chosen to specify that an average face velocity be calculated using flow measurements in the forced makeup air ducts and the outlet ducts. The American Conference of Governmental Industrial Hygienists (ACGIH) recommends minimum average face velocities of 2,700 to 3,600 meters per hour (m/h) for enclosures around belt conveyors, bins/hoppers, and packaging machines, and through paint spray booths. The Agency has selected an average face velocity of at least 3,600 m/h as the requirement for natural draft openings in total enclosures in this industry. A test procedure based on EPA methods is included in the compliance provisions of the promulgated regulation for determination of the average face velocity across the natural draft openings.

It is expected that most enclosures can easily meet this requirement. For instance, the "typical" model coating operation developed by EPA for impact analyses prior to proposal coats a web that is 0.66 m wide. This facility would need a net exhaust from the enclosure of only 0.30 standard m^3 per second (m^3/s) to maintain an average face velocity of 3,600 m/h across entrance and exit web slots measuring 1 m by 0.15 m. This can easily be accomplished with the exhaust from the drying oven to the control device, which is expected to be on the order of 2.6 standard m^3/s . In the event that an enclosure does not meet this requirement, the owner or operator can apply to the Administrator for approval on a case-by-case basis.

When the static pressure inside the enclosure is negative with respect to the static pressure outside the enclosure, an inward flow will result. However, the static pressure differential that results in an average face velocity of 3,600 m/h is so small (approximately 1 pascal [Pa] across a flanged opening) that motion near a natural draft opening could be enough to overcome this pressure differential, resulting in outward flow. For this reason, the requirements state that when the average face velocity is between 3,600 m/h and 9,000 m/h, continuous inward flow must be verified during the determination of average face velocity by observation using smoke tubes, streamers, tracer gases, or other means approved by the Administrator. Above 9,000 m/h, the average face velocity recommended by ACGIH when emissions are actively generated into a turbulent area, the static pressure differential is high enough (approximately 6.5 Pa across a flanged

opening) that continuous inward flow can be assumed without verification.

To differentiate a partial enclosure and a total enclosure, it is necessary to limit the total area of the draft openings (e.g., web slots). The Agency has included requirements in the final rule that restrict the total area of the natural draft openings and the locations of such openings with respect to any source of emissions within the enclosure. The maintenance of a prescribed face velocity through a large opening or through an opening very near a source of emissions would not ensure complete capture because of the increased possibility of localized airflow patterns such as backwash, channeling, and eddies that could carry VOC out of the enclosure. (There is no need to set size restrictions or minimum face velocity requirements for the forced makeup air ducts because the purpose of these ducts is to direct air into the enclosure, and sufficient face velocity will be maintained.) In addition, the frequency with which access doors into the enclosure are opened must be kept at a minimum.

The requirements based on these principles require that the total area of all natural draft openings not exceed 5 percent of the total surface area of the total enclosure's walls, floor, and ceiling. Any sources of emissions within the enclosure, such as the coater, must be at least four equivalent diameters away from each natural draft opening. (The equivalent diameter of an opening is four times the area of the opening divided by its perimeter.) Access doors must be tightly closed during process operation. Brief, occasional openings of such doors to accommodate process equipment adjustments are acceptable, but, if such openings are routine or if an access door remains open during the entire operation, the access door must be considered a natural draft opening. The average inward face velocity across the natural draft openings of the enclosure must be calculated including the area of such access doors.

The requirement that natural draft openings comprise a maximum of 5 percent of the surface area of the enclosure's walls, floor, and ceiling is expected to be easily met. The smallest enclosure would be a small structure around the application/flashoff area coupled with the drying oven. Entrance and exit web slots measuring 1 m by 0.15 m would be natural draft openings totaling 0.3 square meters (m^2). With these natural draft openings, an enclosure with a total surface area of 6 m^2 or more would meet the requirement. Any drying oven alone will exceed this

surface area. Coating operations that require additional natural draft openings (e.g., access doors that are routinely opened) may not meet this requirement as readily with such a small enclosure. However, such facilities can be contained in a larger total enclosure in which operators remain during operation of the facility. The natural draft openings in such an enclosure can easily be designed not to exceed 5 percent of the total surface area. In this configuration, the small structure immediately around the application/flashoff area would serve as a local ventilation system to ensure that the VOC concentration within the larger enclosure is maintained at safe levels. This larger type of enclosure also can readily be designed to comply with the requirements pertaining to distances between natural draft openings and VOC sources and to the opening of access doors. Alternatively, the owner or operator can gain approval of an enclosure that does not meet the requirements by demonstrating to the satisfaction of the Administrator that all VOC emissions from the coating operation are contained and vented to the control device.

Operation of the total enclosure also must be monitored. The final standards allow the owner or operator to select the most appropriate parameter to be monitored, subject to approval by the Administrator.

Based on the preceding discussion, the total enclosure definition; test procedure; and monitoring, recordkeeping, and reporting requirements described below have been added to the regulation.

1. Definition

A total enclosure is a structure that is constructed around a source of emissions so that all VOC emissions are collected and exhausted through a stack or duct. With a total enclosure, there will be no fugitive emissions, only stack emissions. The only openings in a total enclosure are forced makeup air and exhaust ducts and any natural draft openings such as those that allow raw materials to enter and exit the enclosure for processing. All access doors or windows are closed during routine operation of the enclosed source. (Otherwise they are considered natural draft openings.) The drying oven itself may be part of the total enclosure. A permanent enclosure that meets the requirements found in § 60.713(b)(5)(i) is assumed to be a total enclosure. (These requirements are discussed above.) The owner or operator of a permanent enclosure that does not meet the requirements may apply to the

Administrator for approval of the enclosure as a total enclosure on a case-by-case basis. Such approval shall be granted upon a demonstration to the satisfaction of the Administrator that all VOC emissions are contained and vented to the control device.

2. Test Procedure

All forced-air inlet ducts to the enclosure and exhaust ducts from the enclosure will be tested according to EPA Methods 1 or 1A and 2, 2A, 2C, or 2D (40 CFR 60 Appendix A). These measurements will be made to determine (1) the amount of air evacuated from the enclosure (or any component within the enclosure) and (2) the amount of forced makeup air entering the enclosure. By subtracting (2) from (1), the value of the net airflow into the enclosure through the natural draft openings is obtained. When this net airflow is divided by the total area of all natural draft openings, the value of the average face velocity is determined. These measurements also indicate whether the static pressure within the enclosure is positive or negative. When the net airflow is positive, the enclosure static pressure is negative with respect to the exterior.

3. Monitoring, Recordkeeping, and Reporting

The owner or operator must submit a monitoring plan for the total enclosure along with notification of anticipated startup. The plan must identify the parameter to be monitored (e.g., the amperage of the exhaust fans or duct flow rates) and the methods for continuously monitoring the chosen parameter. All 3-hour periods during which the average monitor readings vary by 5 percent or more from the average value measured during the most recent performance test that demonstrated compliance must be reported.

One commenter raised concerns about the technical feasibility, accuracy, and cost of conducting the performance evaluations under the gaseous emissions options, particularly at plants with many coating lines and multiple-bed carbon adsorbers. The commenter questioned the accuracy of measurements taken in a temporary enclosure around the coater. The commenter also noted a problem in determining accurately the total VOC exiting a multiple-bed carbon adsorber because the VOC concentration in all the stacks would have to be measured and integrated over time to determine emissions from the recovery plant.

The performance test using gas-phase measurements for determining

compliance is based on two independent measurements that may be conducted simultaneously. One measurement is capture efficiency or the efficiency of the VOC collection and containment device(s) around the affected facility. The other measurement is the efficiency of the control device. The product of these two efficiency measurements is the overall control system efficiency.

The measurement of capture efficiency is dependent on the ability to measure fugitive emissions. There are two methodological approaches. One approach would be to shut down all other sources of VOC that are located in the same room as the affected facility and continue to exhaust the fugitive emissions from the affected facility through the building ventilation system and other room exhausts such as ovens or roof fans. The preferred approach is to build a temporary enclosure around the coating operation and its VOC capture system and to discharge the fugitive emissions through a common stack so that all fugitive emissions can be measured simultaneously at a single point.

A temporary enclosure built to measure fugitive emissions must be constructed and ventilated so that it has minimal impact on the performance of the permanent VOC capture system. A temporary enclosure will be assumed to achieve total capture of fugitive VOC emissions if it conforms to the requirements for a total enclosure discussed above and if all natural draft openings are at least four duct or hood equivalent diameters away from each exhaust duct or hood. (This requirement is included to avoid drawing air through a nearby natural draft opening directly into the exhaust duct or hood. This sort of "short circuit" could (1) dilute the SLA vented to the control device, (2) allow stagnant areas to develop within the enclosure where the VOC concentration might build up to unsafe levels, and (3) preferentially influence the face velocities across the natural draft openings. With a distance of four equivalent diameters or more between the exhaust ducts or hoods and the natural draft openings, these potential problems will be minimized. In nearly all cases, a temporary enclosure can readily be designed to meet this requirement.) Alternatively, the owner or operator may apply to the Administrator for approval of his temporary enclosure on a case-by-case basis. The development of this capture efficiency test procedure is ongoing. Additional guidance on the design of a temporary enclosure may be obtained as

indicated above in the discussion of total enclosure requirements.

For the performance test, all emission streams including fugitive emissions must be transported through ducts or stacks suitable for conducting the gas-phase measurements of flow rate and VOC concentration. Once this requirement is met, every stream is subjected to the same battery of sampling and analytical tests. These tests are EPA methods that have been prescribed for compliance determinations in numerous other NSPS. The EPA has promulgated these methods with instructions for obtaining maximum accuracy and precision.

The cost of Method 25A and the complementary methods for determining the gas flow rate will probably range from \$8,000 to \$10,000 per stack. The cost of Method 18 or 25 will be somewhat higher. The cost of a temporary enclosure will vary depending on the complexity of the site and the design of the fugitive emission exhaust system.

The presence of a multiple-bed carbon adsorber will not introduce significant error into the test results. The performance testing provisions in the promulgated standards require that the test runs coincide with discrete adsorption cycles. Each bed of multiple-bed systems with individual exhaust stacks are to be tested individually. Also, in a properly operated system, a bed would not be desorbed in such a way as to direct the steam into the exhaust streams of the beds that are adsorbing. If residual humidity poses a problem, a drying agent can be used in the sample lines.

It is the Agency's determination that the test method described above and in the regulation provides an accurate means of determining compliance at a reasonable cost. In addition, each owner or operator has the option of selecting the alternative method of demonstrating compliance presented in § 60.713(b)(5), which is the installation of a permanent total enclosure and the ventilation of all emissions to a 95 percent efficient control device. Because owners or operators selecting this option must measure only total enclosure average face velocity (see previous comment) and the control device efficiency, the cost of a compliance test is reduced. Additional detail on this comment and response is contained in section 2.5 of the promulgation BID.

F. Cost and Economic Assumptions and Impacts

One commenter stated that the Agency has not adequately addressed the problems associated with the use of

ketones by the magnetic tape industry. The commenter submitted data that, in the commenter's opinion, demonstrated the problems caused by the use of ketones. The commenter also implied that the variability in carbon adsorber performance is greater when ketones are present in the SLA stream and that ketones shorten the useful life of the carbon in adsorption systems, resulting in greater cost impacts attributable to the NSPS than indicated by the cost analysis carried out by EPA prior to proposal.

As a result of this comment, the Agency sought additional information on the effect of ketones in the SLA stream delivered to a carbon adsorber. Based on EPA's analysis and responses by designers of carbon adsorption systems, carbon manufacturers, and operators of adsorption systems, the Agency agrees that ketones (particularly cyclohexanone) appear to accelerate fouling in an adsorption bed. The accelerated fouling will reduce bed life and increase recovery costs above those experienced for other organics. Nevertheless, carbon adsorbers have been the control system of choice at a number of plants that use solvent mixtures containing ketones in the absence of an NSPS. The NSPS should place no additional demands on such systems which would significantly affect their useful life or cost. If the adsorber is properly designed and operated, recovery efficiency can be maintained above 95 percent in spite of accelerated fouling.

Accelerated fouling is caused by some ketones (particularly cyclohexanone) that react on the surface of the carbon in the bed, forming large molecules that are difficult to desorb. The result is an incremental reduction in the working capacity of the carbon which, when added to the normal incremental decay of working capacity, can significantly reduce the effective life of the carbon. However, this does not affect efficiency if the bed is placed in the regeneration cycle at the proper time. As the working capacity of the bed is reduced by fouling, a cycle change to regeneration that is initiated by a constant time interval rather than outlet concentration would result in an apparent, rapid degradation in the recovery efficiency of a carbon bed. The reason for this apparent degradation is that efficiency is a function of the time that elapses after breakthrough and before the adsorber vessel is switched off line. When accelerated fouling causes breakthrough to occur before the set time interval for switching adsorber vessels has passed, the efficiency averaged over the complete cycle falls

off rapidly. Additional technical information on carbon bed fouling and its implications for carbon bed life and adsorber efficiency is included in the promulgation BID.

In a system where accelerated fouling occurs, the bed life will be a function of the rate of fouling and the capacity initially designed into the system. Although the exact mechanisms of accelerated fouling are poorly understood, the rate is probably dependent on the type and quantity of organic in the SLA stream, the regeneration procedures, and the type of carbon. Reports by this industry of bed lives as brief as 3 to 18 months when ketones are used indicate that the fouling rate is indeed greater than that commonly encountered when other solvents are used. Bed lives up to 10 years are commonly reported when solvents other than cyclohexanone are used.

Although reduced bed life need not affect the efficiency achieved by a properly designed and operated carbon adsorption system, it will affect the cost of operating the system. When the bed life is reduced, the annualized cost of carbon replacement will increase. As explained in the following discussion, essentially the same amount of cyclohexanone will be vented to the adsorber under the regulatory baseline (the typical SIP) as under the NSPS, so the reduction in bed life (and attendant increase in control costs) will also be the same in both cases. Thus, the cost effectiveness of the NSPS relative to the baseline regulation is not changed directly by the use of cyclohexanone.

However, as suggested by the commenter, the bed life may be reduced slightly under the NSPS relative to the baseline regulations. This effect can be examined in two ways, as discussed below.

The first approach is that of EPA's preproposal cost analysis. In that analysis, a carbon adsorber efficiency of 95 percent was assumed for both the baseline and NSPS cases. The difference in the overall control levels achieved by the two alternatives was assumed to result from greater capture efficiency achieved in the NSPS case by containing emissions from the application/flashoff area that would be emitted to the atmosphere as fugitive emissions in the baseline case. The increase in the mass of VOC vented to the adsorber under the NSPS as a result of increased capture efficiency (a maximum of about 10 percent) would be expected to reduce carbon bed life slightly through a small increase in the rate of fouling and a proportional reduction in the length of

the adsorption cycle prior to breakthrough.

