

would be rendered on a gratuitous basis, the fee approved shall be reasonably commensurate with the actual necessary work performed by the representative, and with due regard to the capacity in which the representative appeared, the amount of compensation involved, and the circumstances of the claimant.

§ 61.404 Assignments; creditors.

The right of any person to benefits under the Act is not transferable or assignable at law or in equity except to the United States, and none of the moneys paid or payable (except money paid as reimbursement for funeral expenses), or rights existing under the Act are subject to execution, levy, attachment, garnishment, or other legal process or to the operation of any bankruptcy or insolvency law.

PART 62—[REMOVED]

3. 20 CFR Part 62 is removed.

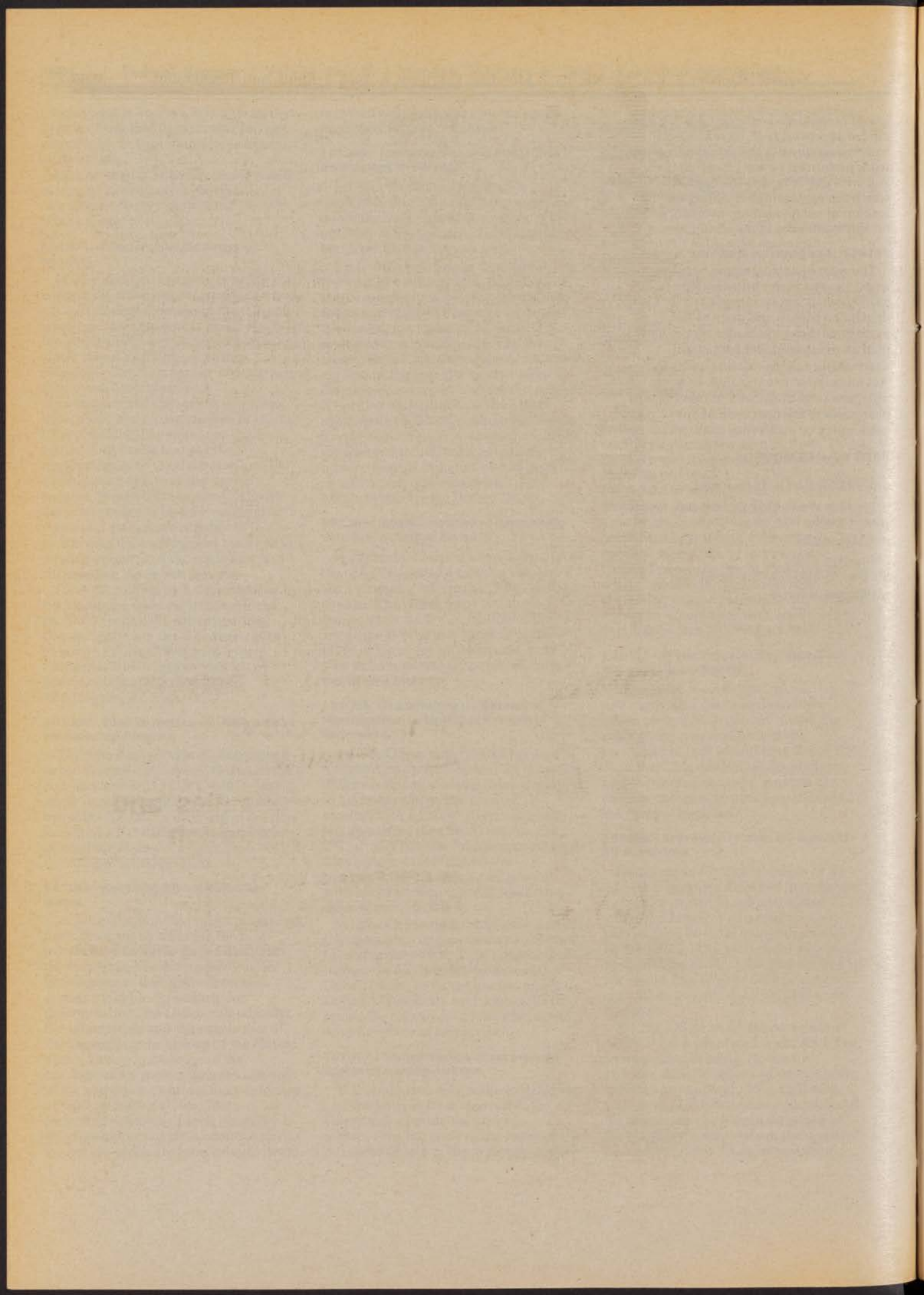
Signed at Washington, DC, this 29th day of January 1988.

Ann McLaughlin,

Secretary of Labor.

[FR Doc. 88-2400 Filed 2-5-88; 8:45 am]

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Monday
Februar 8, 1988

Part IV

Department of Defense
General Services
Administration

National Aeronautics and
Space Administration

48 CFR Parts 1, 32 and 52
Federal Acquisition Regulation;
Ratification of Unauthorized
Commitments and Prompt Payment; Final
Rule

DEPARTMENT OF DEFENSE

GENERAL SERVICES
ADMINISTRATIONNATIONAL AERONAUTICS AND
SPACE ADMINISTRATION

48 CFR Parts 1, 32, and 52

[Federal Acquisition Circular 84-33]

Federal Acquisition Regulation;
Ratification of Unauthorized
Commitments and Prompt Payment

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: Federal Acquisition Circular (FAC) 84-33 amends the Federal Acquisition Regulation (FAR), to add section 1.602-3, Ratification of unauthorized commitments, and to add Subpart 32.9 and a related contract clause to consolidate under a single procurement regulation the policies and procedures necessary to implement Office of Management and Budget (OMB) Circular A-125, "Prompt Payment."

EFFECTIVE DATE: February 22, 1988.

FOR FURTHER INFORMATION CONTACT: Margaret A. Willis, FAR Secretariat, telephone 202-523-4755, Room 4041, GS Building, Washington, DC 20405.

SUPPLEMENTARY INFORMATION:**A. Background.**

FAC 84-33, Item I. The FAR's predecessor regulations, the Defense Acquisition Regulation and the Federal Procurement Regulations, contained guidance on the subject of ratification of unauthorized commitments. The coverage was omitted from the FAR, however, pending a decision by the Councils regarding the need for its inclusion. Item I of this FAC reflects the Councils' decision to include such coverage.

FAC 84-33, Item II. When OMB Circular A-125 was initially issued in August 1982, the Federal agencies provided implementing instructions through their individual procurement regulations. These regulations were later superseded by the FAR in April 1984. Because the FAR did not specifically include coverage on OMB Circular A-125, the Federal agencies continued to provide implementing instructions through their respective FAR supplements. Later, as problems surfaced and amendments were issued to OMB Circular A-125, it became

increasingly necessary to establish uniform coverage in the FAR.

A proposed rule for FAR Subpart 32.9 was published for public comment in the *Federal Register* on July 17, 1986 (51 FR 25976). Subsequent to that publication, a number of events occurred that were pertinent to the policies and procedures being proposed. The Senate introduced a legislative initiative to amend the Prompt Payment Act. The House of Representatives Committee on Government Operations issued a report entitled, "Prompt Payment Act Implementation: Improvements Needed." The General Accounting Office issued a report entitled, "Prompt Payment Act—Agencies Have Not Fully Achieved Available Benefits." Therefore, a revised proposed rule was published for public comment in the *Federal Register* on March 18, 1987 (52 FR 8576).

In developing the final rule, the Civilian Agency Acquisition Council and the Defense Acquisition Regulatory Council not only took the public comments into consideration, but they also considered revisions that had been made to OMB Circular A-125 on June 9, 1987 (52 FR 21928). A summary of the major issues affecting the final rule is presented below.

Scope of FAR Coverage

The purpose of the new FAR Subpart 32.9 and the related contract clause at 52.232-25 is to implement OMB Circular A-125 as it applies to the Government's purchase of supplies and services from the private sector. The coverage is not intended to address areas outside this scope, such as federal assistance programs, Government debt collection, and agency reporting procedures. The coverage also does not implement proposed amendments to the Prompt Payment Act, such as subcontract flowdown, reduction in the grace period, and double interest penalties. It was observed that many criticisms of the proposed rule were directed more at the Prompt Payment Act and OMB Circular A-125 than the FAR coverage itself. In the event that the Prompt Payment Act is amended and OMB Circular A-125 is correspondingly revised, necessary changes will be made to FAR Subpart 32.9 and the related contract clause at 52.232-25.

Invoice Payment

The proposed rule's standard for establishing the payment due date on contractor invoices was based on the requirements of OMB Circular A-125. That is, payment will generally be made 30 days after the later of the following two events: (1) Receipt of a proper

invoice and (2) Government acceptance of supplies or services. Some commenters believed that more favorable payment terms should be permitted, particularly for a few specific industries. Except for existing statutory requirements, no change was made in this area because a 30-day standard was considered appropriate in view of the normal commercial practice of payment in "net 30." This amount of time was also considered necessary to ensure that Government officials involved in the payment process had sufficient time to fulfill their responsibilities. Establishing separate standards in FAR Subpart 32.9 for specific industries was not feasible due to the vast range of supplies and services purchased by the Government. Agency heads, however, have been authorized to prescribe additional standards for establishing payment due dates, where considered appropriate.

Constructive Acceptance

In order to improve the timeliness of invoice payments, the proposed rule introduced a concept of constructive acceptance. This concept provided that solely for purpose of computing an interest penalty that might be due the contractor, acceptance will be deemed to have occurred on the 5th working day after contractor delivery. A period greater than 5 working days could be incorporated in the contract clause at 52.232-25 where justified under policies and procedures issued by the agency head. Commenters raised questions on the practical application of this clause to fixed price construction and architect-engineer contracts because payment is based on estimates of work accomplished. Accordingly, Subpart 32.9 was modified to accommodate this payment method. An alternate to the contract clause was also created.

Contract Financing Payments

The proposed rule implemented the OMB Circular A-125 requirement to specify a due date in the contract for making contract financing payments, even though such payments would not be subject to interest penalties if paid late. In so doing, it was essential to furnish a meaningful definition of invoice payment and contract financing payment. It was also important to distinguish between progress payments made under the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, and the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, from other forms of progress payments more appropriately treated as contract financing payments. The proposed rule

allowed agency heads to prescribe due dates for making contract financing payments, provided that payment was not made earlier than the seventh or later than the thirtieth day. The public comments received reflected continued confusion over the distinction between invoice payments and contract financing payments. The revisions to OMB Circular A-125 made on June 9, 1987, improved these definitions, and corresponding adjustments were made to FAR Subpart 32.9.

B. Regulatory Flexibility Act

FAC 84-33, Item I. The proposed rule was published in the *Federal Register* on March 18, 1986 (51 FR 9429). The DoD, GSA, and NASA certify that this final rule will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because very few ratification actions are necessary.

FAC 84-33, Item II. The proposed rule published in the *Federal Register* on March 18, 1987 (52 FR 6360), contained an Initial Regulatory Flexibility Analysis. The analysis indicated that the purpose of the FAR revisions was to consolidate under a single procurement regulation the Federal agencies' implementing guidance on OMB Circular A-125. Further, it stated that the requirements adopted in FAR Subpart 32.9 would be consistent with the requirements of OMB Circular A-125.

No public comments were received that addressed the Initial Regulatory Flexibility Analysis prepared for the proposed rule. A final Regulatory Flexibility Analysis has been prepared and is on file in the Office of the FAR Secretariat.

C. Paperwork Reduction Act

FAC 84-33, Item I. The Paperwork Reduction Act does not apply because this proposed change to FAR 1.602 does not contain any additional information collection requirements which require the approval of OMB under 44 U.S.C. 3501 *et seq.*

FAC 84-33, Item II. The proposed rule published in the *Federal Register* on March 18, 1987 (52 FR 6360), contained a statement that the Paperwork Reduction Act did not apply because the rule did not impose any additional requirements beyond those already imposed by OMB. There were no comments received on that Paperwork Reduction Act statement.

The information collection regarding electronic funds transfers contained in Alternate II of the clause at FAR 52.232-25 was approved by the Office of Management and Budget (OMB) pursuant to a request from the

Department of the Treasury. OMB Control No. 1510-0056 was assigned to this information collection and to Form TFS 3831, Payment Information Form, which is referenced in the clause.

List of Subjects in 48 CFR Parts 1, 32, and 52

Government procurement.
Harry S. Rosinski,
Acting Director, Office of Federal Acquisition and Regulatory Policy.

Federal Acquisition Circular

[Number 84-33]

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84-33 is effective February 22, 1988.

Eleanor R. Spector,
Deputy Assistant Secretary of Defense for Procurement.

[Number 84-33]

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84-33 is effective February 22, 1988.

T.C. Golden,
Administrator, GSA.

[Number 84-33]

Unless otherwise specified, all Federal Acquisition Regulation (FAR) and other directive material contained in FAC 84-33 is effective February 22, 1988.

S.J. Evans,
Assistant Administrator for Procurement, NASA.

Federal Acquisition Circular (FAC) 84-33 amends the Federal Acquisition Regulation (FAR) as specified below:

ITEM I—RATIFICATION OF UNAUTHORIZED COMMITMENTS

FAR 1.602-3 is added to provide policy and procedures on ratification of unauthorized commitments.

ITEM II—PROMPT PAYMENT

FAR Subpart 32.9 and the related contract clause at 52.232-25 are added. This revision consolidates under a single procurement regulation the policies and procedures necessary to implement OMB Circular A-125, Prompt Payment. When OMB Circular A-125 was initially issued in August 1982, the Federal agencies had provided implementing instructions in their individual procurement regulations. These regulations were later superseded by the FAR in April 1984. Because the FAR did not specifically include coverage on OMB Circular A-125, the Federal agencies continued to provide

implementing instructions through their respective FAR supplements. Later, as implementation problems surfaced and amendments were issued to OMB Circular A-125, it became increasingly desirable to establish uniform coverage in the FAR.

Therefore, 48 CFR Parts 1, 32, and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 1, 32, and 52 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

PART 1—FEDERAL ACQUISITION REGULATIONS SYSTEM

2. Section 1.602-3 is added to read as follows:

1.602-3 Ratification of unauthorized commitments.

(a) Definitions.

"Ratification," as used in this subsection, means the act of approving an unauthorized commitment by an official who has the authority to do so.

"Unauthorized commitment," as used in this subsection, means an agreement that is not binding solely because the Government representative who made it lacked the authority to enter into that agreement on behalf of the Government.

(b) Policy. (1) Agencies should take positive action to preclude, to the maximum extent possible, the need for ratification actions. Although procedures are provided in this section for use in those cases where the ratification of an unauthorized commitment is necessary, these procedures may not be used in a manner that encourages such commitments being made by Government personnel.

(2) Subject to the limitations in paragraph (c) of this subsection, the head of the contracting activity, unless a higher level official is designated by the agency, may ratify an unauthorized commitment.

(3) The ratification authority in subparagraph (b)(2) of this subsection may be delegated in accordance with agency procedures, but in no case shall the authority be delegated below the level of chief of the contracting office.

(4) Agencies should process unauthorized commitments using the ratification authority of this subsection instead of referring such actions to the General Accounting Office for resolution. (See 1.602-3(d).)

(5) Unauthorized commitments that would involve claims subject to resolution under the Contract Disputes Act of 1978 should be processed in

accordance with Subpart 33.2, Disputes and Appeals.

