

to all applicable Federal, State, and local laws: in the SE ¼ of sec. 19, and the NE ¼ of sec. 30, T. 37 N., R. 12 E., WM, approximately 200 yards northwest of State Route 20 near mile marker 119, the area known as the Newhalem rifle range.

Dated: October 16, 1989.

Maryanne C. Bach,

Acting Assistant Secretary for Fish and Wildlife and Parks.

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[AD-FRL-3526-5]

Requirements for Implementation Plans: Surface Coal Mines and Fugitive Emissions; Approval and Promulgation of Implementation Plans

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action.

SUMMARY: The EPA is taking final action under section 302(j) of the Clean Air Act (Act) on a rulemaking proposed October 26, 1984 (49 FR 43211) to add surface coal mines (SCM's) to the list of source categories for which fugitive emissions are included in major source threshold applicability determinations (TAD's) regarding EPA's new source review (NSR) permitting requirements, which includes prevention of significant deterioration (PSD) permitting requirements. The EPA is also taking final action to resolve issues concerning the review of fugitive emissions from surface coal mines which are not specifically listed under section 302(j) but which may be subject to review under certain limited circumstances, such as when collocated with other major sources.

EFFECTIVE DATE: December 28, 1989.

ADDRESSES: A docket, number A-84-33, containing information considered by EPA in the development of this rulemaking is available for public inspection between 8:30 a.m. and 3:30 p.m., weekdays, at EPA's Air Docket (LE-131), Room M-1500, Waterside Mall, 401 M Street SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: William Lamason at Mail Drop 15, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, telephone (919) 541-5374 (FTS 629-5374).

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

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I. Summary of Today's Action

Today, EPA is taking final action on an October 26, 1984 rulemaking proposal (49 FR 43211) to "list" fugitive emissions from SCM's and on related fugitive dust emissions issues. The "list" referred to, found at 40 CFR 51.166(b)(1)(iii) and 52.21(b)(1)(iii), is of those stationary source categories for which fugitive emissions are included in determining whether a prospective new source or modification is "major." New major stationary sources and major modifications to existing major stationary sources are required to obtain major source NSR permits. The EPA is also taking final action to resolve issues concerning the review of fugitive emissions from SCM's which are not specifically listed but which are subject to review under certain limited circumstances.

In this notice, EPA announces its conclusion that SCM's should not be added to the list of sources for which fugitive emissions are considered in TAD's for major source NSR (including PSD) permits. The EPA notes that the extensive authorities and regulations administered by the Department of the Interior (DOI) under the Surface Mining Control and Reclamation Act (SMCRA) and the Federal Coal Management Program (FCMP) adequately address the potential air quality problems in natural resource areas of special concern that a decision to list SCM's affecting these areas would seek to address. Although EPA has considered the effect of DOI authorities in deciding not to list SCM's, EPA is not granting preemptory authority to DOI for the control of air pollution from SCM's. The Act still requires State implementation plans

(SIP's) to contain emission limitations, permit programs, and other measures to ensure that ambient standards and PSD increments are attained and maintained and that there is no manmade visibility impairment in any mandatory Federal Class I area (see sections 110, 161, 169A, and 172 of the Act).

Today's notice that EPA will not list SCM's does not preclude EPA from reconsidering listing SCM's at a later date, if sufficient evidence is provided to EPA of a threat of reduced visibility or other adverse air quality impacts in national parks, wilderness areas, national memorial parks, and international parks that are Class I PSD areas. Such evidence should also show that DOI authorities will not protect visibility and other air quality values within these areas.

The EPA also announces that it is maintaining the status quo regarding inclusion of fugitive emissions from SCM's where SCM's are collocated with listed sources or otherwise presently subject to NSR regulations. The EPA believes that emissions from SCM's will be subject to review in this fashion only in limited circumstances, if at all, since SCM's themselves are not listed. The EPA is also retaining the interpretation that the definition of major source in section 302(j) of the Act does not extend to modifications and would therefore not affect SCM's collocated with an existing major source undergoing modification.

II. Background

This section briefly summarizes the events leading to today's action but does not repeat in detail previous discussions already published in the *Federal Register*. The reader is referred to these previous notices, specifically August 25, 1983 (48 FR 38742), October 26, 1984 (49 FR 43202 and 43211), and February 28, 1986 (51 FR 7090), for a more detailed discussion.

A. The PSD and NSR Applicability Determinations and Fugitive Emissions—1. Scope of Applicability. The review and permitting requirements of PSD provisions in Part C of the Act apply to "major" new stationary sources and major modifications to existing major sources. Similar NSR requirements under Part D of the Act apply to major sources locating in designated "nonattainment" areas. The EPA and State permitting authorities conduct emissions assessments to determine whether a source is major and therefore subject to the PSD and NSR requirements of Parts C and D of the Act. The EPA refers to these assessments as TAD's. Section 302(j) of

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

Any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant (including any major emitting facility or source of fugitive emissions of any such pollutant, as determined by rule by the Administrator).¹

The EPA regulations define "fugitive emissions" as emissions that could not reasonably pass through a stack or other functionally equivalent opening. (See 40 CFR 52.21(b)(20).)

2. *Importance of Fugitive Emissions.* Sources in many types of industrial categories exceed major source thresholds solely by virtue of their stack emissions. Other source categories, however, such as SCM's, have relatively few stack emissions. Since a source could be major if fugitive emissions are included in TAD's, but nonmajor if fugitive emissions are not included, treatment of fugitive emissions for applicability purposes can be important. A determination that a source is or will be "major" subjects a project to all PSD or nonattainment permit requirements and/or a construction ban under section 110(a)(2)(I) of the Act.²

3. *Mines, Strip Mines, and SCM's.* The terms "mine," "strip mines," and "SCM's" are used in this notice to refer to mining operations. Today's action is limited to SCM's, which were proposed for listing in October 1984 (49 FR 43211). The terms mines and strip mines are more general but include SCM's. Strip mining may refer to open surface operations for mining coal and other materials. Mines may refer to all mines, including underground material extraction. Although today's action focuses on SCM's, comments and discussion may refer to issues applicable to other mines. For example, some DOI regulations pertain to all mining activities, above and below ground.

B. *Regulatory Basis—1. Clean Air Act Section 302(j).* Following enactment of

¹ For PSD purposes, section 169(l) effectively modifies section 302(j) by establishing the threshold amount of emissions as 100 tons per year for certain designated source categories and 250 tons per year for sources in other categories.

² A threshold applicability determination is distinct from a pollutant applicability determination, which is a determination of which pollutant streams from a "major" source or "major" modification are subject to the substantive requirements of the regulations in question. The PSD requirements, for instance, apply to each regulated pollutant that a "major" source emits in "significant" amounts, e.g., 40 CFR 52.21(j)(1984). The regulations do not distinguish between stack and fugitive emissions for this purpose. Construction ban regulations are codified at 40 CFR 52.24.

the Act Amendments of 1977, which added part C and Part D, EPA issued in 1978 and 1979 various regulations and guidelines under 40 CFR parts 51 and 52 to implement these new provisions. In each action, EPA assumed without discussion that the fugitive emissions of a source or modification were to be included in quantifying its emissions rate in order to determine whether it is "major" (see, e.g., 43 FR 26382-83, 26403-04 (June 19, 1978)). The EPA regarded the Part C definition of "major emitting facility" as exclusively governing the meaning of that term for PSD purposes. Since that definition does not distinguish between fugitive and nonfugitive emissions, EPA concluded that fugitive emissions are as eligible for inclusion in the threshold determinations of PSD applicability as nonfugitive emissions.

One of the consequences of this assumption was that sources of predominantly fugitive emissions, such as SCM's, could be "major" and, hence, subject to PSD and NSR permitting requirements or the construction ban.

2. *Alabama Power v. Costle.* In December 1979, the U.S. Court of Appeals for the District of Columbia Circuit held that EPA's interpretation of "major emitting facility" in Part C was incorrect, and, thus, EPA may require the inclusion of fugitive emissions in TAD's for projects in a particular category only if it first satisfied the rulemaking requirement of section 302(j) as to that category (*Alabama Power Company v. Costle*, 636 F.2d 323, 369). The court did not specify what it thought EPA had to consider in such a rulemaking. It did say, however, that:

The EPA's regulation of fugitive emissions has been of special concern to the mining and forestry industries which contend, without serious opposition, that they are incapable of meeting the strict limitations on the emission of particulate matter set by the PSD provisions. * * *

The legislative history of this rulemaking provision [Section 302(j)] is sparse, but it may well define a legislative response to the policy considerations presented by the regulation of sources where the predominant emissions are fugitive in origin, particularly fugitive dust. Whatever the motivation of the "rule" provision of 302(j), its existence is unmistakable. Even if the origin of this provision is fortuitous, the provision may well be welcomed as serendipitous, for it gives EPA flexibility to provide industry-by-industry consideration and appropriate tailoring of coverage. [id.]

3. *August 7, 1980 Rulemaking.* In response to the U.S. Court of Appeals for the District of Columbia Circuit ruling in *Alabama Power Company v. Costle*, EPA proposed amendments to

both the PSD and nonattainment regulations that would comply with the rulemaking requirements of section 302(j) by excluding fugitive emissions from TAD's except as to certain specifically listed categories of sources (e.g., 44 FR 51924, 51948 (September 5, 1979)). Most listed categories corresponded generally to those in the Part C definition of "major emitting facility;" the remaining categories encompassed any source subject on August 7, 1980 to an emission standard under either section 111 or 112 of the Act, 42 U.S.C. 7411 or 7412. [The SCM's were not among the listed categories (id. at 51931)]. The EPA explained that it was proposing to require the inclusion of fugitive emissions for the listed categories because (1) emissions from sources in those categories deteriorate air quality regardless of how they emanate, and (2) the Agency's experience in quantifying fugitive emissions from such sources was in general greater than its experience in quantifying fugitive emissions from other sources (id.).

Numerous issues were raised in the course of proposal. In response, EPA maintained its initial interpretation of section 302(j) as reflected in the September 1979 proposal and concluded that the rulemaking it was conducting had afforded sources the opportunity to comment on the proposed inclusion of fugitive emissions in threshold calculations (id. at 52961). Hence, in August 1980, EPA promulgated the substance of the amendments it had proposed (e.g., 45 FR 52739).³

4. *Chemical Manufacturer's Association v. EPA and Settlement Agreement.* In late 1980, the American Mining Congress (AMC) and other industry organizations (collectively, the "industry petitioners") petitioned the D.C. Circuit to review the provisions that require the fugitive emissions of projects in the listed categories to be taken into account in TAD's. These challenges were subsequently consolidated into *Chemical Manufacturer's Association v. EPA*, No. 79-1112 (D.C. Circuit) (CMA).

The industry petitioners argued that EPA, before it established those

³ The EPA simultaneously promulgated a wide array of other changes to the various new source review regulations in effect at the time; not only the Part 51 and 52 PSD regulations, the Offset rule, and the construction ban, but also 40 CFR 51.165(a), which set forth the requirements of the Part D permit program and which EPA had first promulgated in May 1980 (45 FR 31307).

The EPA did not include SCM's on the list of categories, although the Sierra Club in its comments had argued for their inclusion.

provisions, should have considered the problems of measuring, modeling, and controlling fugitive emissions that are peculiar to each category and then provided (in the words of the *Alabama Power* opinion): "appropriate tailoring of coverage." They also contended that the Act required the EPA to consider, on an industry-by-industry basis, the social, economic, health, and welfare impacts of including fugitive emissions in TAD's. They suggested that EPA could decline to require the inclusion of fugitive emissions as to a particular category on the grounds that growth in that industry was important to the economy and that the emissions posed low risks to human health and welfare. Finally, the industry petitioners asserted that EPA entirely failed to meet those requirements of the Act [Petitioners Brief on Fugitive Emissions and Certain Other Issues, at 12-19 (February 11, 1981)]. In June 1981, EPA began negotiations with the industry petitioners to settle the issues relating to fugitive emissions in the *CMA* case. In February 1982, EPA entered into a settlement agreement with these petitioners in which it agreed to propose to delete the requirement for including fugitive emissions and to take final action on that proposal. Subsequently, the court granted a stay of the case pending implementation of the agreement. The EPA proposed the change called for in this portion of the agreement on August 25, 1983 (48 FR 38742).

5. *Sierra Club v. Gorsuch*. In addition to challenges by various industry representatives, the Sierra Club and other environmental groups petitioned the D.C. Circuit to review the 1980 regulations, including the provisions relating to fugitive emissions. In response to industry contention that EPA, in requiring the inclusion of fugitive emissions for the listed categories, had failed to conduct the rulemaking the court had contemplated, the Sierra Club countered that EPA, in failing to list SCM's, had acted arbitrarily and capriciously. The court consolidated the industry challenges under *CMA v. EPA* (No. 79-1112), and kept the Sierra Club challenge on its own track.

