passenger or merchandise (including baggage) without authorization by the appropriate Customs officer.

(c) *Vessels.* For report of arrival requirements applicable to all vessels, regardless of tonnage, and arriving from any location, see §§ 4.2 and 4.2a of this chapter.

(d) *Method of reporting.* Report of arrival under paragraphs (a), (b), and (c) of this section shall be made in person unless the appropriate district director, by local instructions, requires that it be made by some other specific means. Such local instructions issued by the district director will be made available to interested parties by posting in Customs offices, publication in a newspaper of general circulation in the Customs district that supervises the location, and/or other appropriate means.

4. Section 123.2 is revised to read as follows:

§ 123.2 Penalty for failure to report arrival or for proceeding without a permit.

(a) *Persons.* Any person arriving otherwise than by conveyance who enters the U.S. at other than a designated port of entry, or Customs station if authorization exists for entry at that station, who fails to report arrival as required in § 123.1(a) of this part, or who departs from the port of entry or Customs station without authorization by the appropriate Customs officer, whether or not intentionally, shall be subject to such civil and criminal penalties as are prescribed under 19 U.S.C. 1459 and provided for in § 123.1 of this part.

(b) *Vessels.* The penalty provisions applicable to vessels for failure to report arrival or for proceeding without a permit are those as provided in § 4.3a.

(c) *Vehicles.* (1) *Civil penalties.* The person in charge of any vehicle who—

(i) Enters the vehicle into the U.S. at other than a designated port of entry, or Customs station if authorization exists for entry at that station;

(ii) Fails to report arrival and present the vehicle and all persons and merchandise (including baggage) on board for inspection as required in § 123.1(b) of this part;

(iii) Fails to file a manifest or any other document required to be filed in connection with arrival in the U.S. under this part; or

(iv) Without authorization by the appropriate Customs officer, removes such vehicle from the port of entry or Customs station or discharges any passenger or merchandise (including baggage) shall be subject to such civil penalties as are prescribed in section 436, Tariff Act of 1930, as amended (19 U.S.C. 1436), and any conveyance used in connection with any such violation shall be subject to seizure and forfeiture. The person also may be subject to an additional civil penalty equal to the value of the merchandise on the conveyance which was not entered or reported as required by § 123.1(b) of this part, and that merchandise may be subject to seizure and forfeiture unless properly entered by the importer or consignee. If the merchandise consists of any controlled substances, additional penalties may be assessed, as prescribed in section 584, Tariff Act of 1930, as amended (19 U.S.C. 1584).

(2) *Criminal penalties.* Upon conviction, any person in charge of a vehicle who intentionally commits any of the violations described in paragraph (c)(1) of this section shall, in addition to the penalties described therein, be subject to such additional criminal penalties as are prescribed in section 436, Tariff Act of 1930, as amended (19 U.S.C. 1436). If the vehicle has or is discovered to have had on board any merchandise (other than sea stores or the equivalent for conveyances other than vessels) the importation of which into the U.S. is prohibited, the person in charge of the vehicle is subject to such additional criminal penalties as are prescribed in section 436, Tariff Act of 1930, as amended (19 U.S.C. 1436).

5. Section 123.9 is amended by revising paragraph (a) and paragraph (d)(2) to read as follows:

§ 123.9 Explanation of a discrepancy in a manifest.

(a) *Provisions applicable*—(1) *Overages.* If any merchandise (including sea stores or its equivalent) is found on board a vessel or vehicle arriving in the U.S. that is not listed on a manifest filed in accordance with § 123.5 of this part, or after having been unladen from such vessel or vehicle, is found not to have been included or described in the manifest or does not agree therewith (an overage), the master, person in charge, or owner of the vessel or vehicle or any person directly or indirectly responsible for the discrepancy is subject to such penalties as are prescribed in section 584, Tariff Act of 1930, as amended (19 U.S.C. 1584), and any such merchandise belonging or consigned to the master, person in charge, or owner of the vehicle is subject to seizure and forfeiture.

(2) *Shortages.* If merchandise is manifested but not found on board a vessel or vehicle arriving in the U.S. (a shortage), the master, person in charge, or owner of the vessel or vehicle or any person directly or indirectly responsible for the discrepancy is subject to such penalties as are prescribed in section 584, Tariff Act of 1930, as amended (19 U.S.C. 1584).

(3) *Failure to file a manifest.* The master or person in charge of a vessel or vehicle arriving in the U.S. or the U.S. Virgin Islands who fails to present a manifest to Customs is liable for civil penalties as are provided by law, and the conveyance used in connection with the failure to file is subject to seizure and forfeiture. A criminal conviction for intentional failure to file shall make the master or person in charge liable for criminal penalties, as provided by statute, and if any merchandise is found or determined to have been on board (other than sea stores or the equivalent for vehicles), the importation of which is prohibited, additional penalties may apply.

* * * * *

(d) *Action on the discrepancy report.*

* * * * *

(2) If the criteria in paragraph (d)(1) of this section are not met, applicable penalties under 19 U.S.C. 1584 shall be assessed.

* * * * *

6. Section 123.9 is further amended by removing the reference to "19 U.S.C. 1460 or" in paragraphs (d)(3), (e) and (f).

Michael H. Lane,

Acting Commissioner of Customs.

Approved: May 27, 1993.

Ronald K. Noble,

Assistant Secretary of the Treasury.

[FR Doc. 93-30908 Filed 12-20-93; 8:45 am]

BILLING CODE 4820-02-P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

21 CFR Part 178

[Docket Nos. 80N-0428 and 82N-0342]

Colorants for Polymers

AGENCY: Food and Drug Administration, HHS.

ACTION: Final rule; response to objections and petitions for reconsideration; denial of requests for a stay of regulation and for hearings.

SUMMARY: The Food and Drug Administration (FDA) is responding to objections and petitions for reconsideration, and is denying requests for a stay of the effective date and for hearings, on its final rule on colorants for polymers. The agency is also making certain amendments to its regulations in response to some of those objections

and is making editorial changes in the regulation to correct a misspelling in the listing for an additive, as well as to reflect the recent reorganization of the Center for Food Safety and Applied Nutrition (CFSAN).

DATES: The amendments to § 178.3297 are effective Decemember 21, 1993; written objections to the amendments made in this document and requests for a hearing on those amendments by January 20, 1994.

ADDRESSES: Submit written objections to the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857.

FOR FURTHER INFORMATION CONTACT: Mitchell Cheeseman, Center for Food Safety and Applied Nutrition (HFS–216), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–254–9511.

SUPPLEMENTARY INFORMATION:

I. Introduction

In the **Federal Register** of August 30, 1991 (56 FR 42927), FDA published a final rule amending its regulations on the use of food additives that may be used as colorants in food-contact polymers. The final rule responded to five food additive petitions for the use of colorants in polymers and transferred the listings for a number of colorants used in food-contact polymers to a single regulation on colorants for polymers in 21 CFR 178.3297 *Colorants for polymers*. In response to information provided in comments on a tentative final rule that published on April 6, 1988 (53 FR 11402), the final rule also permitted the use of D&C Red No. 7 and its lakes, the use of additional shades of phthalocyanine blue, and the expanded use of phthalocyanine green and quinacridone red as colorants in food-contact polymers.

The agency provided 30 days for the filing of objections to the final rule of August 30, 1991. It received six letters containing objections and a petition for reconsideration. The submissions were from the food-packaging industry and from trade associations representing the plastics industry, the color manufacturers' industry, and the paper industry. One of the objections requested a hearing, and the petition for reconsideration requested a stay of the regulation pending a hearing and reconsideration. In addition, the agency received a petition for stay and reconsideration of the preamble to the final rule from the plastics industry and a comment supporting this petition for reconsideration. The issues raised by these objections, requests for hearings, and the petitions for reconsideration, along with the agency's responses, are set forth below.

II. Requests for a Stay

A. Standards for Granting a Stay

Under section 409(e) of the Federal Food, Drug, and Cosmetic Act (the act) (21 U.S.C. 348(e)), a request for a hearing on the issuance of a food additive regulation does not automatically stay or delay the effectiveness of that regulation. That section does, however, grant the Secretary of Health and Human Services (and, by delegation, FDA) the discretion to stay the effectiveness of the regulation.

Under § 10.35 (21 CFR 10.35), an interested person may petition the agency to stay an administrative action. Section 10.35(d) specifies that the filing of a petition for a stay of action, a petition for reconsideration, or objections to a final rule will not necessarily stay or otherwise delay any administrative action unless one of the following applies:

(1) The Commissioner determines that a stay or delay is in the public interest and stays the action.

(2) A statute requires that the matter be stayed.

(3) A court orders that the matter be stayed.

Section 10.35(e) states that the agency will grant a petition for a stay if all of the following apply:

(1) The petitioner will otherwise suffer irreparable injury.

(2) The petitioner's case is not frivolous and is being pursued in good faith.

(3) The petition for a stay is supported by sound public policy grounds.

(4) The delay resulting from the stay is not outweighed by public health or other public interests.

In summary, a petition for a stay of an administrative action must establish that the stay is warranted on the basis of both public and private interests, and that these interests are not outweighed by public health concerns.

B. Decision on Requests for Stay

FDA has received two petitions for a stay of the effective date of the final rule on colorants for polymers. One request seeks a stay pending the publication of a final rule amending §§ 178.3297 and 174.5(d)(3) (21 CFR 174.5(d)(3)) to provide for the use of color additive lakes that are provisionally listed for use in food as colorants for food-contact polymers and to provide for the use of color additives and food additives, listed for direct use in food, as indirect additives, respectively. The second request seeks a stay pending FDA's reconsideration of certain statements made in the preamble to the final rule.

The agency is denying the requests for a stay because neither request meets the conditions stated in § 10.35(d) or (e). FDA finds that there is no merit to the requested stays. The first request seeks a stay of the effect of § 178.3297 pending a decision on whether to add additional substances to this regulation. The petition provides no basis for why the regulation should not go into effect to permit the use of the substances that are listed in the regulation, nor is the agency aware of any public policy grounds that would justify staying the final rule on colorants for polymers. Therefore, the agency is denying this request.

As for the second request, the preamble to the final rule on § 178.3297 has no legal effect. It is simply an advisory opinion that sets forth the agency's views on the matter dealt with in the final rule. Therefore, this request is equally without merit.

III. Petitions for Reconsideration

Under § 10.33 (21 CFR 10.33), any interested person may petition for reconsideration of all or part of any decision of the agency on a petition submitted under § 10.25 (21 CFR 10.25). The agency received two petitions for reconsideration of the final rule on colorants for polymers. One petition requests amendments to §§ 178.3297 and 174.5(d)(3) to provide for the use of color additive lakes that are provisionally listed for use in food as colorants for food-contact polymers and to provide for the use of color additives and food additives listed for direct use in food as indirect additives, respectively. The second petition requests that the agency reconsider and modify statements made in the preamble to the final rule on colorants for polymers.

The agency concludes that the petition for reconsideration requesting amendment of §§ 178.3297 and 174.5(d)(3) is more appropriately dealt with under § 12.26 (21 CFR 12.26) than under the reconsideration provisions of its regulations. Under § 12.24(a)(1) (21 CFR 12.24(a)(1)), the first determination that FDA makes in response to an objection is whether regulations should be modified or revoked under § 12.26. Under § 12.26, the agency can modify or revoke a regulation or order. The agency will consider the issues raised in this petition for reconsideration under § 12.26. Therefore, this petition for reconsideration is moot.

One petition requested FDA to reconsider, pursuant to § 10.33, certain statements made in the preamble to the final rule. Three objections supported the petition for reconsideration of these statements, and one objection offered comments on the petition for reconsideration. This petition and the four objections requested that FDA acknowledge that individual companies as well as the agency have the right to determine that a colorant or other substance that does not migrate in more than insignificant amounts under the intended conditions of use is not a food additive. The petition also asserted that the agency did not adequately consider the statutory definition of a "food additive" in the preamble to the final rule on colorants for polymers. Specifically, the petition contended that not all colorants in polymers will migrate to food in significant amounts, and that, therefore, the position taken by the agency in the preamble to the final rule that all colorants used in polymers are food additives is in conflict with the definition of a "food additive" in section 201(s) of the act (21 U.S.C. 321(s)). This definition states that "the term 'food additive' means any substance the intended use of which results or may reasonably be expected to result, directly or indirectly, in its becoming a component or otherwise affecting the characteristics of any food." The petition further argued that, in the preamble, FDA did not adequately consider the U.S. Court of Appeals holding in *Monsanto Co.* v. *Kennedy*, 613 F.2d 947, 955 (D.C. Cir. 1979), stating that a substance meets the definition of a food additive if FDA can determine "with a fair degree of confidence that [the] substance migrates into food in more than insignificant amounts."

The petition for reconsideration also stated that the agency incorrectly interpreted migration data in its files in concluding that all colorants in food-contact polymers migrate to food. Moreover, the petition contended that FDA has not adequately considered the *Monsanto* decision because the agency still relies on Fick's laws of diffusion to describe migration of colorants and other indirect additives from food packaging to food. In addition, the petition and the other objections asserted that FDA does not have the resources to efficiently deal with the submissions that industry will be forced to make to the agency as a result of the agency's statements in the preamble that colorants in polymers are reasonably expected to migrate to food. One objection stated that FDA also did not adequately consider the economic impact on industry of the agency's requirement that formal submissions must be made to FDA on all colorants for polymers.

The agency concludes that it has previously and adequately considered all information in the administrative record including the information cited by the petition and the four objections. FDA disagrees with the contention that it did not adequately consider the definition of a "food additive" in the act or the conclusions of the court in *Monsanto*. FDA concluded in the final rule that colorants and other additives used in food-contact polymers are reasonably expected to migrate in some amount to food and may therefore be regulated as food additives. This conclusion was based on all the scientific evidence before the agency, including Fick's laws, migration data contained in petitions, and other migration studies (see 56 FR 42927 at 42928 through 42929). The agency noted, however, that it has determined that under specific conditions of use, particular colorants would be expected to migrate at insignificant levels that do not raise any safety concerns. In these cases, the agency has not required that food additive petitions be submitted for the intended use of the substance, even though the substance, under these conditions of use, met the strict definition of a "food additive."

The agency notes that the petition and the four objections are substantially similar to comments received on the April 6, 1988, tentative final rule that FDA addressed in the August 30, 1991, final rule (56 FR 42927 at 42928). Therefore, FDA is denying the petition for reconsideration and the accompanying objections because they do not present any evidence that the agency has not previously and adequately considered in reaching its conclusions in the preamble to the final rule on colorants for polymers (§ 10.33(d)(1)).

Even though the agency is denying the petition for reconsideration of the preamble to the final rule on colorants for polymers, the agency believes that some clarification of the issues is necessary. The petition and four objections appear to be based on a misinterpretation of the agency's intent in the preamble to the final rule. In the preamble, the agency did not intend to imply that firms could not make their own determination as to whether a particular use of a specific substance does not meet the definition of a food additive. However, the agency wishes to point out that such determinations do not bind FDA, and that a firm relies on such a determination at its own risk. If the agency determines, based on its review of the available evidence, that the use of such a substance meets the definition of a food additive, the agency may take regulatory action against the substance as an unsafe food additive or against the firm that introduced it into interstate commerce.

Therefore, in cases where it is not clear whether the use of a food-contact article would meet the "food additive" definition, the agency recommends that firms seek written concurrence by FDA that the substance is not subject to regulation under the food additive provisions. The agency published a proposed rule in the **Federal Register** of October 12, 1993 (58 FR 52719), that, if adopted, will establish a "threshold of regulation" below which substances will not require a food additive regulation for use as an indirect food additive. In the October 12, 1993, proposed rule, the agency stated that it would consider exempting from regulation as a food additive those food-contact materials whose use will result in dietary concentrations of 0.5 parts per billion or less.

The assertion by the objectors that FDA lacks resources to process a projected influx of petitions, and the contention that the cost of analyzing products before introduction into the marketplace would be greater as a result of the August 30, 1991, final rule, are not germane to this rulemaking because FDA is not requiring additional food additive petitions. Moreover, the testing, that would need to be done to determine whether a colorant or other component of a food-contact material is a food additive would be the same, at least if a reliable determination is to be made, whether a firm would be making its own evaluation or submitting the results to the agency for its evaluation. Therefore, whether the data are evaluated by industry or by FDA, the cost of developing them would be the same.

IV. Requests for a Hearing

A. Standards for Granting a Hearing

Section 409(f) of the act (21 U.S.C. 348(f)) provides that, within 30 days after publication of an order relating to a food additive regulation, any person adversely affected by such an order may file objections, specifying with particularity the provisions of the order "deemed objectionable, stating reasonable grounds therefor," and may request a public hearing based upon such objections. Specific criteria for determining whether a request for a hearing has been justified are set forth in § 12.24(b) (21 CFR 12.24(b)). A

hearing will be granted if the material submitted by the requester shows that:

(1) There is a genuine and substantial issue of fact for resolution at a hearing. A hearing will not be granted on issues of policy or law.

(2) The factual issue can be resolved by available and specifically identified reliable evidence. A hearing will not be granted on the basis of mere allegations or denials or general descriptions of positions and contentions.

(3) The data and information submitted, if established at a hearing, would be adequate to justify resolution of the factual issue in the way sought by the person. A hearing will be denied if the agency concludes that the data and information submitted are insufficient to justify the factual determination urged, even if accurate.

(4) Resolution of the factual issue in the way sought by the person is adequate to justify the action requested. A hearing will not be granted on factual issues that are not determinative with respect to the action requested, e.g., if the agency concludes that the action would be the same even if the factual issue were resolved in the way sought, or if a request is made that a final regulation include a provision not reasonably encompassed by the proposal.

(5) The action requested is not inconsistent with any provision in the act or any regulation in this chapter particularizing statutory standards. The proper procedure in those circumstances is for the person requesting the hearing to petition for an amendment or waiver of the regulation involved.

(6) The requirements in other applicable regulations, e.g., §§ 10.20, 12.21, 12.22, 314.200, 314.300, 514.200, and 601.7(a), and in the notice promulgating the final regulation or the notice of opportunity for a hearing are met.

