

Office of Regulations and Rulings, U.S. Customs Service, Franklin Court, 1099 14th St., N.W., 4th floor, Washington, D.C.

Inapplicability of the Regulatory Flexibility Act, and Executive Order 12866

Since the regulation proposed seeks to alleviate regulatory burdens rather than impose new ones, it does not constitute a "major rule" for purposes of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, and is, therefore, not subject to its provisions. Further, this document does not meet the criteria for a "significant regulatory action" as specified in E.O. 12866.

Drafting Information

The principal author of this document was Gregory R. Vilders, Office of Regulations and Rulings, Regulations Branch. However, personnel from other offices participated in its development.

List of Subjects in 19 CFR Part 101

Customs duties and inspection, Exports, Imports, Organization and functions (Government agencies), Reporting and recordkeeping requirements, Tests.

Amendments to the Regulations

For the reasons stated above, part 101 of the Customs Regulations (19 CFR part 101) is amended as set forth below:

PART 101—GENERAL PROVISIONS

1. The authority citation for part 101 is revised to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 2, 66, 1202 (General Note 17, Harmonized Tariff Schedule of the United States (HTSUS)), 1623, 1624.

Section 101.3 and 101.4 also issued under 19 U.S.C. 1 and 58b;

Section 101.9 also issued under 19 U.S.C. 1411–1414.

2. It is proposed to amend part 101 by adding a new § 101.9 to read as follows:

§ 101.9 Test programs or procedures; alternate requirements.

(a) *General testing.* For purposes of conducting a test program or procedure designed to evaluate the effectiveness of new technology or operational procedures regarding the processing of passengers, vessels, or merchandise, the Commissioner of Customs may impose requirements different from those specified in the Customs Regulations, but only to the extent that such different requirements do not affect the collection of the revenue, public health, safety, or law enforcement. The imposition of any such different requirements shall be subject to the following conditions:

(1) *Defined purpose.* The test is limited in scope, time, and application to such relief as may be necessary to facilitate the conduct of a specified program or procedure;

(2) *Prior publication requirement.* For tests affecting the entry of merchandise, whenever practicable, notice shall be published in the **Federal Register** not less than thirty days prior to implementing such test, followed by publication in the Customs Bulletin. The notice shall invite public comments concerning the methodology of the test program or procedure, and inform interested members of the public of the eligibility criteria for voluntary participation in the test and the basis for selecting participants. For tests affecting the entry of passengers or carriers, no public notice is required.

(b) *NCAP testing.* For purposes of conducting an approved test program or procedure designed to evaluate planned components of the National Customs Automation Program (NCAP), as described in section 411(a)(2) of the Tariff Act of 1930 (19 U.S.C. 411), the Commissioner of Customs may impose requirements different from those specified in the Customs Regulations, but only to the extent that such different requirements do not affect the collection of the revenue, public health, safety, or law enforcement. In addition to the requirement of paragraph (a)(1) of this section, the imposition of any such different requirements shall be subject to the following conditions:

(1) *Prior publication requirement.* For tests affecting the NCAP, notice shall be published in the **Federal Register** not less than thirty days prior to implementing such test, followed by publication in the Customs Bulletin. The notice shall invite public comments concerning any aspect of the test program or procedure, and inform interested members of the public of the eligibility criteria for voluntary participation in the test and the basis for selecting participants; and,

(2) *Post publication requirement.* Within a reasonable time period following the completion of the test, a complete description of the results shall be published in both the **Federal Register** and the Customs Bulletin.

George J. Weise,
Commissioner of Customs.

Approved: August 5, 1994.

John P. Simpson,
Deputy Assistant Secretary of the Treasury.
[FR Doc. 94–20029 Filed 8–15–94; 8:45 am]

BILLING CODE 4820–02–P

19 CFR Part 191

Eliminate Notice of Exportation, Customs Form 7511, as Proof of Exportation for Drawback; Withdrawal

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Proposed rule; withdrawal.

SUMMARY: This document withdraws the proposed amendment to the Customs Regulations, which would have eliminated the requirement that the notice of exportation, Customs Form 7511, be submitted as proof of exportation for the purpose of obtaining drawback, and instead permitted the use of other documents generated internally in the course of trade to prove exportation. Customs has concluded that the retention of the notice of exportation is essential, especially in those circumstances where the drawback claimant is not the direct exporter, and the exporter refuses to provide its own documentary evidence to the claimant because of business confidentiality or the administrative cost of providing such supporting documents.

EFFECTIVE DATE: This withdrawal is effective on August 16, 1994.

FOR FURTHER INFORMATION CONTACT: Bruce Friedman, Office of Trade Operations, (202–927–0916).

SUPPLEMENTARY INFORMATION:

Background

Drawback is a refund or remission, in whole or in part, of a Customs duty, internal revenue tax or fee. There are a number of different kinds of drawback authorized under law, including, for example, manufacturing drawback and unused merchandise drawback. In order to qualify for drawback, there must be an exportation or a destruction under Customs supervision. The statute providing for specific types of drawback is 19 U.S.C. 1313. Part 191, Customs Regulations (19 CFR part 191), contains the general regulations for drawback claims and specialized provisions for specific types of drawback claims.

The requirements for establishing the exportation of merchandise as part of a drawback claim are set forth in subpart E of part 191. This subpart authorizes the use of several alternative procedures to establish exportation. Two such alternatives, contained in §§ 191.51(a) and 191.52 (19 CFR 191.51(a), 191.52), require a claimant, in order to receive drawback, to file a notice of exportation on Customs Form (CF) 7511, either uncertified, or certified by a Customs

officer at the time of exportation, for each shipment of merchandise exported. The information required on a CF 7511 consists of the name of the exporting vessel or carrier, the number and kinds of packages and their marks and numbers, a description of the merchandise, the name of the exporter, and the country of ultimate destination. This information, however, is also available from other paperwork, particularly documents usually generated by the exporter internally in the process of trade.

Accordingly, Customs published a notice of proposed rulemaking in the *Federal Register* on October 7, 1992 (57 FR 46113), which would have eliminated the notice of exportation, CF 7511, and instead permitted the use of such other documents generated internally in the course of trade to prove exportation for purposes of obtaining drawback. It was believed that this would result in a saving of paperwork to the benefit of both Customs as well as the drawback claimant.

Discussion of Comments

Thirty comments were received in response to the notice of proposed rulemaking. Of the thirty comments only four generally were in favor of eliminating or replacing the CF 7511. The remaining twenty-six comments strongly opposed the elimination of the CF 7511.

Almost all of the commenters opposing the elimination of the CF 7511 stated that they would be forced to relinquish their right to claim drawback whenever they were not the direct exporter. A separate exporter might not be willing to provide documentation that would reveal information such as the name and address of the foreign purchaser and prices charged by the exporter.

Also, many of these commenters believed that the CF 7511 was necessary for shipments to Mexico and Canada, citing the unavailability of other documents as a continuing problem for drawback claimants.

Another reason against the proposed change mentioned by several commenters was the fact that the reverse side of the CF 7511 is used for the endorsement of drawback rights from one party to another. This endorsement also satisfies the requirement of § 191.73(a), which requires satisfactory evidence that the reservation was made with the knowledge and consent of the exporter. If this form were to be abolished, Customs would probably have to develop another form to take its place.

It was further asserted that the CF 7511 in fact also provided information that might not be readily available on other documents, such as the name of the carrier, the date of exportation, the destination, and the shipper.

Conclusion

Though the concerns about proof of exportation to Mexico and Canada have been resolved by § 181.47(c), Customs Regulations (19 CFR 181.47(c)), which also allows a copy of the Canadian or Mexican customs entry to be used as proof of exportation, Customs is, nevertheless, constrained to conclude that the comments submitted point out persuasive, and controlling, reasons militating against adoption of the proposal, and that, on balance, the retention of the notice of exportation satisfies the concerns of the trade, while occasioning relatively minimum and reasonably justified time and effort in its preparation and/or certification. In particular, the retention of the notice is essential, especially in those circumstances where the drawback claimant is not the direct exporter, and the exporter refuses to provide its own documentary evidence to the claimant because of business confidentiality or the administrative cost of providing such supporting documents.

Withdrawal of Proposal

In view of the foregoing, and after consideration of the comments received and further review of the matter, Customs has determined to withdraw the notice of proposed rulemaking published in the *Federal Register* on October 7, 1992 (57 FR 46113).

Drafting Information

The principal author of this document was Russell Berger, Regulations Branch, U.S. Customs Service. However, personnel from other offices participated in its development.

Michael H. Lane,

Acting Commissioner of Customs.

Approved: July 22, 1994.

John P. Simpson,

Deputy Assistant Secretary of the Treasury.
[FR Doc. 94-20028 Filed 8-15-94; 8:45 am]

BILLING CODE 4820-02-P

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Assistant Secretary for Fair Housing and Equal Opportunity

24 CFR Ch. I

[Docket No. R-94-1743; FR-3755-N-02]

(RIN 2529-AA73)

Discrimination in Property Insurance Under the Fair Housing Act; Advance Notice of Proposed Rulemaking

AGENCY: Office of the Assistant Secretary for Fair Housing and Equal Opportunity, HUD.

ACTION: Advance notice of proposed rulemaking.

SUMMARY: HUD is charged with the administration and enforcement of the Fair Housing Act (the Act), including the promulgation of regulations under the Act. This notice announces HUD's intention (1) to publish regulations concerning nondiscrimination in property insurance practices under the Fair Housing Act, and (2) to solicit public comment on this subject prior to publication of a proposed rule. Issues for which HUD specifically requests comment from the public are set forth in the Supplementary Information section of this notice.

DATES: Comment Due Date: October 17, 1994.

FOR FURTHER INFORMATION CONTACT:

Peter Kaplan, Director, Office of Regulatory Initiatives and Federal Coordination, Office of Fair Housing and Equal Opportunity, HUD, Room 5240, 451 Seventh Street SW., Washington DC 20410-0500, telephone (202) 708-2904 (not a toll free number). The toll free TDD number is 1-800-877-8339.

ADDRESSES: Interested persons are invited to submit comments in response to this notice to the Rules Docket Clerk, Office of the General Counsel, Room 10276, Department of Housing and Urban Development, 451 Seventh Street, SW, Washington, DC 20410-0500. Comments should refer to the above docket number and title. A copy of each comment submitted will be available for public inspection during regular business hours at the above address. Facsimile (FAX) comments are not acceptable.

SUPPLEMENTARY INFORMATION:

I. Background

The Department of Housing and Urban Development (HUD) is committed to initiatives that will provide access to capital and economic

empowerment for all Americans. HUD has launched several programs to stem disinvestment in cities and disadvantaged communities throughout the country, increase the flow of capital into these communities, and create communities of opportunity throughout the nation.

Among HUD's priorities are: (1) Empowerment of local communities by supporting local economic development efforts; (2) expansion of housing opportunities through partnerships with state and local government and private developers and financial institutions; and (3) opening housing markets through vigorous enforcement of the Fair Housing Act (42 U.S.C. 3601-3619). A critical component of these initiatives is assuring access to capital for homeownership and business development. Assuring fair access to property or hazard insurance is essential to achieve each of these objectives. Insurance is necessary for access to capital.

HUD is charged with the administration and enforcement of the Act, including the promulgation of regulations under the Act. HUD is also responsible for receiving and investigating complaints alleging discriminatory practices under the Act and bringing enforcement actions where the Department determines that reasonable cause exists to believe that a violation has occurred or is about to occur. As part of these initiatives, and in furtherance of its responsibilities under the Act, HUD announces its intent to issue regulations concerning property insurance practices that are discriminatory under the Act.

As indicated in HUD's current regulations, discriminatory housing practices include: "refusing to provide * * * property or hazard insurance * * * or providing such * * * insurance differently because of race, color, religion, sex, handicap, familial status, or national origin." 24 CFR 100.70(d)(4). Case precedents such as *Dunn v. Midwestern Indemnity Mid-American Fire & Casualty Co.*, 472 F. Supp. 1106 (S.D. Ohio 1979) and *McDiarmid v. Economy Fire & Casualty Co.*, 604 F. Supp. 105 (S.D. Ohio 1984) established the applicability of the Act to discriminatory insurance practices. But see *Mackey v. Nationwide Insurance Co.*, 724 F.2d 419 (4th Cir. 1984). More recent precedents, *N.A.A.C.P. v. American Family Mutual Insurance Co.*, 978 F.2d 287 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2335 (1993) and *Nationwide Mutual Insurance Co. v. Cisneros*, No. C3-92-52 (S.D. Ohio Feb. 24, 1994), reaffirmed this principle, according deference, under standards

established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), to HUD's substantive regulation promulgated in 1989.

II. Solicitation of Public Comments

HUD is requesting public comment in several areas to be addressed by the regulation. There are several complex issues to be addressed by this regulation. In developing this regulation, HUD will work closely with insurance companies, trade associations, State regulators, civil rights groups and community organizations to ensure that HUD has heard as many viewpoints as possible on the subject of property insurance practices. HUD already has begun informal discussions with representatives of these entities, organizations and individuals to learn more about their views on current property insurance practices and about issues that HUD should address in the regulation. These contacts will continue in the form of group meetings and informal discussions with insurance companies, advocacy groups and trade associations.

In addition, HUD will hold several public meetings around the country for industry groups, advocacy groups and private citizens to submit comments and discuss what the regulation should address.

Based on the comments that HUD receives in response to this notice and comments presented at the public meetings, as well as any written guidance received from additional communications with industry groups and others, HUD will publish a proposed rule. Following careful consideration of the comments received on the proposed rule, HUD will issue a final regulation.

HUD is considering the issues and areas that the regulation should address in order for the regulation: (1) to be effective as guidance to HUD investigators, state and local civil rights agencies and private fair housing groups; (2) to serve as a guidepost for preventive acts by the industry; and (3) to be a clear description of the rights afforded protected classes. To do so, the regulation will address specific practices that are prohibited under the Act, describe the standards to be utilized in determining whether violations of the Act have occurred, and discuss investigative techniques that will be utilized, remedies that will be sought where violations are found, and voluntary affirmative efforts that are appropriate to eliminate discrimination.

The standards for determining discrimination in this area are those

utilized in all other areas covered by the Act. Specific practices that violate the Act will be identified and the factual circumstances for identifying violations will be defined. The rule will describe the investigative techniques HUD will utilize, including those HUD employs in current fair housing complaint investigations. The rule will identify remedies to be considered that are appropriate to insurance cases.

The areas for which HUD specifically requests comment from the public are the following:

1. Underwriting practices that may discriminate due to either disparate treatment or disparate impact.
 2. Sales and marketing practices that may discriminate due to either disparate treatment or disparate impact.
 3. Explanations or justifications for those industry practices that could be challenged as violations of the Act because of disparate treatment or disparate impact. In cases of disparate impact, explanations should address the business necessity for the practice and why no less discriminatory alternative exists.
 4. Barriers to the availability of insurance, or barriers to equal terms and conditions of insurance, for particular protected classes.
 5. Entities and individuals who should be covered by the prohibition against discriminatory insurance practices, such as mutual and stock companies, independent agents, direct writers, exclusive agents, and rating services.
 6. Techniques HUD should use in complaint investigations.
 7. Remedies HUD should consider to discourage discriminatory practices, including equitable, injunctive, and affirmative relief, monetary damages, and civil penalties.
 8. Voluntary actions insurers can take to assure nondiscrimination and to increase availability of insurance to allow access to capital.
 9. Other issues that are relevant to the issue of insurance discrimination.
- In addition to comments, HUD is also requesting any reports, documents, or other evidence that will assist the Department in evaluating issues to be addressed in the regulation.
- HUD requests that, in submitting comments on any of the foregoing issues, the commenter please cite the item number of the issue addressed by the comment. HUD also welcomes comments on issues related to insurance practices that are not specifically included in the items listed.

Dated: August 10, 1994.

Robert Achtenberg,
Assistant Secretary for Fair Housing and
Equal Opportunity.
[FR Doc. 94-20048 Filed 8-15-94; 8:45 am]
BILLING CODE 4210-28-P

PANAMA CANAL COMMISSION

35 CFR Part 103

RIN 3207-AA36

General Provisions Governing Vessels

AGENCY: Panama Canal Commission.

ACTION: Proposed rule.