On August 26, 1983, in response to the Sierra Club petition, the D.C. Circuit ruled that under the logic of its 1980 action, EPA appeared to have no good reason for listing categories without including SCM's (715 F.2d 653). The court subsequently ordered EPA to propose to list or not list SCM's.

6. *October 26, 1984—The "Safety Valve."* In the October 26, 1984 Federal Register, EPA completed its obligations

regarding SCM's under the *CMA* settlement agreement by deciding not to promulgate the fundamental changes proposed in August 1983. The EPA instead determined that its initial 1980 interpretation regarding the nature of the section 302(j) rulemaking requirement was correct (49 FR 43202). On the same day, EPA fulfilled its obligation under *Sierra Club v. Gorsuch* by proposing to list SCM's (49 FR 43211). The EPA characterized congressional intent as requiring EPA to make only two determinations before requiring fugitive emissions to be included in TAD's. For sources in a particular category, EPA must show that: (1) The sources have the potential to degrade air quality significantly, and (2) no unreasonable socioeconomic impacts relative to the benefits would result from subjecting the sources to the relevant PSD or nonattainment programs. Thus, a finding that the sources in a category pose a threat of significant air quality degradation is enough to propose listing, though EPA must consider broader-based objections raised by commenters during the rulemaking before taking final action.

The interpretation of section 302(j) that EPA espoused in 1980 and essentially reaffirmed in 1984 reasonably responds to different congressional intents. A determination by EPA that the sources in a category pose a threat of significant air quality degradation, in effect, establishes a presumption that the sources should be subject to PSD and nonattainment review. This is because the primary purpose of that review is to prevent the construction of new projects that would interfere materially with timely attainment and maintenance of the national ambient air quality standards (NAAQS) and PSD increments. Commenters then may seek to rebut this presumption by producing a record that unreasonable social or economic costs relative to the anticipated benefits would occur if PSD or nonattainment review were applied to a particular category of sources. The EPA's role is to resolve any clash of views and, therefore, engage in a deliberative process that can go far beyond the virtually ministerial decision making that some environmental groups advocate. However, the decision-making process need be extensive only if there are legitimate cost-benefit concerns. Under this interpretation, section 302(j) functions as a useful "safety valve," while at the same time minimizing the expenditure of EPA resources. The EPA's position and reasoning is discussed in further detail in Federal

Register notices published on October 26, 1984 (49 FR 43202) and February 28, 1986 (51 FR 7090).⁴

The October 26, 1984 proposal also reopened the public comment period on the existing list of source categories for which fugitive emissions are included in determining major source status. Further, the notice solicited comment on an interpretive ruling involving section 302(j) of the Act in relation to the review of modifications involving fugitive emissions at sources that are already "major."

7. *AMC Administrative Petition (1984)*. Additional petitions for administrative reconsideration of EPA's October 1984 final action were filed by the AMC, Peabody Holding Co., Inc., and the NCA (collectively, "AMC"). The petitions expressed several concerns related to the prospect that SCM's could be subjected to PSD and NSR even if EPA made a final determination not to list SCM's as such. The industry concerns included the interaction between the definition of "source" for PSD and NSR purposes and the currently listed fugitive emissions source categories, and the applicability of section 302(j) to major modifications. To the extent that SCM's would be indirectly subject to PSD and NSR, mining interests sought regulatory relief, either through a change in the definition of source, or through deletion of certain currently listed fugitive emissions source categories. By letter dated June 28, 1985, EPA granted the AMC petition and stated that EPA would complete its reconsideration, and dispose of the other petitions, in conjunction with its final action on the listing of SCM's. The EPA's disposition of these petitions is set forth later in this notice.

8. *February 28, 1986—Alternatives Proposed for Listing SCM's*. On February 28, 1986 (51 FR 7090), the EPA reopened the public comment period to solicit comments on four possible regulatory alternatives for fugitive emissions from SCM's. Alternative I maintained the status quo (no listing of SCM's). Alternative II would list all new SCM's but "grandfather" (i.e., not count) increment consumption for existing mines.⁵ Alternative III would list all

⁴ Both industry and environmental groups petitioned for judicial review of EPA's October 1984 final action setting the criteria for rulemaking under section 302(j). Those cases were consolidated as *National Coal Association (NCA) v. EPA*, No. 84-1609 (D.C. Cir.), and are still pending as of this date.

⁵ Increments published in 40 CFR 52.21(c) are the allowable maximum increase in pollutant concentrations over baseline concentrations—ambient levels that existed in an area on the baseline date after August 7, 1977 as defined under 40 CFR 52.21(b) (13 through 15).

new SCM's and not grandfather increment consumption for existing mines. Alternative IV would list only SCM's impacting Class I and mandatory Class II areas.⁶ The EPA also proposed to list SCM's unless public comment affirmatively demonstrated that unreasonable socioeconomic impacts would result.

The notice announced that the public comment period with respect to the existing list of source categories and to the relevance of section 302(j) to review of modifications was closed and was not reopened. However, EPA solicited any additional comments on the SCM proposal, the regulatory impact analysis (RIA) of the possible alternatives, and other generic fugitive emissions issues not specifically foreclosed. The EPA noted that other programs, notably the one operated by the DOI pursuant to the SMCRA, 30 U.S.C. 1201 et seq., could address similar problems. The EPA sought comment on the effectiveness of such programs in protecting Class I and mandatory Class II areas and requested an analysis of this issue from DOI.

All comments were placed in the official rulemaking docket [Docket No. A-84-33] and made available for inspection and copying at the EPA offices in Washington, DC. The comment period was extended twice, closing on June 30, 1986.

9. *The RIA.* The EPA prepared an RIA for the proposed SCM rulemaking alternatives, in part, to comply with Executive Order 12291, which provides that major rulemakings consider economic consequences. The EPA has broad discretion in its use of the study, however, since the Act requires many other factors to be considered in this rulemaking. The EPA Administrator relies on the entire rulemaking record in making a final decision.

The RIA evaluated the projected consequences of the proposed alternatives to regulating new and modified SCM's as major sources under PSD and NSR. It considered benefits, costs, and general environmental and economic impacts.

The effects of the four possible regulatory alternatives were considered in the RIA by examining potential impacts at several SCM's typical in size and location for selected coal mining regions. Five important coal basins were investigated to determine the impacts of Alternative II: Powder River, San Juan,

Fort Union, Illinois, and Appalachian. Powder River also served as a case study for Alternative III. Impacts of hypothetical mines on Bryce Canyon National Park and Chaco Culture National Historic Park were reviewed relative to Alternative IV. The analysis of costs and benefits for Alternative IV in the RIA was conducted with an assumption that no other regulatory program would protect Class I and mandatory Class II areas from SCM's.

Benefits and costs in these areas were evaluated for the year 1995.⁷ The costs evaluated arise from application of best available control technology and, more importantly, from size limitations in SCM's because of ambient constraints. Benefit categories include mortality, morbidity, and soiling for Alternatives II and III, and visibility for Alternative IV. The study also examined national impacts involving coal price and production, and the cost of electricity.

Costs estimated under Alternative II considerably exceed benefits for the five basins analyzed in the RIA and were considered to be unreasonable relative to the costs and benefits of other alternatives. Factors mostly responsible for these results include: the relatively low ambient particulate matter contribution from SCM's nationally and low background particulate matter concentrations around SCM's, the limited distance from SCM's that ambient impacts occur, and the general absence of populations exposed to SCM particulate matter.

The Powder River Basin estimated costs under Alternative III are also considerably larger than benefits. Furthermore, costs for the Powder River Basin increased rapidly under Alternative III relative to Alternative II because existing SCM's would be regulated under the third alternative. Relative cost estimates would presumably be even larger if the five basins analyzed under Alternative II were analyzed similarly to the one coal basin under Alternative III. Therefore, Alternative III costs also appear unreasonable relative to benefits provided by other available lower cost options. As under Alternative II, the results for Alternative III are explained by such factors as relatively low SCM-induced particulate concentrations, the limited size of the ambient impact area, and the general absence of large populations in the vicinity of SCM's.

Because Alternative IV potentially affects far fewer coal reserves than either Alternatives II and III, a different

cost approach was undertaken. The social costs of removing the lease tracts at Bryce Canyon and Chaco Culture out of available reserves were estimated. Unlike Alternatives II and III, the benefits considered under Alternative IV reflect only visibility benefits to park users. However, the benefits achieved by Alternative IV are highly variable and depend upon assumptions regarding visibility impacts of mining activities after implementation of this alternative. Also, unlike Alternatives II and III, Alternative IV may yield significant additional benefits not addressed in the RIA. In particular, large potential visibility benefits could not be accurately estimated and were therefore excluded. Other difficult-to-estimate benefits, such as reduced mining noise and water pollution, could further increase benefits realized under Alternative IV. The RIA concludes that the results of the analysis for Alternative IV are ambiguous, but that in any event, the costs of Alternative IV are more nearly in balance with potential benefits than is the case with Alternatives II and III which yielded substantial negative net benefits. However, it is unclear that the costs of Alternative IV are reasonable considering that many if not all of the visibility and other benefits which might accrue from PSD and NSR coverage would already be realized through compliance with DOI regulations.

Several factors limit the precision of the RIA. These limitations are discussed in the February 28, 1986 Federal Register and in greater detail in the RIA. The EPA must take account of the RIA limitations and weigh many considerations, including comments on the RIA and proposed alternatives, in making a final decision.

10. *Modified Alternatives.* On May 4, 1987, EPA placed in Docket A-84-33 two additional alternatives based on modifications to Alternative IV. These were identified as Alternatives IV' (IV prime) and IV'' (IV double prime). These options were designed to obtain the major benefits expected under Alternative IV, specifically the protection of significant national land areas (e.g., national parks), while limiting the economic costs incurred by focusing NSR coverage more directly on these areas. The EPA specifically solicited the views of several parties who had previously demonstrated an interest in the issue surrounding Alternative IV. Responses were received, placed in the rulemaking docket, and compiled in the summary of comments for the rulemaking which was also placed in the docket. Alternatives

⁶ Protected areas created after August 7, 1977 (larger than 10,000 acres) are "mandatory Class II areas" and would have been designated Class I if they had been established as of August 7, 1977. These areas can only be reclassified as Class I or remain Class II but cannot be reclassified to Class III. [40 CFR 52.21(e)].

⁷ For Alternative IV, Chaco Culture National Historic Park was evaluated for 1989 and Bryce Canyon was evaluated for 1996.

IV' and IV'' are discussed in greater detail in the May 4, 1987 memorandum to the docket (document number IV-C-6).

Alternative IV' proposed that PSD review of a mine be triggered, not by a fixed ambient concentration, but by prediction of adverse impact. Under Alternative IV', an increase in ambient particulate matter (PM) concentration of 1 microgram per cubic meter predicted by modeling would trigger an "ambient impact assessment," not a PSD review. Only if the "ambient impact assessment" indicated a potential adverse impact, as determined by the appropriate Federal land manager (FLM) for the affected mandatory Class I* and II PSD areas, would PSD be triggered. The adverse impact assessment is a process already used by FLM's. This alternative was considered a way to protect areas of special natural significance while reducing the number of mines subject to PSD determinations.

Alternative IV'' included the same adverse impact test as Alternative IV' but covered only impacts on mandatory Class I PSD areas. To remove uncertainties as to the application of the adverse impact analysis test, the 1 microgram per cubic meter increase in PM concentration test was dropped and all mines within 50 kilometers of a mandatory Class I area would be subject to an "adverse impact assessment." This option would also provide protection of the most important natural areas but only a consultation process between the FLM and the States would be established for many other natural areas designated as mandatory Class II. This proposal would have reduced costs of compliance but would also produce reduced benefits with minimal, if any, protection of mandatory Class II areas.

C. DOI Authority to Regulate.—1. Provisions to Regulate Fugitive Dust From SCM's. The DOI has demonstrated to the EPA that under existing DOI statutory authorities, regulations, and policies, DOI can adequately protect against adverse effects from SCM's, including fugitive dust emissions. The DOI's authority is particularly effective with respect to national parks and other areas of special concern, which are the

focus of Alternative IV. The authorities identified by DOI include the following:

a. SMCRA Performance Standards

Section 515(b)(4) of the SMCRA, 30 U.S.C. 1201 et seq., establishes a performance standard for control of air pollution from all SCM's, wherever located. The SCM's operators must stabilize and protect all surface areas, including spoil piles affected by the mining, and reclaim areas to effectively control erosion and attendant air and water pollution (30 U.S.C. 1265(b)(4)). The DOI has promulgated mandatory performance standards for SCM's under this statutory requirement at 30 CFR 816.95(a). These standards are implemented in turn through 30 CFR 780.15, which provides that each application for a surface coal mining and reclamation permit must include "[a] plan for fugitive dust control practices" describing all measures the applicant proposes to use to stabilize exposed surface areas to control fugitive dust.