A party seeking a hearing is required to meet a "threshold burden of tendering evidence suggesting the need for a hearing." *Costle* v. *Pacific Legal Foundation*, 445 U.S. 198, 214–215 (1980) reh. den., 445 U.S. 947 (1980), citing *Weinberger* v. *Hynson, Westcott, & Dunning, Inc.*, 412 U.S. 609, 620–621 (1973). An allegation that a hearing is necessary to "sharpen the issues" or to "fully develop the facts" does not meet this test. *Georgia Pacific Corp.* v. *U.S. E.P.A.*, 671 F.2d 1235, 1241 (9th Cir. 1982). If a hearing request fails to identify any factual evidence that would be the subject of a hearing, there is no point in holding one. In judicial proceedings, a court is authorized to issue summary judgment without an evidentiary hearing whenever it finds that there are no genuine issues of material fact in dispute, and a party is entitled to judgment as a matter of law. See Rule 56, "Federal Rules of Civil Procedure." The same principle applies in administrative proceedings.

A hearing request must contain evidence that raises a material issue of fact concerning which a meaningful hearing might be held. *Pineapple Growers Association* v. *FDA*, 673 F.2d 1083, 1085 (9th Cir. 1982). Where the issues raised in the objection are, even if true, legally insufficient to alter the decision, the agency need not grant a hearing. *Dyestuffs and Chemicals, Inc.* v. *Flemming*, 271 F.2d 281 (8th Cir. 1959) cert. denied, 362 U.S. 911 (1960). FDA need not grant a hearing in each case where an objector submits additional information or posits a novel interpretation of existing information. (See *United States* v. *Consolidated Mines & Smelting Co.*, 455 F.2d 432 (9th Cir. 1971)). In other words, a hearing is justified only if the objections are made in good faith and if they "draw in question in a material way the underpinnings of the regulation at issue." *Pactra Industries* v. *CPSC*, 555 F.2d 677 (9th Cir. 1977). Finally, courts have uniformly recognized that a hearing need not be held to resolve questions of law or policy. (See *Citizens for Allegan County, Inc.* v. *FPC*, 414 F.2d 1125 (D.C. Cir. 1969); *Sun Oil Co.* v. *FPC*, 256 F.2d 233, 240 (5th Cir.), cert. denied, 358 U.S. 872 (1958)).

Even if objections raise material issues of fact, FDA need not grant a hearing if those same issues were adequately raised and considered in an earlier proceeding. Once an issue has been so raised and considered, a party is estopped from raising that same issue in a later proceeding without new evidence. The various judicial doctrines dealing with finality are validly applied to the administrative process. In explaining why these principles "self-evidently" ought to apply to an agency proceeding, the D.C. Circuit wrote:

> The underlying concept requires that a party have a fair chance to present its position. But overall interests of administration do not require or generally contemplate that more than a fair opportunity will be given. *Retail Clerks Union, Local 1401, R.C.I.A.* v. *NLRB*, 463 F.2d 316, 322 (D.C. Cir. 1972). (See *Costle* v. *Pacific Legal Foundation, supra* at 1106. See also *Pacific Seafarers, Inc.* v. *Pacific Far East Line, Inc.*, 404 F.2d 804 (D.C. Cir. 1968)).

In summary, a hearing request must present sufficient credible evidence to raise a material issue of fact, and the evidence must be adequate to resolve the issue as requested and to justify the action requested.

B. Decision on Requests for a Hearing

1. Three objections requested that § 178.3297 *Colorants for polymers* be amended to provide for the use of color additive lakes that are provisionally listed for use in food as colorants for food-contact polymers. One objection stated that the proposal for the use of colorants for plastics, published in the **Federal Register** of June 6, 1972, provided for the use of all color additives that were listed for direct use in food as colorants for polymers, and that the intent of that proposal was to include both permanently and provisionally listed colors and their lakes. One objection further asserted that FD&C Red No. 4 is provisionally listed under § 82.304 (21 CFR 82.304) and, therefore, its lakes are also provisionally listed. Two objections requested a hearing on this issue.

In response to these objections FDA reviewed the June 6, 1972, proposal and found that it had proposed to list the use of "* * * colors listed for direct use in food under the provisions of the color additive regulations in Part 8 * * *" for use in food-contact plastics (37 FR 11255 at 11256). At the time of the June 6, 1972, proposal, part 8 (21 CFR part 8) included both permanently and provisionally listed color additives. Therefore, the agency agrees that the June 6, 1972, proposal was to permit the use of provisionally listed lakes of color additives that are listed for direct food use as colorants in polymers. However, § 82.304 restricts FD&C Red No. 4 to use only in externally applied drugs and cosmetics. Therefore, neither FD&C Red No. 4 nor its lakes are listed for direct addition to food, and even under the June 6, 1972, proposal, they could not be used as colorants in food-contact polymers.

The agency acknowledges that FD&C color additives, other than FD&C Red No. 4, are listed for direct use as color additives in food, and that their lakes are provisionally listed for this use. Therefore, in response to these objections, FDA is modifying § 178.3297(d) to include the FD&C lakes (except FD&C Red No. 4 lakes) that are provisionally listed, for use in food as colorants in food-contact polymers. This amendment makes the listing of tartrazine lake (certified FD&C Yellow No. 5 only) in the table of § 178.3297(e) redundant. Therefore, FDA is removing this listing from the table.

Because FDA is amending the final rule on colorants for polymers in this way in response to the objections, there is no issue of fact to consider at a

hearing and, thus, no basis for a hearing (§ 12.24(b)(1)).

2. Two objections requested that § 178.3297 *Colorants for polymers* be corrected to include the use of chromium oxide green as a colorant in repeat-use rubber articles complying with § 177.2600 *Rubber articles intended for repeated use* (21 CFR 177.2600). The objections pointed out that chromium oxide green was listed for use as a colorant under § 177.2600. However, when the agency transferred the colorants listed in § 177.2600 to § 178.3297, it omitted the use of chromium oxide green as a colorant in repeat-use rubber articles. One of the objections requested a hearing on the exclusion of chromium oxide green from use as a colorant for repeat-use rubber articles.

FDA agrees that it inadvertently omitted the use of chromium oxide green in repeat-use rubber articles complying with § 177.2600 when it transferred the colorants listed under § 177.2600 to § 178.3297. Therefore, the agency is modifying the final rule on colorants for polymers to include the use of chromium oxide green as a colorant in repeat-use rubber articles complying with § 177.2600.

The agency concludes that, because it is modifying the final rule on colorants for polymers in response to the objections, there is no issue of fact to consider at a hearing. The agency is, therefore, denying the request for a hearing on this issue (§ 12.24(b)(1)).

3. Three objections requested that § 176.170 *Components of paper and paperboard in contact with aqueous and fatty foods* (21 CFR 176.170) be amended to provide for the use of color additives and their lakes that are permanently or provisionally listed for use in foods as colorants for paper and paperboard in contact with aqueous and fatty food. One party requested a hearing on this objection.

This objection raises an issue that is beyond the scope of the August 30, 1991, final rule. The agency's final rule on colorants for polymers did not address the use of colorants in paper and paperboard food-contact materials. The final rule merely amended § 176.170 to transfer to that regulation the list of colorants for paper and paperboard that had been listed in § 175.300 *Resinous and polymeric coatings* (21 CFR 175.300). Therefore, the amendment to § 176.170 in the August 30, 1991, final rule was only a technical correction and was not an action on any new uses of colorants in paper and paperboard in contact with food. None of the five petitions that FDA responded to in this rulemaking involved colorants in paper and paperboard. Consequently, FDA is denying these requests to amend § 176.170. Because the requests for a hearing are to address an issue that is outside the scope of this rulemaking, there is no basis to hold a hearing on this issue (§ 12.24(b)(4)).

Although FDA is denying these objections, the agency acknowledges that it issued on September 18, 1979, a formal advisory opinion that stated that:

> "* * * We would have no objection to the use, in paper and paperboard intended for food contact, of those color additives regulated for direct addition to food generally and that do not have specific restrictions on the levels or kinds of use. These color additives, which are restricted only by good manufacturing practice, would be among the color additives exempt from certification, which are listed in 21 CFR Part 73, Subpart A; those subject to certification, which are listed in 21 CFR Part 74, Subpart A; and those provisionally listed in 21 CFR 81.1(a) for food use. The color additives in paper and paperboard should not impart a noticeable color to the food by migration."

FDA also wishes to make clear that, in denying these objections, it is not changing this opinion. However, the agency is constrained from incorporating these listings in § 176.170, as requested by these objections, without appropriate rulemaking. If interested persons would like to see § 176.170 amended in the manner suggested by the objections, they should petition the agency to do so in accordance with part 171 (21 CFR part 171).

4. One objection requested that § 174.5(d)(3) be amended to state that color additives and food additives listed for direct use in food have been subject to prior approval and may therefore be used as indirect additives. The objection requested a hearing on the proposed amendment of § 174.5(d)(3). A related objection also contended that food additives listed for direct addition to food are generally recognized as safe (GRAS) for use in polymers that contact food under § 174.5(d)(1).

These objections raise issues that are beyond the scope of the August 30, 1991, final rule. The agency's final rule on colorants for polymers did not consider the amendment of § 174.5. None of the five petitions that FDA responded to in this rulemaking involved such an amendment. Consequently, FDA is denying these requests to amend § 174.5. Because the requests for a hearing are to address an issue that is outside the scope of this rulemaking, there is no basis to hold a hearing on this issue (§ 12.24(b)(4)).

Although the agency is denying these objections, FDA believes that clarification of this issue is necessary. The agency disagrees with the objection that contends that food additives and color additives that are permitted for direct use in food are GRAS for indirect food additive use and may therefore be used under § 174.5(d)(1) as colorants in food-contact polymers. The agency also disagrees that substances regulated for use as direct food additives should be permitted as indirect food additives. Both of these suggestions could significantly increase the exposure to many direct food additives that are present in the human diet only at extremely low levels (e.g., synthetic flavors).

Nonetheless, the agency has published a proposed rule in the **Federal Register** of October 12, 1993 (58 FR 52719), that, if adopted, will establish a level below which substances regulated for direct addition to food would not require regulation for use as an indirect food additive. In the October 12, 1993, proposed rule, the agency stated that it would consider exempting from the requirements of a food additive regulation uses of direct additives in food-contact material that result in an exposure that is less than 1 percent of the acceptable daily intake for the direct additive.

V. Other Objections

One objection requested that § 178.3297 be amended to remove the limitations on the use of zinc oxide and to permit its use as a colorant for repeat-use rubber articles complying with § 177.2600. The objection stated that zinc oxide is necessary as an activator in the vulcanization process for rubber, and that the limitations in § 178.3297 on the use of zinc oxide make it appear that this additive cannot be used in repeat-use rubber articles.

This objection misinterprets several aspects of the agency's food additive regulations. The listing of zinc oxide as a colorant for polymers in § 178.3297 cannot be interpreted to permit the use of this additive as a vulcanizing agent in repeat-use rubber articles. Additives that may be used in the production of repeat-use rubber articles are included in § 177.2600. Although § 177.2600 does not specifically list zinc oxide as a vulcanizing material in paragraph (c)(4)(ii), this substance can be used for this technical effect because it is listed as GRAS in §§ 182.8991 and 182.5991 (21 CFR 182.8991 and 182.5991) (see 21 CFR 177.2600(c)(1).)

VI. Other Actions

A. Technical Correction

The agency is correcting a misspelling in the August 30, 1991, final rule that was incorporated in § 178.3297. Specifically, the agency is correcting the listing for 4,4'-Bis(4-anilino-6-methylethanolamine-α-triazin-2-ylamino)-2,2'-stilbene disulfonic acid, disordium salt, to 4,4'-Bis(4-anilino-6-methylethanolamine-α-triazin-2-ylamino)-2,2'-stilbene disulfonic acid, disodium salt.

B. CFSAN Reorganization

Since the publication of the August 30, 1991, final rule, CFSAN has undergone an administrative reorganization. As a result of the reorganization, the Division of Food and Color Additives no longer exists. Therefore, the agency is correcting paragraph (c) of § 178.3297 by replacing the address for the former Division of Food and Color Additives with the current address for the Division of Petition Control, which is now responsible for responding to requests for extraction testing guidelines.

C. Scope of Final Rule

Amendments to § 178.3297 only include specific changes listed in this final rule because the amendments contained in the August 30, 1991, final rule have already been codified.

VII. Environmental Impact

The agency has determined under 21 CFR 25.24(a)(9) that this action is of a type that does not individually or cumulatively have a significant effect on the human environment. Therefore, neither an environmental assessment nor an environmental impact statement is required.

VIII. Economic Impact

FDA has examined the impacts of this final rule amendment under the Regulatory Flexibility Act. The Regulatory Flexibility Act (Pub. L. 96–354) requires analyzing options for regulatory relief for small businesses. In compliance with the Regulatory Flexibility Act, the agency certifies that this final rule amendment will not have a significant impact on a substantial number of small businesses. This final rule amendment is exempt from Executive Order 12866, which directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects; distributive impacts; and equity).

IX. Objections

Any person who will be adversely affected by the amendments to § 178.3297 to permit the use of provisionally listed color additive lakes listed for direct use in food as colorants in food-contact polymers and to permit the use of chromium oxide green as a colorant in repeat-use rubber articles complying with § 177.2600 may at any time on or before January 20, 1994, file with the Dockets Management Branch (address above) written objections thereto. Each objection shall be separately numbered, and each numbered objection shall specify with particularity the provisions of the regulation to which objection is made and the grounds for the objection. Each numbered objection on which a hearing is requested shall specifically so state. Failure to request a hearing for any particular objection shall constitute a waiver of the right to a hearing on that objection. Each numbered objection for which a hearing is requested shall include a detailed description and analysis of the specific factual information intended to be presented in support of the objection in the event that a hearing is held. Failure to include such a description and analysis for any particular objection shall constitute a waiver of the right to a hearing on the objection. Three copies of all documents shall be submitted and shall be identified with the docket number found in brackets in the heading of this document. Any objections received in response to the regulation may be seen in the Dockets Management Branch between 9 a.m. and 4 p.m., Monday through Friday.

List of Subjects in 21 CFR Part 178

Food additives, Food packaging.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs, 21 CFR part 178 is amended as follows:

PART 178—INDIRECT FOOD ADDITIVES: ADJUVANTS, PRODUCTION AIDS, AND SANITIZERS

1. The authority citation for 21 CFR part 178 continues to read as follows:

Authority: Secs. 201, 402, 409, 721 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321, 342, 348, 379e).

2. Section 178.3297 is amended by revising the third sentence in paragraph (c), revising paragraph (d), and amending the table in paragraph (e) by removing the entry for "Tartrazine lake" and by revising the entries for "4,4'-Bis(4-anilino-6-methylanolamine-α-triazin-2-ylamino)-2,2'-stilbene disulfonic acid, disordium salt" and "Chromium oxide green" to read as follows:

§ 178.3297 Colorants for polymers.

* * * * *

(c) * * * Extraction testing guidelines to conduct studies for additional uses of colorants under this section are available from the Food and Drug Administration free of charge from the Center for Food Safety and Applied Nutrition, Division of Petition Control (HFS–215), Food and Drug Administration, 200 C St. SW., Washington, DC 20204.

(d) Color additives and their lakes listed for direct use in foods, under the provisions of the color additive regulations in parts 73, 74, 81, and 82 of this chapter, may also be used as colorants for food-contact polymers.

* * * * *

(e) * * *

Substances	Limitations
4,4'-Bis(4-anilino-6-methylethanolamine-α-triazin-2-ylamino)-2,2'-stilbene disulfonic acid, disodium salt.	Do.
* * * * * * *	
Chromium oxide green, Cr_2O_3 (C.I. pigment green 17, C.I. No. 77288).	For use only:

Substances	Limitations
	1. In olefin polymers complying with § 177.1520 of this chapter. 2. In repeat-use rubber articles complying with § 177.2600 of this chapter; total use is not to exceed 10 percent by weight of rubber articles.
. . . . .	

Dated: December 10, 1993.

Michael R. Taylor,

Deputy Commissioner for Policy.

[FR Doc. 93–30994 Filed 12–20–93; 8:45 am]

BILLING CODE 4160–01–F

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[MT10–1–5529; FRL–4664–8]

Clean Air Act Approval and Promulgation of the Quality Assurance Plan for Montana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: EPA is approving revisions to Montana's State Implementation Plan (SIP) submitted by the Governor on April 2, 1992. These revisions consisted of amendments to the Administrative Rules of Montana (ARM) 16.8.807 (Ambient Air Monitoring) and 16.8.809 (Methods and Data) and the repeal of 16.810 (Procedures for Reviewing and Revising the Montana Quality Assurance Manual). ARM 16.8.810 previously specified procedures for revising the Montana Quality Assurance (QA) Manual.

EFFECTIVE DATE: This action will become effective on February 22, 1994, unless notice is received by January 20, 1994, that someone wishes to submit adverse or critical comments. If the effective date is delayed, timely notice will be published in the **Federal Register.**

ADDRESSES: Copies of the documents relevant to this action are available for public inspection between 8 a.m. and 4 p.m., Monday through Friday at the following office: Environmental Protection Agency, Region VIII, Air Programs Branch, 999 18th Street, suite 500, Denver, Colorado 80202–2405.

FOR FURTHER INFORMATION CONTACT: Tim Russ, Environmental Protection Agency, Region VIII, Air Programs Branch, 999 18th Street, suite 500, Denver, Colorado 80202–2405. (303) 293–1814.

SUPPLEMENTARY INFORMATION: Section 110(a)(2)(H)(i) of the Clean Air Act (CAA), as amended in 1990, provides the State the opportunity to amend its SIP from time-to-time as may be necessary. The State is utilizing this authority of the CAA to update and revise existing regulations which are a part of the SIP.

I. Background

The Montana Board of Health and Environmental Sciences (hereafter called the Board) adopted regulations, on November 14, 1986, establishing the Montana Quality Assurance Manual (hereafter referred to as the Manual). More specifically, regulation ARM 16.8.807 was created which specified the Manual as the procedures to be used for ambient air quality monitoring in Montana. The Manual was identified as one of several documents to be used as a standard for all ambient air quality monitoring conducted in Montana for the purpose of demonstrating compliance with Montana and National Ambient Air Quality Standards (NAAQS). These standards applied to any person, organization, industry or agency which is required to conduct ambient air monitoring as a condition of a permit, as part of a permit application, as a condition of the Montana Department, Board, or court order, or to demonstrate compliance with an ambient air quality standard.