(c) *Limitations.* The authority in subparagraph (b)(2) of this subsection may be exercised only when—

(1) Supplies or services have been provided to and accepted by the Government, or the Government otherwise has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;

(2) The ratifying official could have granted authority to enter or could have entered into a contractual commitment at the time it was made and still has the authority to do so;

(3) The resulting contract would otherwise have been proper if made by an appropriate contracting officer;

(4) The contracting officer reviewing the unauthorized commitment determines the price to be fair and reasonable;

(5) The contracting officer recommends payment and legal counsel concurs in the recommendation, unless agency procedures expressly do not require such concurrence;

(6) Funds are available and were available at the time the unauthorized commitment was made; and

(7) The ratification is in accordance with any other limitations prescribed under agency procedures.

(d) *Nonratifiable commitments.* Cases that are not ratifiable under this subsection may be subject to resolution as recommended by the General Accounting Office under its claim procedure (GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 4, Chapter 2), or as authorized by FAR Part 50. Legal advice should be obtained in these cases.

PART 32—CONTRACT FINANCING

3. Part 32 is amended by adding new Subpart 32.9, consisting of sections 32.900 through 32.909, to read as follows:

Subpart 32.9—Prompt Payment

32.900 Scope of subpart.

32.901 Applicability.

32.902 Definitions.

32.903 Policy.

32.904 Responsibilities.

32.905 Invoice payments.

32.906 Contract financing payments.

32.907 Interest penalties.

32.907-1 Late invoice payment.

32.907-2 Late contract financing payment.

32.908 Contract clause.

32.909 Contractor inquiries.

32.900 Scope of subpart.

This subpart prescribes policies, procedures, and a clause at 52.232-25, Prompt Payment, for implementing Office of Management and Budget

(OMB) Circular A-125, "Prompt Payment."

32.901 Applicability.

This subpart applies to all Government contracts, except for contracts where payment terms and late payment penalties have been established by other governmental authority (e.g., tariffs). This subpart also does not apply to purchases made outside the United States from foreign vendors.

32.902 Definitions.

"Contract financing payment," as used in this subpart, means a Government disbursement of monies to a contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government. Contract financing payments include advance payments, progress payments based on cost under the clause at 52.232-16, Progress Payments, progress payments based on a percentage or stage of completion (see 32.102(e)(1)) other than those made under the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, and interim payments on cost-type contracts. Contract financing payments do not include invoice payments.

"Day," as used in this subpart, means calendar day, unless otherwise indicated.

"Designated billing office," as used in this subpart, means the Government office designated in the contract where the contractor first submits invoices and contract financing requests. This might be the Government disbursing office, contract administration office, office accepting the supplies delivered or services performed by the contractor, or contract audit office. In some cases, different offices might be designated to receive invoices and contract financing requests.

"Designated payment office" means the place designated in the contract to make invoice payments or contract financing payments. Normally, this will be the Government disbursing office.

"Discount for prompt payment" means an invoice payment reduction voluntarily offered by the contractor, in conjunction with the clause at 52.232-8, Discounts for Prompt Payment, if payment is made by the Government prior to the due date.

"Due date" means the date on which payment should be made. If the due date falls on a nonworking day (e.g., Saturday, Federal holiday), then due date means the next working day.

"Invoice payment," as used in this subpart, means a Government disbursement of monies to a contractor under a contract or other authorization for supplies or services accepted by the Government. This includes payments of partial deliveries that have been accepted by the Government and final cost or fee payments where amounts owed have been settled between the Government and the contractor. For purposes of this subpart, invoice payments also include all payments made under the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, and the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts. Invoice payments do not include contract financing payments.

"Payment date" means the date on which a check for payment is dated or an electronic funds transfer is made.

"Proper invoice" means a bill or written request for payments which meets the minimum standards specified in the clause at 52.232-25, Prompt Payment (also see 32.905(c)), and other terms and conditions contained in the contract for invoice submission.

"Receiving report" means written evidence meeting the requirements of 32.905(e) which indicates Government acceptance of supplies delivered or services performed by the contractor (see Subpart 46.6).

32.903 Policy.

All contracts subject to this subpart shall specify payment procedures, payment due dates, and interest penalties for late invoice payment. Invoice payments and contract financing payments will be made by the Government as close as possible to, but not later than, the due dates specified in the clause at 52.232-25, Prompt Payment. Payment will be based on receipt of a proper invoice or contract financing request and satisfactory contract performance. Agency procedures shall ensure that, when specifying due dates, full consideration is given to the time reasonably required by Government officials to fulfill their administrative responsibilities under the contract. Checks will be mailed and electronic funds transfers will be transmitted on or about the same day the payment action is dated. When appropriate, Government contracts should allow the contractor to be paid for partial deliveries that have been accepted by the Government (see 32.102(d)). Discounts for prompt payment offered by the contractor shall be taken only when payments are made within the discount period specified by the

contractor. Agencies shall pay an interest penalty, without request from the contractor, for late invoice payments or improperly taken discounts for prompt payment. The interest penalty shall be absorbed within funds available for administration or operation of the program for which the penalty was incurred.

32.904 Responsibilities.

Agency heads shall establish the policies and procedures necessary to implement this subpart. Agency heads are authorized to prescribe additional standards for establishing due dates on invoice payments (32.905) and contract financing payments (32.906), as deemed necessary to support agency programs and foster prompt payment to contractors. Agency heads may also adopt different payment procedures in order to accommodate unique circumstances, provided that such procedures are consistent with the policies set forth in this subpart.

32.905 Invoice payments.

(a) Except as prescribed in 32.905(b) and 32.905(c), the due date for making an invoice payment by the designated payment office shall be the later of the two events described in subparagraph (a)(1) or (a)(2) of this section.

(1) The 30th day after the designated billing office has received a proper invoice from the contractor; or

(2) The 30th day after Government acceptance of supplies delivered or services performed by the contractor.

(i) On a final invoice where the payment amount is subject to contract settlement actions, acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(ii) For the sole purpose of computing an interest penalty that might be due the contractor, Government acceptance shall be deemed to have occurred constructively on the fifth working day after the contractor has delivered supplies or performed services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, or contractor compliance with a contract requirement. In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance. The constructive acceptance requirement does not, however, compel Government officials to accept supplies or services, perform contract administration functions, or make payment prior to fulfilling their responsibilities. The contracting officer may specify a longer period for

constructive acceptance, if appropriate due to the nature of the supplies or services to be received, inspected, tested, and accepted by the Government.

(iii) If the contract does not require submission of an invoice for payment (e.g., periodic lease payments), the due date will be as specified in the contract.

(b) The due date for making payments on contracts that contain the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, shall be as follows:

(1) The due date for work or services completed by the contractor shall be the later of the following two events:

(i) The 30th day after the designated billing office has received a proper invoice from the contractor; or

(ii) The 30th day after Government acceptance of the work or services completed by the contractor. On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred on the effective date of the settlement. For the sole purpose of computing an interest penalty that might be due the contractor, Government acceptance shall be deemed to have occurred constructively on the 5th working day after the contractor has completed the work or services in accordance with the terms and conditions of the contract (see also 32.905(b)(3)). In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance.

(2) The due date for progress payments shall be the 30th day after Government approval of contractor estimates of work or services accomplished. For the sole purpose of computing an interest penalty that might be due the contractor, Government approval shall be deemed to have occurred constructively on the 5th working day after contractor estimates have been received by the designated billing office (see also 32.905(b)(3)). In the event that actual approval occurs within the constructive approval period, the determination of an interest penalty shall be based on the actual date of approval.

(3) The constructive acceptance and constructive approval requirements described in 32.905 (b)(1) and (b)(2) are conditioned upon receipt of a proper payment request and no disagreement over quantity, quality, contractor compliance with contract requirements, or the requested progress payment

amount. These requirements do not compel Government officials to accept work or services, approve contractor estimates, perform contract administration functions, or make payment prior to fulfilling their responsibilities. The contracting officer may specify a longer period for constructive acceptance or constructive approval, if appropriate, due to the nature of the work or services involved.

(c) The payment terms on contracts for meat and meat food products and contracts for perishable agricultural commodities are as follows:

(1) The due date on contractor invoices for meat or meat food products, as defined in section 2(a)(3) of the Packers and Stockyard Act of 1921 (7 U.S.C. 182(3)), as further defined in Pub. L. 98-181, will be as close as possible to, but not later than, the seventh day after product delivery.

(2) The due date on contractor invoices for perishable agricultural commodities, as defined in section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)), will be as close as possible to, but not later than, the tenth day after product delivery, unless another date is specified in the contract.

(3) The notice of defect period described in paragraph (d) of this section is 3 days on contracts for meat and meat food products and 5 days on contracts for perishable agricultural commodities.

(d) A proper invoice must include the items listed in paragraphs (d)(1) through (d)(8) of this section. If the invoice does not comply with these requirements, then the contractors must be notified of the defect within 15 days after receipt of the invoice at the designated billing office. If such notice is not timely, then an adjusted due date for the purpose of determining an interest penalty, if any, will be established in accordance with 32.907-1(b):

(1) Name and address of the contractor.

(2) Invoice date.

(3) Contract number or other authorization for supplies delivered or services performed (including order number and contract line item number).

(4) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.

(5) Shipping and payment terms (e.g., shipment number and date of shipment, prompt payment discount terms). Bill of lading number and weight of shipment will be shown for shipments on Government bills of lading.

(6) Name and address of contractor official to whom payment is to be sent (must be the same as that in the contract or on a proper notice of assignment).

(7) Name (where practicable), title, phone number, and mailing address of person to be notified in event of a defective invoice.

(8) Any other information or documentation required by the contract (such as evidence of shipment).

(e) All invoice payments shall be supported by a receiving report or any other Government documentation authorizing payment. The receiving report or other Government documentation should be forwarded to the designated payment office by the 5th working day after Government acceptance or approval, unless other arrangements have been made. This period of time does not extend the due dates prescribed in 32.905. The receiving report or other Government documentation authorizing payment shall, as a minimum, include the following:

(1) Contract number or other authorization for supplies delivered or services performed.

(2) Description of supplies delivered or services performed.

(3) Quantities of supplies received and accepted, if applicable.

(4) Date supplies delivered or services performed.

(5) Date supplies or services were accepted by the designated Government official (or progress payment request was approved if being made under the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts).

(6) Signature printed name, title, mailing address, and telephone number of the designated Government official responsible for acceptance or approval functions.

(7) If the contract provides for the use of certified invoices in lieu of a separate receiving report, the certified invoice must also contain the information described in subparagraphs (e)(1) through (e)(6) of this section.

(f) When a discount for prompt payment is to be taken, payment will be made as close as possible to, but not later than, the end of the discount period. Payment terms are specified in the clause at 52.232-8, Discounts for Prompt Payment.

(g) The designated billing office shall annotate each invoice with the date a proper invoice was received by the designated billing office.

(h) The designated payment office shall annotate each invoice and

receiving report with the date a proper invoice was received by the designated payment office.

32.906 Contract financing payments.

(a) Unless otherwise prescribed in policies and procedures issued by the Agency head, the due date for making contract financing payments by the designated payment office will be the 30th day after the designated billing office has received a proper request. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified. Agency heads may prescribe shorter periods for payment, if appropriate based on contract pricing or administrative considerations. For example, a shorter period may be justified by an Agency if the nature and extent of contract financing arrangements are integrated with Agency contract pricing policies. A period shorter than 7 days or longer than 30 days shall not be prescribed.

(b) For advance payments, loans, or other arrangements that do not involve recurrent submission of contract financing requests, payment shall be made in accordance with the applicable contract financing terms or as directed by the contracting officer.

(c) A proper contract financing request must comply with the terms and conditions specified by contract financing clauses or other authorizing terms. The contractor shall correct any defects in requests submitted in the manner specified in the contract or as directed by the contracting officer.

(d) The designated billing officer and designated payment office shall annotate each contract financing request with the date a proper request was received in their respective offices.

32.907 Interest penalties.

32.907-1 Late invoice payment.

(a) An interest penalty shall be paid automatically by the designated payment office, without request from the contractor, when all of the following conditions, if applicable, have been met:

(1) A proper invoice has been received by the designated billing office.

(2) A receiving report or other Government documentation authorizing payment has been processed and there was no disagreement over quantity, quality, or contractor compliance with any contract requirement.

(3) In the case of a final invoice, the payment amount is not subject to further contract settlement actions between the Government and the contractor.

(4) The designated payment office paid the contractor more than 15 days after the due date (3 days for meat and meat food products and 5 days for perishable agricultural commodities).

(b) The interest penalty computation shall not include (1) the time taken by the Government to notify the contractor of a defective invoice, unless it exceeds the periods prescribed in 32.905(c)(3) or 32.905(d), or (2) the time taken by contractor to correct the invoice. If the designated billing office failed to notify the contractor of a defective invoice within the periods prescribed in 32.905(c)(3) or 32.905(d), then the due date on the corrected invoice will be adjusted by the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the contractor will be based on this adjusted due date.

(c) An interest penalty shall be paid automatically by the designated payment office, without request from the contractor, if an improperly taken discount for prompt payment was not corrected within 15 days after the expiration of the discount period (3 days for meat and meat food products and 5 days for perishable agricultural commodities). The interest penalty shall be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the contractor is paid.

(d) The interest penalty shall be at the rate established by the Secretary of the Treasury under section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the payment date, except where the interest penalty is prescribed by other governmental authority (e.g., tariffs). This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the *Federal Register* semiannually on or about January 1 and July 1. The interest penalty will accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in the succeeding 30-day period. The interest penalty amount will be separately stated by the designated payment office on the check or accompanying remittance advice. Adjustments will be made by the designated payment office for errors in calculating interest penalties, if requested by the contractor.

(e) Interest penalties under the Prompt Payment Act will not continue to accrue (1) after the filing of a claim for such penalties under the clause at 52.233-1, Disputes, or (2) for more than 1 year. Interest penalties of less than \$1.00 need not be paid.

(f) Interest penalties are not required on payment delays due to disagreement between the Government and contractor over the payment amount, or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the Disputes clause.

32.907-2 Late contract financing payment.

No interest penalty shall be paid to the contractor as a result of delayed contract financing payments.

32.908 Contract clause.

(a) The contracting officer shall insert the clause at 52.232-25, Prompt Payment, in all solicitations and contracts, except as indicated in 32.901 or paragraph (b) of this section.

(b) If the contract contains the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, the contracting officer shall use Alternate I instead of the basic clause.

(c) If payment may be made by electronic funds transfer, the contracting officer shall use *Alternate II* with the clause prescribed in paragraph (a) of this section or *Alternate I* prescribed in paragraph (b) of this section.

32.909 Contractor inquiries.

Questions concerning delinquent payments should be directed to the designated billing office or designated payment office. If a question involves a disagreement in payment amount or timing, it should be directed to the contracting officer for resolution. The contracting officer shall coordinate within appropriate contracting channels and seek the advice of other offices as may be necessary to resolve disagreements.

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

4. Section 52.232-25 is added to read as follows:

52.232-25 Prompt payment.

As prescribed in 32.908(a), insert the following clause:

As authorized in 32.905(a)(2)(ii), the Contracting Officer may modify the date in

subdivision (a)(6)(i) of the clause to specify a period longer than 5 working days for constructive acceptance, if considered appropriate due to the nature of the supplies or services to be received, inspected, tested, or accepted by the Government.