Section 515(b)(17) of SMCRA addresses pollution associated specifically with erosion from access roads into and across SCM sites. To implement this provision, and to clarify the reach of 30 CFR 780.15 and 816.95, DOI recently promulgated regulations establishing a performance standard for road dust generated at SCM's:

[b] Performance standards. Each road shall be located, designed, constructed, reconstructed, used, maintained, and reclaimed so as to:

[1] Control or prevent erosion, siltation, and the air pollution attendant to erosion, including road dust as well as dust occurring on other exposed surfaces, by measures such as vegetating, watering, using chemical or other dust suppressants, or otherwise stabilizing all exposed surfaces in accordance with current, prudent engineering practices;

[2] Control or prevent damage to fish, wildlife, or their habitat and related environmental values;

* * * * *

[6] Prevent or control damage to public or private property, including the prevention or mitigation of adverse effects on lands within the boundaries of the National Park System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress. [53 FR 45190, 45213 (November 8, 1988) (to be codified at 30 CFR 817.150(b)(1), (2) and (6)).

b. SMCRA Section 522(e) Prohibitions

Section 522(e)(1) of SMCRA, 30 U.S.C. 1272(e), and 30 CFR 781.11 prohibit

SCM's in certain designated areas, subject to valid existing rights (VER) and except where SCM's existed on August 3, 1977. Lands designated by section 522(e)(1) and DOI's regulations include any lands within the boundaries of the National Parks System, the National Wildlife Refuge System, the National System of Trails, the National Wilderness Preservation System, the Wild and Scenic Rivers System, including designated study rivers, and National Recreation Areas designated by Act of Congress. Subject to VER, and with other exceptions, section 522(e)(2), (4) and (5) likewise prohibits SCM's on Federal lands within National Forests, within 100 feet of public roads and cemeteries, and within 300 feet of occupied dwellings, public buildings, schools, churches, community or institutional buildings, and public parks. In addition, section 522(e)(3) prohibits SCM's in any other location where the SCM will "adversely affect" any publicly-owned park or any place listed in the National Register of Historic Sites. The VER are discussed in detail below.

Provision for a determination of adverse effect under section 522(e)(3) is included in the review process for the SMCRA permit that all SCM's must obtain. Upon receipt of an application for operations that may affect a National Park System Unit (NPSU), the SMCRA regulatory authority (either DOI, or a State acting under an approved program) provides the National Park Service (NPS) written notice and an opportunity to comment (30 CFR 773.13(a)(3)(ii)). Where the regulatory authority preliminarily determines that the proposed operation would adversely affect an NPSU, under 30 CFR 761.12(f)(1) it must request the approval or disapproval of the NPS before it can issue a SMCRA permit.

c. SMCRA Section 522(c) Unsuitability Designations

Section 522(c) of SMCRA grants any person "having an interest which is or may be adversely affected * * * the right to petition the regulatory authority to have an area designated as unsuitable for surface coal mining operations * * *". Section 522(a) and 30 CFR 782.11(b) set out the criteria under which an area may be, but is not required to be, designated as unsuitable for SCM operations. These include a finding that mining would affect fragile, historic, natural hazard, or renewable resource lands. Fragile lands include "areas containing natural, ecologic, scientific, or aesthetic resources that could be significantly damaged" by SCM

* Areas listed under section 162(a) of the Act cannot be reclassified and are generally referred to as mandatory Class I areas. The 158 areas are national parks over 6000 acres, national wilderness areas over 5000 acres, and international parks, all in existence on the PSD codification date, August 7, 1977. Only three nonmandatory Class I areas, all in Montana, have been created by redesignation of Class II areas and a fourth area in Washington has been proposed. All are Indian lands.

operations; historic lands include "areas containing historic, cultural, or scientific resources."

d. The Federal Coal Management Program

The Bureau of Land Management (BLM) administers the FCMP, which applies to SCM's on all Federal lands. According to DOI, the BLM effectively controls approximately 80 percent of western coal through the FCMP. During the land-use planning stage of the FCMP, BLM applies four "screens" to public lands where SCM's potentially could be located, including unsuitability criteria and multiple-use decisions (43 CFR 3420.1-4(e)). Under unsuitability Criterion 5, "Class I visual resource management areas," areas of outstanding scenic quality or high visual sensitivity are considered unsuitable for leasing under the FCMP unless the BLM determines that SCM operations will not significantly diminish or adversely affect the scenic quality of the area (43 CFR 3461.1(e)). The multiple-use decision process balances uses and resources to decide if protection is needed (43 CFR 1601.0-5(f)). The DOI rules provide that the BLM "shall place particular emphasis on protecting * * * air and water quality * * *" in making multiple-use decisions. Where coal development on BLM lands may impact lands under the jurisdiction of the NPS and the Fish and Wildlife Service (FWS), the rules direct the BLM to consult with those agencies to jointly determine whether the lands should be acceptable for further consideration for coal leasing.

In addition to the above provisions, DOI identified various other statutory and regulatory provisions that could be used to regulate SCM operations for the purpose of protecting air quality. Some of these authorities are discussed in Section IV.

2. Proposed VER Rules. The DOI proposed rules for determining VER on December 27, 1988 (53 FR 52374) which, when final, will effectively grandfather specified mining rights from provisions of SMCRA section 522(e). The EPA reviewed the proposed rule and determined that the grandfathered exemptions from SMCRA, as proposed, do not appear to significantly affect DOI authority to regulate fugitive emissions from SCM's. The DOI will still be empowered to make "unsuitability designations" under section 522(c) and VER will only exempt mines from appeals under section 522(e) by affected interest groups. In any event, SCM's established by a VER determination will still be subject to construction and maintenance standards under 30 CFR

818.95(a) that DOI may use to mitigate fugitive dust emissions.

III. Discussion of Today's Action

A. No Listing of SCM's

Today, EPA announces that SCM's will not be added to the list of source categories for which fugitive emissions must be considered in determining if a source is "major." The effect of this decision is to maintain the status quo for SCM's under the Act. Since nearly all of an SCM's emissions are fugitive, a decision to continue not to consider fugitive emissions means that few, if any, SCM's will be classified as major sources or major modifications. Although they may not be classified as major sources or major modifications, emissions from new or modified SCM's, particularly in areas near national parks and other areas of special natural significance, will continue to be regulated by EPA, under other applicable provisions of the Act, and by the DOI under the SMCRA and all other authorities of the DOI. The EPA has reviewed all relevant information in the rulemaking docket and the regulatory and legislative powers available to DOI in making the determination that DOI has adequate authority to regulate fugitive dust emissions from SCM's. The EPA also finds that while overlapping regulation of SCM's under the Act is possible and not prohibited, such regulation is burdensome to the affected industry while likely achieving limited additional benefits.

Although EPA has considered the effect of DOI authorities in deciding not to list SCM's, EPA is not granting preemptory authority to DOI for the control of air pollution from SCM's. The Act will require SIP's to contain emission limitations, permit programs, and other measures to ensure that ambient standards and PSD increments are attained and maintained and that there is no manmade visibility impairment in any mandatory Federal Class I area (sections 110, 161, 169A, and 172). The EPA and the States cannot abrogate their responsibility to regulate the emissions from SCM's. The only question here is whether or not new or modified SCM's should, as a category of sources in and of itself, be subject to the PSD/NSR permit programs for "major sources." However, this decision cannot affect the requirement that SIP's regulate * * * the modification, construction and operation of any stationary source * * * (section 110(a)(2)(D)). Neither SMCRA nor the Act contain any special dispensations for SCM's that grant them categorical exemptions from having to comply with ambient standards, PSD

increments, or visibility protection requirements. Hence, with EPA's decision not to add SCM's to the list of PSD sources, EPA must still ensure that emissions from SCM's comply with all requirements of the Act.

The comments received on the EPA proposals and the EPA analysis of the rulemaking record are summarized below in Section IV and contained in the rulemaking docket.

B. Collocated Sources

In deciding to maintain the "status quo" regulation of SCM's, the EPA also announces that it is not exempting SCM's from review under other circumstances possible under PSD and NSR procedures, specifically SCM's collocated with sources subject to review. The EPA believes these circumstances are limited in number and economic impact and do not warrant establishing the precedent of creating exemptions for specific sources. The EPA has determined to reaffirm its longstanding position that the decision whether to include fugitive emissions from collocated SCM's in these circumstances should be decided on a case-by-case basis, depending on the "primary activity" of the operation as a whole. The EPA also concludes that it has no obligation to depart from its longstanding use of the Standard Industrial Classification (SIC) code and other aspects of the definition of "source" for PSD and NSR purposes in order to satisfy its rulemaking obligations under section 302(j) or to otherwise craft a reasonable and lawful set of PSD and NSR rules. These decisions resolve issues affecting SCM's raised in petitions for reconsideration. Comments and analysis of this issue are summarized below in section IV.

C. Modifications to Existing Sources

In today's action, EPA reaffirms its October 1984 interpretation that section 302(j) does not apply to modifications. Commenters have not persuaded the EPA either that Congress had a contrary specific purpose in adopting section 302(j), or that EPA's interpretation, as explained in the October 1984 proposal, is inconsistent with the Act's purposes. Accordingly, EPA believes that its interpretation is a reasonable one, and thus proper under the law. In any event, EPA believes that this interpretation should have little general impact at this time, because today's central decision to not list SCM's means that few mines should be brought under PSD and NSR solely by virtue of EPA's interpretation of the nonapplicability of section 302(j) to modifications. Comments and

analysis of this issue are summarized in Section IV and the *Federal Register* [October 1984 (49 FR 43202) and February 1986 (51 FR 7090)].

IV. Major Issues

A. Basis For No Listing Decision—1. Comments on The RIA. Numerous comments were received on the RIA and were summarized into four categories: (1) The presence of health and welfare effects associated with SCM's, (2) air quality impacts, (3) cost estimates, and (4) benefit estimates. Comments from industry and some government entities universally asserted that ambient impacts and costs were understated while benefits were either nonexistent or at least overstated. Comments from environmental groups maintained the opposite point of view and were critical of EPA's use of cost-benefit analysis. Conversely, industry commenters contended that the legislative history of section 302(j), and the D.C. Circuit Court's interpretation of that provision in *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), support EPA's use of cost-benefit analysis. Most of the comments were originally addressed in the RIA under qualification of the various analytical components of the RIA. Those not addressed in the RIA are covered in detail in two reports in the docket: (1) Summary of Comments, and (2) Response to Technical Comments. While these documents can be reviewed for a thorough discussion of comments and responses, a summary of major comments and responses is presented below.

a. Health and Welfare Effects

Several commenters argued that since the NAAQS are set at levels below which there are no known adverse health or welfare effects, there would be no benefits from listing SCM's because they are primarily located in areas where air quality is already better than the NAAQS for PM. The commenters are correct to note that the intent of the NAAQS requirements was to direct the Administrator to set air quality standards at pollution levels below those at which quantifiable adverse health and welfare effects have been found or might be expected to occur in sensitive groups. However, experience with the requirements has shown that the scientific data are often so inconclusive that it is difficult to identify with confidence the lowest pollution level at which an adverse effect will occur. Moreover, in cases such as the present one regarding PM, the evidence suggests that there is a continuum of effects, with the risks, incidence, or severity of harm decreasing, but not

necessarily vanishing, as the level of pollution decreases (52 FR 24641, July 1, 1987).

Other commenters argued that fugitive emissions from SCM's do not pose any health risks because such PM is less toxic than particles in urban areas where most of the health and welfare effects information used to establish the PM standards was obtained. This comment has limited merit because the NAAQS for PM nominally 10 micrometers or less in diameter (PM-10) NAAQS focuses on particles capable of penetrating the sensitive thoracic region of the respiratory tract. While the toxicity of various particles differ, the exhaustive review of the available health effects information supporting the PM-10 standards suggests that all particles equal to or less than a nominal 10 micrometers in diameter are of concern regardless of source characteristics. Moreover, it is not clear that coal dust (certainly a constituent of SCM fugitive dust) per se is nontoxic. Indeed, coal dust may contain toxic impurities, such as metals. In any event, "inert" particles may be responsible for a variety of health effects, from deposition throughout the respiratory tract and by several possible mechanisms. For example, nonspecific irritation in the tracheobronchial region may alter respiratory function or clearance mechanisms, clearly of health concern, particularly for sensitive subgroups of the population (e.g., asthmatics and elderly persons with chronic respiratory disease). [52 FR 24641, July 1, 1987]

b. Air Quality Impacts

A number of comments noted deficiencies in the Industrial Source Complex (ISC) model used to estimate ambient impacts around SCM's. While several well-documented analyses have shown that the ISC model has both systematic and random error associated with its use, the model still remains the preferred method for simple terrain stationary source analyses as specified in EPA's *Guideline on Air Quality Models*, Revised (EPA-450/2-78-027R, July 1986). In the RIA, the model was applied consistently, and the EPA believes the results are valid for relative comparisons across regulatory alternatives.

c. Cost Estimates

Different opinions from commenters were noted regarding the RIA cost estimates. For example, costs were asserted to be low by some commenters because the impacts on the largest mines in each basin analyzed were not assessed. Conversely, another set of

comments maintained that costs were overstated because such controls as paved-haul roads and speed restrictions were not considered. Regarding the first comment above, mine costs were estimated using the average size SCM in each basin. The EPA felt such an approach was better for assessing the most likely costs of listing SCM's. Using either the largest or smallest SCM's for cost assessment would have clearly biased the cost estimates presented.