The State subsequently developed the Manual and sent a copy to EPA for its review and comment. There were numerous deficiencies in the quality assurance procedures portion of the Manual which EPA identified to the State. EPA worked to resolve these issues with the State over the course of the next two years.

1. 1989 SIP Revision Submittal

In a letter dated December 29, 1989, the Governor submitted revisions to the Montana SIP. The revisions were specific to ARM 16.8.807 (involving a date change from September, 1986 to March, 1989) and 16.8.809 (involving a date change from September, 1986 to March, 1989) which reference the updated 1989 Montana Quality Assurance Manual. The Board adopted the revisions on November 17, 1989. The Manual was updated from the 1986 version in March of 1989. The update from the 1986 version to the 1989 version of the Manual involved: (a) Adoption of operating, maintenance, and calibration procedures for PM–10 samplers and the Campbell Scientific Dataloggers; (b) Incorporation of emergency episode monitoring procedures; (c) Changes in the method of calculating precision for total suspended particulate, PM–10 and lead; (d) Relaxation of certain control limits for certain meteorological and air quality monitors; (e) Tightening of recertification requirements for hydrogen sulfide and sulfur dioxide permeation tubes; (f) Modification of auditing procedures for dichotomous samplers; and (g) Other miscellaneous requirements, procedures, and guidelines for collection, analysis, and reporting of air quality data.

2. 1992 SIP Revision Submittal

In a letter dated April 2, 1992, the Governor submitted revisions to the Montana SIP. The submittal was reviewed by EPA and the Governor was advised, by a letter dated May 21, 1992, that the submittal was determined to be administratively and technically complete. The revisions were specific to ARM 16.8.807 (involving a date change from March, 1989 to July, 1991), 16.8.809 (involving a date change from March, 1989 to July, 1991), and ARM 16.8.810 (which was repealed in its entirety) which reference the updated 1991 Montana Quality Assurance Manual. The Board adopted the revisions on November 15, 1991. The Manual was updated from the 1989 version in July of 1991. ARM 16.8.807, ARM 16.8.809 and the repeal of ARM 16.8.810 incorporate this latest edition of the Manual, dated July, 1991.

This action approves the repeal of ARM 16.8.810 solely to eliminate a cumbersome process for revising the Manual. Any revisions to the Manual will still go through the public hearing process. The revisions will not, however, have to go through the submittal in draft to all interested parties and the public for comments as was previously required before the public hearing could take place. These revisions were deemed necessary by the State to avoid a potentially time consuming process as annual updates to the Manual are required by the State—EPA Agreement (SEA). This action was requested by the State of Montana.The

revisions to the above-mentioned regulations are highlighted below:

A. ARM 16.8.807 and ARM 16.8.809—the amendments to these rules would require any person, industry, organization, or agency performing air quality monitoring for the purposes of a condition of a permit, as part of a permit application, as a condition of the Montana Department of Health (the Department), the Montana Board of Health and Environmental Sciences (the Board), a court order, or to demonstrate compliance with an ambient air quality standard, to follow the requirements of the July, 1991 edition of the Manual. The 1991 edition of the QA Manual includes numerous changes from the 1989 edition, which involved modifications to sections, deletion of sections, and addition of new sections. Examples of sections that were modified involved: Organization, Quality Assurance Personnel Designations, Siting Criteria, Reference and Equivalent Methods, along with operation, calibration, and maintenance of analyzers. Examples of sections that were deleted included: PM–10 Calibration Procedures, SLAMS Report, Certification of Ozone Monitor as a Transfer Standard, Indoor Carpet Sampling, and operation, calibration, and maintenance of certain ozone and SO_2 analyzers. Examples of new sections to the Manual included: numerous changes to operation, calibration, and operation of PM–10 analyzers, operation and maintenance of Carbon Monoxide and SO_2 analyzers, and Protocol for Street Sampling Procedure.

B. ARM 16.8.810—the repeal of this rule will eliminate a cumbersome process and streamline the procedure for revising the Montana QA Manual. Under the existing regulation the Department of Health is required to review the Manual every two years and, if changes are necessary, prepare a draft revision. The Department is then required to notify interested parties of the draft revision, make it available for review, and accept public comments for 60 days. After consideration of the comments the Department would then propose to the Board approval of any resulting changes to the Manual.

The repeal of this rule would eliminate the need to solicit public comments prior to the official hearing process before the Board. However, since the Board would still have to approve each revision of the Manual, the public would still be provided the opportunity to comment by providing written or oral testimony to the Board as part of the hearing process. The repeal of this rule was deemed necessary by the State to avoid a potentially time-consuming process as annual updates to the Manual are required in the State-EPA Agreement (SEA).

EPA has noted that the Montana Quality Assurance Manual is included in other parts of the Montana SIP. For consistency throughout the whole Montana SIP, the State should review that portion(s) of the SIP which reference obsolete QA procedures.

EPA is publishing this action without prior proposal because the Agency views this as a noncontroversial amendment and anticipates no adverse comments. This action will be effective February 22, 1994, unless, within 30 days of its publication, notice is received that adverse or critical comments will be submitted.

If such notice is received, this action will be withdrawn before the effective date by publishing two subsequent notices. One notice will withdraw the final action and another will begin a new rulemaking by announcing a proposal of the action and establishing a comment period. If no such comments are received, the public is advised that this action will be effective February 22, 1994.

Final Action

EPA is acknowledging the Governor's submittal of December 29, 1989, and is approving revisions to Montana's SIP submitted by the Governor April 2, 1992, which amended the Montana Air Quality Regulations ARM 16.8.807 (Ambient Air Monitoring), ARM 16.8.809 (Methods and Data), and repealed ARM 16.8.810 (Procedures for Reviewing and Revising the Montana Quality Assurance Manual). These revisions will streamline the procedure for revising the Montana Quality Assurance Manual and incorporate the latest edition of the Manual, dated July, 1991. This action was requested by the State of Montana.

Nothing in this action should be construed as permitting or allowing or establishing a precedent for any future request for revision to any state implementation plan. Each request for revision to any state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the federal-state relationship under the CAA, preparation of a regulatory flexibility analysis would constitute federal inquiry into the economic reasonableness of state action. The CAA forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (S.Ct. 1976); 42 U.S.C. 7410(a)(2).

Under 5 U.S.C. 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities (46 FR 8709).

This action has been classified as a Table 3 action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225). On January 6, 1989, the Office of Management and Budget (OMB) waived Table 2 and 3 SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for a period of two years. EPA has submitted a request for a permanent waiver for Table 2 and Table 3 SIP revisions. OMB has agreed to continue the temporary waiver until such time as it rules on EPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993.

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review must be filed in the United States Court of Appeals for the appropriate circuit by February 22, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. 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

Environmental protection, Air pollution control, Carbon monoxide,

Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401–7671q.

Dated: April 2, 1993.

Jack W. McGraw,

Acting Regional Administrator.

Editorial note: This document was received at the Office of the Federal Register December 15, 1993.

Part 52, chapter I, title 40 of the Code of Federal Regulations is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart BB—Montana

2. Section 52.1370 is amended by adding paragraph (c)(26) to read as follows:

§ 52.1370 Identification of plan.

* * * * *

(c) * * *

(26) On April 2, 1992, the Governor of Montana submitted revisions to the plan. The revisions included amendments to the Montana Air Quality Rules incorporating the July 1, 1991, version of the Montana Quality Assurance Manual and streamlining of the procedure for updating the Quality Assurance Manual.

(i) Incorporation by reference.

(A) Revisions, as adopted March 31, 1992, to the Montana Air Quality Rules: 16.8.807 Ambient Air Monitoring, 16.8.809 Methods and Data, and the repeal of 16.8.810 Procedures for Reviewing and Revising the Montana Quality Assurance Manual.

[FR Doc. 93–30989 Filed 12–20–93; 8:45 am]

BILLING CODE 6560–50–P

---

40 CFR Part 52

[NM–1–1–5970; FRL–4814–5]

Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Albuquerque/Bernalillo County Regulation 32 for Nonattainment Area Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action approves a revision to the Albuquerque/Bernalillo County, State of New Mexico State Implementation Plan (SIP) which includes: Albuquerque/Bernalillo County Air Quality Control Regulation (AQCR) 32, entitled Construction Permits—Nonattainment Areas; the April 14, 1993, Supplement to the New Mexico SIP to Control Air Pollution in Areas of Bernalillo County Designated Nonattainment (superseding the Supplement dated July 12, 1989); and a July 18, 1989, letter regarding a stack height commitment and a New Source Performance Standards (NSPS)/National Emission Standards for Hazardous Air Pollutants (NESHAP) performance testing commitment. This approval action was proposed in the Federal Register (FR) on September 22, 1992, and no comments were received on the proposal. This SIP revision approves an important portion of Bernalillo County's permitting program, under which new and modified major stationary sources may be constructed in areas of Bernalillo County (outside the boundaries of Indian lands) where a National Ambient Air Quality Standard (NAAQS) is being exceeded, without interfering with the continuing progress toward attainment of that standard.

EFFECTIVE DATE: This action will become effective on January 20, 1994.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

U.S. Environmental Protection Agency, Region 6, Air Programs Branch (6T–AP), 1445 Ross Avenue, suite 700, Dallas, Texas 75202.

Mr. Jerry Kurtzweg (6101), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Albuquerque Environmental Health Department, The City of Albuquerque, One Civic Plaza Northwest, P.O. Box 1293, Albuquerque, New Mexico 87103.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Sather or Dr. John Crocker, Planning Section (6T-AP), Air Programs Branch, U.S. EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 655–7214.

SUPPLEMENTARY INFORMATION:

1. New Source Review Nonattainment Program

The Clean Air Act (CAA) requires States to implement a preconstruction permit program for new or modified major stationary sources that wish to locate in a nonattainment area. See sections 172(c)(5) and 173 of the CAA. In accordance with section 74–2–4 of the State of New Mexico Air Quality Control Act, Bernalillo County is authorized to provide for the local administration and enforcement of the preconstruction permitting program requirements of the CAA as well as the State Act. Bernalillo County and the City of Albuquerque, through a joint Air Quality Control Board (Board), have the sole authority to issue new and modified source permits within the geographical limits of Bernalillo County, outside the boundaries of Indian lands. The Albuquerque Environmental Health Department implements the Board's requirements. The submitted new source review (NSR) regulation, AQCR 32, will allow the Albuquerque Environmental Health Department to issue permits to major stationary sources in Bernalillo County (outside the boundaries of Indian lands) to construct or modify facilities in areas where a NAAQS is being exceeded, without interfering with the continuing progress toward attaining the standard.

The EPA has adopted regulations specifying the State NSR provisions that must be adopted by a state to satisfy the requirements of sections 172 and 173 of the CAA. These regulations are found in 40 CFR part 51, subpart I, Review of New Sources and Modifications. A SIP satisfying sections 172(b)(6) and 173 of the CAA is required to meet the conditions as set forth in 40 CFR 51.165.

At this time, 40 CFR 51.165 does not reflect the new major source size, offset ratios, and other nonattainment NSR provisions added by the Clean Air Act Amendments (CAAA) of 1990. Nonetheless, these new provisions add additional requirements for state NSR programs which must be reflected in the applicable SIPs. State SIP revisions incorporating the changes mandated by the CAAA of 1990 are subject to pollutant specific deadlines. For instance, SIP revisions incorporating the changes mandated for carbon monoxide (CO) and ozone nonattainment areas were due by November 15, 1992. The EPA is currently in the process of revising its regulations in accordance with the CAAA of 1990 and expects to propose an amended 40 CFR 51.165 in the near future. Since the SIP revisions proposed for Bernalillo County represent a substantial strengthening of the County's nonattainment preconstruction permitting program, the EPA is approving the revisions. However, this action does not excuse the County from making any additional changes required by the CAAA of 1990 in the future. Indeed, even with the

promulgation of the County rules under review in this proceeding, the EPA may use its powers under section 113(a)(5) of the CAA to challenge any permits issued by the County which are not in substantial compliance with the additional permitting requirements imposed by the CAAA of 1990. See 57 FR 13498 and 13555 (April 16, 1992).

The sources to which AQCR 32 apply are new and modified sources that: (1) Are in a nonattainment area and would emit the nonattainment pollutant in a specific amount (100 tons per year), or (2) are located within an attainment area, but their emissions would have a significant impact on a neighboring nonattainment area. By operation of law under the CAAA of 1990, Bernalillo County has been designated nonattainment for only one NAAQS pollutant, CO (moderate category with a design value of 11.1 parts per million). The nonattainment CO boundaries for Bernalillo County are the Albuquerque Metropolitan Statistical Area.

The EPA has reviewed AQCR 32 for compliance with the requirements of 40 CFR part 51, and for compliance with part D of Title I of the CAA. Pertinent details of the EPA's review are found in the document entitled "Evaluation Report for Albuquerque/Bernalillo County Regulation 32—Construction Permits in Nonattainment Areas," revised July 1993. This report is available for inspection by interested parties during normal business hours at the EPA Region 6 address listed above. The highlights of the report are given below.

The baseline in AQCR 32 for calculating emission reduction credit for offsets is the most stringent emission limitation applicable to the source, whether Federal or State, including a Federally enforceable permit which is applicable and in effect at the time the application to construct is filed. Where there is no emission limitation for the particular source of offsets in either a City/County AQCR or Federally enforceable permit, actual emissions from which offset credit is obtained will form the baseline. Where the allowable emissions from the offsetting source are greater than its potential to emit, the potential to emit forms the baseline. Shutdown credits for offsetting are also allowed by AQCR 32 with the same restrictions currently found at 40 CFR 51.165(a)(3)(ii)(C). AQCR 32 requires, as a general rule, an emission reduction (offset) that is at least 20 percent greater than the proposed new allowable emissions, allowing the requirement of EPA regulations for a net air quality benefit to be achieved. Provisions are made for the excess to be either greater or less than 20 percent, but greater than one-for-one, if in certain limited circumstances another amount is more appropriate. Also, once a source becomes subject to AQCR 32, the source must meet all applicable requirements (i.e., a source could not use required emissions reductions in order to "net out" from further requirements.).

It is important to note that the CAA, in section 173(c), now requires all offset emission reductions to be in actual emissions. Specifically, it must be assured that the total tonnage of increased emissions of an air pollutant from a new or modified source shall be offset by an equal or greater reduction in the actual emissions of such air pollutant from the same or other sources in the area. Albuquerque/Bernalillo County has revised Regulation 32 to address this new requirement (in section D.3.a). Unlike the pollutant-specific NSR changes (such as the drop in source size in ozone nonattainment areas), the changes Congress made to the general nonattainment permitting provisions in section 173 of the CAA were not tied to any specific SIP-submission deadlines. For this reason, the EPA views the changes to section 173 as being immediately applicable to this and all SIP amendments the EPA reviews.

Major new sources and major modifications are required by AQCR 32 to meet and maintain the Lowest Achievable Emission Rate. Additionally, all major stationary sources owned or operated in the County must be in compliance with, or on a compliance schedule for, all applicable emission limitations.

Section H of AQCR 32 contains a provision for banking of emission reductions that will be used as offset credits. The regulation contains requirements to ensure the reductions are surplus, permanent, enforceable, and quantifiable.

The State of New Mexico contains only one area, Bernalillo County, which was granted an extension until December 31, 1987, for attainment of the NAAQS for CO. Former section 172(b)(11)(A) of the CAA required preconstruction permitting regulations for extension areas to contain a provision requiring proposed new major stationary sources or major modifications to perform alternate siting analysis. Section 173(a)(5) of the CAA provides that as a condition for issuing a permit to construct a major stationary source or major modification in a nonattainment area, "an analysis of alternative sites, sizes, production processes, and environmental control techniques [must be conducted] for such proposed source [which] demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification." Albuquerque/Bernalillo County has revised Regulation 32 to address alternate siting requirements for all regulated pollutants in accordance with the new requirements of the CAAA of 1990 (see section D.5 of AQCR 32).

The definitions in AQCR 32 all either exactly or substantially correlate with the Federal definitions found in the CFR and the CAA. The Evaluation Report reviews all definitions in AQCR 32.

2. Visibility New Source Review

AQCR 32 requires the County to ensure that proposed new major stationary sources or major modifications which would locate in a nonattainment area and which could potentially degrade visibility in Mandatory Class I Federal areas demonstrate that the sources' emissions will be consistent with making reasonable progress toward the national visibility goal. The national visibility goal is the prevention of any future, and the remedying of any existing, manmade impairment of visibility in certain national wilderness areas, and national and international parks. See CAA section 169A(a)(1) and 40 CFR 51.300(a). Mandatory Class I Federal areas are any areas identified in 40 CFR part 81, subpart D. There are nine Mandatory Class I Federal areas in New Mexico. See 40 CFR 81.421. Two examples of Mandatory Class I Federal areas near Bernalillo County include Bandelier Wilderness Area (40 kilometers) and Bosque del Apache Wilderness Area (80 kilometers). For the purpose of determining the affected sources' consistency with reasonable progress toward the national visibility goal, AQCR 32 provides that the County may take into account costs and time necessary for compliance, the energy and nonair quality environmental impacts of compliance, and the useful life of the source. See 40 CFR 51.307(c).

On October 23, 1984 (49 FR 42670), the EPA proposed Federal regulations for visibility NSR and monitoring and proposed to disapprove the SIPs for 34 States, including New Mexico, and to incorporate the new Federal regulations into those SIPs. To avoid Federal promulgation of these rules, the EPA required those States that had not yet done so (including New Mexico) to submit SIP revisions by May 6, 1985, containing a visibility monitoring strategy and visibility NSR regulations in compliance with the provisions of 40

CFR 51.305 (visibility monitoring) and 51.307 (visibility NSR). The EPA promulgated Federal regulations for visibility NSR and visibility monitoring for those states (including New Mexico) which did not timely adopt necessary SIP revisions by the deadline. See 50 FR 28544, 51 FR 5504 and 51 FR 22937.