The carbon fouling effect on the bed life would not be great. For those plants that use cyclohexanone, no appreciable change in the fouling rate would occur. The increased capture in the application/flashoff area would result in only a marginal increase in the quantity of cyclohexanone vented to the adsorber because cyclohexanone has a low vapor pressure and is emitted almost exclusively in the drying oven. (In fact, it is this slow drying property that makes cyclohexanone a desirable solvent for the magnetic tape manufacturing industry.) The contribution to the overall fouling rate from the increase in the mass of other compounds reaching the adsorber likely would not be noticeable. For those plants where cyclohexanone is not used, the rate of fouling might increase slightly, depending on the identity of the fouling component(s) and the point(s) of generation in the coating process. Compounds with relatively high vapor pressure, the type that are captured in the application/flashoff area, normally are easily removed from the carbon and contribute very little to the fouling rate.

The second effect of an increased mass flow rate to the adsorber is a reduction in the length of the adsorption cycle prior to breakthrough. In all carbon adsorption systems, the carbon gradually loses capacity with use, and the length of the adsorption cycle prior to breakthrough decreases. The carbon must be replaced when the adsorption cycle reaches the minimum acceptable length. Thus, the starting point of the process, the initial length of the adsorption cycle with fresh carbon, is critical in determining the bed life. The reduction in the initial length of the adsorption cycle due to increased capture under the NSPS would be expected to be approximately proportional to the increase in the mass flow rate, in this case, about 10 percent. The absolute magnitude of the reduction will depend on the design of the system but normally will not exceed several minutes. In a well-designed system, such a change will represent only a small fraction of the difference between the initial length of the adsorption cycle and the minimum acceptable length. The combination of this effect and the minimal increase in the rate of fouling will result in only a small reduction in bed life.

The commenter suggested a second approach that implied that the difference between the NSPS and baseline control levels lies not in capture efficiency but in the efficiency

at which the adsorption system is operated. Under this scenario, the capture efficiency would be constant under baseline and NSPS control situations, but the efficiency of the adsorber would have to rise from 85 percent at the baseline to 95 percent under the NSPS.

This scenario, like the one discussed above, would result in a slight decrease in the carbon bed life. The use or nonuse of cyclohexanone has no bearing on this fact; the same quantity of cyclohexanone would reach the adsorber under either of the control options. In addition, the total mass flow rate to the adsorber of all compounds would be identical in the two cases, so the effects discussed above would not occur. However, operation at a higher control efficiency (95 percent) would require that the adsorption cycle be ended earlier than if operation were at a lower efficiency (85 percent). This would reduce the initial length of the adsorption cycle with fresh carbon, and the bed life would be reduced correspondingly.

The exact magnitude of the reduction in cycle length would be determined by a number of site-specific conditions. However, the majority of emissions over the course of a carbon bed's adsorption cycle occurs at the end of the cycle as the solvent front begins to break through the bed. The emission rate rises very rapidly at this time. Thus, the length of an adsorption cycle over which 95 percent efficiency is achieved would be, at most, a few minutes shorter than an 85 percent efficient cycle. With a properly designed, operated, and maintained system, this would result in only slightly more frequent carbon replacement, and the bed life reduction would be small.

The cost-effectiveness implications of the small bed life reduction under the NSPS relative to baseline regulations were analyzed using the "typical" model line (developed for the preproposal cost analysis), which more closely approximates the commenter's situation than do the other model lines that were developed by EPA. For this case, the annualized control cost of the NSPS (with a bed life of 6 months) compared to the baseline control level (with a bed life of 12 months) was found to be a net credit. Additional information on the Agency's analysis of the cost effectiveness of the NSPS at various bed lives is included in the promulgation BID.

Based on the discussion presented above, the Agency has concluded that the NSPS is achievable and cost effective when solvent blends

containing ketones are used. No revisions have been made to the standards as a result of this comment.

Several commenters noted that EPA's projections of growth in the industry (21 new lines by 1990) are out-of-date and that, in fact, 17 or 18 lines have been shut down, retired, or put on stand-by since the National Air Pollution Control Techniques Advisory Committee meeting. The commenters claimed that because so many lines are no longer in operation, VOC emissions from this industry have decreased, and there is no longer a need for the NSPS.

Another commenter presented the results of an independent survey of magnetic tape manufacturers, which indicated that most lines affected by the standard will be modified or reconstructed lines rather than new lines as asserted by EPA at proposal. The survey concluded that significantly more facilities would become subject to the NSPS than the 20 estimated by EPA.

The Agency has confirmed that there are several lines that are not currently in operation. However, these shutdowns do not prove that there will be no facilities affected by the standards in the next 5 years. In fact, as stated by the last commenter and by industry representatives at the public hearing, there will be modifications to existing lines that would cause additional lines to become subject to the proposed standards. Also, at least one new facility has been announced, and other firms have made inquiries of EPA that suggest additional new facilities are under serious consideration. Following the public hearings, six modification scenarios were provided by industry (see Section VIII.C). The EPA determined that three of these are likely to meet the criteria given in 40 CFR 60.14 and would be actual modifications. The EPA conducted its own survey of the industry for information on plans to construct new lines or modify existing lines.

Based on this new information, the projected number of coating lines to become affected by the fifth year of applicability (1991) has been revised downward from 21 to 16. Of these, 5 will be new and 11 will be modified or reconstructed. However, one new line and two modified lines will fall below the applicable minimum annual solvent utilization cutoffs and, thus, are not expected to be required by today's rule to control emissions. In addition, under today's standards, two of the modified and reconstructed coating operations are not expected to be required to increase control efficiency. In summary, 16 affected lines are expected in the

next 5 years, of which 11 will be required to increase their level of control; the remaining 5 lines will be subject only to monitoring and reporting requirements. The reduction in nationwide VOC emissions due to the standards in the fifth year after promulgation is expected to be about 960 Mg. Thus, the decline in the number of plants manufacturing magnetic tape does not negate the need for the NSPS.

The Agency believes that the current growth projection is reasonable based on the information at hand. Of course, economic conditions are always changing, and industry growth patterns will change concurrently. While future changes may result in impacts somewhat different from those now estimated, today's rule is expected to remain cost effective with reasonable economic impacts even in the face of these changes.

Three commenters noted that industry-wide emissions have not increased as projected in the proposal BID; instead, industry has reduced VOC emissions as a result of increasing the packing density of information bytes and/or reducing coating thickness (and solvent consumed) per unit of tape produced. One commenter stated that because decreased emissions have resulted in decreased cost effectiveness, the costs of controls should be reevaluated.

No data have been received supporting the contention that VOC use per unit of tape has decreased. However, even if this is the case, total VOC emissions from the industry may not decrease. According to industry representatives, some new lines will be built and modifications of existing lines will occur in this industry. Of the modification scenarios received, the most common is an increase in production (see section VIII.C). Thus, any decrease in VOC use per unit of tape may be offset by increased tape production.

In any case, as discussed above, a net decrease in emissions from this industry would not negate the impact of the NSPS. In addition, the proposed NSPS included an annual solvent use cutoff below which the cost to install a control device is not reasonable. This cutoff was discussed at proposal and has been retained for new coating operations. A higher cutoff has been added for modified or reconstructed coating operations. Thus, the evaluation of control costs for lower VOC emission rates has already been performed and the Agency does not need to perform another evaluation.

Two commenters stated that the economic assumptions and forecasts

contained in Chapter 9 of the proposal BID are not representative of the economic situation and price competition faced by the domestic magnetic tape manufacturing industry today. One commenter was particularly concerned that the references in Chapter 9 are not more current than 1983 and requested that the economic assumptions and forecasts be reevaluated prior to promulgation of the standard. Another commenter stated that the proposed NSPS will have a negative impact on the domestic magnetic tape industry.

One commenter contended that, contrary to EPA's position, the regulation would have negative economic impacts. The commenter disagreed with the Agency's conclusion that solvent recovery credits would more than offset the NSPS compliance costs, creating a net cost savings. The commenter's own survey of eight plants indicated that savings in new solvent purchases resulting from recovery and reuse of spent solvent from the incremental VOC controls necessitated by the NSPS were not sufficient to offset the total annualized costs of the proposed regulation. Thus, the commenter concluded that the regulation would create net compliance costs for the industry.

The economic impacts of today's rule have been recalculated since proposal using information received from industry and current market prices. This recalculation has resulted in revised impacts but no change in the conclusion that the economic impacts are negligible. The actual impacts may differ from those now estimated as a result of the ever-changing economic climate. These changes are not expected to alter the conclusion that the standards will have negligible economic impacts. More detail on this subject is presented in Section VI (Economic Impact) of this preamble.

One commenter pointed out that this decade has brought dramatic changes to the magnetic tape industry. The domestic industry's market share has fallen, while the retail price of tape has declined sharply. The combination of these two factors has caused retail price to become a key factor in this competitive industry with the result that retail price is much less elastic now than it was a few years ago. This fact makes it difficult for domestic producers to pass on to their customers price increases necessitated by the NSPS. Any increase in retail price places domestic producers at a disadvantage to the foreign competition and increases the foreign share of the market. The commenter stated that, because offshore

facilities are subject to less environmental regulation than those in the U.S., driving the industry offshore would also result in a net detriment to the environment.

Another commenter concurred that an already shrinking margin of profit would be reduced further by foreign competition that is not subject to the regulations and that the proposed regulations would accelerate the trend of exporting coating lines offshore. A third commenter noted that foreign competition would not be subject to the limits on technological innovation as would domestic manufacturers subject to the proposed standards, while a fourth commenter stated that his company would build a new line offshore rather than add further control on an existing line modified under the proposed NSPS.

Foreign competition is an important element in the magnetic tape industry. During recent years, depressed market prices have discouraged the domestic development of new production lines or the entry of new firms in the industry. Lower prices also have encouraged the exit of other firms from the industry and the modification of existing lines to reduce production costs.

Because the NSPS has an insignificant impact on new lines and has little impact on production costs, it is doubtful that the NSPS for new lines would disadvantage U.S. producers relative to their competitors. With modified lines, some additional control costs may have to be incurred, but even these are insignificant, and the production cost reductions that will result from these modifications are expected to far outweigh any additional cost of the added controls. In addition, recent changes in the foreign exchange rates should improve the competitive position of domestic producers.

Environmental regulations are only one of the many factors that must be weighed in determining the comparative advantage of one country over another in the production and marketing of products in international markets. Based upon the evidence to date, however, the economic impacts of the NSPS on the ability of domestic producers to compete in the international market is negligible.

Most of the companies in this industry are large multinational companies with annual revenues and assets in excess of \$1 billion (Table 9-13, pp. 9-27 and 9-28 of proposal BID). These companies each have a minimum of several hundred million dollars of long-term debt. Even the most costly investment for new or modified lines would not increase the debt loadings of the companies by more

than 1 percent. Furthermore, with the recent decrease in interest rates, a greater supply of investment funds at lower cost is now available, thus improving the affordability of new investments.

The proposed standards do not affect or limit technological innovation. All products known to be manufactured in the magnetic tape industry can be coated in a total enclosure. The use of a total enclosure does not affect coating composition or necessitate changes in other aspects of the production process.

The combination of the factors discussed above indicates that the cost to comply with the NSPS would not drive the industry offshore.

A commenter representing an industry trade organization submitted information on an independent survey of the magnetic tape manufacturing industry. Survey forms were sent to 12 companies that indicated a willingness to participate, and six of these firms, representing eight plants, responded. The information included an economic impact analysis of the proposed NSPS that was based on the survey results. The major conclusions drawn by the commenter from the results of this survey and analysis that are not discussed elsewhere are presented below.

The commenter stated that the NSPS would result in significant costs in the form of increased VOC control expenditures and reduced investments in innovations designed to enhance economic productivity. Based on extrapolation of survey findings, the commenter estimated that cumulative capital costs would total \$38.1 million industry wide through 1991, with associated net annual operating costs reaching \$2.6 million in 1991. Thus, the commenter estimated total annualized costs (annualized capital costs plus operating costs) of \$9.2 million in 1991. The commenter also contended that the NSPS would not pass EPA's criterion of cost effectiveness in 4 of the 5 years subject to analysis. The commenter estimated the fifth year (1991) annualized cost per ton of VOC emission reduction to be \$1,816 for 2,452 total estimated tons of reduced emissions. This value is higher than the value alleged by the commenter to be the cutoff criterion used by EPA for NSPS (\$1,075 per ton). Furthermore, the commenter stated that, because nearly all of the anticipated reduction in emissions resulting from the NSPS is expected to occur in areas that have already attained EPA's ambient air standards, the reduction would be less valuable in terms of environmental benefit.

The commenter believed the survey results demonstrated the potential for significant impacts in the form of financial hardship for domestic plants (if costs are not passed on to the consumer) and reduced international competitiveness (if costs are passed on to the consumer). If the increased costs are absorbed by the industry, the commenter felt that the regulation would have an adverse impact on profitability and investment potential. If, on the other hand, the increased costs are borne by the consumer in the form of higher prices, this would result in smaller market shares and fewer jobs for the domestic industry. The commenter concluded that in either case, there are significant factors that fall within the definition of "major rule" in Executive Order 12291, and questioned EPA's position that the proposed rule is not a major rule.

As indicated earlier in this section, EPA has conducted a new survey of the growth plans in this industry since the time the regulation was proposed. This survey agreed with the survey conducted by the commenter in that, over the next 5 years, there is likely to be more modification or reconstruction of existing lines than construction of new lines. Subsequently, a new cost analysis was carried out which resulted in a change in the levels of control required for some modified and reconstructed coating operations and for most mix equipment (see the introductory portion of section VIII and section VIII.C). The revised NSPS takes into account the greater expense of retrofitting modified or reconstructed facilities. Because the commenter's economic analysis was based on the proposed standards and not on the revised ones, the results of the commenter's analysis are no longer applicable. Not enough data were submitted to allow a determination of whether the changes included in the commenter's analysis would legally qualify as modifications and reconstructions, whether the incremental control measures and costs claimed to be required were realistic, or what effect the revisions to the standards would have. Because the commenter's study did not raise any significant new concerns that were not addressed by the revisions already made to the standards, it was determined that the level of effort required to verify the costs and adjust the survey results to reflect the revised NSPS was not justified. The Agency's new economic analysis, based on the revised NSPS, indicates that the standard is cost effective and will result

in an industry-wide net credit of \$32,000 per year in 1991.