The recommendation to analyze paving haul roads and speed restrictions was considered in the planning stages of the RIA. However, best engineering judgment based on Wyoming's best available control technology (BACT) analyses was used to eliminate the former from consideration because of the increased cost of paving roads that would support the enormous trucks used to transport coal around a surface mine. Furthermore, continuous construction and demolition of haul roads would be required as the pit changes location. This could exacerbate the pollution problem and would be expensive. Speed restrictions were not considered a viable option since reducing speed, for a constant production rate, would effectively require more equipment which would create more emissions. Therefore, gains from reducing speed would be offset by adding additional trips to maintain production rate (speed and number of trips equally affect SCM emission rates).

More specific concerns were raised by commenters in regard to the quantity of coal reserves, and subsequent cost effects, affected under Alternative IV. Industry maintained that approximately 8.5 billion tons of coal reserves would be affected by Alternative IV—six times larger than EPA's estimate of 1.4 billion tons. It is true that the original EPA estimate is low due to the exclusion of reserves on Indian lands. However, even the industry estimate of 8.5 billion tons affected represents less than 6 percent of the 157 billion tons of total reserves estimated in the RIA. Furthermore, the total reserve estimates in the RIA were selected as a conservative estimate since current estimates of demonstrated coal reserves exceed 400 billion tons.

d. Benefit Estimates

Several commenters maintained that benefit estimates, particularly, visibility benefits, were overstated. For example, it was asserted that willingness to pay (or contingent valuation) studies of visual range improvement were biased upwards because respondents exaggerate their responses when they do not actually have to pay. In response,

EPA notes that recent comparisons between contingent valuation studies and market studies involving actual payments do not support the hypothesis that contingent valuation is consistently upward biased (*Response to Technical Comments on RIA for EPA Proposal to List Surface Coal Mines for New Source Review*, PEI Associates Inc., EPA Contract No. 68-02-4394, January 1989). While these studies have been found to contain potential biases, the direction of bias can be either upward or downward depending on the specifics of the study design.

Other comments argued conversely that benefits estimates presented were understated relative to costs because it is far easier to measure costs than to quantify benefits. There is merit in this comment, but the RIA explicitly recognizes this by listing benefit categories, such as nonresidential soiling, which are currently not quantifiable. Furthermore, where some benefit categories are quantifiable, but highly uncertain, potential magnitude is presented in the text of the RIA. A good example of this is the valuation of existence value benefits for Alternative IV. While the value of this benefit category is not used to compute the net benefit number in the RIA, a first order approximation of the value is presented in the text and is appropriately qualified.

2. Comments on Proposed Alternatives. In addition to the comments on the RIA summarized above, comments were received on the viability and legality of SCM regulatory alternatives proposed by EPA. The proposed alternatives were summarized in Section II above. After considering comments on Alternatives II-IV, deferring at that time the question of duplicative regulation under SMCRS, EPA decided to modify Alternative IV in an attempt to design a clearly beneficial rulemaking. Comments on these modified alternatives are also discussed below.

The comments below are organized by several categories: (1) Existing regulations, (2) implementation of alternatives, (3) majority recommendations, (4) minority recommendations, and (5) EPA analysis.

a. Existing Regulations

Most commenters argued that EPA is not legally bound to list SCM's and that SCM's are already subject to sufficient air pollution regulation by State governments and other Federal agencies. Commenters noted that some State laws and regulations require control of emissions from SCM's equivalent to BACT. Comments from the

U.S. Department of Agriculture (USDA) asserted that mining operations on Federal lands adjacent to wilderness areas are controllable by USDA administrative policy. The existing authority most frequently cited as providing the protection sought by EPA under the proposed alternatives were programs administered by the DOI. Comments on DOI authorities and EPA analysis of the authorities are discussed below.

b. Implementation of Alternatives

Numerous comments were received on how the proposed alternatives would be implemented. For example, industry claimed that EPA's proposal would effectively create large "buffer zones" around Class I areas which are of no special natural value but where SCM's would be prohibited to prevent possible impacts within the Class I area. A State commenter asserted that some of EPA's proposed regulatory mechanisms were not consistent with State permitting procedures.

Comments on specific procedures were also received. As an example, the USDA suggested that a PSD review trigger, based on acreage disturbed at a specified time, would be simpler to apply than an emissions criteria. The mining industry suggested several changes to Alternative IV" such as excluding the FLM in the determination of adverse impact, reducing the mine impact review criteria distance to between 10 and 15 kilometers, and excluding any provisions for mandatory Class II PSD areas. Environmental groups also criticized including the FLM in the determination of significant adverse impact and implied that Indian Tribes, States, and EPA were better suited to make such decisions. These groups noted that Alternative IV" provided no protection for Class II PSD areas and that mines located greater than 50 kilometers from Class I PSD areas would escape review regardless of their impact on these areas. Several commenters from government agencies criticized the 1 microgram PM per cubic meter ambient impact criteria for initiating review in the Alternative IV" proposal because of uncertainties in the modeling analysis required for estimating the impact. Commenters expressing a preference for Alternative IV" cited the 50 kilometer distance criterion in IV" as a solution to the modeling problems associated with the IV ambient impact trigger.

c. Majority Recommendations

Most commenters emphatically supported Alternative I (no listing of SCM's, therefore, fugitive emissions

would not be included in the PSD and NSR applicability determinations for SCM's). Some of the commenters supporting Alternative I included industry, State governments, Ute Mountain Indian Tribe, and several Federal agencies. The consensus of these commenters was that the costs of Alternatives II-IV exceeded the benefits of the proposed regulation.

These commenters continued to support Alternative I over modifications to Alternative IV. However, of the options requiring some listing of SCM's Alternative IV" was favored by a number of commenters. Industry commenters noted that Alternative IV", with several changes, " * * more faithfully adheres to the Agency's objective of protecting special resources * * " (AMC) and, as applied to Class I areas designated by the Act, is the only proposed alternative which may have positive benefits (Sunbelt Mining Co.).

The DOE considered Alternative IV' (applied only to mandatory Class I PSD areas) to be most consistent with the analytical results. Two environmental regulation agencies in coal mining States expressed similar opinions. Although these commenters expressed some preference for Alternative IV" among Alternatives II-IV, there was also a consensus that other existing regulatory authorities could provide benefits projected from Alternative IV".

d. Minority Recommendations

Robust, differing points of view were also expressed by two smaller groups of commenters. One group, composed mostly of environmental groups, favored listing of SCM's under either Alternative II or III, the most stringent regulatory options. These commenters argued that regardless of the costs projected, EPA should tightly limit fugitive emissions from SCM's under PSD and NSR regulations. Environmental groups generally viewed the proposed Alternatives IV' and IV" as less acceptable than the original Alternative IV which they rejected. The environmental groups' rejection of proposed variations of Alternative IV was shared with DOI. The DOI emphatically rejected Alternatives IV' and IV" and contested the distance criteria of Alternative IV" for PSD applicability as "legally questionable," arbitrary and lacking any empirical basis. In contrast to the environmental groups' recommendations for stringent EPA regulation, DOI joined the majority in supporting Alternative I, no listing.

e. The EPA Analysis of Comments On Proposed Alternatives

The EPA's review of both the RIA and the comments indicate that Alternatives II and III are economically impractical. Although industry appears to have overestimated costs, the RIA still predicts very substantial adverse socioeconomic impacts from these alternatives. Therefore, EPA rejected Alternatives II and III.

Based on a review of public comments and the RIA, EPA concludes that, while more appealing economically than Alternatives II and III, Alternative IV, as originally proposed, is not clearly beneficial given the uncertainty in benefits and cost estimates. Industry assumptions produced very high impact estimates of as much as 1 microgram per cubic meter up to 100 miles from the source, which resulted in very high industry cost estimates. While EPA does not agree with all of the assumptions used in the industry studies, EPA does agree that, in some locations, costs of Alternative IV may be considerable. However, EPA concludes that on a national basis, benefits and costs cannot be firmly estimated.

The final listing options EPA considered were Alternative I, no listing of surface coal mines, and Alternative IV or some variation of it designed to provide visibility and other benefits for natural areas of special significance (e.g., Yellowstone National Park). In considering these options, EPA placed substantial weight on the legal authorities available to the DOI which could also provide protection for areas of "special natural significance."

The EPA does not necessarily agree with commenters that variations of Alternative IV are impractical from a technical or legal perspective. However, it is not necessary to respond to the merits of these comments, because they are moot with the selection of Alternative I. The reasons for choosing Alternative I are not related to the technical and legal adequacy of Alternatives IV' and IV". The EPA did consider the ability of Alternatives IV'-IV" to protect NPSU's and other areas of special, natural significance in evaluating the intent and potential benefits of DOI authorities to regulate fugitive dust emissions from SCM's that might affect such areas. Comments concerning the costs of duplicative regulation under the Act and SMCRA are of concern to EPA and are discussed in greater detail below.

3. *DOI Authorities.* Several commenters, including the DOI and industry representatives, urged EPA to not list SCM's on the ground that under

existing DOI statutory authorities, regulations, and policies, DOI can adequately protect against adverse effects from SCM's. The commenters stated that these authorities are particularly effective with respect to the national parks and other areas of special concern which are the focus of Alternative IV. The DOI authorities were summarized above in Section II.

a. Government and Industry Comments

Comments submitted by DOI, other Federal agencies, and mining industry groups supported the position that statutes, regulations, and policies administered by DOI would capture most or all of the social benefits that may result from listing SCM's in the vicinity of Class I and mandatory Class II areas. Hence, these commenters opposed Alternative IV and other narrowly focused regulatory options on this basis alone.

Two events in particular involving DOI have resolved any doubts regarding its ability to prevent adverse air quality impacts from SCM operations. First, in *National Wildlife Federation (NWF) v. Hodel*, 839 F.2d 694, 765 (D.C. Cir. 1988), the Court of Appeals affirmed that DOI has authority under SMCRA section 515(b)(4) to regulate air pollution that is attendant to erosion. Second, DOI has promulgated a performance standard under SMCRA to control dust due to both wind erosion and dust created by vehicle traffic (53 FR 45190, Nov. 8, 1988).

Regarding SMCRA section 522(e), DOI remarked that it provides significant protection to NPSU's and other publicly owned parks from potential impacts on air quality and related values. Moreover, the term "adversely affect" in section 522(e)(3) is not limited geographically by the location of the prospective mine or the nature of the adverse effect, but is applied on a case-by-case basis in consultation with the manager of the potential affected resource.

As to the unsuitability designation provisions of SMCRA section 522(c), an unsuitability designation could be made for lands inside or outside of the boundaries of NPSU's. Furthermore, excessive levels of fugitive dust emissions from potential SCM's could form the basis for an unsuitability designation where those emissions would significantly damage the fragile or historic lands.

b. Comments from Environmental Groups

In comments submitted prior to the decision in *NWF v. Hodel* and DOI's promulgation of road dust rules, a coalition of environmental groups

argued that there is currently no governmental authority effectively regulating fugitive emissions from SCM's. In particular, the coalition disputed DOI's claimed ability to protect Class I and mandatory Class II areas, asserting that DOI has failed to fully exercise its authority in any meaningful fashion. Regarding the prohibition in SMCRA section 522(e)(3) against SCM's that would adversely affect parklands, the environmental groups pointed out that the SMCRA regulatory authority is required only to consider the views of the NPS, and that NPS has no authority to enforce its recommendations. These groups also noted that no finding of adverse effect or unsuitability under SMCRA has ever been made due to the impacts of mining on air quality.

The environmental groups stated that "[a]ll interested parties agree that the major percentage of fugitive emissions generated by surface coal mining operations occurs as a result of traffic on haul roads." However, the groups focused on the absence of a performance standard for road dust as representative of DOI's purported failure to adopt any substantive regulatory scheme to control fugitive emissions from SCM's.

c. Analysis of Comments

The EPA has carefully considered the presentations made by all interested parties concerning the breadth of DOI's regulatory program for SCM operations. Based on this review, EPA agrees with the views of DOI (and others) that, as a whole, the various DOI authorities governing SCM's, while procedurally quite different from PSD and NSR requirements, have the potential to provide adequate protections against adverse air quality impacts in mandatory Class I and mandatory Class II areas. EPA believes that DOI authorities substantially overlap with those which would be provided under Alternative IV or variations of that regulatory option. Consequently, it would be superfluous to list SCM's for the purpose of protecting the NPSU's and other areas of special concern that are the subject of Alternative IV and its variations. Given the rough equivalence of costs and benefits for Alternative IV that emerged from EPA's RIA and analysis of comments on the RIA, EPA believes that the existence of DOI regulatory authority providing much the same benefits as would be afforded by EPA under the Act, but without the administrative costs that the Clean Air Act coverage could entail, is an adequate basis on which to reject Alternative IV and its variations.

pursuant to the rules for listing decisions under section 302(j).