The Governor of New Mexico subsequently submitted the Albuquerque/Bernalillo County visibility NSR plan to the EPA on April 14, 1989, and August 7, 1989. The NSR plan includes Albuquerque/Bernalillo County Regulation 29—Prevention of Significant Deterioration, applicable to attainment and unclassified areas, and Regulation 32—Construction Permits Nonattainment Areas, applicable to nonattainment areas. The EPA has reviewed the County's submittal and developed a report entitled "Evaluation Report for the Albuquerque/Bernalillo County Visibility Protection Plan in Mandatory Class I Federal Areas," revised July 1993. This evaluation report is available for inspection by interested parties during normal business hours at the EPA Region 6 address listed above. As indicated in the evaluation report, Regulation 32 contains all of the visibility NSR requirements specified in 40 CFR 51.307 for nonattainment areas. Since there are no Mandatory Class I Federal areas in Bernalillo County, the County plan was only required to contain visibility NSR regulations. Regulation 29, concerning attainment and unclassified areas, will be addressed in a separate FR notice.

In addition to the provisions described previously, AQCR 32 contains provisions requiring written notification of the affected Federal land managers of any proposed new major stationary source or major modification that may affect visibility in any Federal Class I area, and provisions for modeling of the environmental effects of the source or modification and associated growth. The evaluation report referenced above contains a more detailed analysis of AQCR 32's compliance with the requirements set out in 40 CFR 51.307. The visibility protection regulations contained in AQCR 32 pertain to nonattainment area sources and are one element of a comprehensive visibility protection plan. Therefore, the EPA is approving the Albuquerque/Bernalillo County Regulation 32 as meeting the "nonattainment area" portion for protection of visibility in Mandatory Class I Federal areas under the NSR program, and is replacing the Federal visibility NSR regulations for nonattainment areas promulgated by the EPA for Albuquerque/ Bernalillo County on February 13, 1986 (51 FR 5505). Thus, this final action supplants or displaces the Federal visibility rules issued for the State of New Mexico, but only to the extent that this action implements visibility NSR requirements applicable to nonattainment areas in Bernalillo County, outside the boundaries of Indian lands.

3. Stack Height Regulations

It is necessary that Regulation 32 be in compliance with the Federal Stack Height and Dispersion Technique Regulations. The Governor of New Mexico submitted to the EPA, concurrent with Regulation 32, a SIP revision for Stack Height and Dispersion Technique Regulations (Regulation 33). Regulation 33 was approved by the EPA on March 5, 1991. See 56 FR 9173.

The EPA's stack height regulations were challenged in *NRDC* v. *Thomas*, 838 F. 2d 1224 (DC Cir. 1988). On January 22, 1988, the U.S. Court of Appeals for the DC Circuit issued its decision affirming the regulations in large part, but remanding three provisions to the EPA for reconsideration. These are:

1. Grandfathering pre-October 11, 1983, within-formula stack height increases from demonstration requirements (40 CFR 51.100(kk)(2));

2. Dispersion credit for sources originally designed and constructed with merged or multiflue stacks (40 CFR 51.100(hh)(2)(ii)(A)); and

3. Grandfathering pre-1979 use of the refined H+1.5L formula (40 CFR 51.100(ii)(2)).

Under this program, the Albuquerque Environmental Health Department will be issuing permits and establishing emission limitations that may be affected by the court ordered reconsideration of the stack height regulations promulgated on July 8, 1985 (50 FR 27892). For this reason, the EPA requires that the Albuquerque Environmental Health Department include the following caveat in all potentially affected permit approvals until the EPA completes its reconsideration of remanded portions of the regulations and promulgates any necessary revisions:

In approving this permit, the Albuquerque Environmental Health Department has determined that the application complies with the applicable provisions of the stack height regulations as revised by the EPA on July 8, 1985 (50 FR 27892). Portions of the regulations have been remanded by a panel of the U.S. Court of Appeals for the DC Circuit in *NRDC* v. *Thomas*, 838 F. 2d 1224 (DC Cir. 1988). Consequently, this permit may be subject to modification if and when the EPA revises the regulation in response to the court decision. This may result in revised emission limitations or may affect other actions taken by the source owners or operators.

The Albuquerque Environmental Health Department made an enforceable commitment to include this caveat in all affected permits in a letter from the Director, Environmental Health Department, to the EPA Region 6 Regional Administrator dated July 18, 1989. This letter will be approved as part of the SIP.

4. Required Amendments to AQCR 32

In the September 22, 1992, FR action proposing the approval of AQCR 32, the EPA required that Albuquerque/ Bernalillo County amend AQCR 32 to address four issues before final approval action. The required amendments are described below:

(A) AQCR 32 had provisions for offset exemptions in section I (Exemptions to D.4 and D.5). The exemptions for resource recovery facilities, for temporary emission sources, and for sources which must switch fuels, had to be deleted from the regulation. Neither 40 CFR 51.165 nor the CAA allow offset exemptions for these or any other types of sources. Albuquerque/Bernalillo County deleted the exemptions in the February 26, 1993, version of AQCR 32.

(B) AQCR 32 also had to have section A (Applicability) revised for clarification purposes. Specifically, section A.3 was deleted, and sections A.1 and A.5(a) (now A.4(a)) were revised to read as follows:

A. Applicability

1. Any person constructing any new major stationary source or major modification shall obtain a permit from the Department in accordance with the requirements of this regulation prior to the start of construction or modification if either of the following conditions apply:

a. The major stationary source or major modification will be located within a nonattainment area so designated pursuant to Section 107 of the Clean Air Act and will emit a regulated pollutant for which it is major and for which the area is designated nonattainment; or

b. The major stationary source or major modification will be located within an area designated attainment or unclassifiable pursuant to Section 107 of the Clean Air Act and will emit a regulated pollutant for which it is major and the ambient impact of such pollutant would exceed any of the significance levels in Table 1 at any location that does not meet any national ambient air quality standard for the same pollutant. See Section A.4.

4a. A new major stationary source or major modification which meets the criteria of Section A.1.(b) shall demonstrate that the source or modification will not cause or contribute to a violation of any National Ambient Air Quality Standard by meeting the following requirements and no others of this regulation:

(i) Section D.3(b) regarding emission offsets;

(ii) Section D.4 regarding a net air quality benefit;

(iii) Section F—Emission Offset Baseline;

(iv) Section G—Emission Offset; and

(v) Section I—Air Quality Benefit.

(C) Albuquerque/Bernalillo County was also required to revise Regulation 32 to address alternate siting requirements for all regulated pollutants in accordance with section 173(a)(5) of the CAA. Specifically, section D.5 was revised to require the owner or operator of proposed major stationary sources or major modifications to conduct an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed sources which demonstrate that benefits of the proposed sources significantly outweigh the environmental and social costs imposed as a result of their location, construction, or modification.

(D) As noted earlier, the CAA, in section 173(c), now requires all offset emission reductions to be in actual emissions.

Specifically, it must be assured that the total tonnage of increased emissions of an air pollutant from a new or modified source shall be offset by an equal or greater reduction in the actual emissions of such air pollutant from the same or other sources in the area. Albuquerque/Bernalillo County has revised Regulation 32 to adequately address this new requirement by revising section D.3.a.

In addition to making the above revisions, Albuquerque/ Bernalillo County made further small and noncontroversial revisions to AQCR 32 which clarified, renumbered, and updated certain sections of AQCR 32. These minor changes are presented as an attachment to the Evaluation Report.

Final Action

The EPA is approving this Albuquerque/Bernalillo County Nonattainment Area permit SIP revision. Specifically, the EPA is approving: Albuquerque/Bernalillo County AQCR 32, entitled Construction Permits—Nonattainment Areas, as filed with the State Records and Archives Center on March 16, 1989, and all of the revisions to AQCR 32 filed on February 26, 1993; the April 14, 1993, Supplement to the New Mexico SIP to Control Air Pollution in Areas of Bernalillo County Designated Nonattainment (supersedes the Supplement dated July 12, 1989); and a July 18, 1989, letter regarding a stack height commitment and an NSPS/ NESHAP performance testing commitment. The EPA is also approving this SIP revision submittal as meeting the "nonattainment area" portion of the NSR requirements (40 CFR 51.307) for protection of visibility in Mandatory Class I Federal areas.

Based on the above evaluation, the EPA is approving this SIP revision which will result in a strengthening of the Albuquerque/Bernalillo County SIP. As discussed, future revisions to this plan regarding Nonattainment Area Permitting must be made in accordance with the requirements of the CAAA of 1990.

This action makes final the action proposed at 57 FR 43653 (September 22, 1992). As noted elsewhere in this action, the EPA received no adverse public comment on the proposed action. As a direct result, the Regional Administrator has reclassified this action from table one to table two under the processing procedures established at 54 FR 2214, January 19, 1989.

Miscellaneous

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, the EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities (5 U.S.C. 603 and 604). Alternatively, the EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, part D, of the CAA do not create any new requirements, but simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The CAA forbids the EPA to base its actions concerning SIPs on such grounds (*Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (1976); 42 U.S.C. 7410(a)(2)).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 22, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

Executive Order

This action has been classified as a table two action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225). On January 6, 1989, the Office of Management and Budget (OMB) waived table 2 and 3 SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for a period of two years. The EPA has submitted a request for a permanent waiver for table two and three SIP revisions. The OMB has agreed to continue the waiver until such time as it rules on the EPA's request. This request continues in effect under Executive Order 12866 which superseded Executive order 12291 on September 30, 1993.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Note: Incorporation by reference of the SIP for the State of New Mexico was approved by the Director of the Federal Register on July 1, 1982.

Dated: December 6, 1993.

Allyn M. Davis,

Acting Regional Administrator (6A).

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart GG—New Mexico

2. Section 52.1620 is amended by adding paragraph (c)(51) to read as follows:

§ 52.1620 Identification of plan.

* * * * *

(c) * * *

(51) A revision to the New Mexico SIP addressing the nonattainment new source review program for Albuquerque/Bernalillo County, outside the boundaries of Indian lands, was submitted by the Governor of New Mexico on April 14, 1989, August 7, 1989, and May 17, 1993. The revision

included visibility protection new source review and stack height provisions.

(i) Incorporation by reference.

(A) Albuquerque/Bernalillo County Air Quality Control Regulation 32—Construction Permits—Nonattainment Areas, Section A, "Applicability," Subsection A(2); Section B, "Source Obligation," Subsections B(1), B(2), B(4); Section C, "Source Information," Subsection C(3); Section G, "Emission Offsets," Subsections G(first paragraph), G(1), G(2), G(4), G(6), G(7), G(8), G(9)(first paragraph), G(9)(a), G(9)(b), G(10); Section J, "Public Participation and Notification," Subsections J(1), J(2)(a), J(2)(d), J(2)(f), J(2)(g), J(2)(h); Section K, "Definitions," Subsections K(first paragraph), K(1), K(2), K(4), K(5), K(6), K(8), K(9), K(10), K(11), K(12), K(13), K(15), K(16)(first paragraph), K(16)(b), K(16)(c)(first paragraph), K(16)(c)(i), K(16)(c)(ii), K(16)(c)(iii), K(16)(c)(iv), K(16)(c)(v)(first paragraph), K(16)(c)(v)(a), K(16)(c)(vi), K(16)(c)(vii), K(16)(d), K(16)(e), K(17)(first paragraph), K(17)(a), K(17)(b), K(17)(c), K(18), K(19), K(20), K(21)(first paragraph), K(21)(a), K(21)(b)(first paragraph), K(21)(b)(i), K(21)(c), K(21)(d), K(21)(e), K(21)(f), K(23), K(26), K(28), K(29), K(31), K(32); and Table 1, "Significant Ambient Concentrations," as filed with the State Records and Archives Center on March 16, 1989; and further revisions to AQCR 32, Section i, "Purpose;" Section A, "Applicability," Subsections A(1), A(3), A(4); Section B, "Source Obligation," Subsections B(3), B(5), B(6); Section C, "Source Information," Subsections C(first paragraph), C(1), C(2); Section D, "Source Requirements;" Section E, "Additional Requirements for Sources;" Section F, "Emissions Offset Baseline;" Section G, "Emission Offsets," Subsections G(3), G(5), G(9)(c); Section H, "Banking of Emission Reduction;" Section I, "Air Quality Benefit;" Section J, "Public Participation and Notification," Subsections J(2)(first paragraph), J(2)(b), J(2)(c), J(2)(e); Section K, "Definitions," Subsections K(3), K(7), K(14), K(16)(a), K(16)(c)(v)(b), K(17)(d), K(17)(e), K(21)(b)(ii), K(22), K(24), K(25), K(27), K(30); and Table 2, "Fugitive Emissions Source Categories," as filed with the State Records and Archives Center on February 26, 1993.

(ii) Additional material.

(A) The Supplement to the New Mexico State Implementation Plan to Control Air Pollution in Areas of Bernalillo County Designated Nonattainment, as approved by the Albuquerque/Bernalillo County Air Quality Control Board on April 14, 1993. This supplement superseded the supplement dated July 12, 1989.

(B) A letter dated July 18, 1989, from Sarah B. Kotchian, Director, Albuquerque Environmental Health Department, to Mr. Robert E. Layton Jr., Regional Administrator, EPA Region 6, regarding a stack height commitment and an NSPS/NESHAP performance testing commitment.

[FR Doc. 93–31037 Filed 12–20–93; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 52

[NM–3–1–5971; FRL–4814–6]

Approval and Promulgation of Air Quality Implementation Plans; New Mexico; Albuquerque/Bernalillo County Prevention of Significant Deterioration Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action approves a revision to the Albuquerque/Bernalillo County, State of New Mexico State Implementation Plan (SIP) which includes: Albuquerque/Bernalillo County Air Quality Control Regulation (AQCR) 29, entitled Prevention of Significant Deterioration (PSD); the April 11, 1990, PSD Supplement (supersedes the Supplement dated July 12, 1989); and revisions to AQCR 2, entitled Definitions. This approval action was proposed in the **Federal Register** (FR) on September 22, 1992, and no comments were received on the proposal. This SIP revision approves an important portion of Bernalillo County's permitting program, under which major stationary sources or major modifications can be constructed in attainment areas and unclassified areas (outside the boundaries of Indian lands), without causing significant deterioration of the air quality in those areas. In addition, this action also approves revisions to AQCR 29 to include nitrogen dioxide (NO_2) increment provisions, and approves a continuous emission monitoring (CEM) negative declaration (in the Supplement).

EFFECTIVE DATE: This action will become effective on January 20, 1994.

ADDRESSES: Copies of the documents relevant to this action are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

U.S. Environmental Protection Agency, Region 6, Air Programs Branch (6T–A), 1445 Ross Avenue, suite 700, Dallas, Texas 75202.

Mr. Jerry Kurtzweg (6101), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Albuquerque Environmental Health Department, The City of Albuquerque, One Civic Plaza Northwest, P.O. Box 1293, Albuquerque, New Mexico 87103.

FOR FURTHER INFORMATION CONTACT: Mr. Mark Sather or Dr. John Crocker, Planning Section (6T–AP), Air Programs Branch, U.S. EPA Region 6, 1445 Ross Avenue, Dallas, Texas 75202–2733, telephone (214) 655–7214.

SUPPLEMENTARY INFORMATION:

1. Prevention of Significant Deterioration (PSD) Program

The Clean Air Act (CAA) sets forth plan requirements for attainment and unclassified areas in part C. The EPA is required to develop regulations to fulfill the requirements of the CAA. The regulations that fulfill this requirement regarding PSD are found in 40 CFR 51.166. The Albuquerque/Bernalillo County PSD program has been reviewed against the requirements found in 40 CFR 51.166 and in the Clean Air Act Amendments (CAAA) of 1990. With the approval of the PSD program for Albuquerque/Bernalillo County, the City/County will be authorized to issue permits to allow major sources to construct or modify processes in attainment or unclassified areas in Bernalillo County, outside the boundaries of Indian lands. The Governor of New Mexico submitted the proposed PSD SIP revision for Albuquerque/Bernalillo County to the EPA on April 14, 1989, August 7, 1989, May 1, 1990, and on May 17, 1993. The SIP revision contained AQCR 29, AQCR 2, and the Supplement to AQCR 29. AQCR 29, AQCR 2, and the Supplement apply to all of Bernalillo County (outside the boundaries of Indian lands), which, in accordance with section 74–2–4 of the State of New Mexico Air Quality Control Act, is authorized to provide for the local administration and enforcement of the CAA. This PSD SIP revision meets the Federal requirements including those for best available control technology (BACT) and modeling. The details of the EPA's evaluation, and the determination that the PSD program in Albuquerque/Bernalillo County meets the Federal requirements, are addressed in the Technical Support Document (as revised July 1993).

The Federal regulations in 40 CFR 51.166(j) require applicants for PSD permits to consider and install the BACT in construction of new major stationary sources or modification of existing major stationary sources. AQCR 29 and the Supplement meet the Federal requirements concerning BACT in sections E and P.10 of AQCR 29 ("Control Technology Requirements"), and in section 8.b of the Supplement.

As found in 40 CFR 51.166(l) of the Federal PSD regulations, applicants must use the EPA approved models for all PSD permitting purposes. AQCR 29 and the Supplement meet the Federal requirements concerning ambient air quality modeling in section H of AQCR 29 and in section 5 of the Supplement by requiring the use of EPA approved models.

2. Nitrogen Dioxide Increment Provisions

To prevent significant deterioration of air quality due to emissions of nitrogen oxides, NO_2 increment provisions have been incorporated into AQCR 29. The provisions follow the requirements set forth in 40 CFR 51.166 and the final rule pertaining to the Prevention of Significant Deterioration for Nitrogen Oxides (53 FR 40656). The NO_2 increment provisions establish the maximum increase in ambient nitrogen dioxide concentrations allowed in an area above the baseline concentration as defined in section P.8 of AQCR 29.

3. Continuous Emission Monitoring Negative Declaration

The April 11, 1990, revisions to the Supplement added a negative declaration regarding continuous emissions monitoring (CEM). This revision specifically addresses 40 CFR part 51, appendix P, section 1.1 (Minimum Emission Monitoring Requirements—Applicability). There is an allowance recognized by the EPA for negative declarations regarding Federal CEM requirements if there are no existing sources that are required by 40 CFR 51.214 and 40 CFR part 51, appendix P, to have continuous emission monitoring. The Supplement narrative explains that as of April 11, 1990, there were no existing sources in Bernalillo County required by 40 CFR part 51, appendix P, to have continuous emissions monitoring.