The Agency does not agree with the commenter's allegation that the anticipated emission reductions due to the NSPS are environmentally less valuable simply because they are expected to occur primarily in attainment areas. The cost-effectiveness value considered reasonable for an NSPS for this industry (\$1,200/Mg) was determined in the context of a national standard for an entire class of sources without consideration of local air quality conditions. Thus, when source-specific air quality and related public health considerations are important factors (e.g., in nonattainment areas and in PSD permitting activities), the cost-effectiveness value that would be considered reasonable would be expected to exceed the value determined for the NSPS program. Also, VOC emitted in some attainment areas can be transported to nonattainment areas, adding to the air quality problems experienced there.

The EPA maintains its position that this rule is not a major rule based on the three criteria required to meet this classification. First, the new economic analysis conducted by the Agency has verified that industry-wide annualized costs are less than \$100 million. As previously stated, it is estimated that the standard would result in a net credit of \$32,000 per year in the fifth year. Secondly, the revised economic analysis showed that no significant increase in retail price is expected as a result of the standard; therefore, it would not be considered a "major increase in costs or prices" as specified in the second criterion in the Order. Thirdly, the revised economic analysis did not indicate any significant adverse effects on competition, investment, productivity, employment, innovation, or the ability of U.S. firms to compete with foreign firms.

In summary, since the time of proposal of the standard, the Agency has considered the higher costs of retrofitting modified or reconstructed facilities to comply with the standards, and revised the regulation accordingly. Even assuming the increased control costs of the NSPS presented in the commenter's study and the decreased prices and competitive market conditions facing the industry are applicable, the conclusion that the proposed rule is not a major rule is still correct. Using the commenter's estimates, the costs to the industry that result from the regulation (\$9.2 million total annualized costs) are considerably less than the \$100 million criterion, and

the subsequent production cost and product price increases, assuming full costs are passed through to the consumer, remain small. Consequently, the net impact of the regulation on the domestic industry's ability to compete is also likely to be minimal.

Based on the data presented in the commenter's study, percentage increases in retail product prices were calculated. These calculations indicate that increases in retail prices of less than 1 percent would occur for most products and scenarios (maximum price increase of 1.52 percent) if all costs are passed through to the consumer. This illustrates that, even assuming the commenter's data are still applicable under the revised regulation, the cost and price effects of the NSPS are relatively insignificant.

G. Suspension of the Standards

Four commenters questioned the need for an NSPS for the magnetic tape industry and suggested either that the NSPS be suspended pending a thorough reevaluation or rescinded. This argument is based on the decrease in VOC emissions due to fewer coating lines and thinner coatings, the reduced growth projected for the industry, and the relatively small share of total national VOC emissions originating from magnetic tape manufacturing facilities (see section VIII.F). One commenter stated that the existing State regulations, at least in the Bay Area of California, are sufficiently stringent and that a new NSPS is not needed.

Because the magnetic tape manufacturing industry is a subcategory of the industrial paper coating industry, which is ranked fourth on the NSPS Priority List (40 CFR 60.16), the CAA authorizes EPA to promulgate standards. For the reasons discussed in section VIII.F, the Agency has determined that the NSPS will have a favorable impact on VOC emission levels despite a lower growth projection and the possible decrease in VOC use per unit of tape. Because the standard will have a favorable environmental impact and reasonable cost and economic impacts, the proposed standard will not be suspended or rescinded.

The VOC regulations in California are more stringent than the baseline used in the analysis of this industry. However, the regulations in all other States generally require a level of control of 83 percent or lower. The NSPS would set a new floor of 93 percent control for facilities subject to its provisions and, thus reduce nationwide emissions from this industry. Therefore, the Agency believes there is a need for the

standards. Of course, State and local agencies are free to require more stringent control as dictated by the needs of specific locations subject to PSD or NSR.

IX. Administrative

The docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The docket is a dynamic file because material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to identify and locate documents readily so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated standards and EPA responses to significant comments, the contents of the docket, except for interagency review materials, will serve as the record in case of judicial review [section 307(d)(7)(A)].

The effective date of this regulation is October 3, 1988. Section 111 of the CAA provides that standards of performance or revisions thereof become effective upon promulgation and apply to affected facilities upon which construction or modification was commenced after the date of proposal, January 22, 1986.

As prescribed by section 111, the promulgation of these standards was preceded by the Administrator's determination (40 CFR 60.16, 44 FR 4922, dated August 21, 1979) that industrial paper coating contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare. The magnetic tape manufacturing industry is included in the industrial paper coating source category. In accordance with section 117 of the Act, publication of these promulgated standards was preceded by consultation with appropriate advisory committees, independent experts, and Federal departments and agencies.

This regulation will be reviewed 4 years from the date of promulgation as required by the CAA. This review will include an assessment of such factors as the need for integration with other programs, the existence of alternative methods, enforceability, improvements in emission control technology, and reporting requirements.

Section 317 of the CAA requires the Administrator to prepare an economic impact assessment for any new source standard of performance promulgated under section 111(b) of the Act. An economic impact assessment was prepared for this regulation and for other regulatory alternatives. All aspects of the assessment were

considered in the formulation of the standards to ensure that cost was carefully considered in determining BDT. The economic impact assessment is included in the BID for the proposed standards.

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the provisions of the *Paperwork Reduction Act*, 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 2060-0171.

Public reporting burden resulting from this rulemaking is estimated to be 16 hours per response (on average), including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Initial performance testing is estimated to vary from 450 to 650 hours (on average) per facility.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Chief, Information Policy Branch, PM-223, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA."

Under Executive Order 12291, EPA is required to judge whether a regulation is a "major rule" and, therefore, subject to the requirements of a regulatory impact analysis. The Agency has determined that this regulation would result in none of the adverse economic effects set forth in section 1 of the order as grounds for finding a regulation to be a "major rule." The maximum cost increase resulting from the NSPS for any product in this industry will be only approximately 0.5 percent. Such an increase will have an insignificant impact on the industry. In the fifth year after promulgation, the total annualized cost of the NSPS will amount to a net credit of approximately \$32,000. The Agency has concluded, therefore, that this regulation is not a "major rule" under Executive Order 12291.

The Regulatory Flexibility Act of 1980 requires the identification of potentially adverse impacts of Federal regulations upon small business entities. The Act specifically requires the completion of a Regulatory Flexibility Analysis in those instances where small business impacts are possible. Because these standards impose only negligible adverse economic impacts, a Regulatory

Flexibility Analysis has not been conducted.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 60

Air pollution control, Incorporation by reference, Intergovernmental relations, Magnetic tape manufacturing (SIC Codes 3679, 3573), Reporting and recordkeeping requirements.

Date: September 16, 1988.

Lee Thomas,
Administrator.

40 CFR Part 60 is amended as follows:

PART 60—[AMENDED]

1. The authority citation for Part 60 continues to read as follows:

Authority: Secs. 101, 111, 114, 116, 301, Clean Air Act as amended (42 U.S.C. 7401, 7411, 7414, 7416, 7601).

2. By adding a new Subpart SSS to read as follows:

Subpart SSS—Standards of Performance for Magnetic Tape Coating Facilities

Sec.

60.710 Applicability and designation of affected facility.

60.711 Definitions, symbols, and cross-reference tables.

60.712 Standards for volatile organic compounds.

60.713 Compliance provisions.

60.714 Installation of monitoring devices and recordkeeping.

60.715 Test methods and procedures.

60.716 Permission to use alternative means of emission limitation.

60.717 Reporting and monitoring requirements.

60.718 Delegation of Authority.

Subpart SSS—Standards of Performance for Magnetic Tape Coating Facilities

§ 60.710 Applicability and designation of affected facility.

(a) The affected facilities to which the provisions of this subpart apply are:

- (1) Each coating operation; and
- (2) Each piece of coating mix preparation equipment.

(b) Any new coating operation that utilizes less than 38 m³ of solvent or any modified or reconstructed coating operation that utilizes less than 370 m³ of solvent for the manufacture of magnetic tape per calendar year is subject only to the requirements of § 60.714(a), § 60.717(b), and § 60.717(c). If the amount of solvent utilized for the manufacture of magnetic tape equals or exceeds these amounts in any calendar

year, the facility is subject to § 60.712 and all other sections of this subpart. Once a facility has become subject to § 60.712 and all other sections of this subpart, it will remain subject to those requirements regardless of changes in annual solvent utilization.

(c) This subpart applies to any affected facility for which construction, modification, or reconstruction begins after January 22, 1986.

§ 60.711 Definitions, symbols, and cross reference tables.

(a) All terms used in this subpart that are not defined below have the meaning given to them in the Act and in Subpart A of this part.

(1) "Base film" means the substrate that is coated to produce magnetic tape.

(2) "Capture system" means any device or combination of devices that contains or collects an airborne pollutant and directs it into a duct.

(3) "Coating applicator" means any apparatus used to apply a coating to a continuous base film.

(4) "Coating mix preparation equipment" means all mills, mixers, holding tanks, polishing tanks, and other equipment used in the preparation of the magnetic coating formulation but does not include those mills that do not emit VOC because they are closed, sealed, and operated under pressure.

(5) "Coating operation" means any coating applicator, flashoff area, and drying oven located between a base film unwind station and a base film rewind station that coat a continuous base film to produce magnetic tape.

(6) "Common emission control device" means a control device controlling emissions from the coating operation as well as from another emission source within the plant.

(7) "Concurrent" means construction of a control device is commenced or completed within the period beginning 6 months prior to the date construction of affected coating mix preparation equipment commences and ending 2 years after the date construction of affected coating mix preparation equipment is completed.

(8) "Control device" means any apparatus that reduces the quantity of a pollutant emitted to the air.

(9) "Cover" means, with respect to coating mix preparation equipment, a device that lies over the equipment opening to prevent VOC from escaping and that meets the requirements found in § 60.712(c)(1)–(5).

(10) "Drying oven" means a chamber in which heat is used to bake, cure, polymerize, or dry a surface coating.

(11) "Equivalent diameter" means four times the area of an opening divided by its perimeter.

(12) "Flashoff area" means the portion of a coating operation between the coating applicator and the drying oven where solvent begins to evaporate from the coated base film.

(13) "Magnetic tape" means any flexible substrate that is covered on one or both sides with a coating containing magnetic particles and that is used for audio or video recording or information storage.

(14) "Natural draft opening" means any opening in a room, building, or total enclosure that remains open during operation of the facility and that is not connected to a duct in which a fan is installed. The rate and direction of the natural draft across such an opening is a consequence of the difference in pressures on either side of the wall containing the opening.

(15) "Nominal 1-month period" means a calendar month or, if established prior to the performance test in a statement submitted with notification of anticipated startup pursuant to 40 CFR 60.7(a)(2), a similar monthly time period (e.g., 30-day month or accounting month).

(16) "Temporary enclosure" means a total enclosure that is constructed for the sole purpose of measuring the fugitive emissions from an affected facility. A temporary enclosure must be constructed and ventilated (through stacks suitable for testing) so that it has minimal impact on the performance of the permanent capture system. A temporary enclosure will be assumed to achieve total capture of fugitive VOC emissions if it conforms to the requirements found in § 60.713(b)(5)(i) and if all natural draft openings are at least four duct or hood equivalent diameters away from each exhaust duct or hood. Alternatively, the owner or operator may apply to the Administrator for approval of a temporary enclosure on a case-by-case basis.

(17) "Total enclosure" means a structure that is constructed around a source of emissions so that all VOC emissions are collected and exhausted through a stack or duct. With a total enclosure, there will be no fugitive emissions, only stack emissions. The only openings in a total enclosure are forced makeup air and exhaust ducts and any natural draft openings such as those that allow raw materials to enter and exit the enclosure for processing. All access doors or windows are closed during routine operation of the enclosed source. Brief, occasional openings of such doors or windows to accommodate

process equipment adjustments are acceptable, but, if such openings are routine or if an access door remains open during the entire operation, the access door must be considered a natural draft opening. The average inward face velocity across the natural draft openings of the enclosure must be calculated including the area of such access doors. The drying oven itself may be part of the total enclosure. A permanent enclosure that meets the requirements found in § 60.713(b)(5)(i) is assumed to be a total enclosure. The owner or operator of a permanent enclosure that does not meet the requirements may apply to the Administrator for approval of the enclosure as a total enclosure on a case-by-case basis. Such approval shall be granted upon a demonstration to the satisfaction of the Administrator that all VOC emissions are contained and vented to the control device.

(18) "Utilize" refers to the use of solvent that is delivered to coating mix preparation equipment for the purpose of formulating coatings to be applied on an affected coating operation and any other solvent (e.g., dilution solvent) that is added at any point in the manufacturing process.

(19) "VOC content of the coating applied" means the product of Method 24 VOC analyses or formulation data (if the data are demonstrated to be equivalent to Method 24 results) and the total volume of coating fed to the coating applicator. This quantity is intended to include all VOC that actually are emitted from the coating operation in the gaseous phase. Thus, for purposes of the liquid-liquid VOC material balance in § 60.713(b)(1), any VOC (including dilution solvent) added to the coatings must be accounted for, and any VOC contained in waste coatings or retained in the final product may be measured and subtracted from the total. (These adjustments are not necessary for the gaseous emission test compliance provisions of § 60.713(b).)

(20) "Volatile Organic Compounds" or "VOC" means any organic compounds that participate in atmospheric photochemical reactions or that are measured by Method 18, 24, 25, or 25A or an equivalent or alternative method as defined in 40 CFR 60.2.

(b) The nomenclature used in this subpart has the following meaning:

(1) " A_k " means the area of each natural draft opening (k) in a total enclosure, in square meters.

(2) " C_{di} " means the concentration of VOC in each gas stream (i) exiting the emission control device, in parts per million by volume.

(3) " C_{bi} " means the concentration of VOC in each gas stream (i) entering the emission control device, in parts per million by volume.

(4) " C_{di} " means the concentration of VOC in each gas stream (i) entering the emission control device from the affected coating operation, in parts per million by volume.

(5) " C_{rk} " means the concentration of VOC in each uncontrolled gas stream (k) emitted directly to the atmosphere from the affected coating operation, in parts per million by volume.

(6) " C_{gv} " means the concentration of VOC in the gas stream entering each individual carbon adsorber vessel (v), in parts per million by volume. For the purposes of calculating the efficiency of the individual adsorber vessel, C_{gv} may be measured in the carbon adsorption system's common inlet duct prior to the branching of individual inlet ducts.

(7) " C_{hv} " means the concentration of VOC in the gas stream exiting each individual carbon adsorber vessel (v), in parts per million by volume.