SUMMARY: Under existing regulations, fees for booking transits at the Panama Canal are assessed at a fixed rate per Panama Canal Gross Ton. The Panama Canal Commission has proposed a major revision of the rules for measurement of vessels using the Panama Canal expected to become effective October 1, 1994. Under the proposal, the existing rules of measurement will be replaced with the Panama Canal Universal Measurement System (PC/UMS). PC/UMS will no longer utilize a Panama Canal Gross Tonnage value. Accordingly, fees for the use of the transit booking or reservation system must be assessed on some other basis. This proposed rule recommends retention of the existing method of calculating booking fees for vessels subject to PC/UMS transitional relief measures and the fixing of fees for all other vessels in reference to the PC/UMS Net Ton.

DATES: Comments must be submitted on or before August 25, 1994.

ADDRESSES: Comments may be addressed to Michael Rhode, Jr., Secretary, Panama Canal Commission, 1825 I Street NW, Suite 1050, Washington, DC 20006-5402. (Telephone: (202) 634-6441). (Facsimile: (202) 634-6439).

FOR FURTHER INFORMATION CONTACT: Michael Rhode, Jr. at the above address and telephone.

SUPPLEMENTARY INFORMATION: On April 18, 1994, the Panama Canal Commission published in the *Federal Register* (59 FR 18332) an advance notice of proposed rulemaking with a request for comments and a notice of hearing with respect to a related matter—a complete revision of the Rules for Measurement of Vessels for the Panama Canal as set forth in 35 CFR part 135. Comments were solicited and received, and a public hearing was held May 25, 1994 in Washington, DC. The views presented by the interested parties were

considered by the Board of Directors of the Panama Canal Commission. The Board gave final approval on July 13, 1994 to proceed with implementation of the PC/UMS. The proposed rule together with the Board's recommendation was forwarded to the President for his approval. The proposed rule was published in the *Federal Register* on July 18, 1994 (59 FR 36398). It is expected that, on or before August 30, the final rule will be approved by the President and published in the *Federal Register*. It is scheduled to become effective October 1, 1994.

Corresponding changes in the transit booking system regulations are necessary to reconcile 35 CFR § 103.8(e) with the aforementioned revisions to the rules for measurement of vessels using the Panama Canal. Under existing § 103.8(e), fees for booking transits at Panama Canal are assessed at \$0.23 per Panama Canal Gross Ton. With the expected replacement of the existing regulations on October 1, 1994, a Panama Canal Gross Ton value will no longer exist. Instead, under the revisions, the new PC/UMS will utilize a PC/UMS Net Ton value. Accordingly, in order to continue using tonnage as the basis for rate assessment for the transit booking system, fees must be assessed on the tonnage value used in the PC/UMS. Therefore, the Commission proposes that for vessels transiting the Canal for the first time after September 30, 1994 transit booking fees be fixed in relation to the PC/UMS Net Ton.

At the same time, however, the Commission desires to minimize the financial impact of the change on the customer. As with the PC/UMS itself, the Commission is striving for revenue-neutrality in the aggregate and for minimal impact for the individual customer. Therefore, the proposed rule also provides special relief measures for vessels which have previously transited the Canal.

In the first category—vessels which have not transited the Canal before October 1, 1994, the proposed regulation establishes a proposed new rate of \$0.26 per PC/UMS Net Ton. This rate of \$0.26 per PC/UMS Net Ton is expected to result in a booking fee near the rate assessed under the existing system. In other words, the amount paid by an individual vessel at \$0.26 per PC/UMS Net Ton will closely approximate the amount it would have paid at \$0.23 per Panama Canal Gross Ton. The new booking fee rate system will be applied to a limited number of vessels inasmuch as the number of first-time transits

involves a relatively small number of vessels each year.

As noted above, the Commission's intention is to revise the rate in a manner which maintains fees at approximately the same level as currently paid by individual vessels. Retention of the \$0.23 rate—merely fixing fees at \$0.23 per PC/UMS Net Ton—could reduce individual booking fees as much as 20%. Inasmuch as the intent of this proposal is solely to reconcile paragraph 103.8(e) with the new standard tonnage measurement and not to otherwise alter the booking fees, the agency proposes the \$0.26 rate which approximates present booking fees without increasing customer costs.

For the other and larger category—vessels which have previously transited the Canal, the proposal retains the existing booking fee computation method. This recommendation has its genesis in the proposed revisions to the Rules for Measurement of Vessels using the Panama Canal. The PC/UMS proposed rule contains transitional relief measures which preserve existing tonnage for ships transiting the Canal between March 23, 1976 (the date of the last significant rules change) and September 30, 1994, inclusive. In the instant proposed rule, the Commission proposes that the method for assessing booking fees for these vessels be similarly retained. Vessels meeting the aforementioned PC/UMS requirements for transitional relief which use the booking system after September 30, 1994 will not be affected inasmuch as they will continue to pay the same fee—\$0.23 per Panama Canal Gross Ton. For these previously-transiting vessels, the booking fee would change only in the event the vessel undergoes a significant structural change, defined in the PC/UMS as a change in the volume of the vessel of 10% or more. Under the PC/UMS, a vessel undergoing a significant structural change loses its entitlement to the relief measures and becomes subject to application of the PC/UMS measurement formulas. In such an instance, the new rate of \$0.26 per PC/UMS Net Ton would be applied to the vessel.

The Commission has been exempted from Executive Order 12866 and, accordingly, the provisions of that directive do not apply to this proposed rule. Even if the order were applicable, the proposed regulation, which concerns "rates" and "practices relating" thereto, would not constitute a "rule" as that term is defined in the Regulatory Flexibility Act (5 U.S.C. 601(2)) and would not have a significant impact on a substantial number of small entities under that Act.

A review of the environmental effect of the proposed measurement rule changes concludes that the proposed change will not have a significant effect on the quality of the human environment. An environmental impact statement is not required under the National Environmental Policy Act of 1969.

Finally, the Administrator of the Panama Canal Commission certifies that these proposed regulations meet the applicable standards provided in sections 2(a) and 2(b)(2) of Executive Order No. 12778.

List of Subjects in 35 Part 103

Advance reservations, Booking system, Order of transit, Panama Canal, Vessels.

Accordingly, for the reasons set forth above, it is proposed that 35 CFR part 103 be amended as follows:

PART 103—GENERAL PROVISIONS GOVERNING VESSELS

1. The authority citation for part 103 is revised to read as follows:

Authority: 22 U.S.C. 3791, E.O. 12215, 45 FR 36043, 3 CFR, 1981 Comp., p. 257.

2. Paragraph (e) of § 103.8 is revised to read as follows:

§ 103.8 Preference in the transit schedule; order of transiting vessels.

(e) Booking Fees. (1) For vessels measured in accordance with § 135.13(a) of this chapter, the fee for booking shall be \$0.26 per PC/UMS Net Ton.

(2) For vessels subject to the transitional relief measures of § 135.31 of this chapter and measured in accordance with § 135.13(b) of this chapter, the fee for booking shall be \$0.23 per Panama Canal Gross Ton as specified on the last certificate issued by the Panama Canal Commission between March 23, 1976 and September 30, 1994, inclusive.

(3) The minimum booking fee for any vessel is \$1,500.

(Existing collections of information are approved under Office of Management and Budget (OMB) control number 3207-0001. Modifications are being submitted to OMB for approval.)

Dated: August 10, 1994.

Gilberto Guardia F.,

Administrator, Panama Canal Commission.
[FR Doc. 94-20049 Filed 8-15-94; 8:45 am]

BILLING CODE 3640-04-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[FRL-5052-2]

State Implementation Plans for Serious PM-10 Nonattainment Areas, and Attainment Date Waivers for PM-10 Nonattainment Areas Generally; Addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990

AGENCY: Environmental Protection Agency (EPA).

ACTION: Addendum to General Preamble for future proposed rulemakings.

SUMMARY: This addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990 principally describes EPA's preliminary views on how the Agency should interpret various provisions of title I with regard to requirements for PM-10 (particles with an aerodynamic diameter less than or equal to a nominal 10 micrometers) serious nonattainment area State implementation plans (SIP's). This document also addresses policy and guidance on attainment date waivers potentially applicable to all areas that have been designated nonattainment for PM-10, waivers of certain requirements applicable to PM-10 serious nonattainment areas, and requirements for international border areas in PM-10 nonattainment areas. Although the guidance includes various statements that States must take certain actions, these statements are made pursuant to EPA's preliminary interpretations, and thus do not bind States and the public as a matter of law. This addendum is an advance notice of how EPA generally intends to take action on SIP submissions and to interpret various PM-10 related title I provisions.

FOR FURTHER INFORMATION CONTACT: Charlene E. Spells, Air Quality Management Division, Mail Drop 15, Office of Air Quality Planning and Standards, U.S. EPA, Research Triangle Park, North Carolina 27711, (919) 541-5255.

ADDRESSES: References cited herein are available from the Public Docket No. A-92-23. The docket is located at the Air and Radiation Docket and Information Center, Room M-1500, Waterside Mall, Mail Code 6102, 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.

SUPPLEMENTARY INFORMATION:

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In accordance with 1 CFR 5.9(c), this document is published in the proposed rules category.

I. Introduction

Issues are discussed in this document regarding policy and guidance that will be applicable to areas that have been designated nonattainment for PM-10 and reclassified as serious areas. This document also discusses issues regarding policy and guidance on attainment date waivers potentially applicable to all areas that have been designated nonattainment for PM-10, as well as policy and guidance on waivers of certain other requirements applicable to PM-10 serious nonattainment areas, and requirements for international border areas in PM-10 nonattainment areas.

Initially, all areas designated as nonattainment for PM-10 are classified as moderate areas (see section 188(a) of the Clean Air Act (Act)).¹ Subsequently,

¹ The 1990 Amendments to the Clean Air Act made significant changes to the air quality planning requirements for areas that do not meet (or that significantly contribute to ambient air quality in a nearby area that does not meet) the PM-10 national ambient air quality standards (see Pub. L. No. 101-549, 104 Stat. 2399). References herein are to the Clean Air Act, as amended, 42 U.S.C. 7401, et seq.

in accordance with section 188(b) of the Act, "The Administrator may reclassify as a serious PM-10 nonattainment area * * * any area that the Administrator determines cannot practicably attain the national ambient air quality standard for PM-10 by the attainment date (as prescribed in subsection (c)) for moderate areas" or any area that fails to timely attain. The EPA took final action on January 8, 1993 to reclassify 5 moderate areas that were initially designated as nonattainment for PM-10 upon enactment of the 1990 Amendments (see 58 FR 3334). The EPA is considering reclassifying additional areas from moderate to serious.

This guidance document is being published as an addendum to the General Preamble for the Implementation of Title I of the Clean Air Act Amendments of 1990 (General Preamble) published April 16, 1992 (57 FR 13498).² Among other things, this PM-10 nonattainment area guidance document describes EPA's preliminary views on how EPA should interpret various provisions of title I with regard to requirements for PM-10 serious area SIP's. Although the guidance includes various statements that States must take certain actions, these statements are made pursuant to EPA's preliminary interpretations, and thus do not bind the States and the public as a matter of law. Of course, the use of prescriptive language is appropriate in those instances where the policy is simply reiterating statutory mandates which provide that States must take certain actions.

Possible approaches to implementing the provisions in section 179B applicable to international border areas, general SIP requirements of section 172(c), the specific requirements in subpart 4 of part D of title I in serious PM-10 nonattainment areas, the issues involved and the means of resolving those issues are discussed in the following sections. The topics discussed include SIP requirements such as provisions to assure that best available control measures (BACM) are implemented; waivers for areas impacted by nonanthropogenic sources; treatment of international border areas; requirements for quantitative milestones, reasonable further progress (RFP) and contingency measures.

II. Designations and Classifications

A. Designations

Section 107(d) of the Act provides generally for the designation of areas of each State as attainment, nonattainment or unclassifiable for each pollutant for which there is a national ambient air quality standard (NAAQS). Certain areas meeting the qualifications of section 107(d)(4)(B) of the Act were designated nonattainment for PM-10 by operation of law upon enactment of the 1990 Amendments (initial PM-10 nonattainment areas). A **Federal Register** notice announcing all of the areas designated nonattainment for PM-10 at enactment and classified as moderate was published on March 15, 1991 (56 FR 11101). A follow-up notice correcting some of these area designations was published August 8, 1991 (56 FR 37654). The nonattainment areas were formally codified in 40 CFR part 81, effective January 6, 1992 (56 FR 56694, November 6, 1991). All those areas of the country not designated nonattainment for PM-10 at enactment were designated unclassifiable (see section 107(d)(4)(B)(iii) of the Act).

B. Classifications

Once an area is designated nonattainment, section 188 of the Act outlines the process for classification of the area and establishes the area's attainment date. In accordance with section 188(a), all PM-10 nonattainment areas are initially classified as moderate by operation of law upon their designation as nonattainment.

C. Reclassifications

1. General Conditions

A moderate area can subsequently be reclassified as a serious nonattainment area under two general conditions. First, EPA has general discretion under section 188(b)(1) to reclassify a moderate area as a serious area at any time the Administrator determines the area cannot practicably attain the NAAQS by the statutory attainment date for moderate areas.³

Second, under section 188(b)(2) a moderate area is reclassified as serious by operation of law after the statutory attainment date has passed if the Administrator finds that the area has not attained the NAAQS. The EPA must publish a **Federal Register** notice identifying the areas that have failed to attain and were reclassified, within 6

months following the attainment date (see section 188(b)(2)(B)).

2. Reclassification of Initial PM-10 Nonattainment Areas

Section 188(b)(1)(A) provides an accelerated schedule by which EPA is to reclassify appropriate initial PM-10 nonattainment areas. The EPA proposed on November 21, 1991 (56 FR 58656) to reclassify 14 of the 70 initial moderate areas as serious. The 14 areas EPA proposed to reclassify were identified largely based on the magnitude and frequency of ambient PM-10 measurements above the 24-hour NAAQS of 150 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) during calendar years 1988-1990. The EPA took final action on January 8, 1993 (58 FR 3334) to reclassify 5 of the 14 areas. The final decision to reclassify the 5 areas was based on the criteria utilized in the proposal, comments received in response to the proposal and on EPA's preliminary review of the SIP's for the areas.

In the future, EPA anticipates that, generally, any decision to reclassify an initial PM-10 nonattainment area before the attainment date will be based on specific facts or circumstances demonstrating that the NAAQS cannot practicably be attained in the area by December 31, 1994 (the statutory attainment date specified in section 188(c)(1) for initial PM-10 nonattainment areas).

3. Reclassification of Future PM-10 Nonattainment Areas

Section 188(b)(1)(B) provides a timeframe within which EPA is to reclassify appropriate areas designated nonattainment for PM-10 subsequent to enactment of the 1990 Amendments. Appropriate areas are to be reclassified as serious within 18 months after the required date for the State's submission of a moderate area PM-10 SIP.⁴ The statute requires that these moderate area PM-10 SIP's be submitted within 18 months after the area is designated nonattainment (see section 189(a)(2)(B)). Taking these provisions together, the statute thus requires that EPA reclassify appropriate PM-10 moderate areas designated nonattainment after 1990 as serious within 3 years of such designation.

Because the moderate area SIP's are due before this reclassification deadline, EPA anticipates that any determination that such areas should be reclassified will be based upon facts contained in

² A supplemental notice was published at 57 FR 18070, April 28, 1992, which provides certain appendices to the April 16, 1992 General Preamble. Subsequent references in this notice to the General Preamble are inclusive of both documents.

³ The EPA's interpretation of the reclassification provisions in section 188(b)(1) is discussed in detail in section III.C.1(b) of the General Preamble (57 FR at 13537-38).

⁴ This directive does not restrict EPA's general authority, but simply specifies that it is to be exercised, as appropriate, in accordance with certain dates.

the moderate area SIP demonstrating that the NAAQS cannot practicably be attained by the statutory deadline. The EPA may also consider reclassifying moderate areas for which a SIP has not been submitted whenever it becomes apparent (e.g., because of an extensive delay in submitting the SIP) that an area cannot practicably attain the standards by the applicable attainment date. The EPA may also determine that an area cannot practicably attain the standards by the applicable date when the State submits an incomplete or otherwise inadequate SIP for the area (i.e., a SIP which would not assure timely attainment) and the State does not act expeditiously to correct such deficiencies.