4. Visibility New Source Review

AQCR 29 requires the County to ensure that proposed new major stationary sources or major modifications which would locate in an attainment or unclassified area and which could potentially degrade visibility in Mandatory Class I Federal areas demonstrate that the sources' emissions will be consistent with making reasonable progress toward the national visibility goal. The national visibility goal is the prevention of any future, and the remedying of any existing, manmade impairment of visibility in certain national wilderness areas, and national and international parks. See section 169A(a)(1) of the CAA and 40 CFR 51.300(a). Mandatory Class I Federal areas are any areas identified in 40 CFR part 81, subpart D. There are nine Mandatory Class I Federal areas in New Mexico. See 40 CFR 81.421. Two examples of Mandatory Class I Federal areas near Bernalillo County include Bandelier Wilderness Area (40 kilometers) and Bosque del Apache Wilderness Area (80 kilometers). For the purpose of determining the affected sources' consistency with reasonable progress toward the national visibility goal, AQCR 29 provides that the County may take into account costs and time necessary for compliance, the energy and nonair quality environmental impacts of compliance, and the useful life of the source. See section 169A(g)(1) of the CAA.

The CAAA of 1990 revised sections 162(a) and 164(a) of the CAA to specify that the boundaries of areas designated as Class I must conform to all boundary changes at such parks and wilderness areas made since August 7, 1977, and any changes that may occur in the future. The EPA interprets the current regulations at 40 CFR 52.21 as being able to accommodate these statutory changes, and no regulatory revisions are necessary at this time in order to implement these changes. For a discussion of the EPA's policy regarding the implementation of the boundary change, please consult the memorandum entitled "New Source Review Program Transitional Guidance," from John S. Seitz, Director, Office of Air Quality Planning and Standards, March 11, 1991. See 57 FR 18075 (April 28, 1992). In addition, by letter dated April 20, 1992, the City of Albuquerque has committed to interpreting the PSD regulations in a manner consistent with the changes in sections 162(a) and 164(a) of the CAA as interpreted by the EPA.

On October 23, 1984 (49 FR 42670), the EPA proposed Federal regulations for visibility new source review and monitoring and proposed to disapprove the State Implementation Plans (SIPs) for 34 States, including New Mexico, and to incorporate the new Federal regulations into those SIPs. To avoid Federal promulgation of these rules, the EPA required those States that had not yet done so (including New Mexico) to submit SIP revisions by May 6, 1985, containing a visibility monitoring strategy and visibility new source review (NSR) regulations in compliance with the provisions of 40 CFR 51.305 (visibility monitoring) and 51.307 (visibility NSR). The EPA promulgated Federal regulations for visibility NSR and visibility monitoring for those States (including New Mexico) which did not timely adopt necessary SIP revisions by the deadline. See 50 FR 28544, 51 FR 5504 and 51 FR 22937.

The Governor of New Mexico subsequently submitted the Albuquerque/Bernalillo County visibility NSR plan to the EPA on April 14, 1989, and August 7, 1989. The NSR plan includes Albuquerque/Bernalillo County Regulation 29—Prevention of Significant Deterioration, applicable to attainment and unclassified areas, and Regulation 32—Construction Permits—Nonattainment Areas, applicable to nonattainment areas. The EPA has reviewed the County's submittal and has developed a report entitled "Evaluation Report for the Albuquerque/Bernalillo County Visibility Protection Plan in Mandatory Class I Federal Areas," revised July 1993. This evaluation report is available for inspection by interested parties during normal business hours at the EPA Region 6 address listed above. As indicated in the evaluation report, Regulation 29 contains all of the visibility NSR requirements specified in 40 CFR 51.307 for attainment or unclassified areas. Since there are no Mandatory Class I Federal areas in Bernalillo County, the County plan was only required to contain visibility NSR regulations. Regulation 32, concerning nonattainment areas, will be addressed in a separate FR notice.

In addition to the provisions described previously, AQCR 29 contains provisions requiring written notification of the affected Federal land managers of any proposed new major stationary source or major modification that may affect visibility in any Federal Class I area, and provisions for modeling of the environmental effects of the source or modification and associated growth. The evaluation report referenced above contains a more detailed analysis of AQCR 29's compliance with the requirements set out in 40 CFR 51.307. The visibility protection regulations contained in AQCR 29 pertain to attainment and unclassified area sources and are one element of a comprehensive visibility protection plan. Therefore, the EPA is approving the Albuquerque/Bernalillo County Regulation 29 as

meeting the "attainment area" portion for protection of visibility in Mandatory Class I Federal areas under the NSR program. Thus, this final action supplants or displaces the Federal visibility rules issued February 13, 1986, for the State of New Mexico, but only to the extent that this action implements visibility new source review requirements applicable to attainment and unclassifiable areas in Bernalillo County, outside the boundaries of Indian lands.

5. Concluding Remarks and Administrative Details

The EPA reviewed AQCR 29, AQCR 2, and the Supplement for compliance with the requirements of 40 CFR 51.166 pertaining to PSD requirements, including NO_2 increment provisions, 40 CFR part 51, appendix P, pertaining to CEM requirements, and part C of title I of the CAA, as amended. This review is available at the EPA Region 6 address listed above.

In the September 22, 1992, FR action proposing the approval of AQCR 29, the EPA required that Albuquerque/Bernalillo County make four administrative corrections. The corrections to AQCR 29 are detailed below:

A. In section P.7, Table 2, Table 4, and Table 6, "mgm/m³" was changed to "ugm/m³."

B. In the Regulation section E.3, the phrase, ". . . appropriate at the *latest* reasonable time . . ." was amended to read, "appropriate at the *least* reasonable time . . .", in accordance with 40 CFR 51.166(j)(4).

C. Under definitions, section P.11, "Building, structure, facility, or installation," the U.S. Government stock number was incorrectly listed as 041–001–00066–6. It now reads 4101–0066 in accordance with 40 CFR 51.166(b)(6).

D. The Clean Air Act Amendments of 1990 amended section 169(1) to expand the list of major emitting facilities subject to PSD requirements to include municipal incinerators (municipal waste combustors) capable of charging more than 50 tons of refuse per day with a potential to emit more than 100 tons per year of any regulated pollutant. Under prior law, only municipal incinerators capable of charging more than 250 tons of refuse per day were subject to the 100 tons per year major source threshold for PSD applicability. The EPA interprets this statutory change as being immediately effective. The City of Albuquerque has formally added this new class of PSD major sources to AQCR 29 in Table 1. In addition to making the above revision, Albuquerque/Bernalillo County made further small and noncontroversial revisions to AQCR 29 which clarified and updated certain sections of AQCR 29. These minor changes are presented as an attachment to the Technical Support Document.

The CAAA added a new section 302(z) defining the term "stationary source" as generally any source of an air pollutant, except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle as defined in section 216. The EPA's initial view is that the definition of stationary source in the PSD regulations is flexible enough to accommodate new section 302(z) without requiring regulatory revisions. 3y a letter dated April 20, 1992, the City of Albuquerque has committed to interpreting the regulations in a manner consistent with this statutory addition.

The CAAA also revised section 169(3) to specify that "clean fuels" should be considered in a BACT analysis, and to provide that a source utilizing clean fuels, or any other means, to comply with the BACT requirement shall not be allowed to increase above levels that would have been required under section 169(3) prior to the 1990 CAAA. The EPA has interpreted the new statutory language regarding clean fuels as merely codifying present practice under the CAA, under which clean fuels are an available means of reducing emissions to be considered along with other approaches in identifying BACT-level controls. Accordingly, the EPA believes that no regulatory revisions are necessary in order to implement these statutory changes. By letter dated April 20, 1992, the City of Albuquerque has committed to interpreting the revised language in section 169(3) in a manner consistent with the EPA's interpretation.

The Albuquerque/Bernalillo County PSD SIP revision does not apply to sources located or wanting to locate on Indian lands. This PSD SIP revision will be approved under the statutory requirements of sections 110 and 160–169A of the CAA, 42 U.S.C. 7410 and 7470–7491.

Final Action

The EPA is approving the Albuquerque/Bernalillo County PSD SIP revision. Specifically, the EPA is approving: Albuquerque/Bernalillo County AQCR 29, entitled Prevention of Significant Deterioration (PSD), as filed with the State Records and Archives Center on March 16, 1989, and all of the revisions to AQCR 29 filed on April 24, 1990, and on February 26, 1993; the April 11, 1990, PSD Supplement (supersedes the Supplement dated July 12, 1989); and sections 2.31–2.52 of AQCR 2, entitled Definitions, as filed with the State Records and Archives Center on March 16, 1989. The EPA is also approving this SIP revision submittal as meeting the "attainment area" portion of the NSR requirements (40 CFR 51.307) for protection of visibility in Mandatory Class I Federal areas.

The EPA has reviewed and evaluated the Albuquerque/Bernalillo County PSD program, including NO_2 increment provisions and a continuous emission monitoring negative declaration. The EPA's determination is that the Albuquerque/Bernalillo County PSD program is adequate for authorizing the Albuquerque Environmental Health Department to issue and enforce the PSD permits in most areas of Bernalillo County. The EPA will retain authority for reviewing, issuing, and enforcing the PSD permits on Indian lands in Bernalillo County, in accordance with 40 CFR 52.21 and other applicable regulatory provisions.

With respect to all of the statutory changes discussed in this action, the EPA plans to undertake national rulemaking in the near future to adopt clarifying changes to its regulations. Upon final adoption of those regulations, the EPA will call upon States with approved PSD programs, including Albuquerque, to make corresponding changes in their SIPs. Based on the above evaluation, the EPA approves the Albuquerque/Bernalillo County PSD program as strengthening the New Mexico SIP.

This action makes final the action proposed at 57 FR 43657. As noted elsewhere in this action, the EPA received no adverse public comment on the proposed action. As a direct result, the Regional Administrator has reclassified this action from table one to table two under the processing procedures established at 54 FR 2214, January 19, 1989.

Miscellaneous

Under the Regulatory Flexibility Act, 5 U.S.C. 600 *et seq.*, the EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities (5 U.S.C. 603 and 604). Alternatively, the EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

SIP approvals under section 110 and subchapter I, parts C and D of the CAA do not create any new requirements, but

simply approve requirements that the State is already imposing. Therefore, because the Federal SIP-approval does not impose any new requirements, I certify that it does not have a significant impact on any small entities affected. Moreover, due to the nature of the Federal-State relationship under the CAA, preparation of a regulatory flexibility analysis would constitute Federal inquiry into the economic reasonableness of State action. The CAA forbids the EPA to base its actions concerning SIPs on such grounds (*Union Electric Co.* v. *U.S. E.P.A.*, 427 U.S. 246, 256–66 (1976); 42 U.S.C. 7410(a)(2)).

Under section 307(b)(1) of the CAA, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by February 22, 1994. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. See section 307(b)(2).

Executive Order

This action has been classified as a table two action by the Regional Administrator under the procedures published in the **Federal Register** on January 19, 1989 (54 FR 2214–2225). On January 6, 1989, the Office of Management and Budget (OMB) waived tables two and three SIP revisions (54 FR 2222) from the requirements of section 3 of Executive Order 12291 for a period of two years. The EPA has submitted a request for a permanent waiver for table two and three SIP revisions. The OMB has agreed to continue the waiver until such time as it rules on the EPA's request. This request continues in effect under Executive Order 12866 which superseded Executive Order 12291 on September 30, 1993.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Note: Incorporation by reference of the SIP for the State of New Mexico was approved by the Director of the **Federal Register** on July 1, 1982.

Dated: December 6, 1993.

Allyn M. Davis,

Acting Regional Administrator (6A).

40 CFR part 52 is amended as follows:

PART 52—[AMENDED]

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

Authority: 42 U.S.C. 7401–7671q.

Subpart GG—New Mexico

2. Section 52.1620 is amended by adding paragraph (c)(53) to read as follows:

§ 52.1620 Identification of plan.

* * * * *

(c) * * *

(53) A revision to the New Mexico SIP addressing the prevention of significant deterioration program for Albuquerque/Bernalillo County, outside the boundaries of Indian lands, was submitted by the Governor of New Mexico on April 14, 1989, August 7, 1989, May 1, 1990, and May 17, 1993. The revision included NO_2 increment provisions and visibility protection NSR.

(i) Incorporation by reference.

(A) Albuquerque/Bernalillo County Air Quality Control Regulation (AQCR) 29—Prevention of Significant Deterioration, Section A, "Applicability;" Section B, "Exemptions;" Section C, "Source Obligation;" Section D, "Source Information;" Section E, "Control Technology Requirements," Subsections E(1), E(2), E(4)(a), E(4)(b), E(4)(c), E(4)(d), E(4)(e), E(5), E(6), E(7), E(8); Section F, "Ambient Impact Requirements," Subsections F(1), F(2); Section G, "Additional Impact Requirements;" Section H, "Ambient Air Quality Modeling;" Section I, "Monitoring Requirements," Subsections I(1), I(2), I(3), I(4), I(5), I(7), I(8), I(9); Section J, "Stack Height Credit;" Section K, "Temporary Source Exemptions;" Section L, "Public Participation and Notification;" Section M, "Restrictions on Area Classifications;" Section N, "Exclusions from Increment Consumption;" Section O, "Additional Requirements for Sources Impacting Federal Class I Areas," Subsections O(1), O(2), O(3), O(5), O(6), O(7); Section P, "Definitions," Subsections P(first paragraph), P(1), P(2), P(3), P(4), P(5), P(6), P(26)(first paragraph), P(26)(a), P(26)(c), P(26)(d), P(27); and Table 3, "Significant Monitoring Concentrations," as filed with the State Records and Archives Center on March 16, 1989; and further revisions to AQCR 29, Section O, "Additional Requirements for Sources Impacting Federal Class I Areas," Subsection O(4); Section P, "Definitions," Subsections P(8), P(9), P(10), P(12), P(13)(first paragraph), P(13)(a), P(14), P(15), P(16), P(17), P(18), P(19), P(20), P(21), P(22), P(23), P(24), P(25), P(26)(e), P(28), P(29), P(30), P(31), P(32), P(33), P(34), P(35), P(36), P(37), P(38), P(39), P(40), P(41); and Table 5, "Maximum Allowable Increases for Class I Waivers," as filed with the State Records and Archives Center on April 24, 1990; and further revisions to AQCR 29, Section E, "Control Technology Requirements," Subsections E(3), E(4)(first paragraph); Section F, "Ambient Impact Requirements," Subsection F(3); Section I, "Monitoring Requirements," Subsection I(6); Section P, "Definitions," Subsections P(7), P(11), P(13)(b), P(26)(b); Table 1, "PSD Source Categories;" Table 2, "Significant Emission Rates;" Table 4, "Allowable PSD Increments;" and Table 6, "Maximum Allowable Increase for Sulfur Dioxide Waiver by Governor," as filed with the State Records and Archives Center on February 26, 1993.

(B) Albuquerque/Bernalillo County Air Quality Control Board Regulation 2—Definitions, Sections 2.31, 2.32, 2.33, 2.34, 2.35, 2.36, 2.37, 2.38, 2.39, 2.40, 2.41, 2.42, 2.43, 2.44, 2.45, 2.46, 2.47, 2.48, 2.49, 2.50, 2.51, and 2.52, as filed with the State Records and Archives Center on March 16, 1989.

(ii) Additional material.

(A) The Supplement to the New Mexico State Implementation Plan for Prevention of Significant Deterioration in Albuquerque/Bernalillo County, as approved by the Albuquerque/Bernalillo County Air Quality Control Board on April 11, 1990. This supplement superseded the supplement dated July 12, 1989.

(B) A letter dated April 20, 1992, from Sarah B. Kotchian, Director, Albuquerque Environmental Health Department, to A. Stanley Meiburg, Director, Air, Pesticides and Toxics Division, EPA Region 6, regarding a commitment to incorporate Clean Air Act Amendment revisions into the Albuquerque/Bernalillo County PSD program.

3. Section 52.1634 is revised to read as follows:

§ 52.1634 Significant deterioration of air quality.

(a) The plan submitted by the Governor of New Mexico on February 21, 1984 (as adopted by the New Mexico Environmental Improvement Board (NMEIB) on January 13, 1984), August 19, 1988 (as revised and adopted by the

NMEIB on July 8, 1988), and July 16, 1990 (as revised and adopted by the NMEID on March 9, 1990), Air Quality Control Regulation 707—Permits, Prevention of Significant Deterioration (PSD) and its Supplemental document, is approved as meeting the requirements of part C, Clean Air Act for preventing significant deterioration of air quality.

(b) The requirements of section 160 through 165 of the Clean Air Act are not met for Federally designated Indian lands. Therefore, the provisions of § 52.21 (b) through (w) are hereby incorporated by reference and made a part of the applicable implementation plan, and are applicable to sources located on land under the control of Indian governing bodies.

(c) The plan submitted by the Governor in paragraph (a) of this section for Prevention of Significant Deterioration is not applicable to Bernalillo County. Therefore, the following plan described below is applicable to sources located within the boundaries of Bernalillo County (including the City of Albuquerque). This plan, submitted by the Governor of New Mexico on April 14, 1989, August 7, 1989, May 1, 1990, and May 17, 1993, and respectively adopted on March 8, 1989, July 12, 1989, April 11, 1990, and February 10, 1993, by the Albuquerque/Bernalillo County Air Quality Control Board, containing Regulation 29—Prevention of Significant Deterioration and its April 11, 1990, Supplemental document, is approved as meeting the requirements of part C of the Clean Air Act for the prevention of significant deterioration of air quality.

4. Section 52.1636 is revised to read as follows:

§ 52.1636 Visibility protection.

(a) The requirements of section 169A of the Clean Air Act are not met for the State of New Mexico, outside the boundaries of Bernalillo County, because the plan does not include approvable procedures meeting the requirements of 40 CFR 51.305 and 51.307 for protection of visibility in mandatory Class I Federal areas.

(b) Regulations for visibility monitoring and new source review. The provisions of §§ 52.21, 52.27, and 52.28 are hereby incorporated and made part of the applicable plan for the State of New Mexico, outside the boundaries of Bernalillo County.

(c) Long-term strategy. The provisions of § 52.29 are hereby incorporated and made part of the applicable plan for the State of New Mexico, outside the boundaries of Bernalillo County.