As prescribed in 32.906(a) and only as allowed under agency policies and procedures, the Contracting Officer may insert in paragraph (b) of the clause a period shorter than 30 days (but not less than 7 days) for making contract financing payments.

Prompt Payment (February 1988)

Notwithstanding any other payment clause in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. Definitions of pertinent terms are set forth in 32.902. All days referred to in this clause are calendar days, unless otherwise specified.

(a) Invoice Payments

(1) For purposes of this clause, "invoice payment" means a Government disbursement of monies to a Contractor under a contract or other authorization for supplies or services accepted by the Government. This includes payments for partial deliveries that have been accepted by the Government and final cost or fee payments where amounts owed have been settled between the Government and the Contractor.

(2) Except as indicated in subparagraph (a)(3) of this clause, the due date for making invoice payments by the designated payment office shall be the later of the following two events:

(i) The 30th day after the designated billing office has received a proper invoice from the Contractor.

(ii) The 30th day after Government acceptance of supplies delivered or services performed by the Contractor. On a final invoice where the payment amount is subject to contract settlement actions, acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(3) The due date on contracts for meat and meat food products, contracts for perishable agricultural commodities, and contracts not requiring submission of an invoice shall be as follows:

(i) The due date for meat and meat food products, as defined in Section 2(a)(3) of the Packers and Stockyard Act of 1921 (7 U.S.C. 182(3)) and further defined in Pub. L. 98-181 to include poultry, poultry products, eggs, and egg products, will be as close as possible to, but not later than, the 7th day after product delivery.

(ii) The due date for perishable agricultural commodities, as defined in Section 1(4) of the Perishable Agricultural Commodities Act of 1930 (7 U.S.C. 499a(4)), will be as close as possible to, but not later than, the 10th day after product delivery, unless another date is specified in the contract.

(iii) If the contract does not require submission of an invoice for payment (e.g., periodic lease payments), the due date will be as specified in the contract.

(4) An invoice is the Contractor's bill or written request for payment under the contract for supplies delivered or services performed. An invoice shall be prepared and submitted to the designated billing officer specified in the contract. A proper invoice must include the items listed in subdivisions (a)(4)(i) through (a)(4)(viii) of this clause. If the invoice does not comply with these requirements, then the Contractor will be notified of the defect within 15 days after receipt of the invoice at the designated billing office (3 days for meat and meat food products and 5 days for perishable agricultural commodities). Untimely notification will be taken into account in the computation of any interest penalty owed the Contractor in the manner described in subparagraph (a)(6) of this clause.

(i) Name and address of the Contractor.

(ii) Invoice date.

(iii) Contract number or other authorization for supplies delivered or services performed (including order number and contract line item number).

(iv) Description, quantity, unit of measure, unit price, and extended price of supplies delivered or services performed.

(v) Shipping and payment terms (e.g., shipment number and date of shipment, prompt payment discount terms). Bill of lading number and weight of shipment will be shown for shipments on Government bills of lading.

(vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number and mailing address of person to be notified in event of a defective invoice.

(viii) Any other information or documentation required by other requirements of the contract (such as evidence of shipment).

(5) An interest penalty shall be paid automatically by the Government, without request from the Contractor, if payment is not made within 15 days after the due date (3 days for meat and meat food products and 5 days for perishable agricultural commodities) and the following conditions are met, if applicable:

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed and there was no disagreement over quantity, quality, or contractor compliance with any contract term or condition.

(iii) In the case of a final invoice for any balance of funds due the Contractor for supplies delivered or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(6) The interest penalty shall be the rate established by the Secretary of the Treasury under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the payment date, except where the interest penalty is prescribed by other governmental authority. This rate is referred to as the "Renegotiation Board Interest Rate," and it is

published in the Federal Register semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the contractor of a defective invoice within the periods prescribed in paragraph (a)(4) of this clause, then the due date on the corrected invoice will be adjusted by subtracting the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties, if requested by the Contractor.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance shall be deemed to have occurred constructively on the 5th working day after the Contractor delivered the supplies or performed the services in accordance with the terms and conditions of the contract, unless there is a disagreement over quantity, quality, or contractor compliance with a contract provision. In the event that actual acceptance occurs within the constructive acceptance period, the determination of an interest penalty shall be based on the actual date of acceptance. The constructive acceptance requirement does not, however, compel Government officials to accept supplies or services, perform contract administration functions, or make payment prior to fulfilling their responsibilities.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The period taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 15 days (3 days for meat and meat food products and 5 days for perishable agricultural commodities).

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the Disputes clause or for more than 1 year. Interest penalties of less than \$1.00 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and Contractor over the payment amount or other issues involving contract compliance or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the Disputes clause.

(7) An interest penalty shall also be paid automatically by the designated payment office, without request from the contractor, if an improperly taken discount for prompt payment was not corrected within 15 days

after the expiration of the discount period (3 days for meat and meat food products and 5 days for perishable agricultural commodities). The interest penalty will be calculated as described in paragraph (a)(6) of this clause on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the contractor is paid.

(b) Contract Financing Payments

(1) For purposes of this clause, "contract financing payment" means a Government disbursement of monies to a Contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government. Contract financing payments include advance payments, progress payments based on cost under the clause at 52.232-16, Progress Payments, progress payments based on a percentage or stage of completion (32.102(e)(1)) other than those made under the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, and interim payments on cost type contracts.

(2) For contracts that provide for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the (insert day as prescribed by Agency head; if not prescribed, insert 30th day) day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified.

(3) For advance payments, loans, or other arrangements that do not involve recurrent submissions of contract financing requests, payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer.

(4) Contract financing payments shall not be assessed an interest penalty for payment delays.

(End of clause)

Alternate I (FEB 1988). (a) If the contract contains the clause at 52.232-5, Payments Under Fixed-Price Construction Contracts, or the clause at 52.232-10, Payments Under Fixed-Price Architect-Engineer Contracts, insert *Alternate I* instead of the basic clause.

(b) As authorized in 32.905(b)(3), the Contracting Officer may modify the date in subdivision (a)(6)(i) of the clause to specify a period longer than 5 working days for constructive acceptance or constructive approval, if considered appropriate due to the nature of the work or services involved.

(c) If applicable, as authorized in 32.906(a) and only as allowed under agency policies and procedures, the Contracting Officer may insert in paragraph (b) of the clause a period shorter than 30 days (but not less than 7 days) for making contract financing payments.

Prompt Payment—Alternate I (February 1988)

Notwithstanding any other payment terms in this contract, the Government will make invoice payments and contract financing payments under the terms and conditions specified in this clause. Payment shall be considered as being made on the day a check is dated or an electronic funds transfer is made. Definitions of pertinent terms are set forth in 32.902. All days referred to in this clause are calendar days, unless otherwise specified.

(a) *Invoice Payments.* (1) For purposes of this clause, "invoice payment" means a Government disbursement of monies to a contractor under a contract or other authorization for work or services accepted by the Government, payments for partial deliveries that have been accepted by the Government, and progress payments based on contracting officer approval of the estimated amount and value of work or services performed.

(2) The due date for making invoice payments shall be as described in this subparagraph (a)(2).

(i) The due date for work or services completed by the Contractor shall be the later of the following two events:

(A) The 30th day after the designated billing office has received a proper invoice from the Contractor.

(B) The 30th day after Government acceptance of the work or services completed by the Contractor. On a final invoice where the payment amount is subject to contract settlement actions (e.g., release of claims), acceptance shall be deemed to have occurred on the effective date of the contract settlement.

(ii) The due date for progress payments shall be the 30th day after Government approval of Contractor estimates of work or services accomplished.

(3) An invoice is the Contractor's bill or written request for payment under the contract for work or services performed under the contract. An invoice shall be prepared and submitted to the designated billing office. A proper invoice must include the items listed in subdivisions (a)(3)(i) through (a)(3)(viii) of this clause. If the invoice does not comply with these requirements, then the Contractor will be notified of the defect within 15 days after receipt of the invoice at the designated billing office. Untimely notification will be taken into account in the computation of any interest penalty owed the Contractor in the manner described in paragraph (a)(5) of this clause:

- (i) Name and address of the Contractor.
- (ii) Invoice date.
- (iii) Contract number or other authorization for work or services performed (including order number and contract line item number).
- (iv) Description of work or services performed.
- (v) Delivery and payment terms (e.g., prompt payment discount terms).
- (vi) Name and address of Contractor official to whom payment is to be sent (must be the same as that in the contract or in a proper notice of assignment).

(vii) Name (where practicable), title, phone number, and mailing address of person to be notified in event of a defective invoice.

(viii) Any other information or documentation required by the contract.

(4) An interest penalty shall be paid automatically by the designated payment office, without request from the Contractor, if payment is not made within 15 days after the due date and the following conditions are met, if applicable:

(i) A proper invoice was received by the designated billing office.

(ii) A receiving report or other Government documentation authorizing payment was processed and there was no disagreement over quantity, quality, Contractor compliance with any contract term or condition, or requested progress payment amount.

(iii) In the case of a final invoice for any balance of funds due the Contractor for work or services performed, the amount was not subject to further contract settlement actions between the Government and the Contractor.

(5) The interest penalty shall be at the rate established by the Secretary of the Treasury under Section 12 of the Contract Disputes Act of 1978 (41 U.S.C. 611) that is in effect on the payment date, except where the interest penalty is prescribed by other governmental authority. This rate is referred to as the "Renegotiation Board Interest Rate," and it is published in the *Federal Register*

semiannually on or about January 1 and July 1. The interest penalty shall accrue daily on the invoice payment amount approved by the Government and be compounded in 30-day increments inclusive from the first day after the due date through the payment date. That is, interest accrued at the end of any 30-day period will be added to the approved invoice payment amount and be subject to interest penalties if not paid in the succeeding 30-day period. If the designated billing office failed to notify the Contractor of a defective invoice within the periods prescribed in subparagraph (a)(3) of this clause, then the due date on the corrected invoice will be adjusted by subtracting the number of days taken beyond the prescribed notification of defects period. Any interest penalty owed the Contractor will be based on this adjusted due date. Adjustments will be made by the designated payment office for errors in calculating interest penalties, if requested by the Contractor.

(i) For the sole purpose of computing an interest penalty that might be due the Contractor, Government acceptance or approval shall be deemed to have occurred constructively as shown in subdivisions (a)(5)(i) (A) and (B) of this clause. In the event that acceptance or approval occurs within the constructive acceptance or approval period, the determination of an interest penalty shall be based on the actual date of acceptance or approval. Constructive acceptance or constructive approval requirements do not apply if there is a disagreement over quantity, quality, Contractor compliance with a contract provision, or requested progress payment amounts. These requirements also do not compel Government officials to accept work or services, approve Contractor estimates, perform contract administration functions, or

make payment prior to fulfilling their responsibilities.

(A) For work or services completed by the Contractor, Government acceptance shall be deemed to have occurred constructively on the 5th working day after the Contractor has completed the work or services in accordance with the terms and conditions of the contract.

(B) For progress payments, Government approval shall be deemed to have occurred on the 5th working day after Contractor estimates have been received by the designated billing office.

(ii) The following periods of time will not be included in the determination of an interest penalty:

(A) The period taken to notify the Contractor of defects in invoices submitted to the Government, but this may not exceed 15 days.

(B) The period between the defects notice and resubmission of the corrected invoice by the Contractor.

(iii) Interest penalties will not continue to accrue after the filing of a claim for such penalties under the clause at 52.233-1, Disputes, or for more than 1 year. Interest penalties of less than \$1.00 need not be paid.

(iv) Interest penalties are not required on payment delays due to disagreement between the Government and contractor over the payment amount or other issues involving contract compliance, or on amounts temporarily withheld or retained in accordance with the terms of the contract. Claims involving disputes, and any interest that may be payable, will be resolved in accordance with the clause at 52.233-1, Disputes.

(6) An interest penalty shall also be paid automatically by the designated payment office, without request from the Contractor, if an improperly taken discount for prompt payment was not corrected within 15 days after the expiration of the discount period. The interest penalty will be calculated on the amount of discount taken for the period beginning with the first day after the end of the discount period through the date when the Contractor is paid.

(b) *Contract Financing Payments.* (1) For purposes of this clause, if applicable, "contract financing payment" means a Government disbursement of monies to a Contractor under a contract clause or other authorization prior to acceptance of supplies or services by the Government, other than progress payments based on estimates of amount and value of work performed. Contract financing payments include advance payments.

(2) If this contract provides for contract financing, requests for payment shall be submitted to the designated billing office as specified in this contract or as directed by the Contracting Officer. Contract financing payments shall be made on the (insert day as prescribed by Agency head; if not prescribed, insert 30th day) day after receipt of a proper contract financing request by the designated billing office. In the event that an audit or other review of a specific financing request is required to ensure compliance with the terms and conditions of the contract, the designated payment office is not compelled to make payment by the due date specified. For

advance payments, loans, or other arrangements that do not involve recurrent submissions of contract financing requests, payment shall be made in accordance with the corresponding contract terms or as directed by the Contracting Officer. Contract financing payments shall not be assessed an interest penalty for payment delays.

(End of clause)

Alternate II (FEB 1988). If payment may be made by electronic funds transfer, add the following paragraph (c) to the basic clause or to its *Alternate I*:

(c) *Electronic Funds Transfer.* Payments under this contract will be made by the Government either by check or electronic funds transfer (through the Treasury Financial Communications System (TFCS) or the Automated Clearing House (ACH)), at the option of the Government. After award, but no later than 14 days before an invoice or contract financing request is submitted, the contractor shall designate a financial institution for receipt of electronic funds transfer payments. The Contractor shall submit this designation to the Contracting Officer or other Government official, as directed.

(1) For payment through TFCS, the Contractor shall provide the following information:

(i) Name, address, and telegraphic abbreviation of the financial institution receiving payment.

(ii) The American Bankers Association 9-digit identifying number of the financing institution receiving payment if the institution has access to the Federal Reserve Communications System.

(iii) Payee's account number at the financial institution where funds are to be transferred.

(iv) If the financial institution does not have access to the Federal Reserve Communications System, name, address, and telegraphic abbreviation of the correspondent financial institution through which the financial institution receiving payment obtains electronic funds transfer messages. Provide the telegraphic abbreviation and American Bankers Association identifying number for the correspondent institution.

(2) For payment through ACH, the Contractor shall provide the following information:

(i) Routing transit numbers of the financial institution receiving payment (same as American Bankers Association identifying number used for TFCS).

(ii) Number of account to which funds are to be deposited.

(iii) Type of depositor account ("C" for checking, "S" for savings).

(iv) If the Contractor is a new enrollee to the ACH system, a "Payment Information Form," TFS 3881, must be completed before payment can be processed.

(3) In the event the Contractor, during the performance of this contract, elects to designate a different financial institution for the receipt of any payment made using electronic funds transfer procedures, notification of such change and the required information specified above must be received

by the appropriate Government official 30 days prior to the date such change is to become effective.

(4) The documents furnishing the information required in this paragraph (c) must be dated and contain the signature, title, and telephone number of the Contractor official authorized to provide it, as well as the Contractor's name and contract number.

(5) Contractor failure to properly designate a financial institution or to provide appropriate payee bank account information may delay payments of amounts otherwise properly due.

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Best Management Practices

Monday
February 8, 1988

Part V

Environmental Protection Agency

40 CFR Parts 51 and 52

Prevention of Significant Deterioration
for Nitrogen Oxides; Proposed Rule and
Notice of Public Hearing

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[AD-FRL 3304-9]

Prevention of Significant Deterioration for Nitrogen Oxides

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule; notice of public hearing.