The EPA believes that under the range of authorities discussed above, DOI and State regulatory authorities, have extremely broad powers to prevent the potential harms addressed by Alternative IV and its variations. These powers are at least as broad, and in some instances, broader, than those afforded to DOI and other Federal agencies in their role as FLM's, and to State governments and EPA itself in their role as permitting authorities under the PSD and NSR provisions of Parts C and D of the Act. For example, under Clean Air Act section 165(d)(2)(C)(ii), if the FLM demonstrates to the satisfaction of a permitting authority that emissions from a prospective facility would "have an adverse impact on the air quality-related values (including visibility)" of a Class I area, the State may not issue a PSD permit. Similarly, under SMCRA section 522(e)(3), if the SMCRA regulatory authority determines that a prospective SCM would "adversely affect" a publicly-owned park, the mine cannot be built if the responsible government agency agrees in that finding. Thus, under SMCRA Federal land management agencies are powerful stewards of the public trust, charged with the responsibility and authority to protect public lands of special concern.

The VER could provide some exceptions to SMCRA section 522(e), although the extent of any such exemption is unclear pending completion of DOI rulemaking on VER. However, any mine constructed in areas near NPSU's would still be subject to performance standards under SMCRA section 515 (b)(4) and (b)(17) and codified in 30 CFR 780.15, 816.150 and 816.95. Any mine operating near an NPSU would be expected to meet stringent construction and maintenance standards. Indeed, DOI regulations provide the flexibility to require such stringency for SCM's affecting NPSU's under DOI's policy of control in response to local conditions. In any case, nothing would prevent the Federal government from buying back VER when there is significant public interest in protecting an NPSU and Congress appropriates funds for purchasing VER of concern. DOI has given notice in a statement of policy that to prevent coal mining in areas covered by SMCRA section 522(e), DOI will use available authorities to acquire VER through "exchange, negotiated purchase or condemnation" subject to appropriation (53 FR 52384).

The EPA also concludes that questions raised by comments from environmental groups concerning DOI's ability and willingness to protect the public trust by pursuing regulation of SCM's under the DOI authorities have been adequately answered by events subsequent to the submission of those comments. *NWF v. Hodel* upheld DOI's authority to promulgate general SCM performance standards requiring a plan for fugitive dust control practices under SMCRA section 515(b)(4). The reasoning of that decision validates regulations promulgated under other sections of SMCRA to address air pollution attendant to erosion. Thus, DOI cited the *NWF v. Hodel* decision in promulgating its road dust rules under SMCRA section 515(b)(17) (53 FR 45202).

In addition, DOI's adoption of road dust rules shows its willingness to take strong regulatory action on air pollution from all SCM's. As the environmental group commenters noted, all parties agree that a significant amount of fugitive dust from SCM operations is generated as a result of haul road traffic. In commenting on the DOI proposed rule, EPA related its understanding that in addition to fugitive dust attributed directly to wind, the rule would cover erosion-related pollution resulting from the movement of overburden and coal haul trucks, light and medium duty vehicles, and other equipment operating outside of the mine pit using on-site roads and surfaces. The DOI accepted this comment and made EPA's suggested change to the final rule clarifying that performance standards apply to dust created by vehicle traffic (53 FR 45203).

Evidence of DOI's specific commitment to protect the air quality related values of national parks and other sensitive areas is evident in the SMCRA programs governing adverse effect determinations and unsuitability designations. As noted above, DOI has interpreted the unsuitability determination process as extending to damages caused by fugitive dust emissions from prospective SCM's. Although the environmental groups are correct that DOI has not designated any Federal lands as unsuitable for mining based on potential adverse effects on air quality, DOI has rarely been called upon to do so.⁹ Thus, EPA has every reason to believe that DOI will responsibly pursue petitions alleging that a prospective SCM would adversely affect parklands.

Regarding the FCMP, DOI rules direct the BLM to place particular emphasis on

the air quality portion of the multiple use decision, and require the BLM to consult with the NPS and FWS prior to a joint determination of whether BLM lands should be accepted for further consideration for coal leasing (52 FR 46469).

3. *Comparison of Cost and Benefits Under the Act and SMCRA.* The EPA's "safety valve" interpretation of section 302(j) clearly calls for the Agency's deliberative process to address legitimate cost/benefit concerns in reaching a listing decision (49 FR 43202). This approach to listing decisions is under review in *NCA v. EPA* and is not at issue here. As discussed elsewhere in this notice, EPA believes that commenters have confirmed that the benefits of adopting Alternatives II or III are greatly outweighed by the costs associated with those options. The EPA disagrees with these commenters' similar arguments regarding Alternative IV. Nevertheless, the EPA is not compelled to adopt Alternative IV or some variation of it. As it addressed Alternative IV, the RIA did not take into account the prospect that DOI could provide equivalent environmental benefits. However, for the reasons set forth above, EPA now believes that the various DOI authorities already in place can provide much the same degree of environmental protection as would PSD under the Act. Thus, few, if any, additional socioeconomic benefits would be provided by a decision to list SCM's under Alternative IV or its variations. Conversely, a decision to list could entail additional costs sufficient to justify not taking that course of action.

By accepting that DOI's programs will provide benefits equivalent to Alternative IV through the mitigation or prevention of adverse effects on air quality related values in national parks and other areas of special concern, EPA is assuming a roughly similar mix of pollution control measures, reductions in SCM size, and SCM relocations as was assumed would accompany Alternative IV. It follows that EPA should also assume that the DOI programs will also entail roughly similar costs to producers and others in realizing those benefits. One might argue that it also follows that the addition of PSD under Alternative IV would add no additional costs beyond those already required by the DOI programs, and, thus, EPA must promulgate regulations under its "safety valve" interpretation of section 302(j). But, in practical terms, this is not true. Such an argument ignores the fact that the DOI programs are already in place, and that the addition of another set of regulatory requirements is inherently

⁹ The one instance in which this issue was raised, regarding the Alton Coal Field and Bryce Canyon National Park, resulted in a determination of unsuitability based on other grounds.

costly. Thus, even if the addition of Alternative IV required no sources to meet (or change their plans to avoid) PSD requirements because DOI programs would have already obviated the need for such actions, there would still be the built-in administrative costs of the EPA program to contend with. For example, under Alternative IV the SCM owner might be required to undertake a separate modeling analysis for the sole purpose of demonstrating that it would not exceed the PSD coverage threshold of a 1 microgram per cubic meter ($\mu\text{g}/\text{m}^3$) impact on a Class I or mandatory Class II area.

To give another example, if pursuant to Alternative IV a prospective SCM were brought under PSD because it exceeded the $1 \mu\text{g}/\text{m}^3$ threshold at a Class I national park located at a considerable distance from the SCM site, it would trigger an adverse impact determination by the FLM under the Act, section 165(d)(2)(C)(ii). If the FLM found, and the permitting authority agreed, that an adverse impact would occur, the mine could not be built. However, as discussed above, the responsible State or Federal agency may conduct a similar analysis under SMCRA, and the SCM could not be permitted if that agency and the SMCRA regulatory authority agreed there would be an adverse effect on the park. Thus, in this example also, PSD would entail costs to the prospective source in applying for a PSD permit and to the FLM in making a separate adverse impact determination under the Act, yet these costs would not provide any benefits not already present under the DOI authorities.

In short, nothing in the Act or EPA's interpretation of section 302(j) requires EPA to promulgate regulatory requirements that provide no benefits where there are some, albeit modest, costs. Indeed, under such circumstances, even modest costs are unreasonable precisely because they are not counterbalanced by benefits. In taking due account of the environmental protections provided by SMCRA, the FCMP, and other DOI authorities, EPA believes that today's section 302(j) decision is an appropriate exercise of the "flexibility to provide industry-by-industry consideration and appropriate tailoring of coverage" which the D.C. Circuit envisioned in *Alabama Power Co. v. Costle*, 636 F. 2d 323, 369 (D.C. Cir. 1979). At present, EPA has no basis to question the adequacy of DOI's authorities. Of course, if in the future EPA is presented with a petition for rulemaking containing appropriate evidence that the various DOI

authorities do not in fact provide environmental protection equivalent to that available under the Act, EPA will carefully reconsider the basis for today's action.

B. Fugitive Dust Issues Related to SCM's

The EPA's actions in October 1984 (49 FR 43202) and February 1986 (51 FR 7090) reaffirmed the Agency's 1980 interpretation regarding the nature of the section 302(j) rulemaking requirement, and retained the list of sources whose fugitive emissions must be considered in making PSD and NSR TAD's. Although EPA believed its 1980 rulemaking met the procedural standards of section 307(d)(8), 42 U.S.C. 7607(d)(8), as a matter of policy the Agency solicited further comment on the listing of source categories. The EPA stated that, consistent with its "safety valve" interpretation of section 302(j), it would not remove a category from the list unless commenters showed adverse consequences to the broad national interest in continuing the listing. Public comment on these matters was generally limited during the initial round of comments. However, mining industry representatives expressed several concerns related to SCM's which could result in a source being subjected to PSD and NSR even if EPA made a final determination not to list SCM's. The industry's concerns included the interaction between the definition of "source" for PSD and NSR purposes and the currently listed fugitive emissions source categories and the applicability of section 302(j) to major modifications. To the extent that SCM's would be indirectly subject to PSD or NSR, several industry representatives filed petitions for administrative reconsideration of EPA's October 1984 action (see "AMC Petitions", section II above) seeking relief, either through a change in the definition of source, or through deletion of certain, currently listed fugitive emissions source categories. Accordingly, in reopening the public comment period in February 20, 1986 Federal Register, EPA solicited comment on whether, if EPA decided not to list SCM's, some exemption from or interpretation of the "source" definition as it relates to section 302(j) rulemaking would be appropriate.

The following discussion of the SIC code definition of source and listed source issues constitutes EPA's substantive disposition of industry comments and the applicable petitions for reconsideration.

1. SIC Code Definition of Source

The 1980 PSD and NSR regulations established the SIC Manual as the principal definitional tool for identifying the types of pollutant-emitting activities that shall be considered part of the same industrial grouping for purposes of determining the scope of a stationary source for NSR purposes. Specifically, activities within the same Major Group, i.e., the same two-digit SIC code, are aggregated [see, e.g., 40 C.F.R. 52.21(b)(6)]. As EPA noted in the February 28, 1986 Federal Register (51 FR 7090), use of the SIC code has implications for the mining industry by virtue of the fact that SIC Major Group 12, "bituminous coal and lignite mining," includes not only the mine proper but also coal cleaning and other coal preparation activities. "Coal cleaning plants (with thermal dryers)" are on the list of fugitive emissions source categories [see, e.g., 40 CFR 52.21(b)(1)(iii)(a)]. Coal preparation plants are also listed because a new source performance standard regulating them (40 CFR Part 60, Subpart Y) was promulgated prior to August 7, 1980 [see, e.g., 40 CFR 52.21(b)(1)(iii)(aa)]. The mining industry raised two principal issues stemming from this aspect of the definition of source: applicability of substantive PSD and NSR requirements to SCM's considered to be part of a major source because they are collocated with such sources, and inclusion of fugitive emissions from SCM's in the PSD and NSR threshold applicability determinations of collocated sources.

a. Industry Comments. Mining interests contend that SCM's are not a type of stationary source that Congress intended to be subject to PSD and NSR requirements. In their view, EPA's error in considering regulation at all is compounded by the Agency's attempts to impose on SCM's the SIC code and other attributes of the PSD/NSR definition of source that may be appropriate for other industries but cannot be properly applied to SCM's through a "definitional quirk." Any regulation of SCM's by virtue of the source definition is arbitrary and in excess of EPA's authority, they assert, unless EPA complies with the rulemaking requirements of section 302(j). Industry commenters claimed that consideration of SCM fugitive dust emissions as the "secondary emissions" of an off site support facility in determining the air quality impact of a major stationary source is also precluded absent compliance with section 302(j).

b. *Analysis.* The EPA disagrees fundamentally with the industry contention that rulemaking under section 302(j) is a broad prerequisite to any regulation of SCM's under the Act and PSD/NSR programs.¹⁰ To the contrary, EPA continues to believe section 302(j) has only a limited "safety valve" function. Once the Administrator determines that sources in a given source category have the potential to degrade air quality significantly, commenters have an opportunity to present factual and policy arguments sufficient to convince the Administrator that it would not be appropriate to include fugitive emissions from sources in that category in TAD's. Section 302(j) is irrelevant in defining the scope of the term "source" and in applying substantive PSD and NSR requirements. Thus, in *Alabama Power v. Costle*, the D.C. Circuit upheld EPA's position that section 302(j) has no bearing whatsoever on the applicability of substantive PSD requirements under section 165 after a source is determined to be major (636 F.2d at 369). In addition to establishing the limited reach of section 302(j), the *Alabama Power* decision is highly informative of the limited scope and discretionary nature of those rulemakings which must be conducted under that section. Consequently, in both the 1980 and 1984 final rulemakings, EPA reasonably concluded that Congress consigned any problems of measurement, modeling, and pollution control regarding fugitive emissions to individual permit proceedings (45 FR 52690-92 and 49 FR 43203). Similarly, in its final action on the rulemaking proceeding arising out of Exhibit A of the CMA Settlement Agreement, EPA concluded that where SCM's function as off site support facilities for a major stationary source, the mine's reasonably quantifiable fugitive dust emissions must be included in the air quality impact analysis for the major source, and that it is not necessary to conduct a section 302(j) rulemaking to make this finding [54 FR 27286, 27290, (June 28, 1989)].