[FR Doc. 93–31038 Filed 12–20–93; 8:45 am]
BILLING CODE 6560–50–P

40 CFR Part 81

[FRL–4686–4]

Designation of Areas for Air Quality Planning Purposes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Pursuant to section 107(d)(3) of the Clean Air Act (Act), EPA is taking final action to redesignate areas (or portions thereof) as nonattainment for the PM–10 (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) and sulfur dioxide (SO_2) national ambient air quality standards (NAAQS). The EPA is taking action to redesignate these areas as nonattainment due to violations of the NAAQS for these pollutants. The Act requires that the States containing such nonattainment areas develop plans to expeditiously bring the areas into attainment with the NAAQS for both pollutants.

EFFECTIVE DATE: January 20, 1994.

ADDRESSES: Information supporting today's action can be found in Public Docket No. A–92–22. The docket is located at the U.S. EPA Air Docket, Room M–1500, Waterside Mall, LE–131, 401 M Street SW., Washington, DC 20460. The docket may be inspected from 8:30 a.m. to 12 noon and from 1:30 p.m. to 3:30 p.m. on weekdays, except for legal holidays. A reasonable fee may be charged for copying. In addition, the public may inspect information pertaining to a particular area at the respective EPA Regional Office which serves the State where the affected area is located.

FOR FURTHER INFORMATION CONTACT: Larry Wallace (PM–10), SO_2/Particulate Matter Programs Branch, Air Quality Management Division (MD–15), Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, (919) 541–0906.

SUPPLEMENTARY INFORMATION: The contacts and addresses of the Regional Offices are:

Regional offices	States
William S. Baker, Chief, Air Programs Branch, EPA Region II, 26 Federal Plaza, New York, New York 10278, (212) 264–2517.	New York.
Marcia Spink, Chief, Air Programs Branch, EPA Region III, 841 Chestnut Building, Philadelphia, Pennsylvania 19107, (215) 597–9075.	District of Columbia, Pennsylvania, and West Virginia.
Stephen H. Rothblatt, Chief, Air and Radiation Branch, EPA Region V, 77 West Jackson Street, Chicago, Illinois 60604, (312) 353–2211.	Illinois.
Gerald Fontenot, Chief, Air Programs Branch, EPA Region VI, 1445 Ross Avenue, Dallas, Texas 75202–2733, (214) 655–7205.	New Mexico.
Douglas M. Skie, Chief, Air Programs Branch, EPA Region VIII, 999 18th Street, Denver Place—suite 500, Denver, Colorado 80202–2405, (303) 293–1750.	Colorado, Montana.
David L. Calkins, Chief, Air Programs Branch, EPA Region IX, 75 Hawthorne Street, San Francisco, California 94105, (415) 744–1219.	California, Arizona.
George Abel, Chief, Air Programs Branch, EPA Region X, 1200 Sixth Avenue, Seattle, Washington 98101, (206) 442–1275.	Idaho, Oregon, and Washington.

I. General

The EPA is authorized to redesignate areas (or portions thereof) as nonattainment for PM–10 and SO_2 pursuant to section 107(d)(3) of the Act,[1] on the basis of air quality data, planning and control considerations, or any other air quality-related considerations that the Administrator deems appropriate.

Following the process outlined in section 107(d)(3), in January and February of 1991, EPA notified the Governors of the affected States that EPA believed certain areas should be redesignated as nonattainment for PM–10 and SO_2. The EPA identified those areas in a **Federal Register** notice published on April 22, 1991 (56 FR 16274). Under section 107(d)(3)(B) of the Act, the Governors of each of the affected States were required to submit to EPA the designations that he or she considered appropriate for each area in question no later than 120 days after notification. However, for reasons of administrative efficiency, the EPA requested the States to submit the designations by March 15, 1991, (the date the lists of designations for all ozone and carbon monoxide areas were due from the Governor of each State pursuant to section 107(d)(4)(A) of the Act). Under section 107(d)(3)(C) of the

[1] References herein are to the Clean Air Act, as amended (1990 Amendments). The Clean Air Act is codified, as amended, in the U.S. Code at 42 U.S.C. 7401, *et seq.*

Act, EPA promulgates the redesignation submitted by the State, making such modifications as EPA may deem necessary. The EPA proceeded to propose redesignation to nonattainment for many PM–10 and SO_2 areas where such action was not inconsistent with the recommendations of the affected State (see 57 FR 43846, September 22, 1992). The EPA is taking final action as proposed, except for the changes described below which were made in response to public comments.

Section 107(d)(1)(A) of the Act sets out definitions of nonattainment, attainment, and unclassifiable. A nonattainment area is defined as any area that does not meet, or that significantly contributes to ambient air quality in a nearby area that does not meet, the national primary or secondary ambient air quality standard for the relevant pollutant[2] (see section 107(d)(1)(A)(i)). Thus, in determining the appropriate boundaries for the nonattainment areas addressed in today's final rule, EPA has considered not only areas where violations of the relevant NAAQS have been monitored and/or modeled, but also nearby areas which significantly contribute to such violations.

II. Today's Action

A. PM–10

On July 1, 1987, EPA revised the NAAQS for particulate matter (52 FR 24634), replacing total suspended particulates as the indicator for particulate matter with a new indicator called PM–10 that includes only those particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers. At the same time, EPA set forth regulations for implementing the revised particulate matter standards and announced EPA's State implementation plan (SIP) development policy elaborating PM–10 control strategies necessary to ensure attainment and maintenance of the PM–10 NAAQS (see 52 FR 24672). The EPA adopted a PM–10 SIP development policy dividing all areas of the country into three categories based upon their probability of violating the new NAAQS: (1) Areas with a strong likelihood of violating the new PM–10 NAAQS, and requiring substantial SIP adjustment, were placed in Group I; (2) areas which may have been attaining the PM–10 NAAQS, and whose existing SIP's most likely needed less adjustment, were placed in Group II; (3) areas with a strong likelihood of attaining the PM–10 NAAQS and, therefore, needing adjustments only to their preconstruction review program and monitoring network, were placed in Group III (52 FR 24672, 24679–24682).

Pursuant to sections 107(d)(4)(B) and 188(a) of the Act, areas previously identified as Group I (55 FR 45799, October 31, 1990) and other areas which had monitored violations of the PM–10 NAAQS prior to January 1, 1989 were, by operation of law upon enactment of the 1990 Clean Air Act Amendments (Pub. L. No. 101–549, 104 Stat. 2399), designated nonattainment and classified as moderate for PM–10. Formal codification in 40 CFR part 81 of those areas was announced in a **Federal Register** notice dated November 6, 1991 (56 FR 56694) (see also 57 FR 56762, November 30, 1992). All other areas of the country were designated unclassifiable for PM–10 by operation of law upon enactment of the 1990 Amendments (see section 107(d)(4)(B)(iii) of the Act).

In January and February of 1991, EPA notified the Governors of those States which recorded violations of the PM–10 standard after January 1, 1989 that EPA believed that those areas should be redesignated as nonattainment for PM–10. In a **Federal Register** notice published on April 22, 1991 (56 FR 16274), EPA identified those PM–10 areas for which EPA had notified the Governors of affected States that the area's PM–10 designation should be revised to nonattainment. After notification, the Governor of each affected State was required to submit to EPA the redesignation he or she considered appropriate for each area. The EPA proceeded to propose redesignation to nonattainment 13 areas for PM–10 in the September 22, 1992 **Federal Register** notice.

Today, EPA is taking final action to redesignate as nonattainment for PM–10 10 of the areas previously proposed for redesignation in the September 22, 1992 **Federal Register** notice. The EPA is deferring action on two of the remaining areas and is no longer taking action to redesignate Bernalillo, New Mexico, to nonattainment for PM–10. The two areas that EPA is deferring action on are the following: (1) Kootenai County, Idaho (part); and (2) Benton, Franklin, and Walla Walla/Tri Counties, Washington, excluding the initial PM–10 nonattainment area of the city of Walla Walla, Washington. The EPA received comments on these areas during the 60-day public comment period provided in the September 22, 1992 **Federal Register** notice and, as a result of these comments, has decided to defer action on the areas at this time. A more detailed explanation for why EPA is deferring action on these areas is provided in the "Response to Comments" section below.

The 10 areas that EPA is taking final action on in today's notice are the following: (1) Payson, Arizona; (2) Bullhead City, Arizona; (3) Sacramento County, California; (4) San Bernadino County, California; (5) the Steamboat Springs Area Airshed, Colorado; (6) Shoshone County, Idaho (part); (7) Thompson Falls, Montana; (8) New York County, New York;[3] (9) Oakridge, Oregon; and (10) the city of Weirton, West Virginia. These 10 areas are classified as moderate PM–10 nonattainment areas by operation of law at the time of their nonattainment redesignation (see section 188(a) of the Act). Note also that the complete descriptions of the nonattainment boundaries for these 10 areas are set out in the regulatory language at the end of today's notice.

The EPA received comments concerning the redesignation of some of these areas during the public comment period provided in the September 22, 1992 **Federal Register** notice and has provided a detailed response to these comments in the "Response to comments" section below.

B. SO_2

Following the Clean Air Act Amendments of 1977, EPA published a list of areas identified by the States as nonattainment, attainment, or unclassifiable for SO_2. The 1990 Amendments provided for designations of areas based on their status immediately before enactment of the 1990 Amendments. For example, any area previously designated as not attaining the primary or secondary SO_2 NAAQS as of the date of enactment of the 1990 Amendments was designated nonattainment for SO_2 by operation of law upon enactment, pursuant to section 107(d)(1)(C)(i) of the Act. In addition, any area designated as attainment or unclassifiable (or "cannot be classified") immediately before the enactment of the 1990 Amendments was also designated as such upon the enactment of the Amendments pursuant to sections 107(d)(1)(C) (ii) and (iii) of the Act. For the current status of SO_2 areas, readers should refer to the codification tables currently set forth in 40 CFR part 81 (1991) and to any

[2] The EPA has construed the definition of nonattainment area to require some material or significant contribution to a violation in a nearby area. The Agency believes that it is reasonable to conclude that something greater than a molecular impact is required.

[3] After EPA proposed its PM–10 nonattainment redesignation for New York County, the Natural Resources Defense Council filed a petition requesting that EPA promptly proceed to final action. Today's final action disposes of that request.

subsequent modifications to those SO_2 tables that have been published in the **Federal Register** (see also 56 FR 56706, November 6, 1991).

As described above, EPA is authorized to initiate the redesignation of additional areas (or portions thereof) as nonattainment for SO_2, pursuant to section 107(d)(3) of the Act, on the basis of air quality data, planning and control considerations, or any other air quality-related considerations the Administrator may deem appropriate. The EPA believes that monitoring and/or modeling information may be used in determining the attainment status of an area and in establishing SO_2 nonattainment boundaries that are consistent with section 107(d)(1)(A)(i) of the Act.[4] As indicated previously, a nonattainment area is any area which does not meet the relevant NAAQS or which significantly contributes to a violation of the relevant NAAQS in a nearby area.

In January and February of 1991, EPA notified the Governors of the affected States that EPA believed that certain areas should be redesignated as nonattainment for SO_2 due to violations of the primary and secondary standards. In a **Federal Register** notice published on April 22, 1991 (56 FR 16274), EPA identified those SO_2 areas for which EPA had notified the Governors of affected States that an area's SO_2 designation should be revised to nonattainment. After notification, the Governor of each affected State was required to submit to EPA the redesignation he or she considered appropriate for each area. In the September 22, 1992 **Federal Register** notice, the EPA proceeded to propose redesignation of seven areas to nonattainment for SO_2.

Today, EPA is taking final action to redesignate, as nonattainment for SO_2, two of the areas previously proposed for redesignation in September 22, 1992 **Federal Register** notice. The EPA is deferring action on the remaining five areas. The five areas that EPA is deferring action on are the following: (1) Allegheny County, Pennsylvania (part); (2) the District of Columbia (General Service Administration's Central Heating Plant); (3) the District of Columbia (General Service Administration's West Heating Plant); (4) Madison County, Illinois (part); and (5) St. Clair County, Illinois (part). The EPA received comments on these areas during the 60-day public comment period provided in the September 22, 1992 **Federal Register** notice, and as a result of these comments has decided to defer action on the areas at this time. A more detailed explanation for why EPA is deferring action on these areas is provided in the comment section below.

The two areas that EPA is taking final action on in today's notice are the city of Weirton, West Virginia and Warren County, Pennsylvania (part). The EPA did not receive any adverse comments concerning the redesignation of these areas during the public comment period following the September 22, 1992 **Federal Register** notice. Therefore, EPA is taking final action as planned to redesignate these areas to nonattainment.

III. Response to Comments

In the September 22, 1992 proposal, EPA provided a 60-day comment period ending on November 23, 1992 in order to solicit public comments on all aspects of the proposal. For those areas that EPA is redesignating in today's action, EPA has responded to the public comments received and, as appropriate, made modifications in light of such comments. In certain instances, EPA is deferring redesignation of areas. Where EPA is deferring redesignation of an area, EPA will publish its final determination on the area in a separate notice and will respond to relevant public comments at that time.

A. PM–10: Arizona—Portion of Gila County

Comments were received contending that the PM–10 violations recorded in Payson were due to sources in the vicinity of the monitoring equipment. Comments were received requesting that industry in the Payson area be further evaluated to determine if compliance with the PM–10 NAAQS can be achieved through the current State permitting programs. One commenter requested that EPA delay the designation of the area as nonattainment until sufficient information became available to evaluate the extent of the problem in the area. One commenter further contended that areawide violations were not recorded which would justify a nonattainment designation for the area. This particular commenter further contended that the proposed boundaries of the nonattainment area are unwarranted and would constitute an extreme and unnecessary hardship upon the area.

The EPA notes that particulate matter sampling has been conducted in Payson since 1974. A monitor measuring total suspended particulates (TSP)[5] began operation in downtown Payson in 1974. Significant violations of the TSP NAAQS were recorded annually until 1977 when the monitoring site was relocated to the Tonto National Forest Ranger Station, 2 miles north of the original site. In 1980, the monitor was again relocated to the original site and again recorded significant annual violations of the TSP NAAQS through 1986. In 1987, PM–10 monitoring was begun and violations of both the 24 hour PM–10 NAAQS and the annual were recorded in 1989 and 1990. These violations thus provided an ample basis for proceeding with a nonattainment designation for Payson (see section 107 (d)(1)(A)(i), (d)(3) of the Act and 40 CFR 50.6).

That commenters contended that some monitors in the area have not recorded violations, and that Payson may only have a localized problem, does not change the fact that Payson has violated the PM–10 NAAQS and should therefore be designated nonattainment. Rather, these comments are relevant to the scope and nature of the PM–10 nonattainment problem. These issues are precisely what the SIP development process which follows from nonattainment designation is intended to assess and to address. This is also the case with the comments suggesting that EPA impose source specific control measures or rely on the State permitting process instead of designating the area nonattainment. The Act calls for States containing areas designated nonattainment to submit to EPA for approval a plan that will expeditiously bring the area back into attainment. During the SIP development process, comprehensive emissions inventory data will be collected and monitors and modeling will be employed to assess the scope and nature of the problem and reasonable measures will be implemented to address the problem (see, e.g., sections 189(a), 172(c), and 110(a)(2) of the Act). The Act provides for EPA review of the SIP to assess its sufficiency and to make it federally enforceable (see, e.g., sections 110(k), 302(q), and 113 of the Act).

The Arizona Department of Environmental Quality (ADEQ) conducted a special monitoring study in 1990 to, among other objectives, identify the sources (both point and area) that

[4] The EPA believes that those tools which are reasonably reliable can be used in determining, under section 107(d)(1)(A)(i) of the Act, whether an area "does not meet" or "contributes to ambient air quality in a nearby area that does not meet" the relevant NAAQS (see also 57 FR 13545, April 16, 1992).

[5] Total suspended particulates (TSP) was the original air quality indicator for the NAAQS for particulate matter. The TSP was a measurement of all particulate matter in the ambient air, regardless of size. In July 1987, EPA revised the NAAQS for particulate matter to include only those particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers (PM–10).

contribute to the high PM–10 concentrations in Payson. The results of that study indicate that the highest PM–10 concentrations occur in the winter months and that residential wood combustion, an areawide PM–10 air quality problem, is the most significant contributor to PM–10 concentrations during this time. These results conflict with the commenters claim that the elevated PM–10 concentrations are the result of particular point sources.

Further, in January 1991, EPA provided the State of Arizona with notification that Payson should be redesignated to nonattainment and requested the State to submit the appropriate boundary description for the Payson area. The State responded in May of 1991 by designating the nonattainment boundaries EPA proposed for the Payson area in the September 22, 1992 **Federal Register** notice. The EPA has not been informed by the State that the nonattainment redesignation for the area should be changed. In redesignating an area to nonattainment, EPA accords significant deference to the State's judgment unless further information is received which indicates that modifications to the State's submittal are necessary (see, e.g., section 107(d)(3) of the Act).

Furthermore, EPA has the authority under section 110(k)(6) of the Act to correct the boundaries of a nonattainment area where, for example, SIP equivalent information submitted to EPA reveals that the previous boundaries were in error (see 56 FR 37656, notes 6–7 (August 8, 1991), and 57 FR 56762–63 (November 30, 1992)). For example, EPA would consider exercising its authority under section 110(k)(6) if the SIP development process reveals that the boundaries issued today are clearly inappropriate and other information persuasively supports a change.

Portion of Mohave County

In its proposal to redesignate a portion of Mohave County, Arizona, as nonattainment for PM–10, EPA requested information addressing whether and to what extent the Mohave Power Plant (MPP) in Laughlin, Nevada, contributes to the PM–10 nonattainment problem and the appropriateness of the proposed nonattainment boundaries for Mohave County in light of any such information (57 FR 43848). The Nevada Bureau of Air Quality (NBAQ) and the Southern California Edison Company (SCE), operators and co-owners of the Mohave Power Plant, responded to this request.

The SCE claimed that a study conducted by Desert Research Institute (DRI) indicated that MPP has a less than 1 percent impact on annual average ambient PM–10 levels in Mohave Valley and that fugitive dust emissions from construction activities contribute up to 75 percent. Similarly, NBAQ indicated that the study showed that less than 1 percent of the PM–10 measured at Bullhead City from September 1988 through 1989 was from MPP stack operations and that 75 percent was from local soil. However, NBAQ also indicated that the calculations cannot distinguish local soil dust from MPP operations from other sources of soil dust, but that MPP operations cover only a small fraction of the local area and water is applied to minimize fugitive dust.