(8) "E" means the control device efficiency achieved for the duration of the emission test (expressed as a fraction).

(9) "F" means the VOC emission capture efficiency of the VOC capture system achieved for the duration of the emission test (expressed as a fraction).

(10) "FV" means the average inward face velocity across all natural draft openings in a total enclosure, in meters per hour.

(11) "G" means the calculated weighted average mass of VOC per volume of coating solids (in kilograms per liter) applied each nominal 1-month period.

(12) " H_v " means the individual carbon adsorber vessel (v) efficiency achieved for the duration of the emission test (expressed as a fraction).

(13) " H_{sys} " means the carbon adsorption system efficiency calculated when each adsorber vessel has an individual exhaust stack.

(14) " L_{si} " means the volume fraction of solids in each coating (i) applied during a nominal 1-month period as determined from the facility's formulation records.

(15) " M_{di} " means the total mass in kilograms of each coating (i) applied at an affected coating operation during a nominal 1-month period as determined from facility records. This quantity shall be determined at a time and location in the process after all ingredients (including any dilution solvent) have been added to the coating, or appropriate adjustments shall be made to account for any ingredients added after the mass of the coating has been determined.

(16) " M_r " means the total mass in kilograms of VOC recovered for a nominal 1-month period.

(17) " Q_{di} " means the volumetric flow rate of each gas stream (i) exiting the emission control device, in dry standard cubic meters per hour when Method 18 or 25 is used to measure VOC concentration or in standard cubic meters per hour (wet basis) when Method 25A is used to measure VOC concentration.

(18) " Q_{bi} " means the volumetric flow rate of each gas stream (i) entering the emission control device, in dry standard cubic meters per hour when Method 18 or 25 is used to measure VOC concentration or in standard cubic meters per hour (wet basis) when Method 25A is used to measure VOC concentration.

(19) " Q_{di} " means the volumetric flow rate of each gas stream (i) entering the emission control device from the affected coating operation, in dry standard cubic meters per hour when Method 18 or 25 is used to measure VOC concentration or in standard cubic meters per hour (wet basis) when Method 25A is used to measure VOC concentration.

(20) " Q_{rk} " means the volumetric flow rate of each uncontrolled gas stream (k) emitted directly to the atmosphere from the affected coating operation, in dry standard cubic meters per hour when Method 18 or 25 is used to measure VOC concentration or in standard cubic meters per hour (wet basis) when Method 25A is used to measure VOC concentration.

(21) " Q_{gv} " means the volumetric flow rate of the gas stream entering each individual carbon adsorber vessel (v), in dry standard cubic meters per hour when Method 18 or 25 is used to measure VOC concentration or in standard cubic meters per hour (wet basis) when Method 25A is used to measure VOC concentration. For purposes of calculating the efficiency of the individual adsorber vessel, the value of Q_{gv} can be assumed to equal the value of Q_{hv} measured for that adsorber vessel.

(22) " Q_{hv} " means the volumetric flow rate of the gas stream exiting each individual carbon adsorber vessel (v), in dry standard cubic meters per hour when Method 18 or 25 is used to measure VOC concentration or in standard cubic meters per hour (wet basis) when Method 25A is used to measure VOC concentration.

(23) " $Q_{in,i}$ " means the volumetric flow rate of each gas stream (i) entering the total enclosure through a forced makeup

air duct, in standard cubic meters per hour (wet basis).

(24) "Q_{out,j}" means the volumetric flow rate of each gas stream (j) exiting the total enclosure through an exhaust duct or hood, in standard cubic meters per hour (wet basis).

(25) "R" means the overall VOC emission reduction achieved for the duration of the emission test (expressed as a percentage).

(26) "RS_i" means the total mass (kg) of

VOC retained on the coated base film after oven drying for a given magnetic tape product.

(27) "V_{cl}" means the total volume in liters of each coating (i) applied during a nominal 1-month period as determined from facility records.

(28) "W_{oi}" means the weight fraction of VOC in each coating (i) applied at an affected coating operation during a nominal 1-month period as determined by Method 24. This value shall be

determined at a time and location in the process after all ingredients (including any dilution solvent) have been added to the coating, or appropriate adjustments shall be made to account for any ingredients added after the weight fraction of VOC in the coating has been determined.

(c) Tables 1a and 1b present a cross reference of the affected facility status and the relevant section(s) of the regulation.

TABLE 1A.—CROSS REFERENCE ^{a b}

Status	Standard ^c	Compliance provisions ^a —§ 60.713
A. Coating operation alone:		
New.....	§ 60.712(a): Recover or destroy at least 93 percent of the VOC applied.....	(b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (c), (d)
Modified or reconstructed:		
1. If at least 90 percent of the VOC applied is recovered or destroyed prior to modification/reconstruction.	§ 60.712(b)(1): (i) Maintain demonstrated level of VOC control or 93 percent, whichever is lower. (ii) If the VOC control device is subsequently replaced, the new control device must be at least 95 percent efficient, a demonstration must be made that the overall level of VOC control is at least as high as required with the old control (90 to 93 percent) and, if the demonstrated level is higher than the old level, maintain the higher level of control (up to 93 percent).	(a)(1), (a)(3), (b)(1), (b)(2), (b)(3), (b)(4), (c), (d)
2. If existing coating operation has a total enclosure vented to a control device that is at least 92 percent efficient.	§ 60.712(b)(2): (i) Continue to vent all VOC emissions to the control device and maintain control efficiency at or above the demonstrated level or 95 percent, whichever is lower. (ii) If the VOC control device is subsequently replaced, the new control device must be at least 95 percent efficient and all VOC emissions must be vented from the total enclosure to the new control device.	(a)(2), (b)(5), (c), (d)
3. If existing coating operation is not in the previous two categories.	§ 60.712(b)(3): Recover or destroy at least 93 percent of the VOC applied.....	(b)(1), (b)(2), (b)(3), (b)(4), (b)(5), (c), (d)
B. Coating mix preparation equipment alone:		
New:		
1. With concurrent construction of new VOC control device (other than a condenser) on the coating operation.	§ 60.712(c): Install and use covers and vent to a control device that is at least 95 percent efficient ^a .	(b)(6)
2. Without concurrent construction of new VOC control device on the coating operation or with concurrent construction of a condenser.	§ 60.712 (d)(1) or (d)(2): Install and use covers and vent to a control device or install and use covers ^a .	(b)(7), (b)(8)
Modified or reconstructed.....	§ 60.712 (d)(1) or (d)(2): Install and use covers and vent to a control device or install and use covers ^a .	(b)(7), (b)(8)
C. Both coating operation and coating mix preparation equipment: New and modified or reconstructed.	§ 60.712(e): In lieu of standards in § 60.712(a)-(d), use coatings containing a maximum of 0.20 kg VOC per liter of coating solids.	(b)(9)

^a This table is presented for the convenience of the user and is not intended to supersede the language of the regulation. For the details of the requirements, refer to the text of the regulation.

^b Refer to Part B to determine which subsections of § 60.714, § 60.715, and § 60.717 correspond to each compliance provision (§ 60.713).

^c As per § 60.710(b), any new coating operation with solvent utilization < 38 m³/yr or any modified or reconstructed coating operation with solvent utilization < 370 m³/yr is exempt from the VOC standards (§ 60.712). Such coating operations are subject only to § 60.714(a), § 60.717(b), and § 60.717(c). However, should a coating operation once exceed the applicable annual solvent utilization cutoff, that coating operation shall be subject to the VOC standards (§ 60.712) and all other sections of the subpart. Once this has occurred, the coating operation shall remain subject to those requirements regardless of changes in annual solvent utilization.

^d As applicable.

^e Section 60.716 permits the use of an alternative means of VOC emission limitation that achieves an equivalent or greater VOC emission reduction.

TABLE 1B.—CROSS REFERENCE

Compliance provisions ^a —§ 60.713	Test methods— § 60.715	Category/ equipment ^b	Installation of monitoring devices and recordkeeping— § 60.714	Reporting and monitoring requirements ^c — § 60.717
A. Coating operation alone:				
(b)(1)—When emissions from only the affected coating operation are controlled by a solvent recovery device, perform a liquid-liquid VOC material balance.	(a)		(b), (i), (k)	(a), (d)(1), (e), (h), (i)
(c)(2)—When emissions from only the affected coating operation are controlled by an incinerator or when a common emission control device (other than a carbon adsorption system with individual exhaust stacks for each adsorber vessel) is used to control emissions from an affected coating operation as well as from other sources of VOC, perform a gaseous emission test.	(b)-(g)	General CA CO TI CI PE, TE	(j), (k) (c) (d) (e) (f) (g)	(a), (e), (h), (i) (d)(3), (d)(4) (d)(5) (d)(6) (d)(7) (d)(8)

TABLE 1B.—CROSS REFERENCE—Continued

Compliance provisions ^a —§ 60.713	Test methods— § 60.715	Category/ equipment ^b	Installation of monitoring devices and recordkeeping— § 60.714	Reporting and monitoring requirements ^c — § 60.717
(b)(3)—When emissions from both the affected coating operation and from other sources of VOC are controlled by a carbon adsorption system with individual exhaust stacks for each adsorber vessel, perform a gaseous emission test.	(b)–(g)	General CA PE, TE	(1), (k) (c) (g)	(a), (e), (h), (i) (d)(3), (d)(4) (d)(8)
(b)(4)—When emissions from more than one affected coating operation are vented through the same duct to a control device also controlling emissions from nonaffected sources that are vented separately from the affected coating operations, consider the combined affected coating operations as a single emission source and conduct a compliance test described in § 60.713(b) (2) or (3).	(b)–(g)	General CA CO TI CI PE, TE	(1), (k) (c) (d) (e) (f) (g)	(a), (e), (h), (d)(3), (d)(4) (d)(5) (d)(6) (d)(7) (d)(8)
(b)(5)—Alternative to § 60.713(b) (1)–(4): Demonstrate that a total enclosure is installed around the coating operation and that all VOC emissions are vented to a control device with the specified efficiency.	(b)–(g)	General CA CO TI CI TE	(1), (k) (c) (d) (e) (f) (h)	(a), (e) (h), (i) (d)(3), (d)(4) (d)(5) (d)(6) (d)(7) (d)(8)
B. Coating mix preparation equipment alone:				
(b)(6)—Demonstrate that covers meeting the requirements of § 60.712(c) (1)–(5) are installed and used properly; procedures detailing the proper use of covers are posted; the mix equipment is vented to a control device; and the control device efficiency is greater than or equal to 95 percent.	(b)–(g)	General CA TI CI	(k) (c) (e) (f)	(a), (e), (h), (i) (d)(3), (d)(4) (d)(6) (d)(7)
(b)(7)—Demonstrate that covers meeting the requirements of § 60.712(c) (1)–(5) are installed and used properly; procedures detailing the proper use of covers are posted; and the mix equipment is vented to a control device.				
(b)(8)—Demonstrate that covers meeting the requirement of § 60.712(c) (1)–(5) are installed and used properly and that procedures detailing the proper use of the covers are posted.				
C. Both coating operation and coating mix preparation equipment: (b)(9)—Determine that weighted average mass of VOC in the coating per volume of coating solids applied for each month.	(a)		(i), (j) (k)	(d)(2), (e), (g), (h), (i)

^a Section 60.713(a) specifies the procedures to be used prior to modification/reconstruction to establish the applicability of the VOC standards in §§ 60.712(b) (1) and (2) for modified/reconstructed coating operations. Section 60.713(a)(1) requires the use of the procedures of § 60.713(b) (1), (2), (3), or (4) to demonstrate prior to modification/reconstruction that 90 percent of the applied VOC is recovered or destroyed. Section 60.713(a)(2) requires the use of procedures of § 60.713(b)(5) to demonstrate prior to modification/reconstruction that the coating operation has a total enclosure vented to a control device that is at least 92 percent efficient. Sections 60.713(c) and (d) do not have corresponding test methods, monitoring, reporting, or recordkeeping requirements.

^b TI = thermal incinerator; CI = catalytic incinerator; CA = carbon adsorber; CO = condenser; PE = partial enclosure; TE = total enclosure.

^c See § 60.717(f) for additional reporting requirements when coating mix preparation equipment is constructed at a time when no coating operation is being constructed. See § 60.717(g) for additional reporting requirements when coating mix preparation equipment is constructed at the same time as an affected coating operation.

§ 60.712 Standards for volatile organic compounds.

Each owner or operator of any affected facility that is subject to the requirements of this subpart shall comply with the emission limitations set forth in this section on and after the date on which the initial performance test required by § 60.8 is completed, but not later than 60 days after achieving the maximum production rate at which the affected facility will be operated or 180 days after initial startup, whichever date comes first.

(a) Each owner or operator shall control emissions from a new coating operation by recovering or destroying at least 93 percent of the VOC content of the coating applied at the coating applicator.

(b) Each owner or operator of a modified or reconstructed coating operation shall meet the appropriate standard set out in (b)(1), (2), or (3) of this section.

(1) For coating operations demonstrated prior to modification or

reconstruction pursuant to § 60.713(a)(1) to have emissions controlled by the recovery or destruction of at least 90 percent of the VOC content of the coating applied at the coating applicator.

(i) Subject to the provisions of (b)(1)(ii) of this section, each owner or operator shall continue to control emissions from the coating operation to at least the demonstrated level or 93 percent, whichever is lower.

(ii) If the VOC control device in use during the emission reduction demonstration made pursuant to § 60.713(a)(1) is subsequently replaced, each owner or operator shall:

(A) Install a control device that is at least 95 percent efficient; and

(B) Control emissions from the coating operation to at least the level determined pursuant to § 60.713(a)(3)(ii).

(2) For coating operations demonstrated prior to modification or reconstruction pursuant to § 60.713(a)(2) to have a total enclosure installed around the coating operation and all

VOC emissions ventilated to a control device that is at least 92 percent efficient.

(i) Subject to the provisions of (b)(2)(ii) of this section, each owner or operator shall continue to ventilate all VOC emissions from the total enclosure to the control device and maintain control device efficiency at or above the demonstrated level or 95 percent, whichever is lower.

(ii) If the VOC control device in use during the control device efficiency demonstration made pursuant to § 60.713(a)(2) is subsequently replaced, each owner or operator shall install a VOC control device that is at least 95 percent efficient and ventilate all VOC emissions from the total enclosure to the control device.

(3) For coating operations not subject to paragraph (b)(1) or (2) of this section, each owner or operator shall control emissions from the coating operation by recovering or destroying at least 93 percent of the VOC content of the

coating applied at the coating applicator.