Based on the above, EPA concludes that it has no obligation to depart from its longstanding use of the SIC code and other aspects of the definition of "source" for PSD and NSR purposes in order to satisfy its rulemaking obligations under section 302(j) or to

otherwise craft a reasonable and lawful set of PSD/NSR rules. The EPA also reaffirms its interpretation of section 302(j). Moreover, EPA believes that the results of this conclusion reflect adequate consideration of the particular characteristics of the SCM industry, consistent with EPA's obligation to administer and enforce the Act. In addition, EPA does not believe that the effects of today's action will be unduly burdensome to industry.

2. *Listed Collocated Sources.* As discussed in the February 1986 (51 FR 7090) reopening of the public comment period, EPA's position has been that stack emissions and fugitive emissions from a coal cleaning plant or coal preparation plant must be summed in determining whether it would be a major stationary source. If, standing alone, such a plant were "major," and therefore subject to review, then a collocated SCM generally would also be considered part of the major source and subject to substantive PSD and NSR requirements regardless of whether SCM's are listed. (See *Alabama Power*, 636 F.2d at 369). Such operations typically must be aggregated as a single source under EPA's rules because they belong to the same SIC two digit code, and typically are located on adjacent or contiguous properties and are under common control.¹¹

The EPA believes that the structure and function of its regulations in the above examples are reasonable and appropriate under the Act. Indeed, industry commenters have presented no evidence of adverse practical consequences from this view, because coal preparation plants and coal cleaning plants apparently do not usually exceed major source size thresholds. A more difficult question is presented by whether the fugitive emissions of a collocated SCM must also be considered for threshold applicability purposes. Industry comments and EPA's February 1986 notice pointed out that a strict construction of the regulations with respect to the SIC code could result in the entire operation, including the SCM, being considered as part of the "listed" coal preparation or coal cleaning plant. The EPA has determined to reaffirm its longstanding position that the decision whether to include fugitive emissions from collocated SCM's in these circumstances should be decided for each occurrence, depending on the "primary activity" of the operation as a

whole. As stated in the preamble to the 1980 regulations, "[e]ach source is to be classified according to its primary activity, which is determined by its principal product or group of products produced or distributed, or services rendered" (45 FR 52695).¹²

Under this primary activity test, EPA or the permitting authority should review all the facts and circumstances of the particular case to determine what is the main purpose and function of the overall operation, and make an applicability determination based on the status (listed vs. nonlisted) and tonnage threshold (100 tons per year vs. 250 tons per year) of the primary activity. Thus, as SCM's continue to be a nonlisted source category, where coal mining is the primary activity, a mine's fugitive emissions are not considered in determining threshold applicability for a source consisting of the mine and some other collocated activity. In both of the final determinations cited above, EPA concluded that the coal mine was the primary activity, and EPA anticipates that this would be the case in most, if not all, future examples involving coal processing activities. In terms of both the purpose of the enterprise and the economic value of the newly mined coal as compared with the processed coal, it is the mining that is the focus of the overall effort.

3. *Support Facilities—*a. *Collocating Sources of Differing SIC's.* Mining industry commenters also raised closely related questions arising from the collocation of listed sources and SCM's that are under different two-digit SIC codes. They noted that when EPA articulated the primary activity test in the 1980 regulations, the Agency stated: "one source classification encompasses both primary and support facilities, even when the latter includes units with a different 2-digit SIC code. Support facilities are typically those which convey, store, or otherwise assist in the production of the principal product" (45 FR 52695). These commenters noted, that in 1980, EPA stated, in response to a specific comment, that a power plant and a SCM connected by a 20-mile railroad would be considered separate sources because of the distance and the different two-digit SIC codes, but sought clarification as to a SCM and a closer or adjacent coal-fired power plant. As stated above, these matters must be

¹⁰ Industry representatives must present their arguments on the listed source issues as requests for clarification or reconsideration of EPA's definition of source and current list of fugitive emissions source categories. In so doing, they at least tacitly acknowledge that these issues are separate from the limited question presented by the proposal to list SCM's under section 302(j).

¹¹ For the same reasons, stack emissions from the mine must also be added to the emissions of the preparation or cleaning plant in determining threshold applicability.

¹² See also Memorandum, Edward E. Reich, Director, Stationary Source Compliance Division, EPA to John M. Daniel, Assistant Executive Director, Virginia Air Pollution Control Board, May 31, 1983; Memorandum, Edward E. Reich to Allyn Davis, Director, Air and Hazardous Materials Division, EPA Region VI, June 8, 1980.

decided on a case-by-case basis. However, EPA anticipates that it would, in most cases, conclude that a SCM and an adjacent mine-mouth power plant controlled by the same entity would be considered a single source, the primary activity of which is either the generation of electrical power or the mining of coal, depending on the most likely overall purpose of the facility. If the mine and power plant were isolated in a remote area, for which the power plant is designed to support mining operations, the primary activity would likely be determined to be mining. However, if the facility is not isolated and service capacity of the power plant obviously exceeds the needs of the mine alone, and the facility will generate power for a public utility, then EPA would likely find that both the central purpose of the enterprise and the principal locus of its economic value is power generation. In the latter example, because power plants in excess of 250 million BTU heat input per hour are listed sources (see, e.g., 40 CFR 52.21(b)(1)(iii)(z)), the fugitive emissions of the SCM would be included in TAD's, and the SCM would be subject to substantive PSD and NSR requirements.

Industry commenters object to this possible outcome for two reasons. First, they contend that unless SCM's are separately listed, use of the factor of geographic proximity to consider a SCM as part of a single source that also includes a power plant violates the rulemaking requirements of section 302(j). However, as suggested above, section 302(j) does not require rulemaking as to SCM's in order to make such a finding. Regarding the listing of fossil-fuel fired steam electric plants as such, commenters have not demonstrated that considering SCM's as part of a source that also includes a power plant is, for the threshold applicability purposes of section 302(j), unreasonable. In practical terms, virtually all power plants in excess of 250 million BTU heat input exceed the major source threshold without consideration of fugitive emissions from collocated SCM's. Also, as discussed previously, *Alabama Power* conclusively determined that once a source is found to be major and subject to review substantive PSD and NSR requirements "apply with equal force to fugitive emissions and emissions from industrial point sources" (636 F.2d at 369). Thus, today's action should have no impact on existing coverage of collocated SCM's and power plants.

b. Economically Forced Relocation Sources. Industry's second objection is that including a SCM and a listed power

plant as a single source would encourage relocation of the power plant to a distant location and thereby cause adverse energy and environmental impacts. Although there is some surface plausibility to this notion, commenters did not clearly demonstrate that such a result would occur. More importantly, this objection does not relate to the proper scope of a section 302(j) inquiry, but rather to EPA's definition of "source," and these commenters have not shown that it is unreasonable for EPA to adhere to its consistent and longstanding construction of this term rather than create a special exemption for SCM's. Similarly, the commenters have not shown that it would be unreasonable to retain the current list of fugitive emissions source categories.

4. Continuance of Status Quo. Finally, as to both the support facility issue and the SIC code issue, it is clear that the central thrust of the mining industry's objections to PSD and NSR coverage is the special pleading that SCM's would be unable to meet applicable air quality requirements in an economical fashion. As discussed elsewhere in this notice, it is no longer clear that this is universally the case. Moreover, the net result of today's action is not to add any new regulatory requirements, but merely to retain the status quo, under which only certain SCM's collocated with certain other listed sources must meet substantive PSD and NSR requirements, including ambient impact requirements. However, the need to demonstrate that SCM's collocated with listed sources will not exceed applicable NAAQS and increments, the focus of industry's concerns, is already in place by virtue of EPA's prior action on "secondary emissions." As explained in the preamble to that action, EPA concluded that the Act mandates the inclusion of such secondary emissions as a general matter (54 FR 27290). The EPA today reaffirms that conclusion.

C. Applicability of Section 302(j) to Modifications—1. Background. In the 1984 rulemaking proposal, EPA solicited comment on its interpretation that section 302(j) applies to TAD's only for major new sources, and not for major modifications to existing major stationary sources (49 FR 43213). The EPA pointed out that the language of section 302(j) explicitly attaches the rulemaking requirement only to existing or proposed major sources, and says nothing about major modifications to existing units. The EPA also noted that the PSD and nonattainment NSR definitions of modification in section 169(2)(C), 42 U.S.C. 7479(2)(C), and section 171(4), 42 U.S.C. 7501(4), are both

nonsubstantive, and refer to section 111(a)(4) of the Act's new source performance standards (NSPS) provisions, 42 U.S.C. 7411(a)(4). Section 111(a)(4), in turn, defines modification solely in terms of the total amount of pollution that a source change would produce, indicating that Congress intended to establish no qualitative distinction between stack and fugitive emissions. Moreover, EPA stated, the legislative history on section 302(j) does not refer directly to modifications, although the conference report on the PSD construction and modification definitions in section 169(2)(C) does provide that Congress' general intent was "to conform to usage in other parts of the Act" [123 Cong. Rec. H 11957, col. 3 (daily ed.) (November 1, 1977)]. The EPA reasoned that this passage referred not only to section 111(a)(4), but to usage of these terms in extant EPA regulations under the NSPS and PSD/NSR programs. Those regulations did not distinguish between fugitive and stack emissions. Thus, EPA concluded that section 302(j) ran counter to longstanding practice, and that if Congress had intended a legislative change as to modifications, it would have said so explicitly. In addition, EPA related that its interpretation likely would not impose new regulatory burdens because fugitive emissions from modifications would still be excluded from TAD's unless the modifications occurred at a major stationary source. Thus, if SCM's continue to be nonlisted, and therefore generally deemed not to be major sources, a modification that significantly increased fugitive emissions at a SCM still would not trigger PSD and NSR.

In reopening the comment period in February 1986, EPA reiterated its view that the nonapplicability of section 302(j) to modifications would not affect PSD and NSR applicability in the general case, but pointed out that resolution of the "listed source" issues could affect this outcome (51 FR 7093).

2. Industry Comments. Mining industry representatives commented that section 302(j) should apply to modifications. They disagreed with EPA's interpretation of the legislative history, believing instead that congressional silence on the subject disclosed a lack of guidance. The AMC asserted that since new sources and modifications are generally treated the same in most respects under the Act, there is no basis to treat them differently under section 302(j).

Industry commenters also argued that EPA must resolve, in the context of a separate rulemaking under section

302(j), certain ambiguities as to what "physical change or change in the method of operation" would result in a "significant net emissions increase" at a major stationary source and therefore constitute a major modification subject to NSR. (See, e.g., 40 CFR 52.52(b)(2)(i).) In their view, EPA's October 1984 proposal was inadequate to apprise the interested public of the purpose and intent of the proposal and how it relates to other existing regulatory requirements.

Peabody Holding Co., pointed out that due to the nature of SCM's, there must constantly be movement of mining operations as mining progresses along the coal deposits, possibly requiring the addition of new equipment or even the development of a new pit as the reserves in the existing pit are mined out. The NCA similarly asserted that physical or operational changes of this nature are a normal part of strip mining. Peabody suggested that EPA adopt a test which provides that any activity or change at a mine that represents a logical mining sequence of the mine's production pursuant to the mining plan used by State authorities in issuing air quality permits, or mining and reclamation permits in instances where air quality permits were not required, can serve as a guide to whether a modification would occur. Thus, activity in conformance with the mining plan should not be considered a modification when the mine owner has previously used that plan as a basis for securing all required permits. Peabody noted, however, that in some cases, especially in the eastern half of the United States, the mining plan will not cover the future movement of the mine for more than a few years because such movement depends upon the future acquisition of mineral rights in adjoining land. The movement of the mine to those sites in the future should not be considered a modification of the existing mine for NSR purposes so long as it represents a logical progression of mining activities. In Peabody's view, changes such as the addition of more haul roads or a change in pit sequences, would be routine and not constitute a modification.