In today's action, EPA is finalizing the Mohave County PM–10 nonattainment boundaries as proposed. However, as stated previously, EPA would consider exercising its authority under section 110(k)(6) of the Act to correct the boundaries of this nonattainment area if, for example, information obtained in the SIP development process reveals that the boundaries issued today are in error.

The EPA also received comments from SCE and NBAQ contending that the violations monitored in Mohave County were due to exceptional events and that EPA should not proceed with a designation for this area on the basis of such data.

On July 26, 1990, ADEQ informed EPA that an exceedance of the 24-hour PM–10 NAAQS was recorded in Bullhead City in 1989. The data were from a monitoring site operated by DRI for SCE. Sampling is conducted once every 6 days (see, e.g., section 3.1 of 40 CFR part 50, appendix K). Additionally, ADEQ reported that the annual PM–10 NAAQS was violated in 1989. In its letter to EPA, ADEQ stated that although it had no input into the selection of the monitoring site, based on its observations, the site appeared to be representative of the central Bullhead City area. Further, ADEQ reviewed a summary of DRI's quality assurance program and found it to be satisfactory.

The NBAQ claimed that there were elevated wind speeds on 2 days when the 24-hour NAAQS exceedances occurred, as well as construction sources that contributed to elevated values. The SCE contended that the annual PM–10 exceedance in 1989 was an exceptional event caused by increased construction activities and that strong winds that created dust storms contributed to the 24-hour NAAQS exceedance in 1991.

Section 2.4 of 20 CFR part 50, appendix K, has been partially superseded by the changes made to the Act in the 1990 Amendments (see section 193 of the Act). Section 2.4 defines an exceptional event as an uncontrollable event caused by natural sources of particulate matter or an event that is not expected to recur at a given location.

The 1990 Amendments added section 188(f) to the Act which authorizes the waiver of certain PM–10 requirements based on the nonanthropogenic contribution to the PM–10 problem in the area (see draft guidance announced in 57 FR 31477, July 16, 1992). The premise of section 188(f) is that areas having a nonanthropogenic contribution to the PM–10 problem will be designated nonattainment. In fact, this provision would be meaningless if EPA did not designate areas on this basis.[6] Thus, recurrence alone, and not the source of the exceedance, remains relevant in determining whether an exceedance qualifies as an "exceptional event" under section 2.4.

The commenters did not provide supporting information or data showing that the high winds and construction activities did, in fact, have a direct causal nexus to the PM–10 NAAQS exceedances or, if so, the magnitude of the contribution from these sources [see *Citizens for Clean Air* v. *EPA*, 959 F.2d 839, 846–48 (9th Cir. 1992) (upholding EPA's rejection of public comments that were not accompanied with specific supporting information)]. Further, the comments simply asserted that these activities were exceptional. The comments did not address the likelihood of the recurrence of these activities. The commenters did not demonstrate that elevated winds alleged to have contributed to the exceedances are unlikely to recur. In fact, the SIP development process is intended to prevent exceedances from anthropogenic activities such as construction by providing for planning by the State and local community to help ensure such activities adequately mitigate their contribution to PM–10 air quality problems. Accordingly, EPA believes that the available air quality data provide an ample basis to proceed with a nonattainment designation for the Bullhead City area. Further, the

[6] See *U.S.* v. *Nordic Village, Inc.*, 112 S.Ct. 1011, 1015 (1992) (rejecting a statutory interpretation that "violates the settled rule that a statute must, if possible, be construed in a fashion that every word has some operative effect") (citation omitted); *Boisie Cascade Corp.* v. *EPA*, 942 F.2d 1427, 1432 (9th Cir. 1992) ("[u]nder accepted canons of statutory interpretation, we must interpret statutes as a whole, giving effect to each word and making every effort not to interpret a provision in a manner that renders other provisions of the same statute inconsistent, meaningless or superfluous") (citation omitted).

State of Arizona has recommended that EPA redesignate this area as nonattainment for PM–10 (see section 107(d)(3)(C) of the Act).

California—Sacramento County

The EPA received a comment contending that the PM–10 concentrations of 155 μg/m³ measured at the Stockton Boulevard monitoring site in 1989, and a measured exceedance of 153 μg/m³ at the Citrus Heights site in 1990, were both marginal exceedances of the NAAQS for PM–10, and should not be used as a basis for redesignating Sacramento County to nonattainment.

Pursuant to 40 CFR, part 50, appendix K, an exceedance is defined as a value which is measured above the level of the 24-hour standard after rounding to the nearest 10 μg/m³ (i.e., values ending in 5 or greater are rounded up). Therefore, the PM–10 concentration of 153 μg/m³ measured at the Citrus Heights site would not be considered as an exceedance of the PM–10 NAAQS. However, the PM–10 concentration of 155 μg/m³ is considered to be an exceedance of the PM–10 NAAQS. The exceedance was measured according to an EPA reference method and therefore should be considered valid.

Further, the contention that the measured exceedance is marginal is without validity. The PM–10 NAAQS specify a level of air quality, the attainment and maintenance of which, based on air quality criteria reflecting the latest scientific knowledge and allowing for an adequate margin of safety, is requisite to the protection of the public health (see sections 108 and 109 of the Act). The NAAQS is a designated level, not a designated range, of PM–10 above which the air quality is considered unhealthy.

The commenter also contended that the PM–10 exceedance of 187 μg/m³ measured at the Del Paso Manor monitoring site in 1990 occurred due to extremely cold temperatures which led to an unusual number of fireplaces being in operation at the same time. The commenter therefore contends that due to this unusual and isolated chain of events, the measured exceedances should not be considered as a basis for redesignation of the Sacramento County area to nonattainment.

The commenter, in this instance, has conceded that, residential wood combustion contributed to the measured exceedances of the NAAQS for PM–10. The commenter also concedes that the exceedances were due to the operation of a large number of residential wood stoves in a highly populated area which poses a significant public health risk. The purpose of the SIP process is basically to identify and control such sources of PM–10 that contribute to violations of the health based standards. Further, the commenter did not offer supporting evidence showing that the unique events identified, such as cold weather and high residential wood combustion are unlikely to recur (see *Citizens for Clean Air* at 846–48). Therefore, the comments serve to validate EPA's decision to redesignate the area and initiate the SIP development process.

The commenter further contends that PM–10 concentration levels which exceeded the PM–10 NAAQS in the Sacramento County area during the past 3 years occurred in a specific portion of Sacramento County and were not county-wide exceedances. The commenter therefore contends that if redesignation of the area is necessary, only the portion of Sacramento County where the exceedances were measured should be redesignated.

The EPA provided the State of California with notification that Sacramento County should be redesignated to nonattainment in January of 1991 (see section 107(d)(3)(A) of the Act). In that notification, EPA requested the State to submit the appropriate boundary description for the Sacramento County area. In a response dated March 15, 1991 the State affirmed all federally-identified PM–10 nonattainment areas and addressed the boundary issue as follows:

> [W]e understand that it is EPA's policy to use county boundaries as the default, though procedures set forth in EPA's guidance documents may also be applied. Given the nature of the emission sources contributing to California's PM–10 problems, we tend to think that large nonattainment boundaries are appropriate for planning purposes. We would like an opportunity to confirm that for each particular area, though, and will provide supplemental comments shortly.

The State also requested EPA to use the State's recommendations as the basis for its rulemaking. The EPA receive no further comments from the State, and therefore proceeded to propose Sacramento County as the nonattainment boundaries for the area. In the September 22, 1992 notice proposing to redesignate Sacramento County as nonattainment, EPA described its policy for establishing PM–10 nonattainment area boundaries:

> Generally, the PM–10 nonattainment area boundaries are presumed to be, as appropriate, the county, township, or other municipal subdivision in which the ambient particulate matter monitor recording the PM–10 violation(s) is located. The EPA has presumed that such boundaries would include both the area violating the PM–10 NAAQS and any area significantly contributing to the violations. However, a boundary other than the county perimeter or municipal boundary may be more appropriate. Affected States may submit information indicating that, consistent with section 107(d)(1)(A)(i), a boundary should be alternatively defined (57 FR 43848).

The EPA indicated that the "PM–10 SIP Development Guideline" (EPA–450/2–86–001) (Guideline) contained guidance on the information that should be submitted to support such alternative boundaries.

The Guideline recommends employing the following techniques singly or in combination to alternatively define area boundaries: (1) Qualitative analysis of the area of representativeness of the monitoring station, together with consideration of terrain, meteorological, and sources of emissions; (2) spatial interpolation of air monitoring; and (3) air quality simulation by dispersion modeling (Guideline, pages 2–9 through 2–10).

The EPA received no comments from the State concerning the boundaries for the area in response to the September 22, 1992 proposal. Thus, the State's only relevant guidance to EPA suggests that the State supports the general designation of this area as nonattainment and, given the nature of California's PM–10 problems, large boundaries for planning purposes (see section 107(d)(3)(C)).

Further, three exceedances of the PM–10 NAAQS have been observed in Sacramento County at two different monitoring sites.

Sacramento Health Center, Stockton Boulevard

Site number 06–067–04001 in Sacramento: an exceedance was measured on November 18, 1989 (155 μg/m³) and December 18, 1989 (158 μg/m³). This monitoring site is located in the city of Sacramento.

Sacramento Del Paso Manor

Site number 06–067–0006 in Sacramento: exceedances were measured on December 25, 1990 (187 μg/m³). This monitoring site is located in the county, east of the city of Sacramento.

In addition, monitoring data from 1989, 1990, and 1991 indicate that Sacramento County has experienced elevated levels of PM–10. In several cases (described below), these levels represented greater than or equal to 80 percent of the PM–10 NAAQS. These observed concentrations do not represent exceedances of the PM–10 NAAQS. Nevertheless, these data were

collected from five different monitoring sites in the County and provide additional evidence of the scope of elevated PM–10 concentrations in the County.

Elevated PM–10 Concentrations in Sacramento County

1989
Site 06–067–0001: 139 μg/m³
Site 06–067–0002: 125 μg/m³
Site 06–067–0006: 142 μg/m³
Site 06–067–0283: 120 μg/m³
1990
Site 06–067–0001: 153 μg/m³
Site 06–067–0006: 135 μg/m³
Site 06–067–0006: 124 μg/m³
Site 06–067–0010: 140 μg/m³
Site 06–067–0010: 134 μg/m³
Site 06–067–0010: 120 μg/m³
1991
Site 06–067–0006: 127 μg/m³
Site 06–067–0010: 134 μg/m³

The commenter that requested EPA to provide boundaries that are only a portion of the county did not specifically suggest alternative boundaries and did not conduct the analysis recommended by EPA's policy. However, the commenter did suggest that "an extensive review of ambient air monitoring data, emission inventory data, and meteorological data could be performed" to determine a boundary for the area. Such "extensive" data collection and analysis is what the SIP development process will involve.

Previously, EPA has indicated that it would consider using its authority under section 110(k)(6) of the Act to correct the boundaries of a nonattainment area where, for example, SIP equivalent information submitted to EPA reveals that the previous boundaries were in error (see, e.g., 56 FR 37656, notes 6–7 (August 8, 1991), and 57 FR 56762–63 (November 30, 1992)). Thus, this authority provides another mechanism for the consideration of further information on this issue.

Finally, PM–10 air quality problems are generally areawide. The commenter concerned about the scope of the boundaries indicated that residential wood combustion contributed to at least one of the air quality exceedances monitored and also indicated that PM–10 levels in the area are affected by motor vehicle emissions. These are precisely the types of sources that give rise to broader areawide PM–10 air quality problems.

Colorado—Portion of Routt County

The State of Colorado submitted comments indicating that on May 28, 1991, the Routt County Commissioners adopted a PM–10 nonattainment boundary for a portion of Routt County which included the city of Steamboat Springs, as well as certain surrounding areas in Routt County. The adoption incorporated a map indicating the boundary of the area in question. Subsequently, on June 20, 1991, this boundary was adopted by the Colorado Air Quality Control Commission. The State requested that EPA issue a final boundary consistent with that adopted by the State. In today's final action, EPA has adopted a final boundary for the affected portion of Routt County that is consistent with the State's recommendation and is taking final action to redesignate the area.

Idaho—Kootenai County

The EPA received many comments on its proposed nonattainment redesignation for this area. The EPA is still assessing these comments and is not making a final decision at this time. The EPA expects to make a final decision for this area within the next few months and will issue a notice in the **Federal Register** announcing its final decision at that time.

Idaho—Part of Shoshone County

The 1990 Amendments authorize a State, on its own initiative, to submit to EPA a revised designation for an area in that State (see section 107(d)(3)(D)). The city of Pinehurst, a portion of Shoshone County, was designated nonattainment for PM–10 by operation of law upon enactment of the 1990 Amendments (see section 107(d)(4)(B), 40 CFR § 81.313 (1992)). After the 1990 Amendments, EPA received information from Idaho requesting that EPA expand the nonattainment boundary for this area to include additional townships along the Silver Valley (see 56 FR 37658 (August 8, 1991)). In the September 22, 1992 proposal for today's action, EPA proposed expanding the boundary consistent with the State's request (57 FR 43849).

The Idaho Department of Environmental Quality (IDEQ) submitted information indicating that it is in part rescinding its request to expand the PM–10 nonattainment area boundary for Pinehurst. The IDEQ requested that EPA expand the boundary to include an area just slightly larger than the city of Pinehurst. The IDEQ indicated that during the SIP development process for the city of Pinehurst it obtained information that allowed it to further refine the PM–10 nonattainment boundary for this area.

Because the State has withdrawn a portion of its previous request, it is no longer pending before EPA. Therefore, in today's action EPA is approving for redesignation to nonattainment the more circumscribed boundary requested by the State which includes an area slightly larger than the city of Pinehurst. The EPA also notes that the State has indicated to EPA that the moderate PM–10 SIP developed for the city of Pinehurst covers the slightly expanded boundary. The EPA will assess this during its review of the moderate area SIP for the city of Pinehurst. The moderate area plan for Pinehurst is ultimately approved by EPA, and it covers the expanded areas outside the city, then it would be unnecessary for the State to submit a separate moderate area plan addressing the area encompassed in the slightly expanded boundary.

New Mexico—Bernalillo County

In the proposal for today's action, EPA indicated that the city of Albuquerque provided information demonstrating that since a 1989 exceedance of the annual PM–10 NAAQS, the same site (#35–001–1013 or "the Alameda site") had monitored a downward trend in the annual values (57 FR 43848). The EPA further indicated that the downward trend was likely attributable at least in part to steps that the City had taken to reduce PM–10 emissions. For example, an area near the monitor that was suspected of contributing to the PM–10 problem had been paved in order to reduce dust generated from various activities in the area. Nevertheless, EPA proceeded with proposing the designation because certain measures taken to reduce PM–10 had not been submitted to EPA as a SIP revision and, therefore, EPA had no way of ensuring that the measures would be permanent and federally enforceable.

Since the proposal, the State of New Mexico has submitted these measures to EPA as SIP revisions. One revision involved a topsoil disturbance program that, among other things, prohibits the disturbance or removal of certain amounts of soil without a valid permit. The EPA approved this submittal in a direct final rulemaking notice published on February 23, 1993 (58 FR 10970). A second submittal contains a winter woodburning curtailment program for the city of Albuquerque. Section 107(d)(3)(A) of the Act provides that, among other things, "planning and control considerations" are relevant in determining whether the Administrator should proceed with a redesignation. The EPA believes the control measures adopted by the State are addressing the PM–10 air quality problem that prompted EPA's proposed redesignation

for this area.[7] Further, an assessment of recent data indicates that the downward trend of the annual NAAQS at the Alameda site appears to be continuing. Accordingly, at this time, EPA is not redesignating Bernalillo County as nonattainment for PM–10. The area will retain its unclassifiable designation.

Today's action in no way precludes EPA from redesignating this area as nonattainment at a later date should information reveal a PM–10 air quality problem with either the 24-hour or annual NAAQS. In fact, in the September 22, 1992 proposal, EPA specifically indicated that it was aware of potential violations of the 24-hour NAAQS in Albuquerque and was assessing the situation. The EPA is continuing to review this issue.

Washington—Part of Benton, Franklin, and Walla Walla Counties

The EPA received many comments on its proposed nonattainment redesignation for this area. The EPA is still assessing these comments and is not making a final decision regarding the redesignation of this action at this time. The EPA expects to make a final decision concerning this area within the next few months and will issue a notice in the **Federal Register** announcing its final decision at that time.

B. Sulfur Dioxide: District of Columbia—Two Areas in Washington, DC

The EPA received a comment from a commenter who contended that the area within a 1 kilometer range of the General Services Administration's (GSA) central heating plant and the area within 1.5 kilometers of GSA's west heating plant should not be redesignated to nonattainment until EPA and the District of Columbia have completed the process of negotiating a compliance plan with GSA. The aforementioned compliance plan is required under the terms of the enforceable compliance agreement entered into by EPA, the District of Columbia, and GSA. It is the District's intention to incorporate the terms of the final compliance plan and compliance agreement, along with a technical analysis, demonstrating that the emissions from GSA's two heating plants no longer cause violations of the NAAQS for SO_2 into a formal SIP revision to be submitted to EPA.

As previously stated in the September 22, 1992 **Federal Register** notice (57 FR 23846), EPA proceeded with the redesignation of the two areas surrounding the GSA heating plants because the District of Columbia had not submitted the aforementioned SIP revision to EPA. Since the date of the redesignation proposal, EPA has worked very closely with the District of Columbia and GSA to resolve this issue. The District has committed to submit a SIP revision for the areas by October 31, 1993. This SIP revision consists of requirements to reduce emissions at the sources in question and provide an attainment demonstration for the area.

Therefore, EPA has decided not to finalize the redesignation to nonattainment at this time, pending review of the forthcoming SIP submission. The EPA reserves the right to finalize the proposed redesignation of the area if the SIP revision submitted by the District of Columbia is ultimately disapproved by EPA.