SUMMARY: As required by section 166 of the Clean Air Act (Act), with this notice EPA is here proposing regulations for nitrogen dioxide under Part C, Title I of the Act for the prevention of significant deterioration (PSD) of air quality due to emissions of nitrogen oxides. Stationary and mobile sources emit nitrogen oxides, which react in the atmosphere to form nitrogen dioxide. Nitrogen dioxide is the pollutant for which national ambient air quality standards (NAAQS) have been established. The proposed regulations would establish air quality increments to restrict the maximum allowable increase in annual average ambient concentrations of nitrogen dioxide over a baseline level in designated attainment and unclassifiable areas. The proposed regulations would also adopt a three-tiered area classification scheme for the purpose of applying different increment requirements.

To implement the proposed increment regulations for nitrogen dioxide, EPA is proposing revisions to 40 CFR Parts 51 and 52. Part 51 establishes requirements for the preparation, adoption, and submittal of State implementation plans (SIP's); Part 52 sets forth the Administrator's approval and promulgation of implementation plans, and establishes the regulation that is in effect in the absence of an approved SIP or until the responsibility for the program is delegated to the State.

DATES: Comments on the proposed regulations must be received on or before April 8, 1988; a public hearing will be held on March 23, 1988, beginning at 9:00 a.m.; requests to present oral testimony must be received on or before March 16, 1988. Supporting information used in developing the proposed rules is contained in Docket No. A-87-16. This docket is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday.

ADDRESSES: Comments may be mailed (in duplicate if possible) to: EPA Central Docket Section, Attn: Docket No. A-87-16, WIC Building, South Conference Center, Room 4, 401 M Street SW., Washington, DC 20460; the hearing will be held in the auditorium at the EPA's Office of Administration, Research Triangle Park, North Carolina.

FOR FURTHER INFORMATION CONTACT: For technical information, contact Eric Noble at 919-541-5362. Persons interested in attending the hearing or wishing to present oral testimony should contact Nancy Mayer at 919-541-5390. Both Mr. Noble and Ms. Mayer may be contacted in writing at: Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Management Division, Noncriteria Pollutant Programs Branch, Mail Drop 15, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are listed in the following outline:

- I. Background
 - A. PSD Program
 - B. Statutory Context
 1. Numerical Measures
 2. Stimulating Improved Control Technology
 3. Protection of Class I and Other Special Areas
 4. "At Least As Effective As"
- II. Selection of Increments
 - A. Selection of Increment Stringency Options
 1. Relationship to NAAQS
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 - B. Class II Increment Analyses
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- III. Implementation
 - A. Baseline Date
 - B. State Implementation Issues
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 - b. Inclusion of Nitrogen Dioxide Increment Analysis in Applications
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 - a. Emission Inventories
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 - c. Increment Violations and Enforcement
 - C. Alternative Implementation Methods
- IV. Administrative Requirements
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 - B. Docket

- C. Reference Documents
- D. Office of Management and Budget Review
- E. Federalism Implications
- F. Economic Impact Assessment
- G. Regulatory Flexibility Act Compliance

I. Background

A. PSD Program

The PSD program enacted by Congress in the 1977 Amendments to the Act contains measures to prevent significant deterioration in air quality, including requirements that major sources of air pollution employ the best available control technology (BACT) and prevent adverse impacts on Class I Federal areas. The PSD program is also implemented in part through the use of "increments" and area classifications for the pollutants sulfur dioxide and particulate matter. An increment is the maximum increase (above a baseline concentration) in the ambient concentration of a pollutant that would be allowed in an area. The area classification scheme establishes three classes of geographic areas and applies more stringent increments to those areas recognized as having higher air quality values (e.g., certain national parks and other Class I areas).

In the 1977 Amendments, Congress specified increments and area classification provisions applicable to particulate matter and sulfur dioxide under section 163 of the Act. Congress also directed the Administrator, in section 166 of the Act, to conduct a study and then to promulgate regulations to prevent significant deterioration resulting from emissions of hydrocarbons, carbon monoxide, photochemical oxidants, and nitrogen oxides, as well as pollutants for which NAAQS would be established after the passage of the 1977 Amendments.

Following the enactment of section 166, EPA began to analyze the technological, economic, and policy issues involved in establishing a PSD regulation for nitrogen oxides and these other pollutants. In 1980, EPA published an advance notice of proposed rulemaking (ANPR) that described 10 regulatory alternatives the Agency was considering incorporating into the PSD program for these pollutants and requested public comment on these alternatives. Numerous comments were received in response to the ANPR asserting that the options listed in the ANPR were too costly or would greatly restrict growth. After considering these comments, the development of these

PSD regulations was canceled by EPA in 1981.

In 1986, the Sierra Club and others filed a citizens suit in the U.S. District Court for the Northern District of California against the Administrator (*Sierra Club, et al., v. Thomas*, No. C-86-0971WWS). The plaintiffs sought to compel EPA to promulgate regulations under section 166 for nitrogen oxides. In April 1987, the Court directed the Administrator to conduct a regulatory development program for nitrogen oxides under a specified schedule. The Court called for publication of the proposed regulations for nitrogen oxides no later than February 9, 1988, and promulgation of final regulations no later than October 9, 1988. This proposed rulemaking is being undertaken in response to the mandate of section 166 and follows the schedule set forth by the District Court for completing these regulations. The rulemaking will complement the BACT, Class I area protection, and other measures to which major sources of nitrogen oxides are already subject by establishing ambient increments and a corresponding area classification scheme for nitrogen dioxide. Thus, the rulemaking will complete EPA's PSD obligations as to this pollutant. The increments proposed today would apply directly only to major stationary sources of nitrogen oxides. However, because aggregate mobile source emissions of nitrogen oxides are significant, EPA is proposing that such emissions be considered in assessing the increment available to stationary sources.

B. Statutory Context

The PSD program mandated by Congress is required to balance three primary goals, as specified by section 160 of the Act. The first of these goals is to protect public health and welfare. This goal includes the prevention of significant deterioration of air quality in all areas where the ambient pollutant concentrations required by the NAAQS are currently being achieved. The second goal emphasizes the protection of air quality in national parks, wilderness areas, and similar areas of special concern where air quality is considered particularly important. The third goal is to ensure that economic growth in clean areas occurs only after careful deliberation by State and local communities.

The particular requirements for the PSD regulations under section 166 of the Act are as follows:

(c) Such regulations shall provide specific numerical measures against which permit applications may be evaluated, a framework for stimulating improved control technology,

protection of air quality values, and fulfill the goals and purposes set forth in section 101 and section 160.

(d) The regulations * * * shall provide specific measures at least as effective as the increments established in section 163 to fulfill such goals and purposes, and may contain air quality increments, emission density requirements, or other measures.

1. Numerical Measures

The first step in developing regulations for nitrogen oxides under section 166 is to define deterioration using specific numerical measures. These proposed regulations for nitrogen dioxides follow the particulate matter and sulfur dioxide regulations under section 163 by establishing maximum increases (increments) in ambient air concentrations (expressed in micrograms per cubic meter, or $\mu\text{g}/\text{m}^3$) allowed over a baseline concentration. These increments represent the maximum deterioration in air quality that would be allowed in a PSD area from both stationary and mobile sources and are implemented through a series of permit review procedures applicable to major new or modified stationary sources. The impacts on ambient pollution levels of the construction and operation of a new or modified source subject to PSD review are calculated using mathematical models, and a determination is made as to whether the particular project under consideration, in conjunction with other applicable increases and decreases, would result in the increments being exceeded.

The increment provisions established by Congress for particulate matter and sulfur dioxide also include a three-tiered area classification scheme which recognizes that the need for prevention of significant deterioration in air quality may be greater in some geographic areas than others (see Clean Air Act, sections 162-164). Congress established Class I areas as areas of special national concern where the need to prevent significant deterioration in air quality is greatest. Class I areas include certain national parks and wilderness areas. Class II areas are, initially, all PSD areas that are not designated in the Act as Class I areas. The final classification established by Congress, Class III, permits more deterioration over baseline concentrations. This classification is available for specific areas designated by the States for higher levels of industrial development and other emissions growth. There are as yet no Class III areas.

Section 166 of the Act specifies that EPA is not required to adopt the area classification scheme for other pollutants. With respect to nitrogen oxides, however, EPA believes that this

approach will contribute to the accomplishment of the goals of the PSD regulatory program and notes that it has been successfully implemented in the PSD regulatory program for particulate matter and sulfur dioxide. In addition, a substantial body of experience with administration of the area classification system has developed within EPA and other agencies charged with implementation of the PSD program, and a network of institutional arrangements exists to implement this scheme effectively. Consequently, EPA has determined that the three-tiered classification scheme is reasonable and appropriate for the section 166 regulations for nitrogen oxides.

The 1980 ANPR discussed a number of possible alternative forms for a section 166 regulation for nitrogen oxides. Most of these alternatives, however, can more properly be classified as alternative methods for implementing a regulation under section 166. Since most of these alternatives would not specify the amount of deterioration considered significant under section 166, it would be difficult to compare their effectiveness. The implementation method used in the particulate matter and sulfur dioxide PSD regulatory program and proposed in this regulation today relies on direct enforcement of the increment on a case-by-case basis through evaluation of preconstruction permit applications and air quality monitoring and modeling. At this time, none of the alternatives discussed in the 1980 ANPR appear to provide any greater protection than direct enforcement of the increment. However, EPA may provide in the promulgated rule an opportunity for States to propose an equivalent alternative implementation method in the SIP each submits. These alternative implementation measures are discussed in more detail in section III.D. of this preamble, "Alternative Implementation Methods."

2. Stimulating Improved Control Technology

Stimulating improved air pollution control technology through an increment regulation is primarily a function of the stringency of the increment. A number of factors may affect the selection of the control technology for an individual facility. These include the growth in emissions from sources located in close proximity to each other, the amount of increment remaining in an area when a permit application is received, and the stringency of the BACT requirement that would have applied in the absence of constraints imposed by the increments.

However, as discussed below, the only one of these factors which can be directly varied in this rulemaking is the stringency of the increments.

Because geographic areas can be expected to experience economic growth and development at different rates, the rate of consumption of PSD increments will differ between regions. Over time, as a given PSD increment level is approached, the level of control required to avoid causing exceedance of the increment becomes more stringent. Consequently, new or modified sources in such localities may have to install control technologies more effective than those normally considered representative of BACT in order to comply with the increment, or to preserve some portion of the increment for future economic growth. In States where air quality problems (such as possible increment exceedances) result in stringent control requirements for nitrogen oxides, the technologies applied to new sources will generally be more stringent than those currently required elsewhere. Because BACT determinations include an examination of the most stringent control technologies available, it is reasonable to expect that over time the control technologies utilized in these problem areas will become the basis of BACT determinations elsewhere. As technologies become more common, their costs tend to fall. This, in turn, tends to increase the frequency of their application. The effectiveness of different increment levels in stimulating improved control technologies is discussed in section II, "Selection of Increments."

3. Protection of Class I and Other Special Areas

In section 160(2) of the Act, Congress set forth the purposes of Part C. The second of these is a general PSD goal of protecting air quality in all national parks, wilderness areas, monuments, seashores, and other areas of "special national or regional natural, recreational, scenic or historic value." A more specific concern is evidenced in the area classification and increment scheme in sections 161 through 164 of the Act, applicable to sulfur dioxide and particulate matter. That scheme designates a mandatory subset of these special areas as mandatory Class I areas and allows only a small incremental increase in ambient pollution levels. Similarly, Congress created another subset of mandatory Class II areas.

In addition to the statutory increment provisions addressing air quality directly, Congress charged Federal land

managers (FLM's) in section 165(d)(2)(B), with an affirmative responsibility to protect the "air quality related values (including visibility)" (AQRV's) of Class I areas, and to consider whether a proposed major new or modified source would have an adverse impact on AQRV's. In general, protection of AQRV's in the PSD program refers to the preservation of the environmental, social, aesthetic, and economic benefits that accrue to Class I areas by virtue of their air quality. Thus, AQRV's are directly dependent on low ambient concentrations of pollutants. Section 165(d)(2)(C) provides a mechanism for denial of a PSD permit in some circumstances where the proposed source would adversely affect AQRV's even if the Class I increment would not be exceeded.

4. "At Least As Effective As"

The requirement of section 166(d) that the PSD regulations for nitrogen oxides be "at least as effective as" the PSD increments for sulfur dioxide and particulate matter requires an analysis of the projected impacts of incorporating an increment into the nitrogen oxides regulation. In developing these proposed regulations, a range of alternative increments was examined to determine how they compare in terms of technology requirements, costs, product price impacts, cost effectiveness, and impacts on ambient air quality in selected areas. The comparison of these alternatives and the impacts of each are discussed in section II, "Selection of Increments."

II. Selection of Increments

A. Selection of Increment Stringency Options

To determine the level of stringency that would accomplish the two goals of stimulating the development of technology and being "at least as effective as" the existing PSD increments, a set of alternative increment levels was developed. These alternative levels were evaluated to determine which ones are "at least as effective as" the increment-based regulations for sulfur dioxide and particulate matter in achieving the goals and purposes of the PSD program. These evaluations focused initially on the selection of an increment for Class II areas because these areas are expected to show the greatest impacts of the regulation. A discussion of Class I and Class III area increments follow the description of the national impacts of the alternative increments on Class II areas.

The first alternative increment level, 100 $\mu\text{g}/\text{m}^3$ (annual average), was chosen as the "base case" in this analysis. This level of ambient nitrogen dioxide concentration is the same as the NAAQS for nitrogen dioxide, and represents the constraint on ambient concentrations that is already in effect through direct application of the NAAQS. The next alternative increment level chosen was 25 $\mu\text{g}/\text{m}^3$, which represents an increment level that is equivalent to the level established for sulfur dioxide and particulate matter in terms of a proportion of the annual NAAQS. Two additional alternative increments were selected at 45 and 35 $\mu\text{g}/\text{m}^3$ in order to evaluate less stringent increment levels. Similarly, an alternative increment was selected at 15 $\mu\text{g}/\text{m}^3$ so that the impacts of an increment more stringent than those for particulate matter and sulfur dioxide could be examined.

1. Relationship to NAAQS

In establishing the PSD regulations for sulfur dioxide and particulate matter, Congress used the NAAQS for those pollutants as the benchmark for determining what constitutes "significant deterioration," setting increments (with certain exceptions) as a percentage of the NAAQS level for each pollutant, and using the same averaging time and units of measurement as the NAAQS ($\mu\text{g}/\text{m}^3$). Because of this precedent, and because the NAAQS constitute the basic measure of air quality under the Act, the EPA has reached the preliminary conclusion that the regulations for nitrogen oxides under section 166 should also be established by reference to the NAAQS.

The NAAQS for control of nitrogen oxides is based on annual average ambient concentrations of nitrogen dioxide. Nitrogen dioxide is the most common of the nitrogen oxides and has been documented to have adverse effects on human health and welfare (see *Air Quality Criteria for Oxides of Nitrogen*, EPA 600/8-82-026). In basing the PSD increment on the NAAQS, it follows that the increment should be based on annual average ambient concentrations of nitrogen dioxide.