The EPA does not believe that generally reclassifying moderate areas as serious rewards areas which delay development and implementation of PM-10 control measures. Rather, EPA believes its policy creates an incentive for the timely submittal and effective implementation of moderate area SIP requirements and facilitates the PM-10 attainment objective. For example, if an area that fails to submit a timely moderate area SIP is reclassified, this does not obviate the requirement that the area submit and implement the moderate area SIP requirements. Accordingly, in addition to reclassifying such areas, EPA would also determine that the State had failed to submit a PM-10 SIP and the area could be subject to sanctions under sections 110(m) and 179 for its delay. As provided under section 179(a) of the Act, States containing areas for which EPA has made such determinations have up to 18 months from EPA's determination to submit a complete plan or plan revision before EPA is required to impose either the highway funding sanction or the requirement to provide two-to-one new source offsets described in section 179(b). If the deficiency has not been corrected 6 months after the first sanction applies, then the second sanction must apply.⁵ The EPA's determination also triggers a requirement for EPA to impose a Federal implementation plan under section 110(c)(1) of the Act. In conjunction with the possible imposition of sanctions, EPA may issue a determination to reclassify the area to serious.

D. Appendix K and Waivers

Appendix K to 40 CFR part 50 provides guidance on the interpretation of ambient air quality data to determine the air quality status of an area.

Appendix K and accompanying guidance (both preceding the 1990 Amendments to the Act) provide in part that measured exceedances of the PM-10 NAAQS which are believed to be influenced by uncontrollable events caused by natural sources of particulate matter or by events that are not expected to recur at a given location are flagged and excluded from decisions as to whether or not the area should be designated nonattainment.⁶ Therefore, if it is established that exceedances are caused by natural sources, a State may be permitted to avoid designating the area as nonattainment, even though the exceedances are expected to recur.

The savings provision of section 193 of the amended Act provides, among other things, that regulations and guidance promulgated or issued by the Administrator prior to enactment of the 1990 Amendments are to remain in effect according to their terms except to the extent that they are inconsistent with any provision of the amended Act. Section 188(f) of the amended Act provides EPA with the discretionary authority to waive a specific date of attainment for a PM-10 nonattainment area where it is determined that nonanthropogenic sources contribute significantly to the violation of the standard in the area, and to waive certain nonattainment area SIP requirements where the Administrator determines that anthropogenic sources of PM-10 do not contribute significantly to the violation of the standard in the area. These provisions take as a fundamental premise that areas experiencing violations of the NAAQS due to nonanthropogenic sources are to be designated as nonattainment. If areas were permitted to avoid being designated as nonattainment because their violations are caused in whole or part by uncontrollable natural events, then this statutory provision would have to be read as having no legal effect or significance. However, this would violate canons of statutory construction, which direct that statutory language not be treated as mere surplusage.

Consequently, although appendix K appears to be preserved in part by section 193, the provision permitting the treatment of "uncontrollable events caused by natural sources" as exceptional events, and therefore excludable from nonattainment decisions, is inconsistent with the provisions of section 188(f) and should therefore be regarded as no longer

having legal effect. Similarly, any EPA guidance permitting such exclusion of these events is inconsistent with the amended Act. For this reason, exceedances which are attributable to uncontrollable nonanthropogenic events may not be discounted or deweighted in any manner, but must be fully considered in determining whether violations of the NAAQS have occurred and whether designation as nonattainment is warranted. Future determinations relevant to exceptional events should therefore focus on the remaining type of exceptional event identified under section 2.4 of 40 CFR part 50, appendix K, namely whether the events—anthropogenic or nonanthropogenic—are likely to recur at the same location.

The EPA plans to make perfunctory modifications to section 2.4 of 40 CFR part 50, appendix K. In addition, guidance on the interpretation of air quality data believed to be influenced by special events and conditions will be addressed in a separate publication that will replace the 1986 Exceptional Events Guideline.

III. International Border Areas

A. Statutory Requirement

Section 818 of the 1990 Amendments added a new section, 179B, to subpart 1, part D of title I. Section 179B applies to areas that could attain the relevant NAAQS by the statutory attainment date but for emissions emanating from outside the United States (U.S.). For PM-10 nonattainment areas, section 179B(a) provides that EPA must approve the moderate area SIP if (1) the SIP meets all the applicable requirements under the Act other than a requirement that such plan or revision demonstrate attainment and maintenance of the PM-10 NAAQS by the applicable attainment date, and (2) the State demonstrates to EPA's satisfaction that the SIP would be adequate to attain and maintain the PM-10 NAAQS by the attainment date but for emissions emanating from outside the U.S. In addition, section 179B(d) provides that if a State demonstrates that an area would have timely attained the PM-10 NAAQS but for emissions emanating from outside the U.S., the area must not be subject to the reclassification provisions of section 188(b)(2). Section 188(b)(2) provides that any moderate PM-10 nonattainment area that EPA determines is not in attainment after the applicable attainment date shall be reclassified to serious by operation of law. Therefore, the statute provides that areas that could attain but for emissions emanating from outside the U.S. must not be reclassified

⁵ See 58 FR 51270 (October 1, 1993).

⁶ See section 2.4 of appendix K of 40 CFR part 50 and "The Guideline on the Identification and Use of Air Quality Data Affected by Exceptional Events," EPA-450/4-86-007, July 1986.

as serious after failing to attain by the applicable date.⁷

B. Policy

Assuming that a plan or revision meets all applicable requirements, the State must show that an area is eligible to have its SIP approved and not be reclassified as serious under section 179B by evaluating the impact of emissions emanating from outside the U.S. and demonstrating that the SIP would bring about attainment but for those emissions. Several types of information may be used to evaluate the impact of emissions emanating from outside the U.S. The EPA will consider the information presented by the State for individual nonattainment areas on a case-by-case basis in determining whether an area may qualify for treatment under section 179B. Five examples of such information are listed below in increasing order of sophistication (the State may use one or more of these types of information or other techniques, depending on their feasibility and applicability, to evaluate the impact of emissions emanating from outside the U.S. on the nonattainment area; the first three examples do not require the State to obtain information from a foreign country):

1. Place several ambient PM-10 monitors and a meteorological station, measuring wind speed and direction, in the U.S. nonattainment area near the international border.⁸ Evaluate and quantify any changes in monitored PM-

10 concentrations with a change in the predominant wind direction.

2. Comprehensively inventory PM-10 emissions within the U.S. in the vicinity of the nonattainment area and demonstrate that the impact of those sources on the nonattainment area after application of reasonably available controls does not cause the NAAQS to be exceeded. This analysis must include an influx of background PM-10 in the area. Background PM-10 levels could be based, for example, on concentrations measured in a similar nearby area not influenced by emissions from outside the U.S.

3. Analyze ambient sample filters for specific types of particles emanating from across the border (although not required, characteristics of emissions from foreign sources may be helpful).

4. Inventory the sources on both sides of the border and compare the magnitude of PM-10 emissions originating within the U.S. to those emanating from outside the U.S.

5. Perform air dispersion and/or receptor modeling to quantify the relative impacts on the nonattainment area of sources located within the U.S. and of foreign sources of PM-10 emissions (this approach combines information collected from the international emission inventory, meteorological stations, ambient monitoring network, and analysis of filters).

In addition to demonstrating that the SIP for the area would be adequate to timely attain and maintain the NAAQS but for emissions emanating outside the U.S., the SIP must continue to meet all applicable moderate area SIP requirements in order to qualify for the special SIP approval under section 179B. Among other things, the SIP must provide for the implementation of reasonably available control measures (RACM), including reasonably available control technology (RACT) (see 57 FR 13540). In international border areas, RACM/RACT must be implemented to the extent necessary to demonstrate attainment by the applicable attainment date if emissions emanating from outside the U.S. were not included in the analysis. The EPA believes that this interpretation of the degree of RACM the State is required to implement in moderate PM-10 areas affected by emissions emanating from outside the U.S. is consistent with the purpose of section 179B. By directing EPA, under section 179B, to approve the plan or plan revision of a moderate PM-10 area which shows it would attain the NAAQS but for foreign emissions and by excluding such an area from reclassification to serious, Congress

clearly wanted to avoid penalizing States containing such areas by not making them responsible for control of emissions emanating from a foreign country over which they have no jurisdiction. Moreover, by excluding the area from reclassification, Congress also elected to avoid subjecting such areas to the more stringent control measures applicable in serious PM-10 areas. In addition, as set forth in section 179B(a)(2), the second condition which must be met before EPA may approve a moderate area plan showing attainment but for foreign emissions, by its plain terms, requires the State to establish only that the plan submitted would be "adequate" to timely attain and maintain the NAAQS, but for emissions from outside the U.S. Nothing in section 179B relieves the State from meeting all its applicable moderate area PM-10 SIP requirements, including the requirement to implement RACM. Nonetheless, if, in doing so, States containing such an area were also required, because of contributions to PM-10 violations caused by foreign emissions, to shoulder more of a regulatory and economic burden than States not similarly affected (i.e., by implementing measures which go well beyond those which the SIP demonstrates would otherwise be adequate to timely attain and maintain the PM-10 NAAQS) such a requirement would unfairly penalize States containing international border areas and effectively undermine the purpose of section 179B. Indeed, to the extent an affected State can satisfactorily demonstrate that implementation of such measures clearly would not advance the attainment date, EPA could conclude they are unreasonable and hence do not constitute RACM. Notwithstanding the above, in light of the overall health and clean air objectives of the Act, EPA does encourage affected States to reduce emissions beyond the minimum necessary to satisfy the "but for" test in order to reduce the PM-10 concentrations to which their populations are exposed.

The SIP for an international border area must also include contingency measures as required under section 172(c)(9) of the Act. Under section 179B(a)(1), such SIP's must meet "all the requirements applicable to it under the Act" except that they may demonstrate timely attainment by discounting emissions emanating from outside the U.S. Contingency measures are additional measures included in the SIP that can be undertaken to reduce emissions if the area fails to make RFP or to attain the primary NAAQS by the

⁷ As noted, section 179B(d) states that areas demonstrating attainment of the standards, but for emissions emanating from outside the U.S., shall not be subject to section 188(b)(2) (reclassification for failure to attain). By analogy to this provision and applying canons of statutory construction, EPA will not reclassify before the applicable attainment date areas which can demonstrate attainment of the standards, but for emissions emanating from outside the U.S. (see section 188(b)(1)). First, section 179B evinces a general congressional intent not to penalize areas where emissions emanating from outside the country are the but-for cause of the PM-10 nonattainment problems. Further, if EPA were to reclassify such areas before the applicable attainment date, EPA, in effect, would be reading section 179B(d) out of the statute. Specifically, if EPA proceeded to reclassify, before the applicable attainment date, those areas qualifying for treatment under section 179B, an area would never be subject to the provision in section 179B(d) which prohibits EPA from reclassifying such areas after the applicable attainment date. Canons of statutory construction counsel against interpreting the law such that language is rendered mere surplusage. Finally, note that section 179B(d) contains a clearly erroneous reference to carbon monoxide instead of PM-10, and that this section contains other clear errors (see, e.g., section 179B(c) reference to section 188(b)(9), which does not exist).

⁸ See 40 CFR part 58 for guidance on locating PM-10 monitors and "On-site Meteorological Program Guidance for Regulatory Modeling Applications," EPA-450/4-87-013, June 1987 for guidance on locating meteorological stations.

applicable attainment date. In international border areas, EPA will not require the contingency measures for PM-10 to be implemented after the area fails to attain if EPA determines that the area would have attained the NAAQS, but for emissions emanating from outside the U.S. However, the EPA will require contingency measures to be implemented if it determines that the area failed to make RFP in achieving the required reductions in PM-10 emissions from sources within the U.S., or if the area does not, in fact, obtain the emission reductions that were necessary to demonstrate timely attainment of the NAAQS, but for emissions emanating from outside the U.S.

IV. Serious Area SIP Requirements

The Act requires States to submit several SIP revisions, as necessary, providing for implementation of increasingly stringent control measures and demonstrating when those control measures will bring about attainment of the PM-10 NAAQS. The first SIP revision was due November 15, 1991 for the initial moderate PM-10 nonattainment areas. For areas redesignated nonattainment for PM-10 in the future under section 107(d)(3), the first SIP revision will be due within 18 months after the area is redesignated (see section 189(a)(2)). This SIP revision must, among other things, provide for implementation of RACM on sources in the area (see sections 189(a)(1)(C) and 172(c)(1)). All available technologically and economically feasible control measures would be considered RACM, and therefore reasonable for adoption, for areas that cannot attain the NAAQS by the applicable attainment date (December 31, 1994 for initial moderate PM-10 nonattainment areas) (see 57 FR 13544).⁹

If EPA determines that a moderate area cannot practically attain the NAAQS by the applicable attainment date (or determines the area has failed to attain) and reclassifies the area as a serious nonattainment area under section 188(b), a second SIP revision for

the area is required under section 189(b). This revision must, among other things, include provisions to assure that BACM (including BACT) will be implemented in the area (see section 189(b)(1)(B)). In addition, a demonstration (including air quality modeling) must be submitted showing that the plan will attain the NAAQS either by the applicable attainment date or, if an extension is granted under section 188(e), by the most expeditious alternative date practicable (see section 189(b)(1)(A)).

The SIP revisions to require the implementation of BACM must be submitted to EPA within 18 months after an area is reclassified as serious (see section 189(b)(2)). The BACM are to be implemented no later than 4 years after an area is reclassified (see section 189(b)(1)(B)). The EPA's policies regarding the requirement to implement BACM in serious areas are discussed in section VI of this document.

The serious area attainment demonstration required under section 189(b)(1)(A) must be submitted to EPA within 4 years after an area is reclassified based on a determination by EPA that the area cannot practically attain the NAAQS by the statutory deadline for moderate areas. It is due within 18 months after an area is reclassified for actually having failed to attain the NAAQS by the moderate area attainment date (see section 189(b)(2)).

The new attainment date for initial PM-10 nonattainment areas that are reclassified as serious is to be as expeditious as practicable but not later than December 31, 2001. For areas that are designated nonattainment for PM-10 in the future and subsequently become serious, the attainment date is to be as expeditious as practicable but no later than the end of the tenth calendar year beginning after the area's designation as nonattainment (see section 188(c)(2)).

If the State demonstrates to the satisfaction of EPA that attainment by the statutory deadline for serious areas (as set forth in section 188(c) of the Act) is impracticable, the State must demonstrate that the SIP provides for attainment by the most expeditious alternative date practicable. The State may apply to EPA for a single extension of the serious area attainment date, under section 188(e) of the Act, not to exceed 5 years beyond the serious area attainment date. A State requesting an extension under section 188(e) for an area must, among other things, demonstrate that the plan for the area includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly

be implemented in the area. The EPA intends to issue guidance in the future, as appropriate, on applying for an extension of the serious area attainment date.

If a serious area fails to attain by the applicable attainment date (which may be an extended attainment date), another SIP revision is required within 12 months that provides for attainment and until then for annual reductions in PM-10 or PM-10 precursor emissions within the area of not less than 5 percent of the amount of such emissions as reported in the most recent emission inventory for the area (see section 189(d)).

In addition to the specific PM-10 SIP requirements contained in subpart 4 of part D, title I, States containing serious areas must meet all of the applicable general SIP requirements set forth in section 110(a)(2) and the nonattainment area SIP requirements set forth in subpart 1 of part D, title I, to the extent that these provisions are not otherwise subsumed by, or integrally related to, the more specific PM-10 requirements.¹⁰ The general SIP requirements applicable to all nonattainment areas are discussed in the General Preamble at 57 FR 13556-13557.

The requirements specifically applicable to serious areas under subpart 4 are found primarily in section 189. Those requirements include:

- Current actual and allowable emissions inventories that meet EPA guidelines¹¹ (see section VI.D. below).
- Submission of a SIP, under section 189(b)(1)(A), that includes a demonstration that the plan provides for attainment by the applicable attainment date (December 31, 2001 for the areas initially designated nonattainment for PM-10 by operation of law under section 107(d)(4) and no later than the end of the tenth year beginning after the area's redesignation for areas subsequently redesignated nonattainment), or a demonstration that attainment by the above date is not practicable and that the plan provides for attainment by the most expeditious alternative date practicable.¹²

⁹ See 57 FR 13538 [April 16, 1992].

¹¹ "PM-10 Emission Inventory Requirements," EPA-450/2-93-XX, U.S. Environmental Protection Agency, Research Triangle Park, NC, 1993.