(c) Each owner or operator constructing new coating mix preparation equipment with concurrent construction of a new VOC control device (other than a condenser) on a magnetic tape coating operation shall control emissions from the coating mix preparation equipment by installing and using a cover on each piece of equipment and venting the equipment to a 95 percent efficient control device. Each cover shall meet the following specifications:

(1) Cover shall be closed at all times except when adding ingredients, withdrawing samples, transferring the contents, or making visual inspection when such activities cannot be carried out with cover in place. Such activities shall be carried out through ports of the minimum practical size.

(2) Cover shall extend at least 2 cm beyond the outer rim of the opening or shall be attached to the rim;

(3) Cover shall be of such design and construction that contact is maintained between cover and rim along the entire perimeter;

(4) Any breach in the cover (such as an opening for insertion of a mixer shaft or port for addition of ingredients) shall be covered consistent with (c) (2) and (3) of this section when not actively in use. An opening sufficient to allow safe clearance for a mixer shaft is acceptable during those periods when the shaft is in place; and

(5) A polyethylene or nonpermanent cover may be used provided it meets the requirements of (c) (2), (3), and (4) of this section. Such a cover shall not be reused after once being removed.

(d) Each owner or operator of affected coating mix preparation equipment not subject to § 60.712(c) shall control emissions from the coating mix preparation equipment by either:

(1) Installing and using a cover that meets the specifications in paragraphs (c)(1)–(5) of this section and venting VOC emissions from the equipment to a VOC control device; or

(2) Installing and using a cover that meets the specifications in paragraphs (c)(1)–(5) of this section.

(e) In lieu of complying with § 60.712(a) through (d), each owner or operator may use coatings that contain a maximum of 0.20 kg of VOC per liter of coating solids as calculated on a weighted average basis for each nominal 1-month period.

§ 60.713 Compliance provisions.

(a) Applicability of §§ 60.712(b) (1) and (2) (standards for modified or reconstructed coating operations) and determination of control level required in § 60.712(b)(1)(ii)(B).

(1) To establish applicability of § 60.712(b)(1), each owner or operator must demonstrate, prior to modification or reconstruction, that at least 90 percent of the VOC content of the coating applied at the coating applicator is recovered or destroyed. Such demonstration shall be made using the procedures of paragraph (b)(1), (b)(2), (b)(3), or (b)(4) of this section, as appropriate.

(2) To establish applicability of § 60.712(b)(2), each owner or operator must demonstrate, prior to modification or reconstruction, that a total enclosure is installed around the existing coating operation and that all VOC emissions are vented to a control device that is at least 92 percent efficient. Such demonstration shall be made using the procedures of § 60.713(b)(5).

(3) To determine the level of control required in § 60.712(b)(1)(ii)(B), the owner or operator must demonstrate:

(i) That the VOC control device subsequently installed is at least 95 percent efficient. Such demonstration shall be made using Equation (2)

specified in paragraph (b)(2)(iv) of this section or Equations (4) and (5) specified in paragraph (b)(3) (iv) and (v) of this section, as applicable, and the test methods and procedures specified in § 60.715(b)–(g); and

(ii) That the overall level of control after the VOC control device is installed is at least as high as the level demonstrated prior to modification or reconstruction pursuant to paragraph (a)(1) of this section. Such demonstrations shall be made using the procedures of paragraph (b)(1), (b)(2), (b)(3), or (b)(4) of this section, as appropriate. The required overall level of control subsequent to this demonstration shall be the level so demonstrated or 93 percent, whichever is lower.

(b) Compliance demonstrations for § 60.712(a), (b)(1), (b)(2), (b)(3), (c), (d), and (e).

(1) To demonstrate compliance with § 60.712(a), (b)(1), or (b)(3) (standards for coating operations) when emissions from only the affected coating operations are controlled by a dedicated solvent recovery device, each owner or operator of the affected coating operation shall perform a liquid-liquid VOC material balance over each and every nominal 1-month period. When demonstrating compliance by this procedure, § 60.8(f) of the General Provisions does not apply. The amount of liquid VOC applied and recovered shall be determined as discussed in paragraph (b)(1)(iii) of this section. The overall VOC emission reduction (R) is calculated using the following equation:

$$R = \frac{M_r}{\sum_{i=1}^n [W_{oi} M_{ci} - RS_i]} \times 100$$

(Equation 1)

(i) The value of RS_i is zero unless the owner or operator submits the following information to the Administrator for approval of a measured value of RS_i that is greater than zero:

(A) Measurement techniques; and
(B) Documentation that the measured value of RS_i exceeds zero.

(ii) The measurement techniques of paragraph (b)(1)(i)(A) of this section shall be submitted to the Administrator for approval with the notification of anticipated startup required under § 60.7(a)(2) of the General Provisions.

(iii) Each owner or operator demonstrating compliance by the test method described in paragraph (b)(1) of this section shall:

(A) Measure the amount of coating applied at the coating applicator;

(B) Determine the VOC content of all coatings applied using the test method specified in § 60.715(a);

(C) Install, calibrate, maintain, and operate, according to the manufacturer's specifications, a device that indicates the cumulative amount of VOC recovered by the solvent recovery device over each nominal 1-month period. The device shall be certified by the manufacturer to be accurate to within -2.0 percent;

(D) Measure the amount of VOC recovered; and

(E) Calculate the overall VOC emission reduction (R) for each and every nominal 1-month period using Equation 1.

(iv) For facilities subject to § 60.712 (a) or (b)(3), compliance is demonstrated if the value of R is equal to or greater than 93 percent.

(v) Subject to the provisions of (b)(1)(vi) of this section, for facilities subject to § 60.712(b)(1), compliance is demonstrated if the value of R is equal to or greater than the percent reduction demonstrated pursuant to § 60.713(a)(1) prior to modification or reconstruction or 93 percent whichever is lower.

(vi) For facilities subject to § 60.712(b)(1)(ii), compliance is demonstrated if the value of E (control device efficiency) is greater than or equal to 0.95 and if the value of R is equal to or greater than the percent reduction demonstrated pursuant to § 60.713(a)(3) or 93 percent, whichever is lower.

(2) To demonstrate compliance with § 60.712 (a), (b)(1), or (b)(3) (standards for coating operations) when the emissions from only an affected coating operation are controlled by a dedicated incinerator or when a common emission control device (other than a fixed-bed carbon adsorption system with individual exhaust stacks for each adsorber vessel) is used to control emissions from an affected coating

operation as well as from other sources of VOC, each owner or operator of an affected coating operation shall perform a gaseous emission test using the following procedures:

(i) Construct the overall VOC emission reduction system so that all volumetric flow rates and total VOC emissions can be accurately determined by the applicable test methods and procedures specified in § 60.715 (b) through (g);

(ii) Determine capture efficiency from the coating operation by capturing, venting, and measuring all VOC emissions from the operation. During a performance test, the owner or operator of an affected coating operation located in an area with other sources of VOC shall isolate the coating operation emissions from all other sources of VOC by one of the following methods:

(A) Build a temporary enclosure (see § 60.711(a)(16)) around the affected coating operation; or

(B) Shut down all other sources of VOC and continue to exhaust fugitive emissions from the affected coating operation through any building ventilation system and other room exhausts such as drying ovens. All ventilation air must be vented through stacks suitable for testing;

(iii) Operate the emission control device with all emission sources connected and operating;

(iv) Determine the efficiency (E) of the control device using the following equation:

$$E = \frac{\sum_{i=1}^n Q_{bi} C_{bi} - \sum_{j=1}^p Q_{aj} C_{aj}}{\sum_{i=1}^n Q_{bi} C_{bi}} \quad (\text{Equation 2})$$

(v) Determine the efficiency (F) of the VOC capture system using the following equation:

$$F = \frac{\sum_{i=1}^n Q_{di} C_{di}}{\sum_{i=1}^n Q_{di} C_{di} + \sum_{k=1}^p Q_{fk} C_{fk}} \quad (\text{Equation 3})$$

(vi) For each affected coating operation subject to § 60.712 (a) or (b)(3), compliance is demonstrated if the product of (E) × (F) is equal to or greater than 0.93.

(vii) For each affected coating operation subject to § 60.712(b)(1)(i),

compliance is demonstrated if the product of (E) × (F) is equal to or greater than the fractional reduction demonstrated pursuant to § 60.713(a)(1) prior to modification or reconstruction or 0.93, whichever is lower.

(viii) For each affected coating operation subject to § 60.712(b)(1)(ii), compliance is demonstrated if the value of E is greater than or equal to 0.95 and if the product of (E) × (F) is equal to or greater than the fractional reduction demonstrated pursuant to § 60.713(a)(3) or 0.93, whichever is lower.

(3) To demonstrate compliance with § 60.712 (a), (b)(1), or (b)(3) (standards for coating operations) when a fixed-bed carbon adsorption system with individual exhaust stacks for each adsorber vessel is used to control emissions from an affected coating operation as well as from other sources of VOC, each owner or operator of an affected coating operation shall perform a gaseous emission test using the following procedures:

(i) Construct the overall VOC emission reduction system so that each volumetric flow rate and the total VOC emissions can be accurately determined by the applicable test methods and procedures specified in § 60.715 (b) through (g);

(ii) Assure that all VOC emissions from the coating operation are segregated from other VOC sources and that the emissions can be captured for measurement, as described in § 60.713(b)(2)(ii) (A) and (B);

(iii) Operate the emission control device with all emission sources connected and operating;

(iv) Determine the efficiency (H_v) of each individual adsorber vessel (v) using the following equation:

$$H_v = \frac{Q_{gv} C_{gv} - Q_{hv} C_{hv}}{Q_{gv} C_{gv}} \quad (\text{Equation 4})$$

(v) Determine the efficiency of the carbon adsorption system (H_{sys}) by computing the average efficiency of the adsorber vessels as weighted by the volumetric flow rate (Q_{hv}) of each individual adsorber vessel (v) using the following equation:

$$H_{sys} = \frac{\sum_{v=1}^q H_v Q_{hv}}{\sum_{v=1}^q Q_{hv}} \quad (\text{Equation 5})$$

(vi) Determine the efficiency (F) of the VOC capture system using Equation (3).

(vii) For the affected coating operation subject to § 60.712 (a) or (b)(3), compliance is demonstrated if the product of $(H_{sys}) \times (F)$ is equal to or greater than 0.93.

(viii) For the affected coating operation subject to § 60.712(b)(1)(i), compliance is demonstrated if the product of $(H_{sys}) \times (F)$ is equal to or greater than the fractional reduction demonstrated pursuant to § 60.713(a)(1) prior to modification or reconstruction or 0.93, whichever is lower.

(ix) For each affected coating operation subject to § 60.712(b)(1)(ii), compliance is demonstrated if the value of H_{sys} is greater than or equal to 0.95 and if the product of $(H_{sys}) \times (F)$ is equal to or greater than the fractional reduction demonstrated pursuant to § 60.713(a)(3) or 0.93, whichever is lower.

(4) To demonstrate compliance with § 60.712 (a), (b)(1), or (b)(3) (standards for coating operations) when the VOC emissions from more than one affected coating operation are collected by a common capture system and are vented through a common duct to a control device that is also controlling emissions from nonaffected sources and the emissions from the nonaffected sources are vented separately from the affected coating operations, the owner or operator may:

(i) Consider the combined affected coating operations as a single emission source; and

(ii) Conduct a compliance test on this single source by the methods described in § 60.713(b) (2) or (3), as applicable.

(5) An alternative method of demonstrating compliance with § 60.712 (a) or (b)(3) (standards for coating operations) and the sole method of demonstrating compliance with § 60.712(b)(2) (standards for modified or reconstructed coating operations) is the installation of a total enclosure around the coating operation and the ventilation of all VOC emissions from the total enclosure to a control device with the efficiency specified in paragraph (b)(5)(iii) (A) or (B) of this section, as applicable. If this method is selected, the compliance test methods described in paragraphs (b)(1), (b)(2), (b)(3), and (b)(4) of this section are not required. Instead, each owner or operator of an affected coating operation shall:

(i) Demonstrate that a total enclosure is installed. An enclosure that meets the requirements in paragraphs (b)(5)(i) (A) through (D) of this section shall be assumed to be a total enclosure. The owner or operator of an enclosed coating operation that does not meet the requirements may apply to the Administrator for approval of the enclosure as a total enclosure on a case-by-case basis. The enclosure shall be

considered a total enclosure if it is demonstrated to the satisfaction of the Administrator that all VOC emissions from the affected coating operation are contained and vented to the control device. The requirements for automatic approval are as follows:

(A) Total area of all natural draft openings shall not exceed 5 percent of the total surface area of the total enclosure's walls, floor, and ceiling;

(B) All sources of emissions within the enclosure shall be a minimum of four equivalent diameters away from each natural draft opening;

(C) Average inward face velocity across all natural draft openings (FV) shall be a minimum of 3,600 meters per hour as determined by the following procedures:

(1) Construct all forced makeup air ducts and all exhaust ducts so that the volumetric flow rate in each can be accurately determined by the test methods and procedures specified in § 60.715 (c) and (d). Volumetric flow rates shall be calculated without the adjustment normally made for moisture content; and

(2) Determine FV by the following equation:

$$FV = \frac{\sum_{j=1}^n Q_{out\ j} - \sum_{i=1}^p Q_{in\ i}}{\sum_{k=1}^q A_k} \quad \text{(Equation 6)}$$

(D) The air passing through all natural draft openings shall flow into the enclosure continuously. If FV is less than or equal to 9,000 meters per hour, the continuous inward airflow shall be verified by continuous observation using smoke tubes, streamers, tracer gases, or other means approved by the Administrator while the procedures specified above in paragraph (b)(5)(i)(C) of this section are carried out. If FV is greater than 9,000 meters per hour, the direction of airflow through the natural draft openings shall be presumed to be inward at all times without verification.

(ii) Determine the control device efficiency using Equation (2) or Equations (4) and (5), as applicable, and the test methods and procedures specified in § 60.715 (b) through (g).

(iii) Compliance is demonstrated if the installation of a total enclosure is demonstrated and the value of E determined from Equation (2) (or the value of H_{sys} determined from Equations (4) and (5), as applicable) is equal to or greater than the required efficiency as specified below:

(A) For coating operations subject to the standards of § 60.712(a), (b)(2)(ii), and (b)(3), 0.95 (95 percent); or

(B) For coating operations subject to the standards of § 60.712(b)(2)(i), the value of E determined from Equation (2) (or the value of H_{sys} determined from Equations (4) and (5), as applicable) pursuant to § 60.713(a)(2) prior to modification or reconstruction or 0.95 (95 percent), whichever is lower.