On June 19, 1985, the EPA published a final rule that retained the annual average NAAQS for nitrogen dioxide and concluded that a short-term nitrogen dioxide NAAQS was not justified. In making this decision, the EPA concluded that:

* * * there is insufficient scientific evidence to support decisions on a short-term standard level, averaging time, and number

of allowable exceedances which would be required to propose a separate short-term standard. At the same time, the possibility of adverse health effects cannot be ruled out. [50 FR 25536]

Consequently, EPA proposes that the increment be stated as an increase in the annual average ambient concentration of nitrogen dioxide. The EPA is currently conducting a research program to reduce the scientific uncertainties concerning short-term nitrogen dioxide exposures. Should a short-term NAAQS for nitrogen dioxide be established, EPA will review and reconsider the need for a short-term PSD increment for nitrogen dioxide.

The annual sulfur dioxide and particulate matter increments for Class II areas were established by Congress at 25 percent of the annual NAAQS for each pollutant. This can be interpreted as a Congressional determination of what level of increase in ambient concentration of an air pollutant is considered "significant." By this measure, the nitrogen dioxide increment should be at least as stringent in terms of ambient air quality impacts in order to provide the same level of effectiveness in preventing significant deterioration of air quality. An increment set above this level might theoretically achieve the same level of protection relative to the NAAQS as is achieved by the sulfur dioxide and particulate matter increments if, for example, the same degree of emission reduction ended up being required in all cases. However, the analyses conducted in conjunction with this rulemaking indicate that this does not occur, but rather that a higher increment level would allow additional emissions beyond those permitted by an increment of 25 percent of the NAAQS. A discussion of increment impacts is presented in section IIC.

Based on this consideration, the nitrogen dioxide increment, to be equivalent, should be set at a level of 25 $\mu\text{g}/\text{m}^3$. The alternative increment levels of 35 and 45 $\mu\text{g}/\text{m}^3$ would not be considered "at least as effective as" the sulfur dioxide and particulate matter increments in preventing the significant deterioration of air quality, while the alternative increment of 25 $\mu\text{g}/\text{m}^3$ would be as effective and the 15 $\mu\text{g}/\text{m}^3$ increment would be more effective than the sulfur dioxide increment.

As indicated above, EPA has relied primarily on the relationship between the congressionally-established increments for sulfur dioxide and particulate matter and the NAAQS for those pollutants in determining what nitrogen dioxide increments under section 166 would be "at least as

effective as" the statutory increments in section 163 in preventing significant deterioration of air quality. Thus, EPA has interpreted section 166 as a Congressional determination that limiting increases in ambient air concentrations of nitrogen oxides to roughly the same percentage of the NAAQS that Congress allowed under section 163 would be "at least as effective as" the section 163 increments in fulfilling the goals and purposes of the PSD program.

However, by focusing on the ambient concentrations as a proxy for all the PSD purposes set forth in the statute, EPA chose not to consider directly and in depth the relative actual effectiveness of given sulfur dioxide, particulate matter, and nitrogen dioxide increments in fulfilling the purposes of the PSD program, most notably the purpose listed in section 160(1) to protect against actual or potential adverse effects on public health and welfare.

EPA's Criteria Documents and Regulatory Impact Analyses examining efforts to control particulate matter, sulfur dioxide and nitrogen oxides suggest that particulate matter, sulfur dioxides and nitrogen oxides present differing health and welfare concerns. For example, soiling is much more sensitive to emissions of particulate matter than to nitrogen oxides. Thus, it is possible that nitrogen dioxide concentrations at levels below the NAAQS present greater or lesser potential adverse effects than do sulfur dioxide or particulate matter concentrations at corresponding levels below the NAAQS for those pollutants. This is of particular concern because reductions in the nitrogen oxides emissions baseline in future years (e.g. 1995 and 2000) could increase ozone in some nonattainment areas. In fact, EPA's post-1987 ozone and carbon monoxide strategy suggests that changes in nitrogen oxides emissions can adversely affect ozone levels in ozone nonattainment areas. The nitrogen oxides role in ozone formation varies across regions, both positively and negatively. Given this concern, it may be appropriate to consider the risks associated with increased ozone in nonattainment areas when determining a nitrogen oxides PSD increment that is "at least as effective" as the sulfur dioxide and particulate matter PSD increments. If these parameters were to be considered by EPA, the Agency might conclude that nitrogen dioxide increments that represent different percentages of the NAAQS from those used in section 163 are "at least as effective as" the section increments in fulfilling this statutory purpose. This

alternative approach merits serious consideration during the public comment period.

In light of the above, EPA solicits comment on these two issues associated with this alternative approach to section 166 rules. First, is it reasonable to interpret the statute as allowing a comparative assessment of severity of effects from various criteria pollutants in establishing numerical increments under section 166? Second, what data and analyses are available for documenting and assessing the comparative effects of different criteria pollutants with respect to fulfilling the PSD goals of the Clean Air Act?

2. Control Technology Requirements

In addition to the relationship to the NAAQS, the level of technology required to meet the proposed increment is another measure that could be used to determine if an increment fulfills the requirements of section 166. The use of this measure rests on Congress' determination that the levels chosen for the sulfur dioxide and particulate matter increments provided for the proper level of technological control without placing an unreasonable economic burden on the affected facilities and industries. In order to evaluate economic effect, an analysis was conducted to determine the nitrogen oxides emission control technologies that would be required to achieve compliance with each of the alternative increment levels. The technology requirements associated with each alternative increment were then compared with the baseline control technologies required under the existing PSD regulations, which require BACT emission controls for nitrogen oxides.

Because BACT determinations are made on a case-by-case basis by the individual States, these determinations vary in the specific nitrogen oxides emission control technologies required. As discussed earlier, in section I, some States have imposed more stringent technology requirements than others. For this reason, identifying a level of technology to represent the base case is a complex task. Although different emission control technology requirements could be used as the BACT base case to portray the impacts of the alternative nitrogen dioxide increments, one base case technology level was used in this analysis. This base case represents the least stringent of the technologies required by BACT determinations made under provisions of the existing PSD regulations. The EPA expects that more stringent BACT determinations will be typical of the PSD program in the future and notes

that more stringent technological controls are required by some States at the present time. The single base case was used in these analyses, however, because it reflects the most severe potential economic impacts of the alternative increment requirements. If the economic impacts of an increment are considered reasonable when compared with this relatively lenient base case, raising the stringency of the BACT requirements would only reduce those economic impacts.

B. Class II Increment Analyses

Three analyses were conducted on the economic impacts of the technology requirements of the alternative increments. The first analysis examined the impacts of those alternative increments on model facilities which are representatives of the individual existing facilities in each of the industrial categories expected to be affected most severely by the nitrogen dioxide increment regulations. This analysis is described in detail in the docket for this rulemaking in a document entitled "Model Plant Emission Reduction and Control Cost Impacts." In this model facilities analysis, the focus was on the cost to the individual source or firm of installing and operating the control technologies required to comply with the increment and on the resulting increases in prices projected for the products manufactured at the facility.

The second set of analyses evaluates the impacts of the alternative increments on an areawide basis. These area analyses evaluate the impact of the consumption of increment by all of the potential sources located in two types of geographic areas on the construction of new or modified sources. One area is a high growth urban area with significant nitrogen oxides emissions from mobile sources. The focus of this urban area analysis is on the potential constraints posed by mobile source emissions. The other area is a rural area with a high rate of growth in stationary sources, rather than in mobile sources. The focus of the rural area analysis is on the impacts of concentrated stationary source siting. Additionally, as a preparatory step toward the performance of the third part of the analysis—the national impacts analysis—the area impacts were examined to determine whether costs and impacts associated with the consumption of increment by sources other than the PSD permit applicant should be included in the national costs. The urban and rural area analyses are described in detail in the docket in two documents entitled "Urban Area Air

Quality Impact Analysis" and "Alaska Ambient Nitrogen Dioxide Impact Analysis."

The national impacts analysis itself focused on the annualized costs, emissions reductions, cost effectiveness, and administrative costs associated with the alternative increment levels. A detailed description of the methodology and results of this analysis are contained in the docket in two documents entitled "National Cost Estimates for Proposed NO_x Increment Regulation" and "NO₂ Increment Administrative Costs."

1. Model Facilities Analysis

The source types analyzed in the model facilities analysis are those industrial categories and specific types of emission sources that are most likely to be affected by PSD regulations for nitrogen oxides. Based on a review of PSD permits issued to new and modified sources between 1977 and 1984 (comprising the "new source review" or "NSR" data base), the source types expected to be most affected by the increment regulation and, consequently, selected for analysis were: chemical processing plants, natural gas and crude oil pumping stations, steam electric generating plants (including cogeneration facilities), petroleum refineries, kraft pulp mills, and natural gas processing plants. Municipal solid waste incineration facilities were also selected for analysis because they are expected to be an active source category in the future, even though they are not a frequent source type in the NSR data base. For each of the source types selected for evaluation, the NSR data base was used to determine representative plant configurations that would represent the plants with the potential for the highest ambient nitrogen dioxide concentrations.

The control technologies required to comply with the alternative increment levels were examined to determine if there are technologies available or anticipated which will enable the model facilities to comply with the alternative increments. If compliance with an alternative increment is technologically infeasible in many locations, that increment could be significantly more stringent than either the particulate matter or sulfur dioxide increments. Further, although the increment selected should be feasible, increments should also stimulate technological development in nitrogen oxides control.

Based on the analysis of the control technologies required to comply with the alternative increments, the EPA has determined that, as anticipated, the technology-forcing aspects of the

alternative increments become more significant as the increments become more stringent. Further, the EPA has determined that, with one exception, each of the alternative increments can be achieved by model facilities using available or anticipated nitrogen oxides emission control technologies. The only exception to this conclusion is a limited one. In the unlikely event that a major chemical process plant is proposed for an urban area, there are no technologies available to meet an increment of 25 µg/m³ under adverse meteorological conditions. The 15 µg/m³ increment cannot be achieved in urban areas under any of the meteorological conditions modeled. It should be noted that this analysis is based on impacts projected using nonreactive air quality screening models. These models assume that all nitrogen oxides emitted are converted into nitrogen dioxide as soon as they enter the atmosphere. Since not all the nitrogen oxides emissions are immediately converted into nitrogen dioxide, this assumption results in an overstatement of the impacts of the chemical process plant emissions. The calculated air quality impacts would be expected to be lower if more sophisticated reactive models, which require site-specific data, were used in connection with specific PSD permit applications.

The costs of the alternative increments were also examined for the model facilities to determine the economic impacts of these technology requirements. In addition to showing that the control requirements become more expensive to install and operate as the increment becomes more stringent, the cost impact analysis shows that the increase in costs is significantly greater for some model facilities when going from the 25 µg/m³ to the 15 µg/m³ increments than for any other increase in the stringency of the increment levels.

The costs of the control technologies required under the alternative increments were used to calculate the effects of the increments on the price of products produced by the industries represented by the model facilities. In this screening analysis, it was assumed that a product price increase resulting from the imposition of an increment would be significant if it exceeds 5 percent. The conclusion of the product price analysis is that there are no product price impacts, or only insignificant impacts, resulting from the imposition of a 45, 35, or 25 µg/m³ increment for nitrogen dioxide. For these alternative increments, the product price increases range from 0 to 3.3 percent. At an increment level of 15 µg/m³,

however, product price increases of over 5 percent are possible. Consequently, the economic impacts of a $15 \mu\text{g}/\text{m}^3$ increment could potentially be significant for some source types. For those sources, more refined analyses would be needed to determine whether increases of over 5 percent would actually occur.

2. Area Analysis

The focus of the area analysis is to determine what the impact of a nitrogen oxides regulation would be on typical high growth urban and rural areas subject to the PSD program.

a. *Urban Area Impact Analysis.* The goal of the urban area impact analysis is to determine how increases in nitrogen oxides emissions by mobile sources influence the availability of nitrogen dioxide increments for new or modified stationary sources in high growth urban areas. Nitrogen oxides emissions from mobile sources consume increment after the minor source baseline date has been triggered, posing a potential problem for the siting of new PSD sources. The urban area impact analysis focuses on a single urban area in order to determine what growth in nitrogen oxides emissions is anticipated and whether the consumption of increment by mobile sources places a serious limitation on the location of industrial facilities in high growth urban areas.

The results of the urban area impact analysis indicate that the consumption of increment by mobile sources should not be a constraining factor in the location of new stationary sources or on the modification of stationary sources in high growth urban areas in the near term (through 1994). Although the number of vehicle miles traveled in high growth urban areas is anticipated to increase steadily throughout the study period, the overall quantity of nitrogen oxides emitted is projected to decrease through 1994. This is the result of a decrease in the emissions per vehicle mile traveled due to emission control requirements established pursuant to the Federal Motor Vehicle Control program administered by EPA.

As a result of this decrease in annual emissions, it is projected that nitrogen oxides emissions from mobile sources will not result in significant constraints on the location of new or modified industrial sources in PSD areas subject to a nitrogen dioxide increment. Instead, the reduction in mobile source emissions resulting from the implementation of emission controls on motor vehicles would result in an expansion of the increment through 1994. The expansion provides emission reductions which offset new industrial emissions. Starting

in 1995, emissions of nitrogen oxides may begin to increase as motor vehicle miles traveled increase without compensating improvements in emission controls for motor vehicles.

The urban area impact analysis indicates that the imposition of any of the alternative increments would have little impact on the location of new or modified sources in a high growth urban area. Improvements in mobile source emissions controls will, in effect, expand the increment available until 1995. On a localized level, there may be sites within an urban area where vehicle traffic is low and increment expansion is less significant. At these sites, a more stringent increment might pose constraints on a new or modified source. Overall, however, the expansion of industrial and mobile sources in a high growth urban area should not be constrained by any of the alternative increment levels examined.

b. *Rural Growth Impact Analysis.* The rural growth impact analysis was conducted to determine the impacts of nitrogen dioxides increment on rural areas that are projected to experience significant increases in nitrogen oxides emissions from industrial growth. In contrast to the urban area growth analysis, the rural analysis concentrated on nitrogen oxides emissions and ambient nitrogen dioxide concentrations resulting from stationary point sources located in close proximity to each other, rather than emissions from mobile sources.

For this analysis, a rural area was selected which has experienced and is expected to continue to experience substantial stationary source growth. The Prudhoe Bay area of Alaska was selected for this analysis to represent an extreme case of emissions growth in a rural area. Prudhoe Bay is a rural area that is the site of a major industrial complex associated with the production and transportation of petroleum and natural gas. Analysis of the impact of industrial growth at Prudhoe Bay during the period 1980 through 1987 on nitrogen oxides emissions shows that actual annual emissions have increased by approximately 35,080 tons. Permits have been approved for an additional 10,240 tons of emissions for plants which are not yet in service.

The analysis shows that, as a result of this emissions growth, only the $45 \mu\text{g}/\text{m}^3$ increment alternative would not have been exceeded in Prudhoe Bay, taking into account growth since 1980. All other increment levels would have been exceeded at current levels of emissions. Actual air quality impacts, however, are probably much less. This type of analysis provides a very

conservative estimate of increment consumption, since it is based on "allowable" emissions rather than "actual" emissions. Allowable emissions estimates assume continuous operation at full load so, for an annual average, tend to show higher air quality impacts than would be the case if actual emissions were used. If a contemporaneous baseline date is selected, the constraint on the future development of the Prudhoe Bay area would be in direct proportion to the stringency of the increment and the rate of increase in actual nitrogen oxides emissions.