¹² Subsequent to adopting requirements for BACM shortly after the nonattainment area is reclassified as serious, it may be necessary for the State to adopt additional control measures in order to demonstrate that the SIP provides for attainment of the PM-10 NAAQS in accordance with section 189(b)(1)(A)(i). If the State demonstrates, in accordance with section 189(b)(1)(A)(ii), that attainment by the applicable serious area attainment date is impracticable and seeks an extension of the

⁹ Note that if it can be shown that measures are unreasonable because emissions from the sources affected are insignificant or de minimis, such measures may be excluded from consideration as they would not represent RACM for that area (see 57 FR 13540). Moreover, in international border areas, measures which go beyond those which the SIP demonstrates would be adequate to attain and maintain the standard, but for emissions emanating from outside the U.S., would not be considered "reasonably" available—and therefore would not be required by RACM—since they would not advance the attainment date (although States may elect to implement such measures in order to reduce the public's exposure to PM-10) (see discussion under International Border Areas of this guidance document).

c. Provisions, under section 189(b)(1)(B), to assure that BACM (including BACT) will be implemented no later than 4 years after the area is reclassified as serious.

d. A requirement, under section 189(b)(3), that the terms "major source" and "major stationary source," used in implementing a new source permitting program under section 173 and control of PM-10 precursors under section 189(e), include any stationary source or group of stationary sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 70 tons per year of PM-10.

e. Contingency measures¹³ (see section VII. below).

f. Quantitative milestones, (applicable to both moderate and serious area SIP's under section 189(c)), which are to be achieved every 3 years until the area is redesignated attainment, and which demonstrate RFP toward attainment by the applicable date. The provision includes a requirement for periodic reports demonstrating whether the milestones have been met (see section VIII. below).

g. Plan revisions which provide for attainment of the PM-10 NAAQS and annual reductions of not less than 5 percent of inventoried PM-10 and PM-10 precursor emissions within the area, under section 189(d), if the serious area fails to attain the standards.

h. As applicable, RACT-level, BACT-level, and new source review control of PM-10 precursors from major stationary sources of precursors in the airshed (applicable to both moderate and serious area SIP's under section 189(e)).

The demonstration required under section 189(b)(1)(A) should follow the existing modeling guidelines addressing PM-10 (e.g., "PM-10 SIP Development Guideline" (June 1987); "Guideline on Air Quality Models" (Revised); memorandum from Joseph Tikvar and Robert Bauman dated July 5, 1990) and any applicable regulatory requirements. A supplementary attainment demonstration policy applicable to initial moderate PM-10 nonattainment areas facing special circumstances was issued in a memorandum from EPA's

attainment date pursuant to section 188(e), the State must demonstrate to the best of its ability that the plan for the area includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can be feasibly implemented in the area.

¹³ Contingency measures are other available control measures, in addition to those in the control strategy to attain the NAAQS, that can be implemented if EPA determines the area fails to make reasonable further progress or to attain the NAAQS by the applicable attainment date (see section 172(c)(9)).

Office of Air Quality Planning and Standards to the Directors of EPA Regional Air Divisions on March 4, 1991.¹⁴ That supplementary policy is not applicable to serious area SIP demonstrations.

V. Waivers for Certain PM-10 Nonattainment Areas

A. Historical Perspectives

The EPA in the past focused much of its air pollution control efforts on industrial point source emissions and other traditional sources of air pollution.¹⁵ For instance, EPA's 1977 guidance on SIP development gave priority to control of urban fugitive dust after control of traditional sources, but in preference to rural fugitive dust, on the grounds that (1) urban soil was believed to be contaminated and, therefore, potentially more harmful than the native soils in rural areas; (2) the potential for significant population exposures and attendant health effects was much greater in urban areas; and (3) scarce resources at the Federal, State, and local agency levels could be most effectively brought to bear on the more pronounced problems found in urban areas.¹⁶ Accordingly, EPA's policy was to require greater emphasis on control of emissions in urban areas, including control of fugitive dust from all major sources. In contrast, control requirements for rural areas were far less ambitious, focussing on the control of major industrial sources, with little attention given to natural or nonindustrial emissions. This policy of giving a lower priority to controlling natural or nonindustrial emissions in rural areas became known as the "Rural Fugitive Dust Policy."¹⁷

¹⁴ "PM-10 SIP Attainment Demonstration Policy for Initial Moderate Nonattainment Areas," memorandum from John Calcagni and William Laxton to Director, Air Division, EPA Regions I-X, March 4, 1991.

¹⁵ The EPA distinguished between "traditional" and "nontraditional" sources. The term "nontraditional source" first appeared in official print in 1976 in EPA's "National Assessment of the Urban Particulate Problem," EPA-450/3-76-024, July 1976, and was coined as a catch-all to refer to those sources not traditionally considered in air pollution control strategies, including construction and demolition, tailpipe emissions, tire wear, and various sources of fugitive dust. Since then, the use of the term has expanded to include such sources as prescribed agricultural and silvicultural burning, open burning, and residential wood combustion.

¹⁶ "Guidance on SIP Development and New Source Review in Areas Impacted by Fugitive Dust," Edward F. Tuerk, Acting Assistant Administrator for Air and Waste Management, to Regional Administrators.

¹⁷ See, e.g., "Model Letter Regarding State Designation of Attainment Status," David H. Hawkins, Assistant Administrator for Air and Waste Management, to Regional Administrators, October 7, 1977; see also, "Fugitive Dust Policy: SIP's and New Source Review" (August 1984).

The EPA's policy focus shifted away from the type and location of the emission sources (i.e., traditional or nontraditional sources, urban or rural locations) to the size of the particles emitted when the indicator for the NAAQS was changed in 1987 from total suspended particulate matter to PM-10. While revisions to the rural fugitive dust policy were being considered, the policy was continued during the initial phases of implementing the PM-10 NAAQS on an interim basis.¹⁸ However, EPA believes that the 1990 Amendments provide a statutory alternative that wholly supplants the rural fugitive dust policy (see sections 107(d)(4)(B) and 188(f) of the amended Act; 56 FR 37659 (August 8, 1991)).

B. Waiver Provisions

The Act, as amended in November 1990, was designed to assure that attainment and maintenance of the PM-10 standards, which were promulgated in 1987 (52 FR 24634, July 1, 1987), be as expeditious as practicable. Thus, the Act requires States to submit several revisions of the SIP for PM-10 nonattainment areas, if necessary, to ensure attainment of the PM-10 NAAQS as expeditiously as practicable. Among other planning requirements, the SIP revisions must first provide for the implementation of RACM on PM-10 sources. If RACM is not adequate to attain the NAAQS, subsequent revisions must provide for implementation of additional, more stringent control measures until the NAAQS are attained.

Congress recognized that there may be areas where the NAAQS may never be attained because of PM-10 emissions from "nonanthropogenic sources,"¹⁹ and that the imposition in such areas of certain State planning requirements, as described in the previous section, may not be justified. Therefore, under section 188(f) of the Act, Congress provided a means for EPA to waive a specific date for attainment and certain control and planning requirements when certain conditions are met in the nonattainment area.

Section 188(f) provides two types of waivers. First, the Administrator may, on a case-by-case basis, waive any requirement under subpart 4 applicable to any serious nonattainment area where EPA determines that anthropogenic sources of PM-10 do not contribute significantly to the violation of the

¹⁸ See 52 FR 24716 (July 1, 1987).

¹⁹ The legislative history of the 1990 Amendments indicates that Congress intended that the term "nonanthropogenic" sources of PM-10 refer to activities where the human role in the cause of such emissions is highly attenuated [see H.R. Rep. No. 490, 101st Cong., 2d Sess. 265 (1990)].

standard in the area. Second, the Administrator may waive a specific date for attainment of the standard where EPA determines that nonanthropogenic sources of PM-10 contribute significantly to the violation of the standard in the area.

Section 188(f) contains two different legal tests. The first test applies to a waiver of the serious area requirements and requires that EPA determine that anthropogenic sources do not contribute significantly before EPA grants such a waiver. The second test applies to a waiver of an area's attainment date and requires that EPA determine that nonanthropogenic sources contribute significantly before waiving the attainment date. The first test is more stringent than the second.

C. Application of the Waiver Provisions

Several questions must be answered before the waiver provisions can be applied. Each of these questions is discussed in the subsections that follow.

1. What types of sources should be considered anthropogenic and nonanthropogenic?

The legislative history of the 1990 Amendments indicates that Congress intended that the term "nonanthropogenic" sources of PM-10 refer to activities where the human role in the cause of such emissions is highly attenuated (see H.R. Rep. No. 490 at 265). Naturally occurring events such as wildfires, volcanic eruptions, unusually high pollen counts, and high winds which generate dust from undisturbed land are examples of nonanthropogenic sources that EPA believes meet the intent of Congress.

Anthropogenic sources of PM-10 emissions are those resulting from human activities. Some of the traditional and nontraditional anthropogenic sources generally considered in PM-10 SIP's are commercial, institutional, and residential fuel combustion; fossil fuel-fired electric power plants; industrial processes; vehicular traffic on paved and unpaved roads; construction activities; agricultural activities; and other sources of fugitive dust which are directly traceable to human activities and which are reasonably foreseeable incidents of such activities.²⁰

2. What criteria should be used in determining when nonanthropogenic sources contribute significantly and when anthropogenic sources do not contribute significantly to violation of the NAAQS in the area?

The Act does not define the term "contribute significantly" as it is used in section 188(f), nor does the legislative history provide any useful guidance.²¹ Where a statute is silent or ambiguous with respect to the meaning of a statutory term, a reasonable agency interpretation of the term must be given deference by a reviewing court (see *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984)). The EPA thus believes it has the authority to select reasonable criteria by which to determine when nonanthropogenic/anthropogenic sources in an area do/do not "contribute significantly" to levels of pollution which exceed the NAAQS, as well as to consider for this purpose, criteria utilized in other statutory contexts. In light of the different legal tests set forth in section 188(f), the EPA believes that different indicators of significance are needed to serve the statutory purpose of encouraging protection of public health and welfare while avoiding unreasonable control actions. The criteria which EPA believes provide a reasonable approach to making such a determination, as well as a discussion of the basis for selecting these criteria, are set forth below.

Generally, where a nonattainment area's anthropogenic sources contribute very little to violations, it is likely that controlling those emissions to the extent feasible for the area will be insufficient to attain the NAAQS. In such cases, it would be unreasonable to require the area to implement more stringent and more expensive controls on anthropogenic sources since they would contribute little to attainment or to reducing the public's exposure to unhealthy air quality. In similar fashion, where nonanthropogenic emission contributions are great, even after the area has taken reasonable steps to reduce them, at some point it may not be feasible for the area to reduce nonanthropogenic (or anthropogenic) emissions sufficiently to effect any real change in ambient concentrations. Consequently, it would be unreasonable to require the area to continue to pursue control measures that are beyond the

area's practicable abilities. These principles are discussed below in connection with each of the two waiver tests.

In selecting an appropriate "significance" contribution from anthropogenic sources (for the purposes of deciding whether serious area requirements should be waived), EPA has elected to rely on the test of significance that is applied under new source permitting programs. Under the new source review (NSR) permit program, the EPA requires State permitting programs to consider new major sources or major modifications as causing or contributing to a violation of the PM-10 NAAQS when the source would add, at a minimum, over $5 \mu\text{g}/\text{m}^3$ to the 24-hour average or over $1 \mu\text{g}/\text{m}^3$ to the annual average PM-10 concentrations in an area that does not or would not meet the PM-10 NAAQS (see 40 CFR 51.165(b)). Given that the purpose of new source permitting programs is also to protect air quality in both attainment and nonattainment areas, EPA generally believes that the test of significant contribution to violations under that program should also be applicable when determining significant contributions of anthropogenic sources under section 188(f) of the Act. It should also be noted that, in determining "significance" for purposes of section 188(f), the plain terms of that provision and its underlying purpose dictate that EPA consider the impact of the anthropogenic sources as a whole. Consequently, where emissions from all anthropogenic sources as a whole contribute less than or equal to $5 \mu\text{g}/\text{m}^3$ to 24-hour average design concentrations and less than or equal to $1 \mu\text{g}/\text{m}^3$ to annual mean design concentrations in a nonattainment area, after all RACM have been implemented,²² EPA will generally regard such contributions as insignificant for purposes of waiving requirements applicable to serious PM-10 nonattainment areas pursuant to section 188(f).

Generally, if an area meeting this test has not yet been reclassified as serious and the area would qualify under this test for a waiver of certain serious area requirements as deemed appropriate by EPA (see discussion below), then EPA will not require reclassification, since that action would have no practical

²¹ It should be noted that the term "contribute significantly" (or variations of that term) has been interpreted differently throughout the Act, e.g., in the ozone/carbon monoxide programs (see section 107(d)(4)(A)(iv) and (v)), the new source review (NSR) program, and in specific provisions of the statute, such as sections 110(a)(2)(D)(i)(I) and 126(a)(1)(B). An agency is permitted, but not required, to give a similar meaning to similar terms which appear in different parts of a statute. Thus, although EPA is not bound to adopt the interpretation given the term "contribute significantly" in other parts of the statute, it is likewise not precluded from according this use of similar language some interpretive weight.

²² Implementation of RACM (including RACT) is required in all moderate PM-10 nonattainment areas and that requirement is not waived under the provisions of section 188(f). Therefore, the issue is whether anthropogenic sources still contribute significantly to violations of the NAAQS in an area after implementing RACM.

²⁰ "PM-10 SIP Development Guideline," EPA-450/2-86-001, U.S. Environmental Protection Agency, Research Triangle Park, NC, 1987, p. 5-5, Table 5.1.

effect. Generally, if the contribution of anthropogenic emissions to the 24-hour design concentration exceeds $5 \mu\text{g}/\text{m}^3$, or if the contribution to the annual design concentration exceeds $1 \mu\text{g}/\text{m}^3$, even after the application of all RACM, then the area should be reclassified as serious, and serious area requirements, including BACM, should be implemented. The EPA will consider exercising its authority to waive serious area requirements on a case-by-case basis where the anthropogenic source contribution exceeds these levels, and it can be persuasively demonstrated that because of unique circumstances, anthropogenic sources do not contribute significantly to violations of the PM-10 NAAQS in the area.

The EPA will consider nonanthropogenic sources to contribute significantly (and hence grant an attainment date waiver) only if, after the application of RACM to nonanthropogenic sources, their contribution to the 24-hour average design concentration exceeds $150 \mu\text{g}/\text{m}^3$, or their contribution to the annual mean design concentration exceeds $50 \mu\text{g}/\text{m}^3$. Because the basic purpose of title I is to protect public health and welfare through attainment and maintenance of the NAAQS, EPA believes that before it may generally presume a serious area's nonanthropogenic emissions contribution to be significant, that contribution should by itself prevent the area from attaining the NAAQS after reasonable steps have been taken to reduce or minimize their impacts. Areas which do not meet the above criteria, and other situations for which the general presumption is rebutted, will be reviewed on a case-by-case basis (see question 4 below).

Information derived from chemical and optical analyses of ambient filter catches, area emission inventories, and dispersion modeling to determine maximum source impacts can be used to evaluate the impact of anthropogenic and nonanthropogenic sources. Analysis of filters collected with a network of monitors over a long period (1 or more years) should reveal the portions of normal area PM-10 concentrations attributable to background, nonanthropogenic, and anthropogenic sources, respectively.

3. Under what conditions will the attainment date for a moderate area be waived?

The effect of waiving the attainment date for a moderate area is to relieve it of the serious area requirements. Therefore, special considerations apply to the determination of whether nonanthropogenic sources contribute

significantly to violation of the PM-10 NAAQS in a moderate area and whether such area therefore qualifies for an attainment date waiver.

The significant disparity between the legal tests set out in section 188(f), as discussed above, may lead to an absurd result. In particular, if a moderate area met the less stringent attainment date waiver test and the attainment date for the area was actually waived, the area would never be reclassified.²³ The result would be that a moderate area would be effectively relieved from the serious area requirements without having met the more stringent test that Congress expressly required be met as a prerequisite to a waiver of such requirements. In such an event, the more stringent test for determining whether to waive serious area requirements would be rendered meaningless. Moderate areas would qualify for the attainment date waiver, be effectively relieved of all serious area requirements and never have to meet the required test for such waiver.