Illinois—Portion of Madison and St. Clair Counties

The EPA received several comments addressing its proposed SO_2 nonattainment redesignations for portions of these two counties. At the outset of the redesignation process, EPA notified the Governor of Illinois that, based upon available information, EPA believed that Madison and St. Clair Counties should be redesignated nonattainment for SO_2 (56 FR 16274, April 22, 1991). In the State's response, it largely agreed with EPA (see, e.g., 57 FR 43846). However, during the comment period on EPA's proposed action, the Illinois Environmental Protection Agency (IEPA) submitted comments claiming that recent developments may eliminate the need for redesignation of these areas. The IEPA informed EPA that it is working with sources in these areas to develop permanent and enforceable permit revisions which will serve to address the SO_2 air quality problem in these areas. The State has committed to submit these changes to EPA in the form of a SIP revision by October 31, 1993, and as far in advance of that date as possible. Therefore, the State has requested that EPA not proceed with the nonattainment designation for these areas at this time. Others commenting on behalf of industry in these areas took a similar position to that of IEPA.[8]

The EPA is deferring final action at this time on the nonattainment redesignation for these areas in light of the recent planning efforts by the State and certain sources in the areas. However, EPA reserves the option of issuing a nonattainment redesignation for these areas at a future date. In particular, if the State does not submit the SIP revision for these areas by the October 31, 1993 commitment date which addresses the SO_2 air quality problem in these areas, EPA intends to assess whether a nonattainment redesignation for these areas should be finalized and would likely proceed with such a final redesignation at that time.

Pennsylvania—Portion of Allegheny County

As stated in the September 22, 1992 **Federal Register** notice (57 FR 23846), EPA's rationale for proposing redesignation of the portion of Allegheny County inclusive of Lincoln, Liberty, Glassport, and Port Vue Boroughs and the city of Clairton to nonattainment is due to monitored violations of the 24-hour standard for SO_2. The 24-hour standard was violated in 1986 and 1988.

The commenters contend that the principle source of SO_2 emissions in the proposed nonattainment area, U.S. Steel-Clairton Works, has invested a substantial amount of money and effort into making enhancements to its coke oven gas desulfurization facility. Furthermore, it is suggested that the changes have led to documented improvements in air quality in the "Clairton area." The commenters contend that the recent actions on the part of U.S. Steel are adequate to protect the NAAQS for SO_2 in the proposed nonattainment area. The commenters provided information correlating the monitored exceedances with specific sulfur-removal equipment failures and outages. The commenters believe that the recent upgrading of the desulfurization facility at the Clairton Works has remedied these previous equipment malfunctions which produced the monitored exceedances of the NAAQS. Therefore, the area should not be redesignated to nonattainment.

In response to above comments, EPA is encouraged by the progress made by U.S. Steel in reducing its emissions of SO_2. Therefore, EPA is not taking final action at this time for the "Clairton area." The EPA will work closely with the State of Pennsylvania and Allegheny County as it codifies these significant improvements to the desulfurization facility into the federally-approved SIP for Allegheny County (through the Pennsylvania SIP). However, EPA retains the right to finalize the proposed redesignation of the area if Allegheny

[7] Note also that "planning and control considerations" have informed EPA's decision to defer action on the SO_2 areas discussed below.

[8] One commenter raised additional issues including allegations about the procedures and technical basis associated with EPA's proposed redesignation for the affected portion of Madison County. Because, as indicated below, EPA is not taking final action on this area at this time, EPA is deferring response to these comments.

County does not submit a SIP revision for the "Clairton area" as expeditiously as possible.

IV. Significance of Today's Action

A. Significance for PM–10

Areas redesignated as nonattainment in today's action are subject to the applicable requirements of part D, title I of the Act and will be classified as moderate by operation of law [see section 188(a) of the Act]. Within 18 months of the redesignation, the State is required to submit to EPA an implementation plan for the area containing, among other things, the following requirements: (1) Provisions to assure that reasonably available control measures (including reasonably available control technology) are implemented within 4 years of the redesignation; (2) a permit program meeting the requirements of section 173 governing the construction and operation of new and modified major stationary sources of PM–10; (3) quantitative milestones which are to be achieved every 3 years until the area is redesignated attainment and which demonstrates reasonable further progress, as defined in section 171(1), toward timely attainment; and (4) either a demonstration (including air quality modeling) that the plan will provide for attainment of the PM–10 NAAQS as expeditiously as practicable, but no later than the end of the sixth calendar year after the area's designation as nonattainment, or a demonstration that attainment by such date is impracticable [see, e.g., sections 188(c), 189(a), 189(c), and 172(c) of the Act]. The EPA has issued detailed guidance on the statutory requirements applicable to moderate PM–10 nonattainment area (see 57 FR 13498 (April 16, 1992), and 57 FR 18070 (April 28, 1992)).

The State is also required to submit contingency measures, pursuant to section 172(c)(9) of the Act, which are to take effect without further action by the State or EPA, upon a determination by EPA that an area has failed to make reasonable further progress or attain the PM–10 NAAQS by the applicable attainment date (see 57 FR 13510–13512, 13543–13544). The EPA is hereby establishing the schedule for submission of contingency measures as called for in section 172(b) of the Act. The affected States are to submit contingency measures for the areas redesignated nonattainment for PM–10 in today's action within 18 months of redesignation.

B. Significance for SO_2

The EPA is, by today's action, redesignating two areas as nonattainment for both the primary and secondary standards for SO_2. The affected States must submit implementation plans to EPA within 18 months after promulgation of the nonattainment designations for SO_2, meeting the requirements of part D, title I of the Act (see section 191(a) of the Act). The implementation plans must provide for attainment of the SO_2 NAAQS as expeditiously as practicable, but no later than 5 years from the date of the final nonattainment designation [see section 192(a) of the Act]. As with PM–10, EPA has issued detailed guidance on the development of SIP's for SO_2 nonattainment areas that are consistent with part D, title I of the Act (see 57 FR 13498).

VI. Miscellaneous

A. Regulatory Flexibility Act

Under the Regulatory Flexibility Act, 5 U.S.C. 600 et seq., EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities (5 U.S.C. 603 and 604). Alternatively, EPA may certify that the rule will not have a significant economic impact on a substantial number of small entities [5 U.S.C. 605(b)]. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

Redesignation of an area to nonattainment under section 107(d)(3) of the Act does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any regulatory requirements on sources. To the extent that an affected State must adopt new regulations, based on an area's nonattainment status, EPA will review the effect that those actions have on small entities at the time the State submits those regulations. I certify that the redesignation action announced today will not have a significant economic impact on a substantial number of small entities.

Petitions for judicial review of this action must be filed as provided by section 307(b)(1) of the Act within February 22, 1994. Filing an administrative petition for reconsideration of the rule for purposes of judicial review nor extend the time within which a petition for judicial review of the rule may be filed, and shall not postpone the effectiveness of the rule (see section 307(b)(1)). This action may not be challenged in any subsequent proceedings to enforce its requirements (see section 307(b)(2)).

VII. Executive Order 12866

The Office of Management and Budget has exempted this rule from the requirements of section 6 of Executive Order 12866.

List of Subjects in 40 CFR Part 81

Environmental protection, Air pollution control, National parks, Wilderness areas.

Dated: December 13, 1993.

Carol M. Browner,

Administrator.

Therefore, 40 CFR part 81 is amended as follows:

PART 81—[AMENDED]

1. The authority citation for part 81 continues to read as follows:

Authority: 42 U.S.C. 7401–7671q.

2. Section 81.303 is amended in the table for "Arizona—PM–10" by adding a second entry for "Gila County" and by adding an entry for "Mohave County" to read as follows:

§ 81.303 Arizona.

* * * * *

Arizona—PM–10

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * * * * *				
Gila County (part):				
Payson: T10N, Sections 1–3, 10–15, 22–27, and 34–36 of R9E; T11N, Sections 1–3, 10–15, 22–27 and 34–36 of R9E; T10–11N, R10E; T10N, Sections 4–9, 16–21, and 28–33 of R11E; T11N, Sections 4–9, 16–21, and 28–33 of R11E.	January 20, 1994	Nonattainment .	January 20, 1994	Moderate.

Arizona—PM–10—Continued

Designated area	Designation		Classification	
	Date	Type	Date	Type
Mohave County (Part):				
Bullhead City: T21N, R20–21W, excluding Lake Mead National Recreation Area; T20N, R20–22W; T19N, R21–22W excluding Fort Mohave Indian Reservation.	January 20, 1994	Nonattainment .	January 20, 1994	Moderate.
* * * * * * *				

* * * * *

3. Section 81.305 is amended in the table for "California—PM–10 Nonattainment Areas" by adding entries for "Sacramento County" and "San Bernadino County" to read as follows:

§ 81.305 California.

* * * * *

CALIFORNIA—PM–10 NONATTAINMENT AREAS

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * * * * *				
Sacramento County	January 20, 1994	Nonattainment .	January 20, 1994	Moderate.
San Bernadino, Inyo, and Kern Counties Searles Valley planning area Hydrologic Unit #18090205.	November 15, 1990.	Nonattainment .	November 15, 1990.	Moderate.
San Bernadino County (part): excluding that portion located in the Searles Valley Planning area, and excluding that area in the South Coast Air Basin.	January 20, 1994	Nonattainment .	January 20, 1994	Moderate.
* * * * * * *				

* * * * *

4. Section 81.306 is amended in the table for "Colorado—PM–10 Nonattainment Areas" by adding an entry for "Routt County" to read as follows:

§ 81.306 Colorado.

* * * * *

COLORADO—PM–10 NONATTAINMENT AREAS

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * * * * *				
Routt County (Part):				
The Steamboat Springs Area Airshed as adopted by the Routt County Commissioners on May 28, 1991 and the Colorado Air Quality Control Commission on June 20, 1991.	January 30,1994 .	Nonattainment .	January 30, 1994	Moderate.
* * * * * * *				

6. Section 81.313 is amended in the table for "Idaho—PM–10 Nonattainment Areas" by adding an entry for "Shoshone County" to read as follows:

§ 81.313 Idaho.

* * * * *

IDAHO—PM–10 NONATTAINMENT AREAS

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * * * * *				
Shoshone County (Part):				
That portion of Shoshone County excluding the initial PM–10: including the South half of Southeast quarter of Section 31 of Range 2 east, Township 49; South quarter of Section 32 of Range 2 east, Township 49 north Section 5 of Range 2 east, Township 48 northeast half of Section 6 of Range 2 east, Township 48 northwest quarter of Section 8 of Range 2 east, Township 48 North; and excluding that portion of Shoshone County designated nonattainment for PM–10 on November 15, 1990.	January 20, 1994	Nonattainment .	January 20, 1994	Moderate.
City of Pinehurst	November 15, 1990.	Nonattainment .	November 15, 1990.	Moderate.
* * * * * * *				

* * * * *

7. Section 81.327 is amended in the table for "Montana—PM–10 Nonattainment Areas" by adding an entry for "Sanders County" to read as follows:

§ 81.327 Montana.

* * * * *

MONTANA—PM–10 NONATTAINMENT AREAS

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * * * * *				
Sanders County (Part):				
Thompson Falls and vicinity: including the following Sections: R29W, T21N, Sections: 5, 6, 7, 8, 9, 10, 15, and 16.	January 20, 1994	Nonattainment .	January 20, 1994	Moderate.
* * * * * * *				

* * * * *

8. Section 81.333 is amended by adding a table for "New York—PM–10" and by adding an entry "New York County" to read as follows:

§ 81.333 New York.

* * * * *

NEW YORK—PM–10

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * *	*	*	*	*
New York County	January 20, 1994	Nonattainment .	January 20, 1994	Moderate.
* * * *	*	*	*	*

* * * * *

9. Section 81.338 is amended by amending the table for "Oregon—PM–10 Nonattainment Areas" by adding an entry for "Lane County" to read as follows:

§ 81.338 Oregon.

* * * * *

OREGON—PM–10 NONATTAINMENT AREAS

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * *	*	*	*	*
Lane County (part) Oakridge: The Urban Growth boundary area	January 20, 1994	Nonattainment .	January 20, 1994	Moderate.
* * * *	*	*	*	*

* * * * *

10. Section 81.339 is amended in the table for "Pennsylvania—SO_2" by revising the entry for "Warren County" to read as follows:

§ 81.339 Pennsylvania.

* * * * *

PENNSYLVANIA—SO_2

Designated area	Does not meet primary standards	Does not meet secondary standards	Cannot be classified	Better than national standards
* * * * * * *				
VI. Northwest Pennsylvania Intrastate AQCR:				
(A) Warren County:				
Conewango Twp	X			
Mead Twp		X	X	
Clarendon Boro				
Warren Boro	X			
Pleasant Twp	X	X		
Glade Twp	X	X		
* * * * * * *				

11. Section 81.349 is amended in the table for "West Virginia—PM–10 Nonattainment Areas" by adding an entry for part of "Brooke County" and "Hancock County," to read as follows:

§ 81.349 West Virginia.

* * * * *

WEST VIRGINIA—PM–10 NONATTAINMENT AREAS

Designated area	Designation		Classification	
	Date	Type	Date	Type
* * * * * * *				
Hancock and Brooke Counties (Part) The city of Weirton	January 20, 1994	Nonattainment.	January 20, 1994	Moderate.
* * * * * * *				

* * * * *

12. Section 81.349 is amended in the table for "West Virginia—SO_2" by adding an entry for "Hancock County" to read as follows:

§ 81.349 West Virginia.

* * * * *

WEST VIRGINIA—SO_2

Designated area	Does not meet primary standards	Does not meet secondary standards	Cannot be classified	Better than national standards
* * * * * * *				
Hancock County (Part) The city of Weirton, including Butler and Clay:				
Magisterial Districts	X	X		
Remainder of State				X
* * * * * * *				

[FR Doc. 93–30966 Filed 12–20–93; 8:45 am]
BILLING CODE 6560–50–P

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Public Health Service

42 CFR Part 60

RIN 0905–AC87

Health Education Assistance Loan Program

AGENCY: Public Health Service, HHS.

ACTION: Final regulation.

SUMMARY: This rule amends existing regulations governing the Health Education Assistance Loan (HEAL) program to require lenders to report a borrower's HEAL indebtedness to one or more national credit bureaus after the loan has been fully disbursed; to include hearing procedures prior to termination from the program for lenders, holders, and schools; and to provide authority for schools to withhold services from defaulted HEAL borrowers.

EFFECTIVE DATE: This regulation is effective December 21, 1993.

FOR FURTHER INFORMATION CONTACT: James W. Farrington, D.M.D., Deputy Director, Division of Student Assistance, Bureau of Health Professions, Health Resources and Services Administration, Room 8–48, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857; telephone number: 301 443–1173.

SUPPLEMENTARY INFORMATION: On October 1, 1990, the Assistant Secretary for Health, with the approval of the Secretary of Health and Human Services, published in the **Federal Register**, (55 FR 40140), a Notice of Proposed Rulemaking (NPRM) to establish performance standards against which school, lender, and holder default rates would be measured and to amend the HEAL regulations to require lenders to report a borrower's HEAL indebtedness to one or more national credit bureaus after the loan has been fully disbursed; to include hearing procedures prior to termination from the program for lenders, holders, and schools; and to provide authority for schools to withhold services from defaulted HEAL borrowers. The public comment period on the proposed regulations closed on November 30, 1990. The Department received 121 public comments on this NPRM from 105 school officials, 10 professional associations, and 6 lenders and holders. The Health Professions Education Extension Amendments of 1992 (Pub. L. 102–408) established specific performance standards for schools, therefore school performance standards will not be addressed in this final regulation. Performance standards for lenders and holders will be addressed in a separate action. The comments received on the proposed rule and the Department's responses to the comments are discussed below according to the subparts, section numbers, and headings of the HEAL regulations affected.

Subpart D—The Lender and Holder

Section 60.33 Making a HEAL Loan

Twelve respondents opposed paragraph (h) of this section, which would require the lender to report a borrower's HEAL indebtedness to one or more credit bureaus at the time the loan is made. These respondents were concerned about potential problems that could arise due to credit bureaus' unfamiliarity with student loans, and believed that it would be necessary to educate credit bureaus regarding student loans if this provision were to work effectively. For example, respondents indicated that this requirement could lead to a credit report indicating a negative credit rating as a result of a HEAL loan on which no payments were made, when actually the borrower was in a deferment status or was otherwise not expected to be making payments. Thus, the terms and conditions of educational loans would need to be made known to credit bureaus to avoid improper negative credit ratings during grace periods and deferments. While the Department shares this concern, it also believes that the benefits of this proposal, in terms of making creditors fully aware of a borrower's indebtedness and thus helping to prevent overborrowing, are compelling enough to warrant its immediate implementation.

There was also concern regarding the possibility that a borrower's credit rating might be adversely affected by a "technical" default, which occurs when a borrower who qualifies for deferment is placed in default. To distinguish between a "technical" and "true" default, respondents indicated that it would be necessary to have a reliable and user-friendly system of tracking and encouraging borrowers to file deferment forms. In response, the Department notes that it is continuing to pursue approaches for simplifying the deferment notification process to avoid "technical" defaults. However, it must also be noted that the responsibility for notifying the lender or holder of deferment activities continues to rest with the borrower, and thus it is ultimately the borrower's responsibility if he or she is placed in default due to failure to notify the lender or holder of deferment eligibility. A so-called "technical" default is, in truth, a legal default in that the borrower has breached the contractual requirement to either begin repayment or request a deferment by mailing the appropriate forms. In these instances, the borrower generally can resolve the default in a satisfactorily manner by providing the proper deferment documentation to the lender or holder.

Numerous respondents stated that the proposal does not indicate whether reporting to credit bureaus is to occur after the initial or final loan disbursement and offered various suggestions in this regard. Two commenters suggested that reporting should occur within 120 days after the loan is fully disbursed rather than when the loan is initially made, since borrowers may reduce the original loan amount or return the second disbursement. This approach would minimize the reporting of erroneous data, spare borrowers the problems and hardships of incorrect reports, and save lenders the expense of costly manual corrections. Other suggestions were to report no sooner than the beginning of the grace period or closer to the time repayment is to begin. The Department agrees that it would be appropriate to delay reporting until after the loan is fully disbursed, and believes that 120 days is an adequate amount of time to allow for this reporting to be done. However, the Department does not favor delaying reporting until the beginning of the grace period or repayment period, since it is likely that a borrower may incur consumer debt during this time that should be granted by a creditor with full knowledge of the borrower's HEAL indebtedness. Accordingly, the provision in paragraph (h) of this section has been modified to clarify that reporting must occur no later than 120 days after the date that the lender makes the final disbursement on each loan.

One respondent stated that the requirement should specify that the reporting must be to national, rather than local, credit bureaus. The Department agrees and has amended this provision in paragraph (h) of this section as well.