The NCA asserted that increases in production up to maximum design production capacity of a mine and increases in emission up to the maximum allowed in air quality permits should not be considered a major modification. The AMC contended that since many existing mines have not been required to have permits, there is some question as to whether emissions decreases occurring at a mine are "federally enforceable" and, therefore,

whether the owner or operator could obtain credit for decreases (such as from a haul road that is no longer in use) in making netting calculations. The AMC also pointed out that actual emissions baseline issues must be addressed.

3. *Environmental Group Comments.* The Sierra Club agreed with EPA that section 302(j) does not apply to modifications. However, this commenter contended that EPA should not "grandfather" modifications that occur prior to today's action, on the ground that EPA's view to the contrary was contained only in the August 1983 proposal and was never promulgated.

4. *EPA Analysis.* Upon consideration of the comments, EPA reaffirms its October 1984 interpretation that section 302(j) does not apply to modifications. Commenters have not persuaded the Agency either that Congress had a contrary specific purpose in adopting section 302(j), or that EPA's interpretation, as explained in the October 1984 proposal, is inconsistent with the Act's purposes. Accordingly, EPA believes that its interpretation is a reasonable one, and thus proper under the law [See *Chevron, U.S.A. Inc. v. Natural Resources Defense Council (NRDC)*, 467 U.S. 837 (1984)]. In any event, EPA believes that this interpretation should have little general impact at this time, because today's central decision to not list SCM's means that very few mines should be brought under NSR solely by virtue of EPA's interpretation of the nonapplicability of section 302(j) to modifications.

The EPA's interpretation, in conjunction with today's resolution of the "listed source" issues could in theory have the effect of subjecting certain modifications at existing SCM's to PSD and NSR in some fashion. For example, increases in fugitive emissions resulting from physical or operational changes at mines collocated with coal preparation plants and coal cleaning plants that are deemed to be major sources would be considered in determining whether there was a "significant net increase in emissions," and, hence, a major modification. However, industry commenters have identified no instances in which coal preparation or cleaning plants would, under EPA's resolution of the "listed source" issues, be considered major sources. Even if there are such cases, EPA's interpretation would have a practical effect on the ambient impact analysis requirements of PSD and NSR only in those instances, if any, where there were changes in mining operations that increase fugitive emissions significantly without associated

significant increases in emissions from the coal preparation or coal cleaning facilities standing alone.

Significant increases in fugitive emissions at mine collocated with power plants also could result in PSD and NSR coverage by virtue of the reaffirmation of the current list of fugitive emissions source categories. However, as is the case with major new sources as explained above in the discussion of the "listed source" issues, this result does not flow from any decision as to the application of section 302(j) to SCM's. In addition, as a practical matter, today's decision would have an impact only in those instances, if any, where significant increases in fugitive emissions from mines were not accompanied by significant increases at collocated power plants.

The EPA also rejects industry comments that the Agency must engage in a separate section 302(j) rulemaking to resolve issues relating to the application of existing regulatory concepts associated with the definition of modification to the particular circumstances presented by SCM's. These issues do not relate directly to EPA's interpretation of the rulemaking requirements of section 302(j), to the decision whether to list SCM's, to the applicability of section 302(j) to modifications, or to the "listed source" issues that are the principal subject of this rulemaking. Rather, as industry commenters concede, their concerns relate to the interpretation of EPA's existing modification regulations.¹³ Accordingly, EPA is under no obligation to address industry's concerns in order to conclude this rulemaking. Moreover, as a general matter, since the comments in question essentially call for an interpretative ruling, the Administrative Procedure Act exempts EPA altogether from any legal obligation to engage in notice-and-comment rulemaking before addressing them.¹⁴ Nevertheless, because these comments do raise questions of potential importance in the event that modifications to SCM's should, in practice, be subject to review, EPA addresses some of them here.

In sum, EPA believes that the general applicability concepts associated with its definition of "major modification" may be readily adapted to SCM's. The EPA rejects the inference of industry commenters that these concepts are

¹³ See, e.g., Comments of Peabody Holding Co., Inc., Docket Entry No. A-84-33-IV-L-36 (May 28, 1988), at 38.

¹⁴ In any event, it is evident from the cogent and focused comments summarized above that mining industry representatives have been given ample opportunity to address this matter.

somehow alien to the practical realities of SCM's. Nevertheless, it is appropriate to clarify certain general matters regarding the use of these regulatory concepts in the context of mining operations. Specific application of these concepts can only be addressed from the posture of a particular mine and of necessity are beyond the scope of this discussion.

The EPA agrees with the basic thrust of Peabody's comments as to when changes at an existing SCM should be deemed physical or operational changes for purposes of the PSD and NSR major modification rules. When a prospective new source in a traditional industrial source category receives air quality permits, as, for example, under the Act's PSD provisions, the permit allows construction and operation of specified facilities at specified levels. So long as the source constructs and operates in accordance with the permit terms, the ebb and flow of its activities will not trigger a major modification. Conversely, if, after initial construction and operation under the permit, the source institutes a physical or operational change resulting in a significant net increase in emissions, it will be subject to review as a major modification. These general concepts may be applied to SCM's.

Thus, if there are instances where a specific mining plan specifies the location, methods, and extent of mining activities, and forms the basis of permitting decisions by State or Federal agencies under air quality or surface mining laws and regulations, a source generally could engage in the mining activities set forth in that plan without triggering a major modification. For example, where the mining plan contemplates that the pit will move to specified new areas over time and contemplates the new, extended, or modified haul roads will be constructed to accommodate that movement, such haul roads could in the normal course be considered part of the source as originally constructed, and not as a modification. Likewise, if the original mining plan provides for increases in production over time and discusses in detail associated changes in the mining operations in order to accommodate such increased production, including any changes necessary under applicable law in order to address air quality concerns, such changes generally would not trigger PSD review.

Conversely, where a mining operation moves to a new area not part of the original mine plan, because, for example, mineral rights to the area in question were not secured prior to filing

the original plan, construction of a new, modified, or extended haul road would be deemed a physical or operational change that may trigger review. Similarly, a mining operation may move to an area that, while nominally part of the original plan, has not undergone complete consideration of air pollution control requirements or air quality impacts to the extent necessary under applicable laws or regulations. This might occur because, for example, the regulatory authority could not adequately foresee the environmental impact of such future operations at the time of original approval and therefore retained the right to give additional consideration to such matters at some future time. Under such circumstances, changes in the mining operations could be deemed a physical change or change in the method of operation, and potentially trigger review. In addition, an original mining plan may provide for a particular level of production and specify the means by which that production may be achieved. However, if it later becomes the case that physical or operational changes not contemplated by the original mining plan are necessary in order to achieve the maximum production design capacity, emissions increases associated with such increased production may be subject to PSD review.

However, where changed operations such as those discussed above are cognizable for NSR purposes, a mine owner or operator would also be entitled to seek offsetting, federally enforceable decreases in current actual emissions in order to avoid review. This could be accomplished, for example, through a State construction permit acknowledging the cessation of operations on a haul road no longer needed. In general, as this discussion illustrates, EPA believes that the usual concepts by which major modification applicability is determined can be readily applied to SCM operations. Of course, some consideration must be given to the circumstances of the strip mining industry, as often must be done for other specific industries. In addition, the applicability in a particular case must be determined on the basis of the facts and circumstances surrounding that case.

V. Administrative

A. Docket

This regulatory action is subject to the provisions of Clean Air Act section 307(d) [see section 307(d)(1) (i) and (n)]. The docket for this regulatory action is A-84-33. 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 docket allows interested parties a means to identify and locate documents to effectively participate in the rulemaking process and now serves 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.

B. Office of Management and Budget (OMB) Review

Under Executive Order 12291 (E.O. 12291), EPA must judge whether a regulation is "major" and therefore subject to the requirement of an RIA. Although the proposed regulation was considered major and an RIA was prepared on the proposal, the final action is not major because it will not result in an adverse economic effect set forth in section 1 of E.O. 12291 as grounds for finding a regulation to be major. This regulation was submitted to the OMB for a 10-day review as required by E.O. 12291. In addition to being considered minor, this action is also subject to a court required publication deadline for final action in *Sierra Club v. Thomas*, No. 88-1847 (D.C. Cir.). Any written comments from OMB to EPA and any EPA responses to those comments are included in Docket A-84-33.

No additional reporting and record keeping requirements will occur as a result of today's action. All record keeping and reporting requirements resulting from the Federal PSD and NSR regulations have been submitted to OMB for approval under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501, et seq. and have been assigned OMB clearance No. 2060-0003. Today's action does not add substantively to the existing regulations and focuses primarily on resolving issues which result from EPA not listing a source category for consideration of fugitive dust emissions under section 302(j).

C. Economic Impact Assessment

The requirement for performing an Economic Impact Assessment under section 317 of the Act (42 U.S.C. 7617) does not apply, because this action does not make "substantial revisions" to existing regulations. The action is not substantial because it does not add to the current regulatory burden and simply retains existing provisions.

D. Federalism Implications

Under Executive Order 12612 (E.O. 12612), EPA must determine if a rule has federalism implications. Federalism implications refer 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 E.O. 12612 also requires that agencies, to the extent possible, refrain from limiting State policy options, consult with State prior to taking 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 E.O. 12612 provides for preemption of State law, however, if there is a clear congressional intent for EPA to do so. Any such preemption, however, is to be limited to the extent possible.

Today's action will not affect States beyond the current requirements under Federal PSD and NSR regulations. Under these existing regulations, States may adopt strategies if the strategies, taken as a whole, accomplish the statutory purposes of the Act. In addition, the regulations that EPA has will allow States to develop approvable methods of implementing the existing regulations.

In summary, no modifications are being made to the existing EPA-State relationship by today's action. Consequently, there are not federalism implications of this action.

E. 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 significant economic impact on a substantial number of small business entities (see 46 FR 8709).

List of Subjects

40 CFR Part 51

Administrative procedures and practices, Intergovernmental relations, Air pollution control, Prevention of significant deterioration, National parks and wilderness area, Fugitive emissions, Coal strip mining, Particulate matter, Nitrogen dioxide, Carbon monoxide, Hydrocarbons, Lead.

40 CFR Part 52

Air pollution control, Prevention of significant deterioration, National parks and wilderness areas, Fugitive emissions, Coal strip mining, Particulate

matter, Nitrogen dioxide, Carbon monoxide, Hydrocarbons, Lead.

Dated: November 16, 1989.

William K. Reilly,

Administrator.

[FR Doc. 89-27663 Filed 11-27-89; 8:45 am]

BILLING CODE 6560-50-M

40 CFR Part 52

[A-1-FRL-3691-5]

Approval and Promulgation of Air Quality Implementation Plans; Connecticut; Alternative Reasonably Available Control Technology for Frismar, Inc.

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is approving a State Implementation Plan (SIP) revision submitted by the State of Connecticut. This revision provides an alternative reasonably available control technology (RACT) determination for the control of volatile organic compound (VOC) emissions from one paper coating line at Frismar, Incorporated in Clinton, Connecticut. The intended effect of this action is to approve the State's request to amend its SIP. This action is being taken in accordance with section 110 of the Clean Air Act.

EFFECTIVE DATE: This rule will become effective on December 28, 1989.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Region I, JFK Federal Bldg., Room 2311, Boston, MA 02203 and the Air Compliance Unit, Department of Environmental Protection, State Office Bldg., 165 Capitol Avenue, Hartford, CT 06106.

FOR FURTHER INFORMATION CONTACT: David B. Conroy, (617) 565-3252; FTS 835-3252.

SUPPLEMENTARY INFORMATION: On July 22, 1988 (53 FR 27711), EPA published a Notice of Proposed Rulemaking (NPR) for the State of Connecticut. The NPR proposed approval of State Order No. 8001 for Frismar, Incorporated as a revision to the Connecticut SIP. No public comments were received on the proposed approval.

The final State Order was submitted by Connecticut as a formal SIP revision on November 5, 1987. This State Order was issued pursuant to provisions found in subdivision 22a-174-20(cc)(3) of

Connecticut's regulations which allow the DEP to impose alternative limitations on a source that has demonstrated it cannot meet the RACT limitations in the SIP for technological and economic reasons.

EPA approved the provisions in subdivision 22a-174-20(cc)(3) for making alternative RACT determinations on June 7, 1982 (47 FR 24552) as part of Connecticut's Ozone Attainment Plan. As part of that SIP revision, Connecticut submitted a letter dated January 11, 1982 in which the State committed to submit all alternative RACT determinations to EPA as SIP revisions.