3. National Cost Impacts Analysis

The annualized costs of the alternative increments were calculated for the fifth year after the effective date of the regulations. For the $45 \mu\text{g}/\text{m}^3$ increment, the national annualized costs of the regulation exceed \$7.5 million (in 1987 dollars). The national annualized costs of the $35 \mu\text{g}/\text{m}^3$ increment in the fifth year increase to \$25.2 million. For the $25 \mu\text{g}/\text{m}^3$ increment, the costs increase to \$63.7 million and at the most stringent increment level, $15 \mu\text{g}/\text{m}^3$, costs quadruple to \$236 million.

The national average cost effectiveness of nitrogen oxides control at each increment level was determined compared to base case, as was the incremental cost effectiveness of each increment relative to the next less stringent alternative increment. At an increment of $45 \mu\text{g}/\text{m}^3$, the average and incremental cost effectiveness of nitrogen oxides control over the base case control level is \$875 per ton of nitrogen oxides emission reduction. At an increment of $35 \mu\text{g}/\text{m}^3$, the average cost effectiveness is \$1,051 per ton and the incremental cost effectiveness is \$1,150 per ton. The $25 \mu\text{g}/\text{m}^3$ has an average cost effectiveness of \$1,106 per ton, and an incremental cost effectiveness of \$1,128 per ton.

The national costs of the increments also include the administrative costs of the PSD program. Among other costs, these administrative burdens include the cost to the PSD permit applicant for the preparation of the permit application and for the collection and analysis of ambient air quality data. For the agency reviewing the application, the administrative costs include a determination of the applicability of the regulations to a specific proposed project, as well as the review of the application itself. Based on estimates of the time required to perform these functions in the typical case, it is anticipated that the total annual administrative cost of the PSD

regulations for nitrogen oxides to applicants will be approximately \$400,000. For the reviewing agencies, the total overall administrative cost impact is expected to be \$150,000 per year. It is not anticipated that these costs will vary significantly with the level of stringency of the increment selected.

C. Selection of Class II Increment

Four factors were examined to determine the nitrogen dioxide increment level for Class II areas that is "at least as effective as" the particulate matter and sulfur dioxide increments in achieving the goals of the PSD program. First, the relationship between the NAAQS for particulate matter and sulfur dioxide and the PSD increments for those pollutants was examined. On this basis, it was determined that a nitrogen dioxide increment of $25 \mu\text{g}/\text{m}^3$ in Class II areas achieved a level of protection relative to the NAAQS for nitrogen dioxide that is "at least as effective as" the increments for particulate matter and sulfur dioxide. It was also determined that a nitrogen dioxide increment of $15 \mu\text{g}/\text{m}^3$ could be considered "more effective" than the particulate matter and sulfur dioxide increments when compared to the NAAQS levels.

Second, the product price increases resulting from the alternative increment levels were examined. In this analysis, no direct comparison was made between the economic impacts of the nitrogen dioxide increment and the economic impacts of the particulate matter and sulfur dioxide increments. Instead, the impacts imposed by the nitrogen dioxide increment were examined to determine whether they are unreasonable for the affected industries. Because the industries and source types affected by the different increment requirements vary (to a greater degree between nitrogen dioxide and particulate matter and to a lesser degree between nitrogen dioxide and sulfur dioxide), direct cost comparisons for model facilities are not informative. Congress determined that the economic impacts of the particulate matter and sulfur dioxide increments are reasonable for the most severely affected industries and source types. Therefore, a nitrogen dioxide increment which does not cause significant product price increases is "at least as effective as" the particulate matter and sulfur dioxide increments in avoiding unreasonable economic impacts on affected industries and facilities. Based on the model facilities analysis, the $25 \mu\text{g}/\text{m}^3$ increment alternative is not considered to impose unreasonable product price impacts on individual

facilities and industries. A $15 \mu\text{g}/\text{m}^3$ increment, however, would impose unreasonable impacts on individual facilities under some circumstances.

Third, the impacts of the alternative increment levels on representative areas were evaluated in order to determine whether the nitrogen dioxide increment levels would pose unreasonable constraints on growing urban and rural areas. In many high growth urban areas, it is expected that improvements in mobile source emission controls over the next 5 to 10 years will result in an overall improvement in ambient nitrogen dioxide concentrations. Therefore, no significant adverse impacts are expected in high growth urban areas from any of the alternative increments over the period of time analyzed. For rural areas where mobile sources are less important sources of nitrogen oxides emissions, the impacts of the increments may be more constraining where industrial growth is high, such as Prudhoe Bay, especially at 25 and $15 \mu\text{g}/\text{m}^3$. This result is consistent with the effects that the particulate matter and sulfur dioxide increments have had on balancing economic activity and air quality in PSD areas.

Finally, the national impacts of the alternative nitrogen dioxide increments were calculated to determine the fifth-year costs of regulations based on these alternatives. For the 45 , 35 , and $25 \mu\text{g}/\text{m}^3$ increment levels, the national fifth-year costs remain well below \$100 million, and consequently are not expected to have severe economic effects on these industries. For the $15 \mu\text{g}/\text{m}^3$ increment, however, the fifth-year costs quadruple over the costs of the $25 \mu\text{g}/\text{m}^3$ increment to \$236 million and could have a significant impact on the affected industries.

Based on these separate analyses of the legal and economic aspects of increment selection, the $25 \mu\text{g}/\text{m}^3$ increment is proposed as the increment for Class II areas. This increment level appears to fulfill the statutory requirement of being "at least as effective as" the current annual increments for particulate matter and sulfur dioxide; is expected to provide a more stringent level of technological control of nitrogen oxides emissions from the source categories most affected by the standard than either the 35 or $45 \mu\text{g}/\text{m}^3$ alternatives; and finally, unlike the $15 \mu\text{g}/\text{m}^3$ increment, does not result in the imposition of unreasonable product price impacts on the affected facilities or industries.

D. Class I Analysis

The annual average sulfur dioxide and particulate matter increments for Class I areas are based on smaller percentages of their respective NAAQS than are the increments for Class II areas. This relationship between Class I and Class II areas represents Congress' determination to allow less deterioration of air quality in national parks, wilderness areas, and similar areas. For particulate matter, the annual Class I increment of $5 \mu\text{g}/\text{m}^3$ is 6.7 percent of the NAAQS for particulate matter. For sulfur dioxide, the annual Class I increment of $2 \mu\text{g}/\text{m}^3$ is 2.5 percent of the NAAQS for sulfur dioxide.

In terms of types of sources that generate nitrogen oxides, there is a greater similarity between nitrogen oxides and sulfur dioxide than particulate matter. Both nitrogen oxides and sulfur dioxide are generated primarily by stationary combustion sources, including boilers and process heaters. The exception to this generalization is that nitrogen oxides are also emitted in substantial amounts by mobile sources, as discussed above in the area analysis. Nitrogen oxides and nitrogen dioxide also react and are transported in the atmosphere in ways which are more closely linked to sulfur dioxide than to particulate matter. Because of these similarities, it was decided to set the Class I increment for nitrogen dioxides at 2.5 percent of the NAAQS for nitrogen dioxide, following the pattern set for sulfur dioxide rather than particulate matter. Therefore, the proposed Class I increment for nitrogen dioxide is $2.5 \mu\text{g}/\text{m}^3$.

It should be noted that section 165(d)(2)(C)(iii) and (iv) of the Act contains provisions whereby an FLM may certify to the permitting agency that a particular facility will have no adverse impact on air quality-related values in the Class I area, even though the increment may be exceeded. Pursuant to this certification, the permitting agency may issue a permit for the facility. Even if such a waiver is recognized and the permit issued, the ambient concentrations are constrained from increasing by more than an amount which, for the sulfur dioxide and particulate matter regulations, is equal to the Class II increment. This same provision will also be made applicable to the proposed nitrogen dioxide increment, with a proposed cap on the deterioration of ambient air quality set at $25 \mu\text{g}/\text{m}^3$. Although use of these waiver provisions is expected to be uncommon in practice, it does provide a

mechanism whereby the stringency of a Class I increment can be modified under appropriate circumstances.

One aspect of Class I areas that is important to this rulemaking is the impact of the construction of new or modified stationary sources in Class II areas on the air quality in nearby Class I areas, and, conversely, the constraints imposed by the presence of a Class I area on such construction in Class II areas. To evaluate these impacts, an analysis was performed of selected past PSD permit applications reviewed by the National Park Service and the Fish and Wildlife Service of the U.S. Department of the Interior between 1979 and 1986 that had potential Class I implications. This analysis is described in the docket in a document entitled "Baseline Date Issue Paper" and summarized briefly in the following paragraphs.

For these applications, the distance between the nitrogen oxides source and the impacted Class I area ranged between 17 and 90 kilometers, and annual emissions were stated as ranging from 44 to over 44,000 tons of nitrogen oxides. The impact of these facilities on ambient concentrations of nitrogen dioxide in Class I areas was estimated based on information contained in the applications. This analysis indicated that the expected impacts of these facilities on nitrogen dioxide concentrations in the affected Class I areas would, in all likelihood, be less than $1.0 \mu\text{g}/\text{m}^3$ in all cases. Further, it was concluded that past patterns of stationary sources sitting would not be constrained by the $2.5 \mu\text{g}/\text{m}^3$ Class I increment.

To evaluate the impacts of a $2.5 \mu\text{g}/\text{m}^3$ Class I increment, the contribution of mobile sources to ambient nitrogen oxides concentrations was also evaluated for two of the most frequently visited national parks—Acadia National Park and Great Smoky Mountains National Park. As with the urban area analysis described above, improved emissions controls on newer automobiles are projected to result in an overall reduction in ambient nitrogen dioxide levels in these parks, even though the vehicle miles traveled are expected to increase. Consequently, mobile source emissions should not contribute to increment violations of the $2.5 \mu\text{g}/\text{m}^3$ nitrogen dioxide increment and, hence, the increment should not constrain vehicle traffic in Class I areas in the near-term.

E. Class III Analysis

Increments were established for Class III areas in the Act for sulfur dioxide and particulate matter. This designation

is permitted in order to give States a mechanism for accommodating economic growth and air quality in areas where the Class II increment is too stringent to allow the siting of new or modified sources. Procedures specified by the Act in order for a State to redesignate an area as Class III require the commitment of the State government to creation of such an area, extensive public review, participation in the SIP area redesignation process, and a finding that the redesignation will not result in the increment being exceeded in any other Class I or II area. To date, no area of the country has been redesignated as Class III for sulfur dioxide or particulate matter.

For the sulfur dioxide and particulate matter PSD regulations, the Class III increment is set at 50 percent of the NAAQS, approximately twice the level of the Class II increment. Following this pattern, a nitrogen dioxide increment for Class III areas of $50 \mu\text{g}/\text{m}^3$ is being proposed. The analysis conducted in this rulemaking indicates that the Class II increment should not pose a serious constraint on economic activity in most areas of the country. Consequently, it is not anticipated that the Class III designation will be used in the foreseeable future.

III Implementation

A. Baseline Date

In an increment system, the "baseline date" marks the date after which increases in a pollutant in an area consume increment. Hence, it is an important factor in determining the overall stringency of the increment.

For sulfur dioxide and particulate matter, as defined in section 169(4) of the Act and 40 CFR 51.166(b)(13), the ambient concentration on the baseline date is the baseline concentration against which increment consumption is measured. All ambient concentrations resulting from: (1) Actual emissions from existing sources, and (2) allowable emissions for certain sources permitted, but not yet in operation on that date, are part of the baseline concentration for those pollutants.

The EPA regulations established two baseline dates for particulate matter and sulfur dioxide: the "major source baseline date" and the "minor source baseline date." The major source baseline date is the date after which major stationary sources consume increment, and is a single date applied nationwide. The minor source baseline date is the date on which the first complete PSD application is submitted in an area, after which minor source

emissions in the baseline area affect increment.

The minor source baseline date was, in turn, related to a "trigger date" (August 7, 1977). The first complete PSD application submitted in an area for a major source after the trigger date established the minor source baseline date for that area. Applications submitted prior to the trigger date did not affect the setting of the minor source baseline date. This system has resulted in a wide variety of minor source baseline dates. Some areas still do not have a particulate matter or sulfur dioxide minor source baseline date.

Because this approach has proven effective in the implementation of the increments for particulate matter and sulfur dioxide, the Administrator is proposing a similar approach to the selection of the baseline dates for the nitrogen dioxide increments. Three options have been studied for the major source baseline date and for the trigger date for minor source baseline dates. These options are: Option 1—August 7, 1980, for both dates; Option 2—February 8, 1988, for both dates; and Option 3—August 7, 1980, for the major source baseline date, and February 8, 1988, for the trigger date.

Option 1 is based on the date on which a nitrogen dioxide increment would have become effective had EPA met the schedule for development of the PSD regulations for nitrogen oxides set out in section 166 of the Act. Using this date would prevent any deterioration which has occurred between 1980 and the present from being "grandfathered," but it also constitutes a retroactive application of an effective date, something which EPA has avoided in new source review programs, including PSD.

Option 2 selects the date of proposal of these regulations, February 8, 1988, as the uniform baseline date. The use of the date of proposal avoids retroactive application of the regulation by making owners or operators aware of the fact that they will be affected by the nitrogen dioxide increments before construction begins. It also requires both States and prospective new sources to determine ambient concentration levels as of that date for purposes of future permitting actions. Moreover, selecting the proposal date as the baseline date would prevent a rush of PSD applications between the proposal date and either the promulgation date (approximately October 9, 1988) or the effective date (approximately October 9, 1989). The rush could occur because nitrogen oxides emissions from major sources with permits issued prior to the

major source baseline date would be a part of the baseline concentration, would not consume increment, and would not establish the minor source baseline date in that baseline area.

The selection of a prospective trigger date, as in Option 2, presents an unusual situation since it could result in the setting of a more stringent baseline date than would a retrospective trigger date. This is due to the steadily decreasing contribution of mobile source emissions to ambient air nitrogen dioxide concentrations through 1994. In general, urban area "minor" source emissions have decreased since 1980 due to improvements in mobile source emission controls, while rural area "minor" source emissions have increased modestly due to emissions from nonmajor stationary sources, or have remained about the same. Although not specifically analyzed, rural areas which become urbanized would have experienced moderate emissions growth due to the increased number of mobile sources. A 1980 trigger date, therefore, tends to "free up" (expand) the available nitrogen dioxide increment in urban areas but, in rural areas, the trigger date selected appears to have little, if any, effect. In rural areas, it is the major source baseline date that largely determines the stringency of the increment baseline. In effect, a 1980 trigger date would set a baseline concentration that is less stringent than a 1988 trigger date (assuming in both cases that the minor source baseline date is established soon after the trigger date).

For major PSD sources, a 1988 major source baseline date under Option 2 "grandfathers" emissions increases in both urban and rural areas. In urban areas, the increase in major stationary source emissions may be completely overshadowed by the mobile source emission decreases since 1980. In rural areas, mobile source emission decreases since 1980 are usually not sufficient to offset major source emission increases. Thus, in some rural areas, the choice of a 1980 major source baseline date would significantly diminish the amount of available growth margin for nitrogen oxides emissions, as compared to the increment which would be available using a 1988 baseline date and, in extensive cases, would even require a rollback of existing emissions. For example, several Class I areas now have ambient nitrogen dioxide concentrations up to $1.0 \mu\text{g}/\text{m}^3$ higher than 1980 levels. This is a small absolute increase, but one which represents 40 percent of the proposed Class I increment. In addition, certain Class II areas such as Prudhoe

Bay, Alaska, have ambient concentrations as much as $40 \mu\text{g}/\text{m}^3$ higher than in 1980. This exceeds the proposed $25 \mu\text{g}/\text{m}^3$ Class II increment.