(6) To demonstrate compliance with § 60.712(c) (standard for new mix equipment with concurrent construction of a control device), each owner or operator of affected coating mix preparation equipment shall demonstrate upon inspection that:

(i) Covers satisfying the requirements of § 60.712(c) (1)–(5) have been installed and are being used properly;

(ii) Procedures detailing the proper use of covers, as specified in § 60.712(c)(1), have been posted in all areas where affected coating mix preparation equipment is used;

(iii) The coating mix preparation equipment is vented to a control device; and

(iv) The control device efficiency (E or H_{sys} , as applicable) determined using Equation (2) or Equations (4) and (5), respectively, and the test methods and procedures specified in § 60.715 (b)–(g) is equal to or greater than 0.95.

(7) To demonstrate compliance with § 60.712(d)(1) (standard for mix equipment), each owner or operator of affected coating mix preparation equipment shall demonstrate upon inspection that:

(i) Covers satisfying the requirements of § 60.712(c)(1)–(5) have been installed and are being used properly;

(ii) Procedures detailing the proper use of covers, as specified in § 60.712(c)(1), have been posted in all areas where affected coating mix preparation equipment is used; and

(iii) The coating mix preparation equipment is vented to a control device.

(8) To demonstrate compliance with § 60.712(d)(2) (standard for mix equipment), each owner or operator of affected coating mix preparation equipment shall demonstrate upon inspection that both:

(i) Covers satisfying the requirements of § 60.712(c)(1)–(5) have been installed and are being used properly; and

(ii) Procedures detailing the proper use of covers, as specified in § 60.712(c)(1), have been posted in all areas where affected coating mix preparation equipment is used.

(9) To determine compliance with § 60.712(e) (high-solids coatings alternative standard), each owner or

operator of an affected facility shall determine the weighted average mass of VOC contained in the coating per volume of coating solids applied for each and every nominal 1-month period according to the following procedures:

- (i) Determine the weight fraction of VOC in each coating applied using Method 24 as specified in § 60.715(a);
- (ii) Determine the volume of coating solids in each coating applied from the facility record; and
- (iii) Compute the weighted average by the following equation:

$$G = \frac{\sum_{i=1}^n W_{oi} M_{ci}}{\sum_{i=1}^n L_{si} V_{ci}}$$

(Equation 7)

(iv) For each affected facility where the value of G is less than or equal to 0.20 kilogram of VOC per liter of coating solids applied, the facility is in compliance.

(c) Startups and shutdowns are normal operation for this source category. Emissions from these operations are to be included when determining if the standards for coating operations specified in § 60.712 (a) and (b) are being attained.

(d) If a control device other than a carbon adsorber, condenser, or incinerator is used to control emissions from an affected facility, the necessary operating specifications for that device must be obtained from the Administrator. An example of such a device is a flare.

§ 60.714 Installation of monitoring devices and recordkeeping.

All monitoring devices required under the provisions of this section shall be installed and calibrated, according to the manufacturer's specifications, prior to the initial performance tests in locations such that representative values of the monitored parameters will be obtained. The parameters to be monitored shall be continuously measured and recorded during all performance tests.

(a) Each owner or operator of an affected coating operation that utilizes less solvent annually than the applicable cutoff provided in § 60.710(b) and that is not subject to § 60.712 (standards for coating operations) shall both:

(1) Make semiannual estimates of the projected annual amount of solvent to be utilized for the manufacture of magnetic tape at the affected facility in that calendar year and maintain records of these estimates; and

(2) Maintain records of actual solvent use.

(b) Each owner or operator of an affected coating operation demonstrating compliance by the test method described in § 60.713(b)(1) (liquid material balance) shall maintain records of all the following for each and every nominal 1-month period:

- (1) Amount of coating applied at the applicator;
- (2) Results of the reference test method specified in § 60.715(a) for determining the VOC content of all coatings applied;
- (3) Amount VOC recovered; and
- (4) Calculation of the percent VOC recovered.

(c) Each owner or operator of an affected coating operation or affected coating mix preparation equipment controlled by a carbon adsorption system and demonstrating compliance by the procedures described in § 60.713(b) (2), (3), (4), (5), or (6) (which include control device efficiency determinations) shall carry out the monitoring and recordkeeping provisions of paragraph (c) (1) or (2) of this section, as appropriate.

(1) For carbon adsorption systems with a common exhaust stack for all the individual adsorber vessels, install, calibrate, maintain, and operate, according to the manufacturer's specifications, a monitoring device that continuously indicates and records the concentration level of organic compounds in either the control device outlet gas stream or in both the control device inlet and outlet gas streams. The outlet gas stream would be monitored if the percent increase in the concentration level of organic compounds is used as the basis for reporting, as described in § 60.717(d)(3). The inlet and outlet gas streams would be monitored if the percent control device efficiency is used as the basis for reporting, as described in § 60.717(d)(4).

(2) For carbon adsorption systems with individual exhaust stacks for each adsorber vessel, install, calibrate, maintain, and operate, according to the manufacturer's specifications, a monitoring device that continuously indicates and records the concentration level of organic compounds in the outlet gas stream for a minimum of one complete adsorption cycle per day for each adsorber vessel. The owner or operator may also monitor and record the concentration level of organic compounds in the common carbon adsorption system inlet gas stream or in each individual carbon adsorber vessel inlet stream. The outlet gas streams alone would be monitored if the percent increase in the concentration level of organic compounds is used as the basis for reporting, as described in

§ 60.717(d)(3). In this case, the owner or operator shall compute daily a 3-day rolling average concentration level of organics in the outlet gas stream from each individual adsorber vessel. The inlet and outlet gas streams would be monitored if the percent control device efficiency is used as the basis for reporting, as described in § 60.717(d)(4). In this case, the owner or operator shall compute daily a 3-day rolling average efficiency for each individual adsorber vessel.

(d) Each owner or operator of an affected coating operation controlled by a condensation system and demonstrating compliance by the procedures described in § 60.713(b) (2), (4), or (5) (which include control device efficiency determinations) shall install, calibrate, maintain, and operate, according to the manufacturer's specifications, a monitoring device that continuously indicates and records the temperature of the condenser exhaust stream.

(e) Each owner or operator of an affected coating operation or affected coating mix preparation equipment controlled by a thermal incinerator and demonstrating compliance by the procedures described in § 60.713(b) (2), (4), (5), or (6) (which include control device efficiency determinations) shall install, calibrate, maintain, and operate, according to the manufacturer's specifications, a monitoring device that continuously indicates and records the combustion temperature of the incinerator. The monitoring device shall have an accuracy within ± 1 percent of the temperature being measured in Celsius degrees.

(f) Each owner or operator of an affected coating operation or affected coating mix preparation equipment controlled by a catalytic incinerator and demonstrating compliance by the procedures described in § 60.713(b) (2), (4), (5), or (6) (which include control device efficiency determinations) shall install, calibrate, maintain, and operate, according to the manufacturer's specifications, a monitoring device that continuously indicates and records the gas temperature both upstream and downstream of the catalyst bed. The monitoring device shall have an accuracy within ± 1 percent of the temperature being measured in Celsius degrees.

(g) Each owner or operator of an affected coating operation demonstrating compliance pursuant to § 60.713(b) (2), (3), or (4) (which include VOC capture system efficiency determinations) shall submit a monitoring plan for the VOC capture system to the Administrator for approval along with the notification of

anticipated startup required under § 60.7(a)(2) of the General Provisions. This plan shall identify the parameter to be monitored as an indicator of VOC capture system performance [e.g., the amperage to the exhaust fans or duct flow rates] and the method for monitoring the chosen parameter. The owner or operator shall install, calibrate, maintain, and operate, according to the manufacturer's specifications, a monitoring device that continuously indicates and records the value of the chosen parameter.

(h) Each owner or operator of an affected coating operation who uses the equipment alternative described in § 60.713(b)(5) to demonstrate compliance shall follow the procedures described in paragraph (g) of this section to establish a monitoring plan for the total enclosure.

(i) Each owner or operator of an affected coating operation shall record time periods of coating operations when an emission control device is not in use.

(j) Each owner or operator of an affected coating operation or affected coating mix preparation equipment complying with § 60.712(e) shall maintain records of the monthly weighted average mass of VOC contained in the coating per volume of coating solids applied for each coating, as described in § 60.713(b)(9) (i) through (iv).

(k) Records of the measurements and calculations required in § 60.713 and § 60.714 must be retained for at least 2 years following the date of the measurements and calculations.

[Sec. 114 of the Clean Air Act as amended (42 U.S.C. 7414)]

(Approved by the Office of Management and Budget under Control No. 2060-0171.)

§ 60.715 Test methods and procedures.

Methods in Appendix A of this part, except as provided under § 60.8(b), shall be used to determine compliance as follows:

(a) Method 24 is used to determine the VOC content in coatings. If it is demonstrated to the satisfaction of the Administrator that plant coating formulation data are equivalent to Method 24 results, formulation data may be used. In the event of any inconsistency between a Method 24 test and a facility's formulation data, the Method 24 test will govern. For Method 24, the coating sample must be a 1-liter sample taken into a 1-liter container at a location and time such that the sample will be representative of the coating applied to the base film (i.e., the sample shall include any dilution solvent or other VOC added during the manufacturing process). The container must be tightly sealed immediately after

the sample is taken. Any solvent or other VOC added after the sample is taken must be measured and accounted for in the calculations that use Method 24 results.

(b) Method 18, 25, or 25A, as appropriate to the conditions at the site, is used to determine VOC concentration. The owner or operator shall submit notice of the intended test method to the Administrator for approval along with the notification of the performance test required under § 60.8(d) of the General Provisions. Method selection shall be based on consideration of the diversity of organic species present and their total concentration and on consideration of the potential presence of interfering gases. Except as indicated in paragraphs (b) (1) and (2) of this section, the test shall consist of three separate runs, each lasting a minimum of 30 minutes.

(1) When the method is to be used in the determination of the efficiency of a fixed-bed carbon adsorption system with a common exhaust stack for all the individual adsorber vessels pursuant to § 60.713(b) (2), (4), (5), or (6), the test shall consist of three separate runs, each coinciding with one or more complete sequences through the adsorption cycles of all the individual adsorber vessels.

(2) When the method is to be used in the determination of the efficiency of a fixed-bed carbon adsorption system with individual exhaust stacks for each adsorber vessel pursuant to § 60.713(b) (3), (4), (5), or (6), each adsorber vessel shall be tested individually. The test for each adsorber vessel shall consist of three separate runs. Each run shall coincide with one or more complete adsorption cycles.

(c) Method 1 or 1A is used for sample and velocity traverses.

(d) Method 2, 2A, 2C, or 2D is used for velocity and volumetric flow rates.

(e) Method 3 is used for gas analysis.

(f) Method 4 is used for stack gas moisture.

(g) Methods 2, 2A, 2C, 2D, 3, and 4 shall be performed, as applicable, at least twice during each test period.

§ 60.716 Permission to use alternative means of emission limitation.

(a) If, in the Administrator's judgment, an alternative means of emission limitation will achieve a reduction in emissions of VOC from any emission point subject to § 60.712 (c) or (d) (standards for mix equipment) at least equivalent to that required by § 60.712 (c) or (d), respectively, the Administrator will publish in the *Federal Register* a notice permitting the use of the alternative means. The notice may condition permission on requirements related to the operation and maintenance of the alternative means.

(b) Any notice under paragraph (a) of this section shall be published only after public notice and an opportunity for a public hearing.

(c) Any person seeking permission under this section shall submit either results from an emission test that documents the collection and measurement of all VOC emissions from a given control device or an engineering evaluation that documents the determination of such emissions.

§ 60.717 Reporting and monitoring requirements.

(a) For all affected coating operations subject to § 60.712 (a), (b)(1), (b)(2), or (b)(3) and all affected coating mix preparation equipment subject to § 60.712(c), the performance test data and results shall be submitted to the Administrator as specified in § 60.8(a) of the General Provisions (40 CFR Part 60 Subpart A). In addition, the average values of the monitored parameters measured at least every 15 minutes and averaged over the period of the performance test shall be submitted with the results of all performance tests.

(b) Each owner or operator of an affected coating operation claiming to utilize less than the applicable volume of solvent specified in § 60.710(b) in the first calendar year of operation shall submit to the Administrator, with the notification of projected startup, a material flow chart indicating projected solvent use. The owner or operator shall also submit actual solvent use records at the end of the initial calendar year.

(c) Each owner or operator of an affected coating operation initially utilizing less than the applicable volume of solvent specified in § 60.710(b) per calendar year shall:

(1) Report the first calendar year in which actual annual solvent use exceeds the applicable volume; and

(2) Report the first semiannual estimate in which annual solvent use would exceed the applicable volume.

(d) Each owner or operator of an affected coating operation, or affected coating mix preparation equipment subject to § 60.712(c), shall submit quarterly reports to the Administrator documenting the following:

(1) The 1-month amount of VOC contained in the coating, the VOC recovered, and the percent emission reduction for months of noncompliance for any affected coating operation demonstrating compliance by the performance test method described in § 60.713(b)(1) (liquid material balance);

(2) The VOC contained in the coatings for the manufacture of magnetic tape for any 1-month period during which the

average solvent content of any coating exceeded 0.20 kilogram per liter of coating solids for those affected facilities complying with § 60.712(e) (high-solids coatings alternative standard);

(3) For those affected facilities monitoring only the carbon adsorption system outlet concentration levels of organic compounds, the periods (during actual coating operations) specified in paragraph (d)(3) (i) or (ii) of this section, as applicable.

(i) For carbon adsorption systems with a common exhaust stack for all the individual adsorber vessels, all periods of three consecutive adsorption cycles of all the individual adsorber vessels during which the average value of the concentration level of organic compounds in the common outlet gas stream is more than 20 percent greater than the average value measured during the most recent performance test that demonstrated compliance.

(ii) For carbon adsorption systems with individual exhaust stacks for each adsorber vessel, all 3-day rolling averages for each adsorber vessel when the concentration level of organic compounds in the individual outlet gas stream is more than 20 percent greater than the average value for that adsorber vessel measured during the most recent performance test that demonstrated compliance.

(4) For those affected facilities monitoring both the carbon adsorption system inlet and outlet concentration levels of organic compounds, the periods (during actual coating operations), specified in (d)(4) (i) or (ii) of this section, as applicable.

(i) For carbon adsorption systems with a common exhaust stack for all the individual adsorber vessels, all periods of three consecutive adsorption cycles of all the individual adsorber vessels during which the average carbon adsorption system efficiency falls below the applicable level as follows:

(A) For those affected facilities demonstrating compliance by the performance test method described in § 60.713(b) (2) or (4), the value of E determined using Equation (2) during the most recent performance test that demonstrated compliance.