Frismar is a paper coating facility utilizing two coating lines. The facility is subject to subsection 22a-174-20(g), "Paper coating" of Connecticut's SIP regulations which requires each coating line to meet an emission limitation of 2.9 pounds VOC/gallon of coating (minus water). This emission limitation is identical to the limitation specified in the applicable EPA control techniques guideline (CTG) document for this source category (EPA-450/2-77-008). Under Connecticut's regulations, a source subject to subsection 22a-174-20(g) must comply with the emission limitation contained in that regulation no later than July 1, 1985. Frismar has installed an inert atmosphere solvent recovery system on one of its coating lines (coater #2). Its other coating line (coater #1) presently has no control equipment.

As alternative RACT for one of Frismar's coating lines (coater #1), the State Order requires Frismar to comply with an emission rate of 5.32 pounds VOC/gallon of coating (minus water) for all first-pass coatings and an emission rate of 6.42 pounds VOC/gallon of coating (minus water) for all second-pass coatings. Additionally, to further limit the use of the higher VOC-containing second-pass coatings, the State Order requires Frismar to adhere to a limitation of 20 pounds VOC/ream (3000 square feet) of material coated when utilizing second-pass coatings. Frismar's other coating line (coater #2) is still required to comply with the SIP emission rate (as set forth in subsection 22a-174-20(g) of Connecticut's regulations) of 2.9 pounds VOC/gallon of coating (minus water). Coaters #1, and #2 are required to maintain compliance with their applicable RACT emission rates on an instantaneous basis. Further, the State Order requires Frismar to achieve and maintain a minimum overall reduction level of ninety-three percent (93%) from the inert atmosphere solvent recovery system installed on coater #2.

Additionally, the State Order requires Frismar to maintain daily and monthly caps of 918 pounds and 2.833 tons, respectively, for coater #1 and daily and monthly caps of 286.47 pounds and 2.87 tons, respectively, for coater #2. The monthly cap on coater #1 is required to be maintained on an average basis over every two consecutive month period. The daily and monthly caps insure that the VOC emissions from this facility will not interfere with reasonable further progress (RFP) towards attaining the National Ambient Air Quality Standard (NAAQS) for ozone in Connecticut.

To justify the above limitations as an alternative RACT determination, Frismar has submitted an extensive amount of technical and economic information to the DEP showing that it cannot reasonably attain daily compliance with the emission limitations contained in Connecticut's federally-approved SIP for coater #1. EPA's evaluation of this information confirms that add-on control equipment is economically infeasible for coater #1. (A copy of EPA's analysis is contained in the Technical Support Document prepared for this revision and is available from the EPA Regional Office listed in the *Addresses* section of this notice.)

Furthermore, Frismar has researched the feasibility of reformulating its coatings used on coater #1 to complying levels. Through these efforts, Frismar was able to realize a 28% increase in the content of coating solids in the coatings used on coater #1. Frismar cannot use any higher solids-containing coatings since the stencil manufacturing operation that it uses involves saturation as much as coating, and it is simply not possible for the tissue paper to absorb such coatings. The result of using any higher solids coatings is "skipping" which renders the product useless for subsequent sale and use.

EPA has reviewed the requirements of State Order No. 8001 and has determined that they constitute alternative RACT for Frismar. Further justification and rationale for approving this revision are contained in the Technical Support Document prepared by EPA for this revision. Copies of that document may be obtained from the EPA Regional Office listed in the *Addresses* section of this notice.

At the time of the State's November 5, 1987 submittal, although Connecticut was not in attainment of the ozone NAAQS, EPA had approved the SIP for the area, including the attainment demonstration, as providing for attainment by 1987. Thus, at that time, Connecticut was considered a nonattainment area with an approved

demonstration. As discussed above, Frismar will be achieving reductions in VOC comparable to what were anticipated by Connecticut's 1982 ozone attainment demonstration. Therefore, the SIP revision being approved for Frismar today does not change Connecticut's original ozone attainment demonstration which was approved by EPA on March 21, 1984.

EPA now knows, however, that Connecticut's 1982 ozone attainment plan does not provide for attainment by the end of 1987. In the *Federal Register* on November 24, 1987, EPA's Proposed Post-1987 Policy for Ozone and Carbon Monoxide stated that air quality monitors revealed sufficient exceedances of the ozone standard in Connecticut and that a SIP call would be issued. (See 52 FR 45044). A SIP call is a finding by EPA under Clean Air Act section 110(a)(2)(H) that the SIP does not provide for attainment by the required date, and thus amounts to a revocation (for certain purposes) of EPA's approval of the SIP and the attainment demonstration. Since publishing this notice, the review of data from air quality monitors in the State have revealed additional exceedances of the standard during 1987. On May 25, 1988, EPA issued a SIP call for Connecticut.

EPA does not believe, however, that this precludes EPA from approving the SIP revision for Frismar. Section 172(b) of the Clean Air Act lists the requirements, in addition to those listed in section 110(a)(2), which a nonattainment area SIP must meet. Section 172(b)(3) requires that states must demonstrate reasonable further progress toward attainment through the adoption, at a minimum, of reasonably available control technology (RACT). The Connecticut DEP and EPA have determined, based on substantial documentation from Frismar, that the level of control required by the DEP's State Order represents the most stringent level of control possible at Frismar taking into consideration economic and technological feasibility. Unless and until the DEP determines that to make an RFP demonstration consistent with EPA's Post-1987 policy, the DEP needs reductions from Frismar beyond RACT which would cause the plant to close, it is reasonable to impose RACT in the meantime to meet the requirements of section 172(b)(3).

Consistent with this approach, the DEP has made it clear it will account for Frismar's emissions under State Order No. 8001 in any new attainment demonstration. The State has told EPA it will use the daily cap being imposed on Frismar as representing the actual daily

VOC emissions from Frismar for purposes of showing reasonable further progress with the original ozone attainment demonstration. The emission limitations (including the cap) for Frismar will be included in any new SIP and associated control strategy demonstration that Connecticut prepares. Furthermore, the alternative RACT determination for Frismar does not constrain the State's ability to obtain any additional emission reductions needed to expeditiously attain and maintain ambient air quality standards. Moreover, on September 12, 1988, Connecticut submitted a letter to EPA stating that it is making reasonable efforts to develop a complete approvable SIP and provided EPA with a schedule for such development (including dates for completion of emissions inventory, correction of deficient regulations, and subsequent increments of progress). EPA believes that since the State has adequately made these representations, EPA is able to approve this alternative RACT determination on grounds that it does not interfere with attainment and maintenance of the ozone NAAQS, in accordance with section 110(a)(2) of the Clean Air Act.

Final Action

EPA is approving Connecticut's State Order No. 8001 as a revision to the Connecticut SIP. The provisions of Connecticut's State Order No. 8001 impose alternative RACT on Frismar, Incorporated pursuant to subdivision 22a-174-20(cc)(3) of Connecticut's regulations. EPA is approving this revision based on justification received from Frismar showing that it is economically infeasible for Frismar to install add-on control equipment on coater #1. The provisions contained in the State Order for this coater restrict the overall use of this coater. This requires Frismar to utilize its controlled coater (i.e., coater #2) for a large majority of its production. Under the State Order, coater #2 must continue to meet the RACT limit of 2.9 pounds VOC/gallon of coating (minus water) of subsection 22a-174-20(q), and is not, therefore, approved for an alternative RACT emission rate. Approval of Connecticut State Order No. 8001 covers only Frismar, Incorporated of Clinton, Connecticut and should not be construed as a national precedent for other paper coating facilities.

Further, it is EPA's policy to disallow a relaxation from RACT in an area needing but lacking an approved attainment demonstration. EPA believes, however, it is appropriate to

approve this request under the grand fathering provision set forth in the June 27, 1988 memorandum signed by Gerald Emison, Director of the Office of Air Quality Planning and Standards, because the request was submitted to EPA prior to the post-1987 SIP call when the area had an approved attainment demonstration.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by January 29, 1990. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Air pollution control. Hydrocarbons. Incorporation by reference. Intergovernmental relations. Ozone. Reporting and recordkeeping requirements.

Note: Incorporation by reference of the State Implementation Plan for the State of Connecticut was approved by the Director of the Federal Register on July 1, 1982.

Dated: November 8, 1989.

William K. Reilly,
Administrator.

Subpart H, part 52 of chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

Subpart H—Connecticut

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

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

2. Section 52.370 is amended by adding paragraph (c)(47) to read as follows:

§ 52.370 Identification of plan.

(c) * * *

(47) Revisions to the State Implementation Plan submitted by the Connecticut Department of Environmental Protection on November 5, 1987.

(i) *Incorporation by reference.* (A) Letter from the Connecticut Department of Environmental Protection dated November 5, 1987 submitting a revision to the Connecticut State Implementation Plan.

(B) State Order No. 8001 and attached Compliance Timetable for Frisamar, Incorporated in Clinton, Connecticut.

State Order No. 8001 was effective on October 20, 1987.

(ii) *Additional materials.* (A) Technical Support Document prepared by the Connecticut Department of Environmental Protection providing a complete description of the alternative reasonably available control technology determination imposed on the facility.

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40 CFR Part 52

[FRL-3691-4; KY-060]

Approval and Promulgation of Implementations Plans—Kentucky: 401 KAR 50:010, Definitions and Abbreviations and 401 KAR 51:017, Prevention of Significant Deterioration of Air Quality

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: EPA today approves as State Implementation Plan (SIP) revisions amendments to Kentucky regulations 401 KAR 50:010 (Definitions and Abbreviations), and 401 KAR 51:017, Prevention of Significant Deterioration (PSD) of Air Quality. The first regulation, 401 KAR 50:010, is being amended to delete the applicability of the definition of volatile organic compounds (VOC) from the regulations for PSD and new source review (NSR) in nonattainment areas, and to change the definition of VOC to make it consistent with the federal definition for purposes of the new source performance standards. In order to reduce ambiguity regulation 401 KAR 51:017 is being amended to delete a sentence in section 8(3) relating to monitoring requirements for sources of VOC. The approval of these amendments will eliminate the remaining deficiencies in Kentucky's PSD regulations identified in the approval notice for 401 KAR 51:017 on September 1, 1989 (see 54 FR 36307).

DATE: This action will be effective on January 29, 1990, unless notice is received on or before December 28, 1989, that someone wishes to submit adverse or critical comments. Such notice may be submitted to Richard A. Schutt at the EPA Regional Office address listed below.

ADDRESSES: Copies of the material submitted by the State may be examined during normal business hours at the following locations:

Public Information Reference Unit,
Environmental Protection Agency, 401
M Street, SW., Washington, DC 20460

Environmental Protection Agency,
Region IV, Air Programs Branch, 345
Courtland Street, NE., Atlanta,
Georgia 30365

Commonwealth of Kentucky Natural
Resources and Environmental
Protection Cabinet, 18 Reilly Road,
Building #2, Fort Boone Plaza,
Frankfort, KY 40601.

FOR FURTHER INFORMATION CONTACT:
Richard Schutt of the EPA Region IV Air
Programs Branch at the above address,
telephone (404) 347-2864 or FTS 257-
2864.

SUPPLEMENTARY INFORMATION: On December 29, 1986, the Commonwealth of Kentucky submitted to EPA two regulations: 401 KAR 50:010, Definitions and Abbreviations, and 401 KAR 51:017, Prevention of Significant Deterioration (PSD). A public hearing was held to receive comments on these regulations on November 21, 1986. EPA requested that these amendments be made to eliminate the remaining deficiencies in Kentucky's PSD regulations. The deficiencies were identified in EPA's approval of the PSD regulations on September 1, 1989 (see 54 FR 36307).

Regulation 401 KAR 50:010 is being amended to change the definition of volatile organic compound (VOC) and delete the applicability of the definition of VOC from the regulations for PSD and NSR. Upon changing this definition of VOC, there will be no definition of VOC for the PSD and NSR regulations, just as there is no definition of VOC in the federal regulations for purposes of PSD and NSR. The new VOC definition is similar to the definition that is used in 40 CFR part 60, the federal regulation for New Source Performance Standards (NSPS). Furthermore, VOC remains defined in certain Kentucky regulations in chapters 59 and 61 for new and existing sources, where it is applicable.

Kentucky also incorporates a list of eleven (11) VOC's which are not considered by EPA to be photochemically reactive into regulation 401 KAR 50:010. The compounds on this list are exempt from any VOC regulatory action for the purpose of PSD and NSR. The list is incorporated by reference in 401 KAR 50:016. Kentucky is also excluding from the definition of VOC five (5) compounds that are not considered to be organic compounds under the previous definition.

Since the definition of VOC in some Kentucky regulations in chapters 59 and 61 appears to conflict with the definition in 401 KAR 50:010, Kentucky states that the more specific definition shall apply. At the present time, no sources are affected by 401 KAR 50:010. Should any