To avoid this absurd result and only grant a waiver of the serious area requirements consistent with the legal standard set out in the Act, EPA has construed section 188(f) in the following manner. A moderate area may only qualify for an attainment date waiver if it also qualifies for a waiver of the serious area requirements. Therefore, EPA must determine that anthropogenic sources in the area do not contribute significantly to the violation of the PM-10 NAAQS, and the serious area requirements should be waived before EPA can grant an attainment date waiver for a moderate area. If such a determination is made, then the attainment date may be waived and the area would not be reclassified. These special considerations would not be relevant where EPA is determining whether to waive the attainment date for a serious area since waiving the date in such circumstances would not as a matter of course have the effect of relieving the area of the serious area requirements. An area already reclassified as serious could qualify for an attainment date waiver solely by

showing that nonanthropogenic emissions contribute significantly to the nonattainment problem.

As part of its policy, EPA will require that areas receiving waivers be revisited periodically to reevaluate source contributions, to ensure that source emissions growth is reasonably controlled, and to determine whether additional controls to reduce the public's exposure to high concentrations of PM-10 are available (see also the discussion under question 5).

4. What happens if an area cannot meet the general criteria described above?

If evidence in a given nonattainment area suggests that nonanthropogenic emissions may contribute significantly to violations but are not greater than $150 \mu\text{g}/\text{m}^3$ and/or anthropogenic source contributions are relatively small but not less than $5 \mu\text{g}/\text{m}^3$, then EPA will review the situation on a case-by-case basis taking into account relevant information such as the relative contribution of nonanthropogenic emissions/anthropogenic emissions and the effects of applying additional controls to both types of sources.

For moderate areas, if preliminary data (emission inventory, filter analysis, etc.) persuasively indicate that anthropogenic emissions may be insignificant and that nonanthropogenic emissions may be significant in an area, but such data are not decisive, then EPA will consider granting a temporary or conditional waiver of the moderate area attainment date for no more than 3 years to allow further evaluation of the situation. Prior to granting a temporary waiver, EPA and the State must agree on a protocol for evaluating the impacts of anthropogenic and nonanthropogenic emissions. The protocol must include a schedule with interim milestones by which the State will complete its analyses. The schedule should consider the need for the area to adopt and implement BACM so as to meet the applicable serious area attainment date (as expeditiously as practicable and, for those areas designated nonattainment under section 107(d)(4)(B), no later than December 31, 2001) in the event the evaluation demonstrates that nonanthropogenic emissions do not contribute significantly to violations in the area. If the evaluation conclusively demonstrates that nonanthropogenic emissions are significant, then a waiver of the serious area attainment date may be granted.

If it is shown for any moderate nonattainment area that, although nonanthropogenic emissions may be significant, the application of controls on anthropogenic sources would

²³ If EPA waives a specific attainment date for a moderate area consistent with its authority under section 188(f), the attainment date for the area will be vacated. Therefore, the moderate area would not be subject to reclassification under section 188(b) because there simply would be no attainment date that the area cannot practically meet or that the area fails to meet. However, since section 188(f) authorizes waiving only the attainment date, the moderate area would still be subject to all the remaining moderate area SIP requirements. Therefore, the moderate area SIP submitted to meet the applicable requirements of subparts 1 and 4 must, among other requirements, continue to provide for implementation of RACM.

appreciably reduce PM-10 concentrations in the area, then the area would not be granted a waiver of the moderate area attainment date, but would be reclassified as serious. The area would then be required to implement BACM on non-de minimis anthropogenic source categories (see discussion in section VI). However, subsequent to such reclassification, the area may later apply for a waiver of the serious area attainment date if it can demonstrate that even after implementing BACM (and after considering the extended attainment and post-attainment provisions of sections 188 and 189 of the Act), nonanthropogenic emissions will prevent the area from attaining the NAAQS.

5. For what period may a specific attainment date be waived?

When nonanthropogenic sources have been determined to contribute significantly to violations in an area that has been reclassified to serious, in accordance with the above criteria, those sources may permanently prevent the area from attaining the standards. Therefore, the attainment date for such areas could be waived indefinitely.²⁴ "However, the phrase waive a specific date" does not require that the attainment date be waived indefinitely (see footnote 23 on the effect of waiving the moderate area attainment date), nor does it lessen the State's obligation to strive to expeditiously attain the

²⁴In cases where it is feasible to implement measures that will reduce future emissions from nonanthropogenic sources (i.e., planting indigenous vegetation or establishing wind breaks), EPA has the authority under section 188(e) to extend the attainment date for a serious area for up to 5 years beyond 2001 if it is possible that the NAAQS could be attained in the future. Such measures should be considered by States before seeking waivers of the attainment date.

NAAQS at some time in the future through available means. While EPA does not expect States to exhaust their resources to meet standards that may be unattainable, it does expect them to continue efforts to minimize exposures to unhealthy air.

Even though a specific attainment date and serious area requirements may be waived indefinitely for an area where, respectively, nonanthropogenic sources contribute significantly to violations and anthropogenic sources do not, the State should review the status of anthropogenic and nonanthropogenic source contributions in the area every 3 years. Such a review would entail determining whether nonanthropogenic sources still contribute significantly and anthropogenic sources do not contribute significantly to violation of the PM-10 NAAQS in the area. Since emissions from anthropogenic sources increase with population growth and the location of new sources to the area, the contribution of anthropogenic sources to violations can become significant over time. Therefore, the need for reinstating a specific attainment date and/or previously waived serious area requirements should be reconsidered periodically.

The EPA has the authority under section 172(c)(3) to require periodic updates of a nonattainment area's emissions inventory to assure that the requirements of part D are met. The EPA plans to use this authority to periodically review the waiver status of areas, as described above. A specific attainment date and applicable requirements should be reinstated if it is determined that nonanthropogenic sources no longer contribute significantly or anthropogenic sources begin contributing significantly to violations in the area.

6. What requirements applicable to serious nonattainment areas under subpart 4 of part D should be waived?

The individual subpart 4 requirements (see section IV, above) will be waived only after considering all relevant circumstances on a case-by-case basis for serious areas where anthropogenic sources do not contribute significantly and where RACM have been implemented. Currently, the section 189(b)(3) requirement to modify the definitions of "major source" and "major stationary source" is the only serious area requirement that will not be waived.

D. Waiver Policy Description

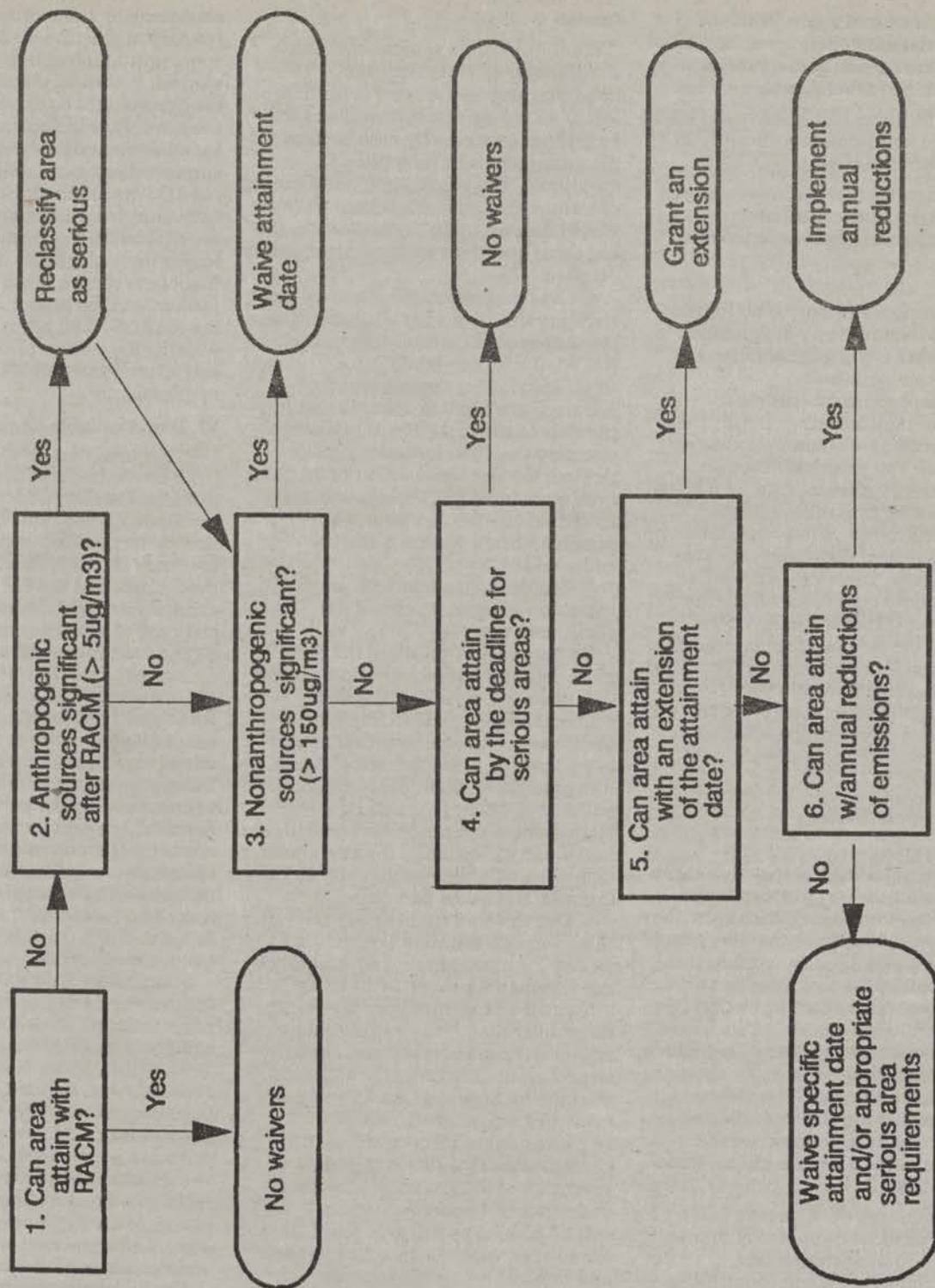
Consistent with the discussion above the EPA intends to implement its authority to grant waivers under section 188(f) in a manner described by the diagram presented in Figure 1. It is important to note that this diagram is provided for illustrative purposes only and should not be interpreted contrary to the policy as it is described in this notice. The figure presents six decision questions. A SIP submitted for a moderate nonattainment area seeking a waiver is expected to address the first three questions:

1. Can the area attain the NAAQS by the applicable statutory attainment date (December 31, 1994 for the initial nonattainment areas) after implementing RACM (including RACT) for contributing anthropogenic and nonanthropogenic sources?

If the moderate area SIP demonstrates that the area can attain with RACM (including RACT) by the attainment date, then the answer to this question is "yes" and the waiver provisions are not applicable.

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FIGURE 1. WAIVER POLICY DIAGRAM



If an area cannot attain by the statutory deadline, then questions 2 and 3 on the waiver policy diagram must be addressed, and several cases may exist.

2. Do anthropogenic sources of PM-10 as a whole contribute significantly to violations in the area?

3. Do nonanthropogenic sources of PM-10 as a whole contribute significantly to violations in the area?

Case #1

If anthropogenic sources no longer contribute significantly to violations in the area after the implementation of RACM, then by default, nonanthropogenic sources must contribute significantly.²⁵ In this case, the moderate area attainment date may be waived. The practical effect of waiving the attainment date for a moderate area is to relieve it from reclassification as serious and, therefore, to relieve it from certain serious area requirements. Therefore, a moderate area may only qualify for an attainment date waiver if it also qualifies for a waiver of the serious area requirements (see section V.C., question 3). The State should reevaluate the impact of anthropogenic sources on the area periodically to determine whether or not they contribute significantly to violations.

Case #2

If anthropogenic sources still contribute significantly to violations in the area after the implementation of RACM (i.e., contribute over 5 µg/m³ to PM-10 concentrations), then the area would be reclassified as serious. Consequently, the serious area requirements discussed in section IV, above, would have to be implemented in the area. These requirements include, among other things, the application of BACM (including BACT) on source categories that are still contributing significantly to violations (see the discussion of BACM in section VI and footnote 33).

Subsequently, the area may qualify for a waiver of the serious area attainment date if it is demonstrated that nonanthropogenic source contributions (i.e., contributions greater than 150 µg/m³) would prevent the area from attaining the NAAQS.

²⁵ It is likely that Congress intended all areas—even those eligible for waivers—to implement whatever measures were reasonably available. Therefore, EPA believes the best reading of the statute requires that the emission reductions attributable to RACM (including RACT) should be considered before evaluating the significance of anthropogenic contributions.

Case #3

If anthropogenic sources contribute significantly to violations, but, nonanthropogenic sources contribute less than 150 µg/m³, then waivers will be granted on a case-by-case basis as discussed above in subsection C., question 4. The eligibility for and timing of serious area attainment date waivers would depend upon the answers to the last three questions on the waiver policy diagram.

4. Can the serious area attain by the statutory deadline after implementing the serious area control strategy (i.e., BACM, (including BACT)), for significant anthropogenic sources?

If the State can demonstrate that it is possible to attain the NAAQS by the statutory deadline for serious areas through the implementation of BACM, then a waiver is not appropriate. If attainment by the deadline is not possible, then question 5 must be addressed.

5. Can the area attain with an extension of up to 5 years of the attainment date?²⁶

To answer this question, the State must determine if an extension of time will make it technologically and economically feasible to implement additional control measures that will bring the area into attainment. Again, if it is possible to attain the NAAQS, then a waiver is not appropriate. If attainment is not possible even with the maximum extension of the attainment date allowed under section 188(e), then question 6 must be addressed.

6. Can the area attain at any time after the extension deadline if emissions within the area are reduced annually by not less than 5 percent?²⁷

To answer this question, the State must determine if the implementation of additional control measures, annually, would eventually bring the area into attainment. Sufficient additional control measures would need to be implemented to achieve at least 5 percent annual reductions in the inventory of PM-10 emissions from anthropogenic sources.

If EPA believes that it is practicable for an area, where both anthropogenic and nonanthropogenic sources

²⁶ The EPA may grant a single extension of the attainment date for serious areas of no more than 5 years under the conditions of section 188(e) of the Act. Guidance on demonstrating that a State qualifies for an attainment date extension will be issued in the future.

²⁷ If an area fails to attain the NAAQS by the end of the extension period, then the State must plan to achieve annual reductions of not less than 5 percent of PM-10 and PM-10 precursor emissions within the area, as reported in the most recent inventory (see section 189(d)).

contribute to violations, to attain the NAAQS at any time in the future, a specific attainment date would not be waived. Rather, as discussed previously, the State would be expected to follow the provisions in sections 188 and 189 for attainment date extensions and continued emission reductions until the NAAQS are attained. However, if emissions from anthropogenic sources are reduced to the point that it is no longer technologically or economically feasible to reduce those emissions further, and the area still cannot attain the NAAQS, then EPA may consider waiving the serious area attainment date and appropriate serious area requirements.

VI. Best Available Control Measures

A. Requirement for BACM

There are two circumstances, as discussed earlier, under which a moderate PM-10 nonattainment area may be reclassified as serious. First, an area may be reclassified whenever EPA determines that the PM-10 NAAQS cannot practicably be attained by the statutory attainment date.²⁸ Such a determination may be made before the attainment date if a review of the SIP for an area shows that RACM, including RACT, will not practicably bring the area into attainment or if delays in adopting, submitting, and implementing SIP requirements form a basis for EPA to conclude that an area cannot practicably attain the NAAQS by the statutory attainment date. The second circumstance is when the area is reclassified by operation of law upon a determination by EPA that the area has failed to attain the NAAQS on schedule (see section 188(b)).

Section 189(b) establishes additional control requirements for PM-10 nonattainment areas that are reclassified as serious by EPA. Under section 189(b)(1)(B), States must submit SIP revisions which provide for implementation of the BACM for PM-10 emissions in such areas. These SIP revisions must be submitted to EPA within 18 months after an area is reclassified and must assure that the measures are implemented no later than 4 years after the area is reclassified as serious (see section 189(b)(1) and (2)).