(B) For those affected facilities demonstrating compliance pursuant to § 60.713(b)(5)(iii)(A) or § 60.713(b)(6), 0.95 (95 percent).

(C) For those affected facilities demonstrating compliance pursuant to § 60.713(b)(5)(iii)(B), the required value of E determined using Equation (2)

pursuant to § 60.713(a)(2) prior to modification or reconstruction or 0.95 (95 percent), whichever is lower.

(ii) For carbon adsorption systems with individual exhaust stacks for each adsorber vessel, all 3-day rolling averages for each adsorber vessel when the efficiency falls below the applicable level as follows:

(A) For those affected facilities demonstrating compliance by the performance test method described in § 60.713(b) (3) or (4), the value of H_v determined using Equation (4) during the most recent performance test that demonstrated compliance.

(B) For those affected facilities demonstrating compliance pursuant to § 60.713(b)(5)(iii)(A) or § 60.713(b)(6), 0.95 (95 percent).

(C) For those affected facilities demonstrating compliance pursuant to § 60.713(b)(5)(iii)(B), the value of H_v determined using Equation 4 pursuant to § 60.713(a)(2) prior to modification or reconstruction or 0.95 (95 percent), whichever is lower.

(5) All 3-hour periods (during actual coating operations) during which the average exhaust temperature is 5 or more Celsius degrees above the average temperature measured during the most recent performance test that demonstrated compliance for those affected facilities monitoring condenser exhaust gas temperature;

(6) All 3-hour periods (during actual coating operations) during which the average combustion temperature is more than 28 Celsius degrees below the average combustion temperature during the most recent performance test that demonstrated compliance for those affected facilities monitoring thermal incinerator combustion gas temperature;

(7) All 3-hour periods (during actual coating operations) during which the average gas temperature immediately before the catalyst bed is more than 28 Celsius degrees below the average gas temperature during the most recent performance test that demonstrated compliance and all 3-hour periods (during actual coating operations) during which the average gas temperature difference across the catalyst bed is less than 80 percent of the average gas temperature difference during the most recent performance test that demonstrated compliance for those affected facilities monitoring catalytic incinerator catalyst bed temperature; or

(8) All 3-hour periods (during actual coating operations) during which the average total enclosure or VOC capture

system monitoring device readings vary by 5 percent or more from the average value measured during the most recent performance test that demonstrated compliance for those affected facilities monitoring a total enclosure pursuant to § 60.714(h) or VOC capture system pursuant to § 60.714(g).

(e) Each owner or operator of an affected coating operation, or affected coating mix preparation equipment subject to § 60.712(c), not required to submit reports under § 60.717(d) because no reportable periods have occurred shall submit semiannual reports so affirming.

(f) Each owner or operator of affected coating mix preparation equipment that is constructed at a time when no affected coating operation being constructed shall:

(1) Be exempt from the reporting requirements specified in § 60.7(a) (1), (2), and (4); and

(2) Submit the notification of actual startup specified in § 60.7(a)(3).

(g) The owner or operator of affected coating mix preparation equipment that is constructed at the same time as an affected coating operation shall include the affected coating mix preparation equipment in all the reporting requirements for the affected coating operation specified in § 60.7(a) (1) through (4).

(h) The reports required under paragraphs (b) through (g) of this section shall be postmarked within 30 days of the end of the reporting period.

(i) The requirements of this subsection remain in force until and unless EPA, in delegating enforcement authority to a State under section 111(c) of the Act, approves reporting requirements or an alternative means of compliance surveillance adopted by such States. In this event, affected sources within the State will be relieved of the obligation to comply with this subsection, provided that they comply with the requirements established by the State.

[Sec. 114 of the Clean Air Act as amended (42 U.S.C. 7414)]

(Approved by the Office of Management and budget under Control No. 2060-0171.)

§ 60.718 Delegation of authority.

(a) In delegating implementation and enforcement authority to a State under section 111(c) of the Act, the authorities contained in paragraph (b) of this section shall be retained by the Administrator and not transferred to a State.

(b) Authorities which will not be delegated to States:

- § 60.711(a)(16)
- § 60.713(a)(4)
- § 60.713(b)(1)(i)
- § 60.713(b)(1)(iii)
- § 60.713(b)(5)(i)
- § 60.713(d)
- § 60.715(a)
- § 60.716

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Part VII

Department of Justice

Office of Juvenile Justice and
Delinquency Prevention

Prevention and Intervention for Illegal
Drug Use and AIDS Among High Risk
Youth; Program Announcement; Notice

DEPARTMENT OF JUSTICE

Office of Juvenile Justice and
Delinquency PreventionPrevention and Intervention for Illegal
Drug Use and AIDS Among High Risk
Youth; Program Announcement

AGENCY: Office of Juvenile Justice and
Delinquency Prevention, Justice.

SUMMARY: The Office of Juvenile Justice and Delinquency Prevention (OJJDP), pursuant to sections 224(a)(2)(5), and 224(b)(1) of the Juvenile Justice and Delinquency Prevention Act, as amended, announces a new OJJDP development initiative to assess, develop, test and disseminate information on prototypical approaches to improve the capability of public and private agencies for providing services to high risk youth involved in illegal drug use, other serious delinquent behavior, exploitation and AIDS.

The purpose of the program is to improve public and private services to high risk youth (under 18) in order to deter involvement in illegal activities and to divert them from initial contact with or continued involvement in the juvenile justice system. This program will focus on runaways, exploited and homeless juveniles who are often involved in illegal drugs and delinquency or who are extremely likely to become involved in these activities unless intervention occurs. It will be designed to develop effective responses to illegal drug use, other serious delinquent activity, sexual exploitation, and the companion problem of AIDS among this population.

This is a developmental effort composed of four incremental stages:

- (1) An assessment of relevant information on illegal drug use, other delinquent activity, and AIDS among runaways, exploited and homeless youth and of existing programs or services for these youth;
- (2) The development of program prototypes (models) and related policies and procedures to guide community agencies in the development and implementation of effective services to reduce illegal drug use among runaways, exploited and homeless youth who are often involved in illegal drugs and delinquency, or who are extremely likely to become involved in these activities unless intervention occurs.
- (3) The development and provision of intensive training, technical assistance and information materials to transfer the prototype programs to selected public and private agency test sites; and

- (4) Implementation and testing of the prototype programs.

OJJDP invites public agencies or nonprofit private agencies, or combinations thereof, to submit competitive applications to develop prototypical (model) approaches to developing effective programs to respond to illegal drug use and AIDS among runaway, exploited and homeless youth.

OJJDP has allocated up to \$400,000 to conduct the first three stages (as noted above) which are to be completed in twenty-four (24) months. The initial budget period will be for twenty-four (24) months. Upon completion of the training and technical assistance materials a decision will be made regarding support for the fourth stage. The project period is four years. One cooperative agreement will be awarded. Applicants are encouraged to present cost-competitive proposals.

The deadline for receipt of applications is November 14, 1988.

FOR FURTHER INFORMATION CONTACT: Richard Sutton, Research and Program, Development Division, (202) 724-5929, or Douglas Dodge, Special Emphasis, Division (202) 724-5914, OJJDP, 633 Indiana Avenue NW., Washington, DC 20531.

SUPPLEMENTARY INFORMATION:

- I. Introduction and Background
- II. Program Goals and Objectives
- III. Program Strategy
- IV. Dollar Amount and Duration
- V. Eligibility Requirements
- VI. Application Requirements
- VII. Procedures and Criteria for Selection
- VIII. Deadline for Receipt of Applications
- IX. Civil Rights Compliance

I. Introduction and Background

Runaways, exploited and homeless are among the high risk juveniles at greatest risk for becoming both offenders and victims. Crisis intervention programs that serve these youth report that illegal drug use and AIDS is a significant problem among this population. They are also highly vulnerable to being exploited as they seek to exchange sex for money and nurture. Both drug abuse and involvement in exploitive sex with multiple partners are risk factors for contracting AIDS. Therefore youth on the street represent a population that is at extremely high risk for involvement in illegal drugs, as well as for AIDS. Drug abuse can increase risk taking sexual behavior, and it is likely that it lowers resistance to the HIV virus. Many runaway, exploited and homeless youth migrate to urban areas where there are

higher rates of sexually transmitted diseases.

To effectively respond to illegal drugs and AIDS among street youth, communities must implement comprehensive prevention and intervention services. Public and private agencies that provide services to runaway, exploited and homeless youth, as well as law enforcement should be involved. Comprehensive services should include four major components:

- (1) Outreach services to educate runaway, exploited and homeless youth regarding the dangers of involvement in illegal drugs and "survival sex"; as well as the symptoms of the consequences e.g., addiction and AIDS;
- (2) Crisis intervention services to provide immediate responses to runaway, exploited and homeless youth who display symptoms of suffering from the mental, emotional and physical consequences of illegal drugs and sexual exploitation;

- (3) Intermediate care to stabilize the youth and assess the need for long term support and services; and

- (4) Support systems for youth requiring long term services for drug addiction and AIDS.

The primary purpose of an outreach component should be to educate runaway, exploited and homeless youth regarding the dangers of illegal drug use, sexual exploitation and AIDS, to identify high risk street youth, and to make appropriate referrals to the crisis intervention component.

The purpose of the crisis intervention component would be to provide shelter, respond to the immediate problems or symptoms exhibited by the youth, and do an initial screening to identify the extent of drug addiction and whether the youth is HIV positive or has an active case of AIDS.

The purpose of the intermediate care component would be to stabilize youth identified as being addicted to illegal drugs or who test positive for the AIDS virus, to keep them off the street long enough to provide services to increase self-sufficiency, to continue diagnostic evaluation as necessary and to arrange for long term care of services as appropriate.

The purpose of the long-term component is to provide for treatment and the continuous care of youth who are heavily addicted to drugs and often suffer from mental and related physical problems, or who have AIDS.

Other juvenile justice system agencies should be involved to promote a community-wide approach to prevention and intervention. Police officers, through routine patrol, are often in a position to

identify drug abuse, exploitation and AIDS among street youth. Law enforcement arrest and referral policies and practices regarding illegal drug use and sexual exploitation impact on runaway, exploited and homeless youth. In turn, the availability of community programs to respond to these youth often affects law enforcement policies and procedures.

Juvenile court policies and procedures regarding runaway, juvenile sexual exploitation, and illegal drug use impact on street youth. Supervision programs, particularly aftercare services, can impact on the life style by juveniles who are returning to the community.

II. Program Goals and Objectives

A. Goals

(1) To assist public and private agencies in developing and implementing effective outreach, crisis intervention, intermediate and long-term care programs to reduce the risk for and to respond to the problems of illegal drug use and AIDS among runaway, exploited and homeless youth, who are involved in or who are extremely likely, without intervention, to become involved in illegal drugs and other serious delinquency.

(2) To disseminate prototype program designs for outreach, crisis intervention, intermediate and long-term care to reduce illegal drug use and AIDS among runaway, exploited and homeless youth.

B. Objectives

(1) Assess existing information regarding illegal drug use and AIDS among runaway, exploited and homeless youth, and approaches to outreach, crisis intervention, intermediate services and long term programming for these high risk youth, develop criteria for identifying promising approaches, and review and describe operational promising programs;

(2) Develop prototypes based on research and the assessment of selected operational programs;

(3) Develop a dissemination strategy, including training and technical assistance materials, to transfer the prototypes to selected sites; and

(4) Test program prototypes: (Applicants are advised that this stage of the program development initiative will not be funded during the initial budget period).

III. Program Strategy

OJJDP's planning and program development activities are guided by a framework that specifies four sequential phases of development: Research,

Development, Demonstration and Dissemination. This framework guides the decision-making process regarding the funding of future stages of the program.

This program is a developmental initiative. The purpose of the development initiative is to develop prototype/models and to determine their effectiveness through a controlled testing process. The program will be conducted in four discrete incremental stages. The four stages include: (1) An assessment of the information on illegal drug use and AIDS among runaway, exploited and homeless youth; (2) the development of prototypes, and implementation and operation of prototypical programs; (3) the development of a training and technical assistance package in order to provide intensive training to test sites that are implementing the prototype; and, (4) testing of the prototypes. During the initial 24 month budget period, it is expected that stages I, II, and III will be completed.

All technical and subject matter portions of the program will be guided by recommendations of an advisory committee established specifically for the program. The advisory committee will provide comments and recommendations regarding the strategies and activities for this program. It may be necessary to change or supplement advisory committee members for different stages of the program; however, the objective will be to select technical and subject matter experts capable of addressing issues related to each of the program stages. The advisory committee members should have combined expertise in research and evaluation on high risk youth, training and technical assistance development and delivery, and knowledge of the programs for runaway, exploited and homeless youth. Each stage of the incremental program development process detailed below is designed to result in a complete and publishable product (e.g. final assessment report), and a dissemination strategy to inform the field of the development of the program and the results and products of each stage. This award is providing funds for stages I and II and III. A decision is made at the completion of each stage, based on availability of funds, and the quality and utility of the products, whether to invest additional funds to proceed to the next stage or terminate the program.

A. Stage I—Assessment

The first stage of the program consists of an assessment that will include a review of the literature and an

operational program. The literature review will be designed to identify significant issues and problems involved in developing programs to address the problems of illegal drug use and AIDS among runaway, exploited and homeless youth. The purpose of the literature review is to identify the most definitive theoretical and empirical research findings in order to apply them to the review of existing programs, and the development of prototypical model(s).

The recipient will apply the results of the literature review to the development of criteria for identifying promising approaches to reduce illegal drug use and AIDS among runaway, exploited and homeless youth, and use the criteria to select programs for review and documentation. Information to be collected and assessed should include, at a minimum, the historical development of the programs: Conceptual framework; theoretical assumptions; definition of the target populations and subsequent system services for the families; identification of services and treatment modalities; number and type of families served; program costs per unit of service and per client; evaluation findings, if applicable; sources of funding; staffing requirements; and program approach to management and administration.

The assessment should provide the basis for refining the goals and objectives of the development program. Specifically, it should identify the key questions that need to be answered regarding the feasibility and effectiveness of the program. Therefore, based on the literature review and the results of the program assessment, the recipient will recommend specific programs or components of programs to be used as a basis for program prototype development.

1. Activities

The major activities of this stage are:

- Establishment of a program advisory committee;
- Development of the assessment plan;
- Review of the literature;
- Development of criteria for identifying promising programs;
- Identification and description of operational promising programs;
- Development of preliminary testing design guidelines;
- Preparation of the assessment report; and
- Development and implementation of a dissemination strategy.