Under Option 3, which uses two different baseline dates, the mobile source emission decreases over the last 8 years create the unusual effect of making Option 3 more stringent in urban areas than would have been the case if the rule had been put into effect by EPA in 1980, or would now be the case if EPA chooses Option 1. This is because a 1980 trigger date would have let the mobile source decreases offset increases from other sources, but Option 3 allows minor sources to affect increment only after February 8, 1988.

After consideration of the environmental, legal, administrative, and implementation aspects of each option, the Administrator is proposing a prospective baseline date of February 8, 1988 (Option 2). The proposed regulation therefore reflects only this option. However, compelling data or arguments have not been developed for selecting between the three baseline date options. Therefore, although the analyses in this notice and the referenced documents concentrate on an Option 2 scenario, information is included on the other options to provide data on the effects of alternate baseline dates. The EPA solicits comments on these options and on the selection of the major source baseline date and the trigger date for the nitrogen dioxide increment. Also, although no information is provided on any other baseline date or trigger date options, it is recognized that there may be valid reasons for selecting different dates (e.g., the effective date of this regulation). Comments are therefore solicited on other possible baseline and trigger dates.

B. State Implementation Issues

There are two main issues regarding implementation of the nitrogen dioxide increments. The first is timing; the second is the type of analysis required.

1. Timing

There are two distinct timing issues. The first is the timing of the implementation of the nitrogen dioxide increments requirement. The second is a determination of when permit applications will be required to include a nitrogen dioxide increment analysis.

a. *Program Implementation.* Complete applications for PSD permits for sources with significant nitrogen oxides emissions submitted after the date on which the nitrogen dioxide increments are implemented must contain a demonstration of compliance with nitrogen dioxide increments as well as

all other PSD requirements. As with other PSD requirements, these increments cannot be implemented with respect to a particular State until they become part of an applicable implementation plan for that State.

Section 166(b) explicitly states that the section 166 regulations become effective one year after promulgation, that SIP revisions accommodating the regulations must be submitted within 21 months of the date of promulgation, and that the Administrator must approve or disapprove the SIP revisions within 25 months of promulgation, "in the same manner as required under section 110." Thus, if States fail to submit appropriate SIP revisions within these time frames, Congress apparently also contemplated that EPA would then promulgate the necessary plan revisions directly under the provisions of section 110(c) of the Act. Implementation dates for the nitrogen dioxide increments would depend on when the SIP was approved [or when EPA finally promulgated the revision under section 110(c)]. Some States may submit approvable SIP's earlier, or could even begin implementation of a State nitrogen dioxide increment program earlier, but no program would be approvable by EPA earlier than 12 months after promulgation. After incorporation of the plan revisions, through action under section 110(c) if necessary, PSD applicants would be required to adhere to the new nitrogen dioxide increments. Given the explicit language of section 166(b), there seems little doubt that Congress intended this approach to be followed for at least those States with PSD programs that have been approved as meeting the requirements of 40 CFR 51.166, and EPA intends to do so for those "approved" States.

However, only about half of the States have approved PSD programs. The remaining States still have not submitted approvable programs. In 1978, EPA incorporated the new PSD requirements of the 1977 Amendments in the form of federal regulations at 40 CFR 52.21 into the SIP's of those States without approved PSD SIP's, pursuant to section 110(c). EPA has since delegated authority to issue PSD permits to most of this group of States under 40 CFR 52.21(u). As to the balance, EPA still issues PSD permits directly.

The continued absence of an approved PSD program in many States raises a significant question regarding whether EPA should afford these States a further period of time after the effective date of the section 166 regulations to submit an entire approvable PSD program, including the

new increment provisions, before proceeding to directly promulgate the necessary revisions to § 52.21. Accordingly, while EPA today proposes to afford all States a 21 month period to submit their SIP revisions, it will consider comments on whether it should instead put revisions to § 52.21 into effect in States without approved programs at the same time as the section 166 regulations take effect (i.e., 12 months after promulgation).¹

In all States, EPA has always retained authority to issue permits under § 52.21 directly to sources locating on Indian lands, because States lack authority to issue PSD permits on Indian lands. Because sources on Indian lands are not subject to PSD permitting by the States, it is a foregone conclusion that States could not submit approvable SIP revisions implementing the increments on Indian lands within their borders. Thus, there is an especially strong reason for EPA to put the necessary revisions to § 52.21 into effect in Indian lands at the same time that the section 166 regulations take effect. On the other hand, this action could make areas in and around Indian reservations less attractive places for development for a time when compared to many other areas, and it is questionable whether Congress ever intended to authorize EPA to create such an uneven pattern of development potential. In light of all this, EPA proposes to insert the necessary revisions to § 52.21 into the SIP's of all States with Indian lands within their borders on the date of promulgation of the section 166 regulations, and to provide that the revisions will be effective in those States one year later. Through this mechanism, the regulations will be implemented without delay. EPA, however, solicits comment on this and any other implementation issues.

b. Inclusion of Nitrogen Dioxide Increment Analysis in Applications. The second timing issue involves the date after which PSD permit applicants must submit a nitrogen dioxide increment analysis. The increment analysis is used by the reviewing agency to determine whether the applicant would cause or contribute to exceedances of the

increment. Construction of proposed sources which would do so is prohibited. These analyses rely in part on a determination of emissions changes which have occurred since the baseline date(s) for an area. The longer the time between a baseline date and the first increment analysis, the more difficult it is to locate and review old records and complete an inventory of emissions as of that baseline date. This is one of the difficulties that would result from a baseline date established in the past (e.g., 1980).

Likewise, even if a contemporaneous baseline date (e.g., date of proposal or promulgation, effective date, etc.) is promulgated, applicants and States will find it more difficult to recreate a 1988 emissions inventory in 1990 than in 1988. Thus, there is some risk in "starting the clock" on increment consumption and then allowing new sources to construct without determining the effect of these sources on the newly established increment. A State could discover in 1990 that it had unknowingly allowed increment exceedances to occur in an area and would then be faced with developing a retrofit control program to correct the exceedances.

States have three main options:

- (1) Require all PSD permit applications to contain the nitrogen dioxide increment analysis after the major source baseline date.
- (2) Require the increment analysis in permits submitted after the effective date of the regulation (12 months after promulgation).
- (3) Require the analysis only for PSD permits submitted after the nitrogen dioxide program has been approved or is being implemented.

The EPA would require States to adopt the third option as a minimum. This would require the analysis only where the program is being implemented because, until that time, it is not mandatory that the analysis be utilized by the reviewing agency under section 166. However, since all major source construction after the major source baseline date consumes increment, EPA would strongly encourage States to require the analysis for informational purposes for applications submitted after the major source baseline date.

In addition, sources and applicants should recognize the importance of determining and retaining emissions and other data essential for calculating increment consumption. Also, it should be noted that applications for sources which significantly impact areas where the nitrogen dioxide increment program is being implemented must include the increment analysis, even if the State in

which the source locates has not yet implemented the program.

2. Increment Analysis. The basic components of a nitrogen dioxide increment analysis are identical to the increment analyses for particulate matter and sulfur dioxide that are required under existing PSD regulations. This demonstration is based on dispersion modeling of incremental emissions of nitrogen oxides in accordance with EPA's "Guideline on Air Quality Models (Revised)," July 1986. The nitrogen dioxide increment demonstration differs from particulate matter and sulfur dioxide increment demonstrations in the development of the emission inventory because of the importance of mobile sources, and in the treatment of atmospheric transformations of the pollutant in dispersion modeling.

a. Emission Inventories. There are three main differences between the emissions inventories for the particulate matter and sulfur dioxide increments and the inventories that will be required for nitrogen oxides.

First, regulatory agencies have generally not required PSD applicants to consider mobile source emissions in increment analyses for particulate matter and sulfur dioxide in the past. However, unlike particulate matter and sulfur dioxide, and as discussed previously in the urban area analysis, mobile sources can greatly influence the amount of nitrogen dioxide increment available in an area and must be considered. A large portion of nitrogen oxides emissions are from mobile and area sources that are not subject to permit requirements and do not have "allowable" levels. The development of an emission inventory based only on permitted allowable emissions would not reflect all of the emissions that must be accounted for in the implementation of the nitrogen dioxide increment. Further, many SIP's only specify allowable nitrogen oxides emission rates for certain source types.

Second, the emission inventory requirements for the nitrogen dioxide increment analyses are different from those needed for particulate matter and sulfur dioxide. Inventories of actual emissions are essential for proper determination of available nitrogen dioxide increment over time. The reason for this difference is that the proposed nitrogen dioxide increment is an annual average while the particulate matter and sulfur dioxide increments also include short-term averages. Short-term averages can often be modeled using allowable emission rates, which are not appropriate for annual averages

¹ Inasmuch as it has already been 10 years—during which those States without approved PSD SIP programs have failed to produce their own programs—it appears unlikely that they will prepare an approvable PSD SIP within 21 months of promulgation of the nitrogen dioxide increments. One position EPA is considering is to amend § 52.21 as of the effective date of the nitrogen dioxide increments unless, before that date, the State informs EPA, in writing through an authorized representative, that it intends to submit a PSD SIP for approval within 21 months of promulgation of the increments.

because, under the guideline, annual averages assume continuous full load operation.

If a retroactive baseline date is chosen, such as 1980, the determination of the baseline inventory of actual nitrogen dioxide concentrations would be further complicated because the inventory would have to be based on historical data (e.g., actual emissions for a prior year, such as 1980 or 1983) which may not be readily available, rather than on contemporary data (1988 and beyond). This problem would be aggravated if minor and area sources are included in the inventory. In addition, if a prior date (e.g., 1980) is chosen and actual emissions from minor and area sources are included in the inventory, a few areas of the country could be in violation of the increment when the nitrogen oxides PSD regulation takes effect (e.g., Prudhoe Bay, Alaska). This violation would not necessarily be revealed through a case-by-case review of PSD permit applications alone and EPA anticipates that it would require States to examine areas which have experienced high growth since 1980 for possible increment exceedances. Exceedances of the nitrogen dioxide increment would, in turn, require revision of the SIP to remedy the existing exceedances and to prevent future exceedances.

Third, the emissions inventories are typically in terms of total nitrogen oxides, while the proposed increment is in terms of nitrogen dioxide. This distinction also relates to the dispersion modeling issues discussed below, since assumptions may have to be made about the ratio of nitrogen dioxide to total nitrogen oxides and the rate of conversion of nitrogen oxides to nitrogen dioxide. Some sources may account for nitrogen dioxide emissions explicitly.

b. *Dispersion Modeling.* Under the proposed rules, PSD applicants will be required to calculate the increment consumed due to the construction of major new or modified stationary sources, in conjunction with all other applicable emission increases and decreases. Increases caused by the proposed new source, as well as increases and decreases at other stationary sources, will generally be based on mathematical dispersion models. The EPA's "Guideline on Air Quality Models (Revised)," July 1986, lists the recommended air quality modeling techniques for estimating air quality impacts of PSD sources and is incorporated by reference in 40 CFR 51.166 and 52.21.

Due to the reactive nature of nitrogen oxides, assumptions regarding the

conversion of nitrogen oxides to nitrogen dioxide are required when modeling, unless suitable photochemical models are used. Because of this limitation, the recommended modeling approach in the guideline for determining annual average concentrations of nitrogen dioxide is a three-tiered screening procedure. The initial screen is based on the use of an appropriate Gaussian model (from Appendix A of the guideline) and assumes total conversion of nitrogen oxides to nitrogen dioxide. If the concentration determined by this initial screen exceeds the increment, then the ozone limiting method (OLM) may be applied to account for a more realistic conversion rate of nitrogen oxides to nitrogen dioxide. Application of the OLM using annual average ozone concentrations to "limit" the conversion of nitrogen oxides to nitrogen dioxide constitutes the second-level screen, while use of the OLM on an hourly basis with hourly ozone data and hourly background nitrogen dioxide is the third-level screen. More refined techniques may be considered on a case-by-case basis, but should consider individual quantities of nitrogen oxides and nitrogen dioxide emissions, atmospheric transport and dispersion, and site-specific atmospheric transformation of nitrogen oxides to nitrogen dioxide.

The PSD applications submitted for major new sources and major modifications after the minor source baseline data has been triggered need to consider consumption of the nitrogen dioxide increment by mobile sources. For modeling the impact of mobile sources, a necessary first step is preparation of the emission inventory. Preliminary emission estimates should be made with the MOBILE 4 model, soon to be released by EPA's Office of Mobile Sources. This model uses vehicle miles traveled and speed data (with default values assumed for other model inputs) for each major highway link. After the minor source baseline date has been triggered, future PSD applicants should determine emissions based on the average tons per year for the 2 years prior to the permit application. If these 2-year averaged emissions are less than the baseline concentration year emissions, then mobile sources will not consume nitrogen dioxide increment, but rather will expand the increment available. In this case, mobile sources can conservatively be ignored when calculating increment consumption.

If mobile source emissions increase, however, the following approach is suggested to determine nitrogen dioxide increment expansion. For most urban

area analyses, localized areas of high ambient nitrogen dioxide concentrations need not be considered, given the annual average basis of the increment (which tends to smooth concentration gradients). Consequently, mobile sources can be modeled as area sources, with grid squares on the order of 1 kilometer on a side. Uniform emissions should be assumed over the entire highway link. Mobile source emissions should be allocated to each area source grid square based on the portion of each highway link within each grid square. The area sources should be modeled consistent with the procedures recommended in the guideline.

If local areas of high ambient nitrogen dioxide concentrations are expected, then the modeling approach should be modified in the vicinity of these localized areas. The mobile source emissions in these areas should be modeled as line sources. Since the guideline does not contain a preferred long-term line source model (CALINE 3 applies only for short-term averages), one of the available long-term guideline models should be used, such as the Industrial Source Complex Long Term (ISCLT) model. A series of volume sources should be used in ISCLT to approximate a line source for each highway segment. A greater spatial resolution in emissions is needed to ensure a more accurate concentration estimate for such localized areas. The line source results (based on the inventory in the localized area of high ambient nitrogen dioxide concentrations) should then be added to the area source results (based on the inventory for the remainder of the study area) at the same receptor(s) for the same year(s) of meteorology. Since experience with the ozone limiting method to account for nitrogen oxides to nitrogen dioxide conversion in the atmosphere has been limited, EPA will consider the need for additional guidance on dispersion modeling for the nitrogen dioxide increment prior to the effective date of the proposed regulation.

c. *Increment Violations and Enforcement.* The adequacy of SIP regulations and procedures for enforcement of the increment also becomes particularly acute for a nitrogen dioxide increment. Currently, violations of PSD increments are addressed through revisions to the SIP. States are required by 40 CFR 51.166(a)(4) to review the adequacy of SIP requirements periodically, or within 60 days of learning that an applicable increment is being violated. If the State or EPA determines that an applicable increment is being violated, the

applicable SIP must be revised within 60 days (or later as prescribed by EPA) to correct the violation pursuant to the requirements of 40 CFR 51.166(a)(3).

A large portion of nitrogen oxides emissions are not regulated by State or local rules. Some of these unregulated emissions are from area sources such as mobile sources and residential and commercial heating units. Others are larger industrial sources for which no SIP regulations for nitrogen oxides emission rates have been developed. This means that, in contrast to particulate matter and sulfur dioxide, the existing SIP regulations have little direct control over much of the nitrogen oxides emissions in an area.