The EPA believes the requirement to implement BACM in serious PM-10 nonattainment areas should, in one respect, be interpreted similarly to the comparable requirement to implement RACM in moderate PM-10

²⁸ The statutory attainment date for the initial group of areas designated nonattainment by operation of law upon enactment of the 1990 Amendments, under section 107(d)(4), is December 31, 1994.

nonattainment areas. Section 172(c)(1), which applies to all nonattainment areas, states that part D RACM shall include "such reductions in emissions from existing sources in the area as may be obtained through the adoption, at a minimum, of reasonably available control technology * * *." Thus, moderate PM-10 nonattainment area RACM plans, which are submitted to meet the requirements of section 189(a)(1)(C), must include provisions ensuring the adoption of RACT (see 57 FR 13540, column 1).

For moderate PM-10 areas reclassified as serious, the nonattainment control requirements (i.e., RACM) are carried over and elevated to a higher level of stringency (i.e., BACM). So, by analogy, just as RACM includes RACT, in the same way, BACM includes BACT.²⁹ Thus, just as moderate PM-10 SIP revisions when implementing RACM under section 189(a)(1)(C) must provide for the adoption of RACT, similarly, PM-10 SIP revisions under section 189(b)(1)(B), implementing BACM in serious PM-10 nonattainment areas, must include provisions ensuring the adoption of BACT. This point was explicitly addressed in the House Committee Report: "Serious areas must include in their submission provisions to require that the best available control measures for the control of PM-10 emissions are implemented no later than 4 years after the area is classified or reclassified as serious. Such provisions must include the application of the best available control technology to existing stationary sources" (H.R. Rep. No. 490, 101st Cong., 2nd Sess. 266-67 (1990)).

Although section 189(b)(1)(B) requires BACM (including BACT) to be implemented in serious PM-10 nonattainment areas, the Act does not define either BACM or BACT for PM-10 nonattainment purposes. Where a statute is silent or ambiguous with respect to the meaning of a statutory term, the agency is authorized to adopt an interpretation reasonably accommodated to the purpose of the statutory provisions.³⁰ In considering how to interpret the provisions requiring BACM (including BACT) for serious PM-10 nonattainment areas, EPA has looked at several factors: The way in which similar terms have been historically interpreted in other sections or titles of the Act, the ordinary grammatical usage associated with the

word "best," and the overall structure and purpose of title I of the statute.

B. EPA's Historical Interpretation of Control Technology Terminology

The Act uses several terms to refer to different levels of emission control technology required for existing or new sources: "reasonable (RACT)," "best (BACT)," and lowest achievable emission rate (LAER). It is helpful to consider EPA's past and current interpretation and implementation of these various control levels in determining the control level appropriate for BACM for serious PM-10 nonattainment areas.

The term "reasonably available" was applied to control measures and control technology required to be implemented at existing sources in nonattainment areas by the 1977 Clean Air Act Amendments (1977 Amendments) (42 U.S.C. 7502(c)(1)). At that time, EPA defined RACT as the lowest emission limitation that a particular source is capable of meeting by the application of technology that is reasonably available considering technological and economic feasibility.³¹ Control measures were determined to be reasonable after considering their energy and environmental impacts and their annualized capital and operating costs. In EPA's view, the cost of using a control measure is considered reasonable if those same costs are borne by other comparable facilities. Since Congress, in the 1990 Amendments, did not modify EPA's interpretations of the RACM and RACT in the earlier 1977 Amendments, it can be presumed to have given some endorsement to EPA's definition of the term.

Congress defined the term "best available control technology" in section 169(3) of the 1977 Amendments for use in implementing the requirement to prevent significant deterioration (PSD) of air quality under part C, title I, of that Act. This definition was modified by section 403(d) of the 1990 Amendments. The BACT is currently defined for the PSD program as an emission limitation based on the "maximum degree of reduction of each pollutant * * * emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy,

environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques * * * for control of each such pollutant." Thus, BACT is to be determined for the PSD program on a case-by-case basis taking into account the energy, environmental, and economic impacts and other costs. Section 169(3) also requires that BACT be at least as stringent as any corresponding new source performance standard (NSPS) or national emission standard for hazardous air pollutants (NESHAP).

Under the PSD program, BACT applies through preconstruction permits issued to major new and major modified facilities in areas where the air quality is better than the NAAQS (section 165(a)(4) of the Act, 42 U.S.C. 7475(a)(4)). In broad overview, BACT is determined by identifying the technologically feasible control measures, from the universe of available control techniques, which yield the maximum degree of emission reduction, after considering the energy, environmental and economic impacts of the technology, and other costs. This may include consideration of the annualized capital and operating costs for the facility. The costs of control for a major new facility or major modification of an existing facility should be considered as a portion of the overall costs of the new facility.

The term LAER refers to the level of control required for issuing a preconstruction permit to major new or major modified facilities in areas where the air quality is worse than the NAAQS (i.e., nonattainment areas) (section 173(a)(2) of the Act, 42 U.S.C. 7503(a)(2)). In broad terms, LAER is defined at section 171(3) of the Act as the more stringent emission rate based on either the most stringent State emission limit or the most stringent emission limit achieved in practice by such class or category of source. Like BACT, the LAER level of control must be at least as stringent as the NSPS applicable to the source. Unlike RACT and BACT, the LAER requirement does not consider energy or cost factors. In general, the costs of achieving LAER in a nonattainment area must be considered as a portion of the overall cost of investing in a major new or major modified facility, as they are with BACT in attainment areas. The EPA believes that it is reasonable to conclude that in selecting the term "best" to apply to control measures in PM-10 serious nonattainment areas, Congress likely considered how the term has been

²⁹ Even without the RACM analogy, the best available technological control measures by their plain terms are a subset of the universe of best available control measures.

³⁰ *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843-44 (1984).

³¹ See, for example, 44 FR 53761-53762 (September 17, 1979) and footnote 3 of that notice. Note that EPA's emissions trading policy statement (51 FR 43814 (December 4, 1986)) has clarified that RACT requirements may be satisfied by achieving "RACT equivalent" emissions reductions in the aggregate from the full set of existing stationary sources subject to those requirements (see also EPA's proposed economic incentives rule, 58 FR 11110, 11123 (February 23, 1993)).

interpreted in other sections and titles of the Act. Several other factors (discussed below) support such a conclusion.

C. BACM for Serious PM-10 Nonattainment Areas

A plain-English interpretation of the term "best" implies a generally higher standard of performance than one that may be considered "reasonable." In addition, the structural scheme throughout title I of the Act is to require the implementation of increasingly stringent control measures in areas with more serious pollution problems, while providing such areas a longer time to attain the applicable standards. This structural scheme reflects a basic underlying premise of title I. The premise is (1) That more stringent control measures are needed in cases when the current control requirements will be insufficient to bring a particular area into attainment; and (2) that the more serious the air quality problem, the more reasonable it is to require States to implement control measures of greater stringency despite the greater burdens such measures are likely to cause. The Act attempts to balance the greater burden imposed in those areas where more stringent controls are required by affording the State additional time to implement them.

For example, under section 188(e), EPA is given authority to extend the attainment date for a serious PM-10 nonattainment area beyond the specified statutory date, provided certain conditions are met. One of those conditions is that the State must demonstrate to EPA's satisfaction that "the plan for that area includes the most stringent measures that are included in the implementation plan of any State or are achieved in practice in any State, and can feasibly be implemented in the area." Thus, under this section, the Act provides such areas an opportunity to receive additional time to attain the NAAQS. The consequence of receiving additional time, however, is that the State must demonstrate that its PM-10 implementation plan contains the "most stringent measures" that can feasibly be implemented in the relevant area from among those which are either included in any other SIP or have been achieved in practice by any other State.

Similarly, the Act requires the application of control measures that are "reasonable" in moderate PM-10 nonattainment areas (RACM) and control measures that are "best" (BACM) whenever a moderate area cannot "practicably" attain or fails to attain the NAAQS and is therefore reclassified as serious. Accordingly, for

the reasons stated above, EPA believes it is reasonable to conclude that Congress intended a greater level of stringency to apply in areas that are required to implement "best available" controls than in those required only to implement controls that are "reasonably available."

As noted earlier, an array of different control measures is applicable under various title I NAAQS-related programs. A key factor, among others, in determining the level of control appropriate for a given area from among the different emission control measures and technologies referred to throughout title I is the severity of the air pollution problem in that area. In addition to the general categorization of areas as "attainment," "nonattainment," and "unclassifiable," the Act characterizes the severity of an area's air pollution problem by classifying the area, for example, as "marginal," "moderate," "serious," and so on. As discussed above, the different control measures are required to be implemented as follows: For new (or modified) sources, BACT applies in PM-10 unclassifiable and attainment areas under the PSD program, while LAER applies in moderate and serious PM-10 nonattainment areas under the nonattainment NSR program; for existing sources, RACM (including RACT) applies in moderate PM-10 nonattainment areas, while BACM (including BACT) applies in serious PM-10 nonattainment areas. In each case, the more serious the pollution problem, the more stringent the control standard required.

It is apparent that in requiring the application of BACM to existing sources in serious PM-10 areas, Congress implied that these sources should be subject to a more stringent level of control than the application of RACM required for existing sources in moderate PM-10 nonattainment areas, but not as stringent as the application of LAER required for new or modified sources in moderate and serious nonattainment areas (or the degree of control required to secure an extension under section 188(e)).

1. Definition

In view of the preceding discussion, EPA believes that, as a starting point in interpreting BACM for PM-10 nonattainment purposes, it is reasonable to consider the term BACT as applied in the PSD program under section 169(3) as an analogue. Because PSD BACT and PM-10 BACM (which includes BACT) are similar terms, EPA believes it is

reasonable to accord some interpretive weight to this use of similar language.³²

Therefore, EPA's interpretation of BACM for serious PM-10 nonattainment areas will generally be similar to the definition of BACT for the PSD program. The BACM is the maximum degree of emissions reduction of PM-10 and PM-10 precursors from a source (except as provided in subsection C. 3) which is determined on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, to be achievable for such source through application of production processes and available methods, systems, and techniques for control of each such pollutant. For PM-10, BACM must be applied to existing source categories in nonattainment areas that cannot practicably attain (or fail to attain) within the moderate area timeframe and are reclassified as serious.³³

As noted above, EPA will interpret PSD BACT and PM-10 BACM as generally similar because, despite the similarity in terminology, certain key differences exist between control measures applicable in the PSD and PM-10 serious nonattainment area programs. The BACT under the PSD program applies only in areas already meeting the NAAQS, while PM-10 BACM applies in areas which are seriously violating the NAAQS. This difference in policy goals, arguably, suggests that the PM-10 BACM control standard should be more stringent than that for PSD BACT. On the other hand, the burden of installing efficient controls during construction of a new source or source modification is generally less onerous than retrofitting an existing PM-10 source with similar controls. If one compares both programs in terms of these factors, the differing regulatory and economic burdens and the different policy purposes tend to offset each other. Nevertheless, EPA

³² Under accepted principles of statutory interpretation, similar terms in a statute generally suggest a similar meaning, and an agency is permitted, but not required, to give a similar meaning to similar terms which appear in different parts of a statute.

³³ The term "source categories" for which BACM will be required, refers to categories of area-wide sources or large individual stationary sources of PM-10 or PM-10 precursor emissions that may be regulated under a specific rule, generic emission limit, or standard of performance, or a specific control program in a SIP. For example, the SIP may regulate emissions from unpaved roads, construction activities, residential wood combustion, asphalt concrete batch plants, etc., as source categories. Note that, in some instances, an entire source category may consist of one large individual stationary source that is regulated separately under the SIP such as a single iron and steel manufacturing facility and the various processes therein.

believes that the differences in policy goals—i.e., preventing further pollution under the PSD program and reducing existing pollution under the PM-10 nonattainment program—counsel against adopting the interpretation and implementation of PSD BACT in its entirety for PM-10 nonattainment purposes. Rather, EPA considers it reasonable to use the approach adopted in the PSD BACT program as defined in section 169(3) of the Act as an analogue for determining appropriate PM-10 nonattainment control measures in serious areas, while at the same time retaining the discretion to depart from that approach on a case-by-case basis as particular circumstances warrant.

2. Preventive Measures

The EPA considers measures that prevent PM-10 emissions over the long term (e.g., requiring gas logs in new fireplaces) to be preferable to those measures that will only temporarily reduce emissions (e.g., curtailment of wood stove use during air pollution episodes or treatment of fugitive dust sources with water). This is because such preventive measures are inherently more effective and involve significantly fewer resources for surveillance, enforcement, and administration. Moreover, increasing emphasis on prevention over mitigation is more likely to be both economically and environmentally beneficial over the long term.

3. De Minimis Source Categories

The BACM are required for all categories of sources in serious areas unless the State adequately demonstrates that a particular source category does not contribute significantly to nonattainment of the NAAQS. While EPA regards the BACM standard applicable in PM-10 serious areas as a more stringent control standard which calls for a greater degree of emissions control for the source categories to which it applies, EPA also believes that it has the authority to limit the applicability of BACM to those source categories which "contribute significantly" to violations of the NAAQS. The Act leaves unresolved the question of whether BACM is intended to be an all-inclusive requirement applicable to every PM-10 serious area source category. It should be noted that in section 189(b)(1)(B), which contains the requirement that serious area PM-10 SIPs provide for the implementation of BACM, Congress has not used the word "all" in conjunction with BACM. Congress has also not stated anywhere in the relevant law or legislative history that BACM must be applied to all

serious area source categories. Even if the statute on its face were interpreted to require States to impose BACM on all source categories in serious PM-10 areas, the Agency believes, based on the decision in *Alabama Power Co. v. Costle*,³⁴ that it has the authority to exempt from regulation those source categories in the area which contribute only negligibly to ambient concentrations which exceed the NAAQS. The EPA believes the court's test for invoking the de minimis exemption authority would be satisfied in circumstances where a State demonstrates conclusively that, because of the small contribution of the source category's emissions to the nonattainment problem, the imposition of additional controls, such as BACM, on a particular source category in the area would not contribute significantly to the Act's purpose of achieving attainment of the NAAQS "as expeditiously as practicable." The EPA will have to determine from the record that, with respect to particular serious area PM-10 source categories which contribute to emissions in excess of the NAAQS, requiring application of BACM would produce an insignificant regulatory benefit.

The EPA will, in general, rely on the criteria applied under new source permitting programs (40 CFR 51.165(b)) to determine when a source category contributes significantly to violations of the NAAQS in a PM-10 serious nonattainment area. The criteria will also be applied spatially and temporally in the same way it is under new source permitting programs.³⁵

As discussed above, a moderate PM-10 nonattainment area may be reclassified as serious based on evidence that the area cannot practicably attain the NAAQS by the statutory attainment date or evidence that it has failed to attain by that date. The evidence, whether modeled or measured, will generally indicate the standard (24-hour or annual), the day, and the location of the predicted or monitored violation. Therefore, under this policy, a source category (see footnote 33) will be presumed to

contribute significantly to a violation of the 24-hour NAAQS if its PM-10 impact at the location of the expected violation would exceed 5 $\mu\text{g}/\text{m}^3$. Likewise, a source category will be presumed to contribute significantly to a violation of the annual NAAQS if its PM-10 impact at the time and location of the expected violation would exceed 1 $\mu\text{g}/\text{m}^3$.

Procedures for identifying source categories that continue to significantly affect the air quality of a serious area (even after RACM (including RACT) are implemented) and procedures for identifying the appropriate mix of control measures applicable to those source categories are discussed below in subsection E.

4. BACM Analysis Independent of Attainment Analysis

The overall structure and purpose of title I of the amended Act, the standard suggested by the word "best," and the differences in the statute between the requirements for BACM as compared to those for RACM, lead EPA to believe that, unlike RACM, BACM are to be established generally independent of an analysis of the attainment needs of the serious area.

As noted earlier in this section, the overall structural scheme throughout title I of the Act is to require the implementation of increasingly stringent control measures in areas with more serious pollution problems, while providing such areas additional time to attain the applicable standards. These tougher measures are deemed necessary in cases where it appears that less stringent controls will be insufficient to reduce emissions in an area to the level of the NAAQS. As described above, the fact that the Act requires the application of control measures that are "reasonable" in moderate PM-10 areas and control measures that are "best" whenever it is determined that a moderate area cannot "practicably" attain or actually fails to attain the NAAQS and is therefore reclassified as serious, strongly suggests that BACM is intended to be a more stringent standard than RACM. Thus, it is reasonable to interpret the statute as requiring a different analysis for determining BACM from the practice of analyzing RACM according to what is reasonable in light of the overall attainment needs of the area. Moreover, when comparing the terms "reasonable" and "best" as applied to control measures, the word "best" strongly implies that there should be a greater emphasis on the merits of the measure or technology alone and less flexibility in considering other factors.