2. Products

The products to be completed during this stage are:

- Assessment Plan—specifying in detail, the approach and activities to be undertaken for each step or the assessment stage;
- Draft and final report on the results of the assessment that includes:
 - Literature review;
 - Criteria for identifying promising programs;
 - Description of operational promising programs and approaches;
 - Recommendations for refining the goals and objectives of the program;
 - Recommendations for developing prototypical/model approaches; and
 - Preliminary testing design guidelines.
- Dissemination strategy to inform the field of the development of the program, and the products and results of this stage.

B. Stage II—Prototype Development

Upon successful completion of stage I, and with the approval of OJJDP, the recipient will develop prototype designs for the development, implementation, and operation of programs for the prevention and intervention of illegal drug use and AIDS among high risk youth. The prototype designs will be accompanied by detailed policy and procedure manuals to be developed by the recipient. The activities and products of this stage will be based on the information generated by the assessment. Appropriate technical and subject matter expertise will be utilized to design the prototypes that will be based, in part, on the operational programs described in the preceding stage.

The prototype design and related policies and procedures will provide guidance regarding identification of the appropriate target group; relationship of the program to other public and private youth-serving agencies; funding program organization and management; the philosophy and content of the intervention; resource development program monitoring; and evaluation of program effectiveness. The prototype designs and accompanying policies and procedures manuals will be used as the basis for the development of a training and technical assistance package. The information will become part of the dissemination package to be disseminated to appropriate state and local agencies, depending on the nature and auspices of each prototype.

1. Activities

The major activities of this stage are:

- Preparation of a plan for developing the prototypes and related policies and procedures;
- Development of the prototypes and related policies and procedures;
- Participation and review by the program advisory committee; and
- Development and implementation of a dissemination strategy.

2. Products

The products to be completed during this stage are:

- Plan for prototype development specifying, in detail, the approach and activities to be undertaken for each step of this stage, and the projected costs on a monthly basis;
- Draft and final prototype design(s) and related policies and procedures manual(s); and
- Dissemination strategy to inform the field of the development of the program, products and results of this stage.

C. Stage III—Training and Technical Assistance

Upon successful completion of stage II, and with the approval of OJJDP, the recipient will transfer the prototype design(s), including policies and procedures, into a training and technical assistance package. A comprehensive training manual must be developed to encourage and facilitate implementation of the prototypes.

The training manual must outline the major issues that need to be addressed in developing programs for prevention and intervention for illegal drug use and AIDS among high risk youth and detail program prototypes. The training manual should be the focal point of the entire training and technical assistance package. The primary audience will be policy makers and practitioners involved in resource allocation and program development related to prevention and intervention programs for high risk youth. The manual must be designed for a formal training setting and for independent use in jurisdictions that do not participate in formal training sessions. Therefore, the manual should include a complete description of the prototype and incorporate related policies and procedures. The manual should contain instructions and supplementary materials for trainers to facilitate presentation, and ensure understanding and successful adaption and implementation of the prototypes.

1. Activities

The major activities of this stage are:

- Preparation of a plan for developing the training and technical assistance package;

- Development of the training and technical assistance materials;
- Recruitment and preparation of the training and technical assistance personnel;
- Testing of the training curriculum manual;
- Participation and review by the advisory committee; and
- Development and implementation of a dissemination strategy that may include workshops or seminars for organizations that provide services to runaway, exploited and homeless youth.

2. Products

The products to be completed during this stage are:

- Plan for the development of the training and technical assistance package;
- Identification of training and technical assistance personnel;
- Draft and final training and technical assistance package, including the training curriculum manual and information materials; and
- Dissemination strategy to inform the field of the development of the program, and the products and results of this stage.

D. Stage IV—Prototype Implementation and Testing

While a decision to test the prototypes will be made during or following completion of the prototype development stage, the applicant is expected to explain the methods and approaches that would be employed to implement this stage.

This stage of the program consists of a test, in selected jurisdictions, of the prototypes developed in stage II. The recipient will be required to assist the OJJDP in developing a solicitation to make awards to test sites. It will also be required to provide intensive training and technical assistance to help the test sites implement the prototypes on an experimental basis. Finally, the grantee will be expected to work cooperatively with an independent evaluator to ensure the integrity of the data collection and feedback activities.

The funds for this stage will be provided through a non-competitive continuation award.

1. Activities

The major activities of this stage are:

- Develop recommendations for a program announcement to select test sites;
- Assist OJJDP in review and selection of test sites;
- Provide intensive training and technical assistance to test sites

regarding the implementation of prototypes on an experimental basis;

- Develop procedures for working cooperatively with the program evaluator, particularly in the areas of data collection and feedback, and
- Develop and implement a dissemination strategy.

2. Products

The major products for this stage are:

- Recommendations for the program announcement for test sites;
- Plan for providing training and technical assistance to test sites; and
- Dissemination strategy to inform the field of the development of the program and the products and results of this stage.

IV. Dollar Amount and Duration

Up to \$400,000 has been allocated for the initial award. One cooperative agreement will be awarded competitively, with an initial budget period of twenty-four (24) months. This development program will consist of four stages (assessment; prototype development; policies and procedures, training, technical assistance; and testing). The initial award will provide support for stages I and II and III. One or more noncompeting continuation awards will be considered to complete a four year project period.

The noncompetitive continuation awards for the additional budget periods may be withheld for justifiable reasons. They include: (1) The results of stage I, II, and III do not justify further program activity; (2) the recipient is delinquent in submitting required reports; (3) adequate grantor agency funds are not available to support the project; (4) the recipient has failed to show satisfactory progress in achieving the objectives of the project or otherwise failed to meet the terms and conditions of the award; (5) a recipient's management practices have failed to provide adequate stewardship of grantor agency funds; (6) outstanding audit exceptions have not been cleared; and (7) any other reason that would indicate continued funding would not be in the best interest of the Government.

A separate competition will be held to select an organization to perform independent evaluation of the selected prototypes/models. The organization selected for this award will be ineligible to compete for the evaluation.

V. Eligibility Requirements

Applications are invited from public agencies and nonprofit private organizations. Applicant organizations may choose to submit joint proposals with other eligible organizations as long

as one organization is designated in the application as the applicant and any co-applicants are designated as such. Applicants and co-applicants must demonstrate that they have prior experience in the design, conduct and implementation of research and development programs; demonstrated knowledge of issues associated with runaway children; prior experience in the development and delivery of training or technical assistance; and research and evaluation of the juvenile justice system.

The applicant must also demonstrate that they have the management and financial capability to effectively implement a project of this size and scope. Applicants who fail to demonstrate that they have the capability to manage this program will be ineligible for funding consideration.

VI. Application Requirements

All applicants must submit a completed Application for Federal Assistance (Standard Form 424), including a program narrative, a detailed budget, and budget narrative. All applications must include the information outlined in this section of the solicitation (Section VI) in Part IV, Program Narrative of the application (SF-424). The program narrative of the application should not exceed 7 double-spaced pages in length.

In submitting applications that contain more than one organization, the relationships among the parties must be set forth in the application. As a general rule, organizations that describe their working relationship in the development of products and the delivery of services as primarily cooperative or collaborative in nature will be considered co-applicants. In the event of a co-applicant submission, one co-applicant must be designated as the payee to receive and disburse project funds and be responsible for the supervision and coordination of the activities of the other co-applicant. Under this arrangement, each organization would agree to be jointly and severally responsible for all project funds and services. Each co-applicant must sign the SF-424 and indicate their acceptance of the conditions of joint and several responsibility with the other co-applicant. Applications that include non-competitive contracts for the provision of specific services must include a sole source justification for any procurement in excess of \$10,000.

The following information must be included in the application:

A. Organizational Capability

Applicants must demonstrate that they are eligible to compete for this cooperative agreement on the basis of the eligibility criteria established in Section V of this solicitation. Applicants must concisely describe their organizational experience with respect to the eligibility criteria specified in Section V above. Applicants must demonstrate how their organizational experience and capabilities will enable them to achieve the goals and objectives of this initiative. Applicants are invited to append one example of prior work products of a similar nature to their application.

(In addition to the assurances provided in Part V, Assurances [SF-424]). Applicants must also demonstrate that their organization has or can establish fiscal controls and accounting procedures that assure Federal funds available under this agreement are disbursed and accounted for properly. Applicants who have not previously received Federal funds will be asked to submit a copy of the Office of Justice Assistance, Research and Statistics (OJP) Accounting System and Financial Capability Questionnaire (OJP Form 7120/1). Copies of the form will be provided in the application kit and must be prepared and submitted along with the application. Other applications may be requested to submit this form. All questions are to be answered regardless of instructions (Section C.I.B. note). The CPA certification is required only of those applicants who have not previously received Federal funding.

B. Program Goals and Objectives

A succinct statement of your understanding of the goals and objectives of the program should be included. The application should include a problem statement and a discussion of the potential contribution of this program to the field.

C. Program Strategy

Applicants should describe the proposed approach for achieving the goals and objectives of the development program. A detailed discussion of how each of the initial three stages of the program will be accomplished should be included. Stage four should be outlined.

D. Program Implementation Plan

Applicants should prepare a plan that outlines the major activities involved in implementing the program, describe how they will allocate available resources to implement the program, and how the program will be managed.

The plan must include an annotated organizational chart depicting the roles and describing the responsibilities of key organizational/functional components, and a list of key personnel responsible for managing and implementing the two major elements of the program. Applicants must present detailed position descriptions, qualifications, and selection criteria for each position. Applicants should provide recommendations for program advisory committee members. This documentation and individual resumes may be submitted as appendices to the application.

E. Time-Task Plan

Applicants must develop a time-task plan for the 24-month project period, clearly identifying major milestones and products. This must include designation of organizational responsibility and a schedule for the completion of the tasks and products identified in Section III and indicate the anticipated cost schedule per month for the entire project period.

F. Products

Applicants must concisely describe the interim and final products of each state of the program, and must address the purpose, audience, and usefulness to the field of each product.

G. Program Budget

Applicants shall provide a 24-month budget with a detailed justification for all costs, including the basis for computation of these costs. Applicants should include a budget estimate to complete the balance of the program. Applications submitted by co-applicants and/or those containing contract(s) must include detailed budgets for each organization's expenses. The budget should include funds for a three-person Program Advisory Committee to meet three times during the 24-month budget period.

VII. Procedures and Criteria for Selection

All applications will be evaluated and rated based on the extent to which they meet the following weighted criteria. In general, all applications received will be reviewed in terms of their responsiveness to the program application requirements, organizational capability, the goals, objectives and program strategy described in the RFP, and thoroughness and innovativeness in responding to strategic issues in project implementation. Applications will be evaluated by a peer review panel according to the OJJDP Competition and Peer Review Policy, 28 CFR Part 34.

Subpart B, published August 2, 1985, at 50 FR 31366-31367. The selection criteria and their point values (weights) are as follows:

A. Organizational Capability (20 Points)

1. The extent and quality of organizational experience in the development, delivery and coordination of research programs that have been national in scope. (10 points)
2. Adequate fiscal controls and accounting procedures to ensure that the applicant can effectively implement a project of this size and scope, and to ensure the proper disbursement and accounting of Federal funds. (10 points)

B. Soundness of the Proposed Strategy (30 Points)

Appropriateness and technical adequacy of the approach to the activities and products of each stage of the program for meeting the goals and objectives; and potential utility of proposed products.

C. Qualifications of Project Staff (20 Points)

1. The qualifications of staff identified to manage and implement the program including staff to be hired through contracts. (10 points)
2. The clarity and appropriateness of position descriptions, required qualifications and selection criteria relative to the specific functions set out in the Implementation Plan. (10 points)

D. Clarity and Appropriateness of the Program Implementation Plan (15 Points)

Adequacy and appropriateness of the activities, and the project management structure; and the feasibility of the time-task plan.

E. Budget (15 points)

Completeness, reasonableness, appropriateness and cost-effectiveness of the proposed costs, in relationship to the proposed strategy and tasks to be accomplished.

Applications will be evaluated by a peer review panel. The results of peer review will be a relative aggregate ranking of applications in the form of "Summary of Ratings." These will ordinarily be based on numerical values assigned by individual peer reviewers. Peer review recommendations, in conjunction with the results of internal review and any necessary supplementary reviews, will assist the Administrator in considering competing applications and in selection of the application for funding. The final award decision will be made by the OJJDP Administrator.

VIII. Deadline for Receipt of Applications

Applicants must submit the original signed application and three copies to OJJDP. The necessary forms for applications (Standard Form 424) will be provided upon request.

Applications must be received by mail or hand delivered to the OJJDP by 5:00 p.m. EST on November 14, 1988. Those applications sent by mail should be addressed to: NIJJDP/OJJDP, U.S. Department of Justice, 633 Indiana Avenue NW., Washington, DC 20531. Hand delivered applications must be taken to the NIJJDP, Room 784, 633 Indiana Avenue, NW., Washington, DC between the hours of 8:00 a.m. and 5:00 p.m. except Saturdays, Sundays or Federal holidays.

The NIJJDP/OJJDP will notify applicants in writing of the receipt of their application. Subsequently, applicants will be notified by letter as to the decision made regarding whether or not their submission will be recommended for funding.

IX. Civil Rights Compliance

A. All recipients of OJJDP assistance including any contractors, must comply with the non-discrimination requirements of the Juvenile Justice and Delinquency Prevention Act of 1974, as amended; Title VI of the Civil Rights Act of 1964; Section 504 of the Rehabilitation Act of 1973 as amended; Title IX of the Education Amendments of 1972; the Age Discrimination Act of 1975; and the Department of Justice Non-Discrimination Regulations (28 CFR Part 43, Subparts C, D, E, and G).

B. In the event a Federal or State court or Federal or State administrative agency makes a finding of discrimination after a due process hearing on the grounds of race, color, religion, national origin or sex against a recipient of funds, the recipient will forward a copy of the finding to the Office of Civil Rights Compliance (OCRC) of the Office of Justice Programs.

C. Applicants shall maintain such records and submit to the OJJDP upon request timely, complete and accurate data establishing the fact that no person or persons will be or have been denied or prohibited from participation in benefits of, or denied or prohibited from obtaining employment in connection with, any program activity funded in whole or in part with funds made available under this program because of their race, national origin, sex, religion, handicap or age. In the case of any program under which a primary

financial assistance to any other recipient of Federal funds extends financial assistance to any other recipient or contracts with any other person(s) or group(s), such other recipient, person(s) or group(s) shall also submit such compliance reports to the primary recipient as may be necessary to enable the primary recipient to assure its civil rights compliance obligations under any award.

Date: September 27, 1988.

Verne L. Speirs,

*Administrator, Office of Juvenile Justice and
Delinquency Prevention.*

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