To overcome this limitation, the procedures for compiling an inventory of increment-consuming emissions based on actual emissions would need to be included in revisions to SIP's presented to EPA for review. Similarly, procedures for detecting and addressing increment violations, particularly with reference to minor and area sources, need to be developed in the SIP revision process. The responsibility for developing these procedures rests with the State regulatory agencies. In the past, States have experienced difficulty in incorporating actual emissions into their inventories. The EPA is considering the need for guidance on the development of emissions inventories for use by the State agencies in the PSD program.

The EPA is specifically requesting comments on the impact of the selection of a major source baseline date and a trigger date on the development of inventories of actual emissions of nitrogen oxides. The EPA further requests comment on the issues involved in addressing both future and retroactive violations of SIP requirements. This is particularly important relative to options that are open to States to address violations of the increment that occur on the effective date of these regulations if a past baseline date is promulgated.

C. Alternative Implementation Methods

On May 7, 1980, the EPA published an ANPR which gave notice of the Agency's intent to develop PSD regulations for the remaining criteria pollutants, including nitrogen oxides (45 FR 30088). In the ANPR, 10 "regulatory alternatives" were identified which EPA was then considering for incorporation into the PSD regulations for one or more of these pollutants. These alternatives were: (1) The use of emission controls only, (2) the use of ambient air quality increments, (3) emission density zoning, (4) inventory management, (5) statewide emission limitations, (6) avoidance of

co-located hydrocarbon and nitrogen oxides sources, (7) emission fees, (8) marketable permits, (9) de minimis levels, and (10) development of BACT for transportation sources. No further action was taken following the publication of this notice to develop these alternatives or to determine their potential for meeting the goals and purposes of the PSD program.

With the initiation of this rulemaking, EPA determined that the appropriate format for the nitrogen oxides PSD regulations is the development and use of ambient air quality increments. This format is similar to the system already in effect for particulate matter and sulfur dioxide. In developing the increments for nitrogen dioxide, the EPA has tentatively concluded that no other alternative protects air quality as effectively as a limit on ambient air concentration increases.

In this respect, then, the EPA believes that 9 of the 10 "regulatory alternatives" are, perhaps, more appropriately considered as potential methods, or surrogates, for implementing an ambient air quality increment, than as alternative forms of a section 166 regulation itself.

However, these other measures might be preferred by the States in formulating plans for implementing its PSD program. Under Section 166, States may adopt strategies other than increments for nitrogen oxides under Section 166 if those strategies, taken as a whole, accomplish the purposes of this provision. In developing such programs, the State would be required to demonstrate that the implementation of such an alternative system would yield a program at least as effective as the program established by EPA through this rulemaking. Further, periodic review of the effectiveness of the alternative program would be required for the State to maintain the program. The EPA is inclined to consider such alternatives as being more complicated than the basic approach of case-by-case modeling already in use. However, it is possible that some combination (e.g., no modeling below a certain emission density, but modeling after that density is reached) may prove worthwhile, compared to case-by-case modeling for every source. Or, that a marketable permit approach might replace some of the cumbersome administrative process that are likely to accompany a "first-come, first-served" approach and provide a more powerful financial incentive for the development of superior technologies. Therefore, EPA solicits comments on these implementation measures, on how their equivalence to the increment approach

might be established, and on their potential role in State PSD programs.

IV. Administrative Requirements

A. Public Hearing

A public hearing will be held to discuss the proposed regulations in accordance with section 307(d)(5) of the Act. Persons wishing to make oral presentations should contact EPA at the address given in the **ADDRESSES** section of this preamble. Oral presentations will be limited to 15 minutes each. Any member of the public may file a written statement with EPA before, during, or within 30 days after the hearing. Written statements should be addressed to the Central Docket Section address given in the **ADDRESSES** section of this preamble.

A verbatim transcript of the hearing and written statements will be available for public inspection and copying during normal working hours at EPA's Central Docket Section in Washington, DC (see **ADDRESSES** section of this preamble).

B. Docket

The docket for this regulatory action is A-87-16. The docket is an organized and complete file of all the information submitted to or otherwise considered by EPA in the development of this proposed rulemaking. The principal purposes of the docket are: (1) To allow interested parties to identify and locate documents so that they can effectively participate in the rulemaking process, and (2) to serve as the record in case of judicial review (except for interagency review materials [section 307(d)(7)(A)]). The docket is available for public inspection at EPA's Central Docket Section, which is listed under the **ADDRESSES** section of this notice.

C. Reference Documents

All the documents referenced in this preamble fall into one of two categories. They are either reference materials which are considered to be generally available to the general public, or they are memoranda and reports prepared specifically for this rulemaking. Both types of documents can be found in docket number A-87-16.

Documents which are classified as reference material are as follows:

1. Air Quality Criteria for oxides of Nitrogen (EPA 600/8-82-026).
2. Guideline on Air Quality Models (Revised) (July 1986) and Supplement A (1987) (EPA 450/2-78-027R).
3. Retention of the National Ambient Air Quality Standards for Nitrogen Dioxide (50 FR 25536), June 19, 1985.
4. Advanced Notice of Proposed Rulemaking: Prevention of Significant Deterioration for Hydrocarbons,

Carbon Monoxide, Nitrogen Oxides, Ozone, and Lead (PSD Set II) (45 FR 30038), May 7, 1980

5. Memorandum of Opinion and Order, United States District Court, Northern District of California, No. C-86-0971-WWS, April 8, 1987

6. Industrial Source Complex (ISC) Dispersion Model Users Guide—2nd Edition (EPA 450/4-86-005)

The memoranda and reports that were prepared specifically for this rulemaking are contained in a 2-part document entitled "Technical Support for NO_x PSD Rule" and placed in the docket. The following referenced reports are contained in Volume 1:

1. Model Plant Emission Reduction and Control Costs Impacts
2. Economic Impact Assessment of the Proposed NO₂ Increment Regulation
3. Urban Area Air Quality Impact Analysis

D. Office of Management and Budget Review

Under Executive Order 12291 (hereafter referred to as the Order), EPA must judge whether a regulation is "major" and, therefore, subject to the requirement of a Regulatory Impact Analysis. This proposed regulation is not major because it 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 major. The annualized costs in the fifth year after the proposed regulations would go into effect would be \$63.7 million, less than the \$100 million established as the first criterion for a major regulation in the Order. Estimated price increases of 0 to 3.7 percent associated with the proposed regulations would not be considered a "major increase in costs or prices" specified as the second criterion in the Order. The economic analysis of the proposed regulations' effect on the industry 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 (the third criterion in the Order).

This regulation was submitted to the Office of Management and Budget (OMB) for review as required by Executive Order 12291. Any written comments from OMB to EPA and any EPA responses to those comments will be included in Docket A-87-16.

The information collection requirements in this proposed regulation have been submitted for approval to OMB under the Paperwork Reduction Act of 1980, 44 USC 3501 *et. seq.* Comments on these requirements should be submitted to the Office of

Information and Regulatory Affairs of OMB, marked "Attention, Desk Office for EPA," as well as to EPA. The final rule will respond to any OMB or public comments on the information collection requirements.

E. Federalism Implications

Under Executive Order (Order) 12612, EPA must determine if a rule has federalism implications. Federalism implications refers to substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. For those rules which have federalism implications, a Federalism Assessment is to be made.

The Order also requires that agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. The Order provides for preemption of State law however if there is a clear Congressional intent for the agency to do so. Any such preemption, however, is to be limited to the extent possible.

The development of section 166 regulations for nitrogen dioxide is a statutory, non-discretionary duty. However, States may adopt strategies other than increments for NO_x under section 166 if the strategies, taken as a whole, accomplish the statutory purposes. In addition, the regulations that EPA is proposing will allow States a full opportunity to develop their own approvable methods of implementing the proposed increments. Finally, the EPA will implement its own increments regulations only for those States that do not develop their own approvable regulations. Congressional intent for preemption of State law is clear in such cases.

Unfortunately, because of the limited time allowed under the Court's order for the development of these increments, it was not possible to consult with States prior to this proposal. However, State comments on the proposal will be fully considered prior to promulgation of final rules. For these reasons a Federalism Assessment has not been prepared.

F. Economic Impact Assessment

Section 317 of the Act requires the Administrator to prepare an economic impact assessment for any regulations under Part C of Title I (relating to PSD of air quality). An economic impact assessment was prepared for the proposed PSD increments for nitrogen

dioxide and for other alternative increments. The requirements of this section were considered in the formulation of the proposed increments to ensure that they would represent the best system for the PSD of air quality, considering costs. The economic impact assessment is included in the docket.

G. Regulatory Flexibility Act Compliance

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this rule, if promulgated, will not have a significant economic impact on a substantial number of small business entities (see 46 FR 8709).

List of Subjects

40 CFR Part 51

Air pollution control, intergovernmental relations, Reporting and recordkeeping requirements, Nitrogen dioxide, State implementation plans.

40 CFR Part 52

Air pollution control, Nitrogen dioxide.

Dated: February 2, 1988.

A. James Barnes,
Acting Administrator.

For the reasons set forth in the preamble, it is proposed that Part 51 of Chapter I of the Title 40 of the Code of Federal Regulations be amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for Part 51 continues to read as follows:

Authority: Secs. 101(b)(1), 110, 160-169, 171-178, and 301(a) of the Clean Air Act 42 U.S.C. 7401(b)(1), 7410, 7470-7479, 7501-7508, and 7601(a).

2. In § 51.166, paragraphs (b)(3)(iv), (b)(13)(i)(b), (b)(13)(ii)(a), (b)(14)(i), (f)(1)(v), (f)(4)(i) and the last sentence of paragraph (p)(4) are revised and new entries are added under the heading "Nitrogen dioxide" in the tables in paragraphs (c) and (p)(4) to read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

(b) * * *

(3) * * *

(iv) An increase or decrease in actual emissions of sulfur dioxide, particulate matter, or nitrogen oxides which occurs before the applicable baseline date is

creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(13) * * *

(i) * * *

(b) The allowable emissions of major stationary sources which:

(1) In the case of particulate matter or sulfur dioxide, commenced construction before January 6, 1975, but were not in operation by the applicable baseline date.

(2) In the case of nitrogen oxides, commenced construction before February 8, 1988, but were not in operation by the applicable baseline date.

(ii) * * *

(a) Actual emissions from any major stationary source which:

(1) In the case of particulate matter or sulfur dioxide, commenced construction after January 6, 1975;

(2) In the case of nitrogen oxides, commenced construction after February 8, 1988;

(14)(i) "Baseline date" means the earliest date after the date specified below on which the first complete application is submitted by a major stationary source or major modification subject to, and under the provisions of, the requirements of 40 CFR 52.21 or the requirements of regulations approved pursuant to 40 CFR 51.166 as follows:

(a) For particulate matter and sulfur dioxide, the baseline date is established on the earliest date after August 7, 1977.

(b) For nitrogen oxides, the baseline date is established on the earliest date after February 8, 1988.

(c) * * *

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Class I	
Nitrogen dioxide: Annual arithmetic mean.....	2.5
Class II	
Nitrogen dioxide: Annual arithmetic mean.....	25.0
Class III	
Nitrogen dioxide: Annual arithmetic mean.....	50.0

(f) * * *

(1) * * *

(v) Concentrations attributable to the temporary increase in emissions of sulfur dioxide, particulate matter, or nitrogen oxides from stationary sources which are affected by plan revisions approved by the Administrator as meeting the criteria specified in paragraph (f)(4) of this section.

(4) * * *

(i) Specifies the time over which the temporary emissions increase of sulfur dioxide, particulate matter, or nitrogen oxides would occur. Such time is not to exceed 2 years in duration unless a longer time is approved by the Administrator.

(p) * * *

(4) * * * If the Federal land manager concurs with such demonstration and so certifies to the State, the reviewing authority may: *Provided*, that applicable requirements are otherwise met, issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, particulate matter, and nitrogen oxides would not exceed the following maximum allowable increases over baseline concentration for such pollutants:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Nitrogen dioxide: Annual arithmetic mean.....	25

For the reasons set out in the preamble, it is proposed that Part 52 of Chapter I of Title 40 of the Code of Federal Regulations be amended as follows:

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

Authority: 42 U.S.C. 7401-7642.

2. In 52.21, paragraphs (b)(3)(iv), (b)(13)(ii)(b), (b)(13)(ii)(a), (b)(14)(i), (f)(1)(v), (f)(4)(i) and the last sentence of paragraph (p)(5) are revised and new entries are added under the heading "Nitrogen dioxide" in the tables in paragraphs (c) and (p)(5) to read as follows:

§ 52.21 Prevention of significant deterioration of air quality

(b) * * *

(3) * * *

(iv) An increase or decrease in actual emissions of sulfur dioxide, particulate matter, or nitrogen oxides which occurs before the applicable baseline date is creditable only if it is required to be considered in calculating the amount of maximum allowable increases remaining available.

(13) * * *

(i) * * *

(b) The allowable emissions of major stationary sources which:

(1) In the case of particulate matter or sulfur dioxide, commenced construction before January 6, 1975, but were not in operation by the applicable baseline date.

(2) In the case of nitrogen oxides, commenced construction before February 8, 1988, but were not in operation by the applicable baseline date.

(ii) * * *

(a) Actual emissions from any major stationary source which:

(1) In the case of particulate matter or sulfur dioxide, commenced construction after January 6, 1975.

(2) In the case of nitrogen oxides, commenced construction after February 8, 1988; and

(14)(i) "Baseline date" means the earliest date after the date specified below on which the first complete application is submitted by a major stationary source or major modification subject to, and under the provisions of, requirements of 40 CFR 52.21 or the requirements of regulations approved pursuant to 40 CFR 51.166 as follows:

(a) For particulate matter and sulfur dioxide, the baseline date is established on the earliest date after August 7, 1977.

(b) For nitrogen oxides, the baseline date is established on the earliest date after February 8, 1988.

(c) * * *

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Class I	
Nitrogen dioxide: Annual arithmetic mean.....	2.5

Pollutant	Maximum allowable increase (micrograms per cubic meter)
Class II	
* * * * *	
Nitrogen dioxide: Annual arithmetic mean.....	25.0
Class III	
* * * * *	
Nitrogen dioxide: Annual arithmetic mean.....	50.0
* * * * *	
(f) * * *	
(1) * * *	
* * * * *	

(v) Concentrations attributable to the temporary increase in emissions of sulfur dioxide, particulate matter, or

nitrogen oxides from stationary sources which are affected by plan revisions approved by the Administrator as meeting the criteria specified in paragraph (f)(4) of this section.

* * * * *

(4) * * *

(i) Specify the time over which the temporary emissions increase of sulfur dioxide, particulate matter, or nitrogen oxides would occur. Such time is not to exceed 2 years in duration unless a longer time is approved by the Administrator.

* * * * *

(p) * * *

(5) * * * If the Federal land manager concurs with such demonstration and he so certifies, the State may authorize the Administrator, *provided* that the applicable requirements of this section

are otherwise met, to issue the permit with such emission limitations as may be necessary to assure that emissions of sulfur dioxide, particulate matter, and nitrogen oxides would not exceed the following maximum allowable increases over baseline concentrations for such pollutants:

Pollutant	Maximum allowable increase (micrograms per cubic meter)
* * * * *	
Nitrogen dioxide: Annual arithmetic mean.....	25

* * * * *

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