³⁴The inherent authority of administrative agencies to exempt de minimis situations from a statutory command has been upheld in contexts where an agency is invoking a de minimis exemption as "a tool to be used in implementing the legislative design" on the ground that "the burdens of regulation yield a gain of trivial or no value" (*Alabama Power Co. v. Costle*, 636 F.2d 323, 360-61 (D.C. Cir. 1979)).

³⁵See "Interpretation of 'Significant Contribution,'" memorandum from Richard G. Rhoads to Alexandra Smith, December 16, 1980, OAQPS Policy and Guidance Notebook, PN 165-80-12-16-007.

Additionally, for PM-10 areas reclassified as serious before the moderate area attainment date, States have up to 4 years, under section 189(b)(2), in which to submit their serious area attainment demonstration. However, under section 189(b)(2), States have only 18 months after reclassification from moderate to serious to submit their plans requiring the use of BACM for those same areas. Thus, for such areas, Congress provided a difference of as much as 2½ years between the required date for submitting BACM plans and the date by which to submit a new attainment demonstration satisfying the requirements of section 189(b)(1)(A). This pronounced difference in timing for the serious area submittals described above is to be contrasted with the timing for submittal of similar provisions for moderate areas. Under section 189(a)(2), both the RACM plans and the attainment demonstration for moderate PM-10 areas must as a general matter be submitted at the same time. The fact that the Act requires BACM to be adopted and implemented by an appreciable time before the attainment demonstration is required, for areas that are reclassified before the moderate area attainment date, suggests that Congress intended that BACM determinations be based more on the feasibility of implementing the measures rather than on an analysis of the attainment needs of the area.³⁶ Therefore, the steps described below for making a BACM determination are intended to be carried out independently from the analysis to determine the emission reductions that would be necessary to attain the NAAQS by the statutory deadline. If the attainment demonstration for the area subsequently shows that BACM will bring the area into attainment before the statutory deadline, then the plan provides for expeditious attainment of the NAAQS. However, if the BACM are not adequate to provide for attainment of the standards, then the State must submit additional measures with the attainment demonstration that will result in attainment of the standard by the statutory deadline or apply for an extension of the attainment date by demonstrating that the specific

conditions of sections 108(e) and 189(b)(1)(A)(ii) have been met.

D. Procedures for Determining Best Available Control Measures

1. Inventory Sources of PM-10 and PM-10 Precursors

The BACM (including BACT) applicable in a nonattainment area must be determined on a case-by-case basis since the nature and extent of a nonattainment problem may vary within the area and from one area to another. Nonattainment problems range from reasonably well-defined areas of violation caused by a specific source or group of sources to violations over relatively broad geographical areas due predominantly to large numbers of small sources widely-distributed over the area. The BACM are required for all source categories for which the State cannot conclusively demonstrate that their impact is de minimis. As stated above, the EPA will generally presume the contribution to nonattainment of any source category to be de minimis if the source category causes a PM-10 impact in the area of less than 5 µg/m³ for a 24-hour average and less than 1 µg/m³ annual mean concentration. The starting point for making a BACM determination would be to reevaluate the emission inventory submitted with the moderate area SIP. Section 172(c)(3) of the Act calls for all nonattainment areas to submit comprehensive, accurate, and current emissions inventories and provides for such periodic revisions as may be necessary to assure that the nonattainment planning requirements are met. If there have been any significant changes in PM-10 sources in the area since the inventory was first compiled (i.e., sources permanently shut down or new or modified sources constructed) or if the inventory is not adequate to support the more rigorous analysis required for serious area SIP demonstrations, it should be revised. All anthropogenic sources of PM-10 emissions and PM-10 precursors (if applicable)³⁷ and nonanthropogenic sources in a nonattainment area must be included in the emission inventory.

Because of its importance in identifying anthropogenic and nonanthropogenic sources and the applicability of BACM requirements, the breakdown of sources to consider when compiling an emissions inventory are as follows:

³⁷ Ambient filter analysis and inventory information may have been presented in certain moderate area SIP to indicate the insignificance of secondary particles (see 57 FR 13541-42).

a. Major point sources (i.e., sources with the potential to emit at least 70 tons per year of PM-10 (or PM-10 precursors) as required in sections 189(b)(3) and 189(e) of the Act).

b. Minor point source categories.

c. Area source categories such as fugitive dust from anthropogenic sources (e.g., construction activities, paved and unpaved roads, agricultural activities, etc.), residential wood combustion, prescribed burning, and commercial/institutional fuel combustion.

d. Nonanthropogenic sources.

2. Evaluate Source Category Impact

The second step in determining BACM for an area is to identify those source categories having a greater than de minimis impact on PM-10 concentrations. The potential maximum impact of various source categories may have been determined with receptor or dispersion modeling performed for the attainment demonstration submitted with the moderate area SIP. In addition, the impact of some source categories may be apparent from analysis of ambient sampling filters from days when the standards are exceeded. If modeling was not performed during development of the moderate area SIP, receptor modeling, screening modeling or, preferably, refined dispersion modeling will generally be necessary at this time to identify key source categories.

3. Evaluate Alternative Control Techniques

In developing a fully adequate BACM SIP, the State is expected to evaluate the technological and economic feasibility of the control measures discussed in the BACM guidance documents³⁸ and other relevant materials for all source categories impacting the nonattainment area except those with a de minimis impact considering emission reductions achieved with RACM.

Energy and environmental impacts of the control measures and the cost of control should be considered in determining BACM. In general, for the reasons stated above, the test of economic and technological feasibility will be higher for source categories in serious areas than for source categories in moderate areas because of the greater

³⁶ The EPA believes this interpretation of the Act is reasonable, even if, as to areas which are classified in the future as serious PM-10 nonattainment areas because the areas have failed to attain, the date BACM plans must be submitted and the date the serious area attainment demonstration is due should happen to coincide. There is no rational basis for interpreting BACM differently depending merely on when an area happens to be reclassified.

³⁸ See "Technical Information Document for Residential Wood Combustion Best Available Control Measures," EPA-450/2-92-002, September 1992; "Prescribed Burning Background and Technical Information Document for Best Available Control Measures," EPA-450/2-92-003, September 1992; and, "Fugitive Dust Background Document and Technical Information Document for Best Available Control Measures," EPA-450/2-92-004, September 1992.

need for emission reductions to attain the NAAQS. As noted earlier, this interpretation is consistent with the overall statutory scheme which requires that as an area's air quality worsens, increasingly stringent control measures are to be adopted in conjunction with the area receiving more time to attain the NAAQS. Thus, measures that were not considered reasonable to implement by the moderate area attainment date may be BACM for serious areas because of the additional time available for implementing them³⁹ and because of the higher degree of stringency implied by the statutory scheme and the term "best." Therefore, BACM could include, though it is not limited to, expanded use of some of the same types of control measures as those included as RACM in the moderate area SIP.

It does not currently appear that mobile sources, as distinct from the surfaces on which they travel, contribute significantly to the PM-10 air quality problem in a sufficient number of areas to warrant issuing national guidance on best available transportation control measures for PM-10 under section 190 of the Act. However, in those areas where mobile sources do contribute significantly to PM-10 violations, the State must, at a minimum, address the transportation control measures listed in section 108(f) to determine whether such measures are achievable in the area considering energy, environmental and economic impacts and other costs.

The technological feasibility of reducing emissions from area sources depends on the ability to alter the characteristics that affect emissions from the sources. Those characteristics have to do with the size or extent of the sources, their physical characteristics and the operating procedures. Reducing emissions of fugitive dust from construction activities, for example, could require the most effective combination of reducing the size of the sources (i.e., acres cleared at one time or vehicle miles traveled on unpaved surfaces), changing the physical characteristics (i.e., silt loading on travel surfaces or moisture content of materials handled), and/or changing the operating practices (i.e., lower vehicle speeds, less surface area exposed to the wind, treating or paving travel surfaces).

The technological feasibility of applying an emission reduction method to a particular point source should consider the source's process and operating procedures, raw materials, physical plant layout, energy requirements, and any collateral environmental impacts (e.g., water pollution and waste disposal). The process, operating procedures, and raw materials used by a source can affect the feasibility of implementing process changes that reduce emissions and the selection of add-on emission control equipment. The operation and longevity of control equipment can be significantly influenced by the raw materials used and the process to which it is applied. The feasibility of modifying processes or applying control equipment is also influenced by the physical layout of the particular plant. The space available in which to implement such changes may limit the choices and will also affect the costs of control.

4. Evaluate Costs of Control

Economic feasibility considers the cost of reducing emissions from a particular source category and costs incurred by similar sources that have implemented emission reductions. As with RACT determinations and BACT/LAER analyses in other statutory contexts, EPA believes that for PM-10 BACM purposes, it is reasonable for similar sources to bear similar costs of emission reduction. As such, when identifying BACM, consideration of economic feasibility should not rely on claims regarding the ability of a particular source to "afford" to reduce emissions to the level of similar sources. Otherwise, less efficient sources might be rewarded for their inefficiency by being allowed to bear lower emission reduction costs. Instead, economic feasibility for PM-10 BACM purposes should focus upon evidence that the control technology in question has previously been implemented at other sources in a similar source category without unreasonable economic impacts.

Where the economic feasibility of a measure (e.g., road paving) depends on public funding, EPA will consider past funding of similar activities as well as availability of funding sources to determine whether a good faith effort is being made to expeditiously implement the available control measures. In other words, if 20 miles of unpaved roads are typically paved each year, then the BACM fugitive dust program should include paving more than 20 miles per year of existing roads and should offer evidence of ambitious efforts to increase

funding and increase the priority for use of existing funds.

The capital costs, annualized costs, and cost effectiveness of an emission reduction technology should be considered in determining its economic feasibility. The "OAQPS Control Cost Manual, Fourth Edition," EPA-450/3-90-006, January 1990, describes procedures for determining these costs. The above costs should be determined for all technologically-feasible emission reduction options.

E. Selection of BACM for Area Sources

Once the significant PM-10 area source categories have been identified, the State should select area source control measures from the candidate BACM listed in the technical information documents for fugitive dust, residential wood combustion (RWC), prescribed burning, or any other technical information documents issued by EPA (see footnote 38). This guidance is based on EPA's analysis of available control alternatives for the identified source categories. While the guidance is intended to be comprehensive, it is by no means exhaustive. Consequently, the State is encouraged to consider other sources of information and is not precluded from selecting other measures and demonstrating to the public and EPA that they constitute BACM. Further, any control measure that a commenter indicates during the public comment period is available for a given area should be reviewed by the planning agency. The agency should determine whether the affected categories of sources are significant and, if so, whether the available measure is achievable in the area considering energy, environmental, and economic impacts and other costs.

As stated earlier, EPA considers measures that prevent PM-10 emissions over the long term to be preferable to short-term curtailment measures. Therefore, when selecting BACM for area sources, a State should first consider pollution preventive measures and measures that provide for long-term sustained progress toward attainment in preference to quick, temporary control. For example, a State should consider requiring the replacement, over time, of old wood stoves with cleaner-burning wood stoves or alternative fuels. Such programs would complement and reduce dependence on wood-burning curtailment programs adopted as RACM for the moderate area SIP. However, EPA recognizes that such long-term measures may entail significant lead time and that temporary measures like wood-burning curtailments may need to be continued in serious areas, at a

³⁹ The statutory attainment date for initial moderate PM-10 nonattainment areas reclassified as serious will be December 31, 2001. For areas designated nonattainment subsequent to enactment of the 1990 Amendments that become serious, the attainment date will be before the end of the tenth year beginning after the area's designation as nonattainment (see section 188(c)).

minimum, to provide interim health protection.

Once the list of available measures for an area source has been identified, the State must evaluate the technological and economic feasibility of implementing the controls. The State may refer to the technical information documents for procedures to determine feasibility.

When evaluating economic feasibility, States should not restrict their analysis to simple acceptance/rejection decisions based on whether full application of a measure to all sources in a particular category is feasible. Rather, a State should consider implementing a control measure on a more limited basis, e.g., for a percentage of the sources in a category if it is determined that 100 percent implementation of the measure is infeasible. This would mean, for example, that an area should consider the feasibility of paving 75 percent of the unpaved roadways even though paving all of the roads may be infeasible. Alternatively, the State should consider whether measures which cannot feasibly be implemented in their entirety prior to the statutory deadline for BACM implementation could be completed over an extended period. In that event, BACM might itself be defined to change over time from a more limited set of measures at the initial implementation date to a progressively tighter or more ambitious program at later dates.

The following example is presented to illustrate how a moderate area program of RACM for fugitive dust control may be complemented with additional BACM after the area is reclassified as serious. Assume that the following control measures were adopted as RACM:

1. Reduce the speed limit on unpaved county roads to 25 miles per hour.
2. Treat all unpaved county roads, monthly, with chemical dust suppressants within 500 feet of their intersections with paved roads.
3. Treat 10 miles of the most heavily-traveled, unpaved county roads with chemical dust suppressants once per month.
4. Pave 4 miles of unpaved city streets.
5. Treat unpaved parking lots in the city with chemical dust suppressants once per month.
6. Clean anti-skid materials from 50 miles of city streets within 48 hours after snow melt begins.

The same area, after being reclassified as serious, may adopt the following

BACM examples to complement the RACM program:⁴⁰

1. Pave 10 miles of the most heavily-traveled, unpaved county roads.
2. Treat 10 miles of unpaved county roads with chemical dust suppressants once per month.
3. Pave 25 unpaved county roads within 500 feet of their intersections with paved roads.
4. Chemically treat or pave both shoulders of 30 miles of State highways within the county.
5. Pave all parking lots within the city.
6. Revise the specifications for winter anti-skid materials to require cleaner, less friable materials, and reduce the quantity used per lane-mile.
7. Require crop rotations on highly erodible lands.
8. Retire highly erodible sections of farmland and plant indigenous vegetation as a cover instead of leaving land fallow.
9. Plant crops and windbreaks across the prevailing wind direction on highly erodible lands.

In summary, the State must document its selection of BACM by showing what control measures applicable to each source category (not shown to be de minimis) were considered. The control measures selected should preferably be measures that will prevent PM-10 emissions rather than temporarily reduce them. The documentation should compare the control efficiency of technologically-feasible measures, their energy and environmental impacts and the costs of implementation.

F. Selection of BACT for Point Sources

The reviewing authority determines BACT on a case-by-case basis. As described above, EPA would expect the reviewing authority to select an emissions limitation that reflects the maximum degree of emission reduction of each pollutant subject to regulation (PM-10 and/or PM-10 precursors), taking into account energy, environmental, and economic impacts and other costs, that it determines is achievable for such facility.

In light of preceding discussions of BACT and its statutory bases, it is EPA's policy that BACT be determined using the analytical methodology established in the reviewing authority's current PSD program to the extent that it is consistent with guidance contained in this notice. The analytical methodology used should, at a minimum, consider a

representative range of available controls (including the most stringent, those capable of meeting standards of performance under 40 CFR part 60 or 61, and those identified by commenters during the public comment period). Selection of a particular control system as BACT must be justified by a comparison of the candidate control systems considering energy, environmental, and economic impacts, and other costs, and be supported by the record.

In addition, if the reviewing authority determines that there is no economically-reasonable or technologically-feasible way to accurately measure the emissions, and hence to impose an enforceable emissions standard, it may require the source to use design, alternative equipment, work practice, or operational standards to reduce emissions of the pollutant to the maximum extent feasible (see, by analogy, 40 CFR 52.21(b)(12); 40 CFR 51.166(b)(12)).

Alternative approaches to reducing emissions of particulate matter including PM-10 are discussed in "Control Techniques for Particulate Emissions From Stationary Sources" - Volume I (EPA-450/3-81/005a) and Volume II (EPA-450/3-81-005b), September 1982. The design, operation, and maintenance of general particulate matter control systems such as mechanical collectors, electrostatic precipitators, fabric filters, and wet scrubbers are discussed in Volume I. The collection efficiency of each system is discussed as a function of particle size. Information is also presented regarding energy and environmental considerations and procedures for estimating costs of particulate matter control equipment. The emission characteristics and control technologies applicable to specific source categories are discussed in Volume II. Secondary environmental impacts are also discussed.

The BACT/LAER Clearinghouse, the EPA Control Technology Center, and past BACT analyses for new and modified major sources under the PSD program may be used to assist in identifying available control options and maximum achievable emission reductions. The EPA will continue to evaluate the need for additional guidance and will produce additional materials as appropriate.

VII. Contingency Measures

Section 172(c)(9) requires that SIP's provide for the implementation of specific measures to be undertaken if the Administrator finds that the

⁴⁰ Adoption of these types of measures may require coordination with other local governmental entities such as the Departments of Agriculture, Transportation, and/or the Interior.

nonattainment area has failed to make RFP toward attainment or to attain the primary NAAQS by the applicable statutory deadline. Following the Administrator's finding, the measures are to "take effect without further action by the State, or the Administrator." The EPA interprets this requirement to be that no further rulemaking actions by the State or EPA would be needed to implement the contingency measures (see generally 57 FR 13512 and 13543-544). The EPA recognizes that certain actions, such as the notification of sources, modification of permits, etc., would probably be needed before a measure could be implemented effectively. However, States must show that their contingency measures can be implemented with minimal further action on their part and with no additional rulemaking actions such as public hearings or legislative review. After EPA determines that a moderate PM-10 nonattainment area has failed to attain the PM-10 NAAQS, EPA generally expects all actions needed to effect full implementation of the measures to occur within 60 days after EPA notifies the State of the area's failure. The State should ensure that the measures are fully implemented as expeditiously as practicable after they take effect.

The purpose of contingency measures is to ensure that additional measures beyond or in addition to the required "core" control measures (i.e., RACM for moderate areas and BACM for serious areas) immediately take effect when the area fails to make RFP or to attain the PM-10 NAAQS in order to provide interim public health and welfare protection. The protection is considered "interim" because the statute often provides for a more formal SIP revision in order to correct, for example, the failure of an area to attain the PM-10 NAAQS (e.g., section 189(b)—serious area plan required upon finding of failure of moderate area to attain the PM-10 NAAQS under 188(b)(2)—and 189(d) (plan revisions required upon failure of serious area to attain the PM-10 NAAQS)). Thus, EPA has noted previously that contingency measures should consist of other available control measures not contained in the applicable core control strategy (57 FR 13543). In designing its contingency measures, the State should also take into consideration the potential nature and extent of any attainment shortfall for the area. The magnitude of the effectiveness of the measures should be calculated to achieve the appropriate percentage of the actual emission reductions required by the SIP control strategy to bring

about attainment. The EPA has recommended that contingency measures provide the emission reductions equivalent to 1 year's average increment of RFP (see discussion below).

Once moderate areas are subsequently reclassified as serious, the affected States must ensure that adequate contingency measures, as described above, are in place for such areas. This is explicitly required under the statute. Section 189(b)(1) requires areas reclassified as serious to submit "an implementation plan." Under section 172(c), in turn, "plan provisions" required under part D must provide for the implementation of contingency measures. Accordingly, for those moderate areas reclassified as serious, if all or part of the moderate area plan contingency measures become part of the required serious area control measures (i.e., BACM), then additional contingency measures must be submitted whether or not the previously submitted contingency measures had already been implemented. Further, the affected States must ensure that serious areas have adequate contingency measures considering, among other things, new information about the potential attainment shortfall for the newly reclassified serious area. The States must submit contingency measures for serious areas or otherwise demonstrate that adequate measures are in place within 3 years of reclassification.⁴¹

VIII. Quantitative Milestones and Reasonable Further Progress

A. General Discussion

The PM-10 nonattainment area SIP's must include quantitative milestones which are to be achieved every 3 years until the area is redesignated attainment and which demonstrate RFP toward attainment by the applicable date (see section 189(c) of the amended Act).

⁴¹ The Clean Air Act does not prescribe when States containing serious PM-10 nonattainment areas shall submit section 172(c)(9) contingency measures (or otherwise demonstrate that adequate contingency measures are already in place). However, section 172(b) of the Act directs the Administrator to establish a schedule for submittal of the plan items in section 172(c) at the time the Administrator designates an area as nonattainment. Such schedule is to include a date or dates "extending no later than 3 years from the date of the nonattainment designation" (see section 172(b)). By analogy, EPA concludes it is reasonable to establish that the formal deadline for the submittal of section 172(c)(9) contingency measures (or a demonstration that adequate contingency measures are in place) by States containing serious PM-10 nonattainment areas is no later than 3 years from the date of the serious area reclassification (see *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-45 (1984)).

Section 171(1) of the Act defines RFP as "such annual incremental reductions in emissions of the relevant air pollutant as are required by this part (part D) or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date." A discussion of these requirements follows.

B. Reasonable Further Progress

Historically, for some pollutants, RFP has been met by showing annual incremental emission reductions sufficient generally to maintain at least linear progress toward attainment by the specified deadline. Requiring linear progress reductions in emissions to maintain RFP may be appropriate in four situations:

1. When pollutants are emitted by numerous and diverse sources.
2. Where the relationship between any individual source and the overall air quality is not explicitly quantified.
3. Where a chemical transformation is involved.
4. Where the emission reductions necessary to attain the standard are inventory-wide.

For example, in those areas where the nonattainment problem is attributed to area type sources (e.g., fugitive dust, residential wood combustion, etc.), RFP should be met by showing annual incremental emission reductions sufficient generally to maintain linear progress towards attainment. Total PM-10 emissions should not remain constant or increase from 1 year to the next in such an area.

Requiring linear progress reductions in emissions to maintain RFP is less appropriate:

1. Where there are a limited number of sources.
2. Where the relationships between individual sources and air quality are relatively well defined.
3. Where the emission control systems utilized (e.g., at major point sources) will result in swift and dramatic emission reductions.

For example, in those areas where the PM-10 nonattainment problem is attributed to a few stationary sources, RFP should be met by "adherence to an ambitious compliance schedule"⁴² which is likely to periodically yield significant emission reductions. Adherence to "an ambitious compliance schedule" does not necessarily mean that it would be unreasonable to achieve

⁴² U.S. EPA, Office of Air Quality Planning and Standards, "Guidance Document for Correction of Part D SIP's for Nonattainment Areas," Research Triangle Park, NC, January 27, 1984, page 25.

annual incremental emission reductions or generally linear progress, however.

The SIP's for PM-10 nonattainment areas must include detailed schedules for compliance with emission regulations in the areas and accurately indicate the corresponding annual emission reductions to be realized from each milestone in the schedule. In reviewing the SIP, EPA will determine whether the annual incremental emission reductions to be achieved are reasonable in light of the statutory objective to ensure timely attainment of the PM-10 NAAQS. Additionally, EPA believes that it is appropriate to require early implementation of the most cost-effective control measures (e.g., controlling fugitive dust emissions at the stationary source) while phasing in the more expensive control measures, such as those involving the installation of new hardware.

Section 189(c) provides that the quantitative milestones submitted by a State for an area also must be consistent with RFP for the area. Thus, EPA will determine an area's compliance with RFP in conjunction with determining its compliance with the quantitative milestone requirement. Because RFP is an annual emission reduction requirement and the quantitative milestones are to be achieved every 3 years, when a State demonstrates an area's compliance with the quantitative milestone requirement, it should also demonstrate that RFP has been achieved during each of the relevant 3 years. Thus, the discussion of quantitative milestones below refers to the "RFP/milestone" submittal dates, achievement dates and demonstration (or reporting) requirements.

C. Quantitative Milestones

1. Nature of Quantitative Milestones

As mentioned above, PM-10 nonattainment SIP's are to contain quantitative milestones (see section 189(c)). These quantitative milestones should consist of elements which allow progress to be quantified or measured. Specifically, States should identify and submit quantitative milestones providing for the amount of emission reductions adequate to achieve the NAAQS by the applicable attainment date. The following are examples of measures which support and demonstrate how the overall quantitative milestones identified for an area may be met:

a. Percent implementation of various control strategies (e.g., pave 50 percent of culpable streets, replace 75 percent of residential wood heaters with natural gas heating units).

b. Percent compliance with implemented control measures.

c. Adherence to a compliance schedule.

2. RFP/Milestone Due Dates

As mentioned above, PM-10 nonattainment SIP's are to contain quantitative milestones which are to be achieved every 3 years until the area is redesignated attainment. There is a gap in the law in that the text of section 189(c) does not articulate the starting point for counting the 3-year period. The EPA believes it is reasonable to begin counting the 3-year milestone deadline from the due date (and not the submittal date) for the applicable moderate area implementation plan revision (see section III.C.1.(f) of the General Preamble (57 FR 13539) for an explanation of why EPA believes it is appropriate to begin counting the 3-year milestone deadline from the SIP due date).

The first "RFP/milestone" achievement date for those areas initially designated as nonattainment for PM-10 by operation of law when the Act was amended will be the moderate area attainment date of December 31, 1994, as stated in section III.C.1.f. of the General Preamble (57 FR 13539). The RFP/milestone achievement date would normally be November 15, 1994, 3 years after the SIP due date of November 15, 1991. The achievement date was delayed 46 days, however, because the de minimis timing differential between the attainment date and the literal first milestone date made it administratively impracticable and of trivial value to require separate milestones and attainment demonstrations for these areas. Thus, for these initial areas that demonstrate timely attainment, EPA's policy is to deem the emission reductions progress made between the SIP submittal due date and the attainment date as sufficient to satisfy the first milestone requirement (57 FR 13539).

Thus the initial RFP/milestone will be met by showing that emission reductions scheduled to be made between the SIP due date and the attainment date for these moderate areas were actually achieved. Most of the emission reductions will result from implementation of RACM (including RACT) adopted as part of the moderate area SIP. The Act requires that RACM be implemented by December 10, 1993 in the initial PM-10 nonattainment areas (see section 189(a)).

Subsequent RFP/milestones for these initial PM-10 nonattainment areas that are reclassified as serious will be due every 3 years after the original due date

for the moderate area SIP.⁴³ Therefore, the second RFP/milestone for the initial nonattainment areas that are reclassified as serious must be achieved by November 15, 1997. The third RFP/milestone achievement date will be November 15, 2000, etc. These RFP/milestones should be addressed by quantifying and comparing the annual incremental emission reductions which result from implementation of BACM/BACT (required within 4 years after the area is reclassified as serious) and from additional measures included in the final serious area SIP to those reductions which were identified in the SIP as quantitative milestones necessary to achieve the NAAQS by the applicable attainment date. The annual incremental emission reductions must be sufficient to assure attainment as expeditiously as practicable but not later than December 31, 2001. In some cases it may also be appropriate to require that the annual incremental emission reductions maintain at least linear progress toward attainment, as discussed earlier.

3. RFP/Milestone Report

The State must demonstrate to EPA, within 90 days after the milestone achievement date, that the SIP measures are being implemented and the RFP/quantitative milestones have been met (see section 189(c)(2)). The RFP/milestone report must be submitted from the Governor or Governor's designee to the Regional Administrator of the respective EPA Regional Office which serves the State where the affected area is located.

The RFP/milestone report must contain technical support sufficient to document completion statistics for appropriate milestones. For example, the demonstration should graphically display RFP over the course of the relevant 3 years and indicate how the emission reductions achieved to date compare to those required or scheduled to meet RFP and the required

⁴³ The plain terms of section 189(c) require that milestones be achieved "every 3 years until the area is redesignated attainment" and, therefore, do not contemplate any breaks in the milestones due to an area's reclassification. Further, reclassifying an area to serious does not obviate the State from controls and emission reductions required in the moderate area implementation plan (see section 189(b)(1)). A continuous series of control measures must be implemented in PM-10 nonattainment areas beginning with RACM (including RACT) and followed by contingency measures which are to be implemented if the moderate area fails to attain. Next, BACM (including BACT) must be implemented within 4 years after the area is reclassified as serious. Subsequently, it may be necessary to implement additional control measures beyond BACM/BACT to attain the NAAQS. Therefore, the structure of the Act requires a series of measures which can provide for RFP/milestones.

milestones. The calculations (and any assumptions made) necessary to determine the emission reductions to date should also be submitted. The demonstration should also contain an evaluation of whether the PM-10 NAAQS will be attained by the projected attainment date in the SIP, i.e., answer the question "Are the emission reductions to date sufficient to ensure timely attainment?"

Within 90 days of its receipt, EPA must determine whether or not the State's demonstration is adequate and meets all the requirements discussed above. The EPA will notify the State of its determination by sending a letter to the appropriate Governor or Governor's designee.

4. Failure to Submit RFP/Milestone Report or Meet RFP/Milestones

If a State fails to submit the RFP/milestone report within the required timeframes or if EPA determines that the State has not met any applicable RFP/milestone, EPA shall require the State, within 9 months after such failure or determination, to submit a plan revision that assures that the State will achieve the next milestone (or attain the PM-10 NAAQS, if there is no next milestone) by the applicable date (see section 189(c)(3)). For example, with respect to RFP, if the required annual emission reductions are not achieved for the relevant years according to the RFP schedule and the implementing milestone requirement, EPA will require the State to submit a SIP revision so that these deviations can be corrected and attainment assured by the applicable date. This would also necessitate implementation of appropriate contingency measures pursuant to section 172(c)(9).

Note also that failure to meet RFP, if not expeditiously corrected, could also result in the application of sanctions as described in sections 110(m) and 179(b) of the amended Act (pursuant to a finding under section 179(a)(4)).

IX. Other Requirements

A. Executive Order 12866

Under Executive Order 12866 (E.O. 12866) (58 FR 51,735 (October 4, 1993)), the Agency must determine whether the regulatory action is "significant" and therefore subject to the Office of Management and Budget (OMB) review and the requirements of E.O. 12866. The E.O. 12866 defines "significant regulatory action" as one that is likely to result in a rule that may:

1. Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the

economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or state, local, or tribal government or communities;

2. create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

3. materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or

4. raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of E.O. 12866, OMB has notified EPA that this action is a "significant regulatory action" within the meaning of the Executive Order. For this reason, this action was submitted to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record.

B. Regulatory Flexibility Act

Whenever the Agency is required by section 553 of the Administrative Procedure Act (APA) or any other law to publish general notice of proposed rulemaking for any proposed rule, the Agency shall propose and make available for public comment an initial regulatory flexibility analysis. The regulatory flexibility requirements do not apply for this PM-10 serious area addendum to the General Preamble because it is not a regulatory action in the context of the APA or the Regulatory Flexibility Act.

Dated: July 29, 1994.

Carol M. Browner,
Administrator.

[FR Doc. 94-19884 Filed 8-15-94; 8:45 am]

BILLING CODE 6560-50-P

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 73

[MM Docket No. 94-74; RM-8476]

Radio Broadcasting Service; Elma, WA

AGENCY: Federal Communications Commission.

ACTION: Proposed rule; Correction.

SUMMARY: This document contains a correction to the *Notice of Proposed Rule Making* (MM Docket No. 94-74; RM-8476), which was published Monday, July 25, 1994 (59 FR 37737). The *Notice* proposed the allotment of Channel 271A at Elma, Washington, as the community's first local aural transmission service.

EFFECTIVE DATE: August 16, 1994.

FOR FURTHER INFORMATION CONTACT: Sharon P. McDonald, Mass Media Bureau, (202) 634-6530.

SUPPLEMENTARY INFORMATION: Need for Correction.

As published, the *Notice* reflected the wrong rulemaking number which needs to be corrected.

Correction of Publication.

Accordingly, the publication on July 25, 1994 of the Public Notice regulations (MM Docket No. 94-74) which were the subject of FR Doc. 94-17992, is corrected as follows:

On page 37737, in the third column, under 47 CFR Part 73, the rulemaking number is corrected to read "RM-8503" in lieu "RM-8476."

Federal Communications Commission.

William F. Caton,

Acting Secretary.

[FR Doc. 94-19989 Filed 8-15-94; 8:45 am]

BILLING CODE 6712-01-M

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 20

RIN 1018-AA24

Migratory Bird Hunting: Proposed Migratory Bird Hunting Regulations on Certain Federal Indian Reservations and Ceded Lands for the 1994-95 Season

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: This rule proposes special migratory bird hunting regulations that would be established for certain tribes on Federal Indian reservations, off-reservation trust lands and ceded lands for the 1994-95 migratory bird hunting season.

DATES: The comment period for these proposed regulations will end August 31, 1994.

ADDRESSES: Address Comments to: Director (FWS/MBMO), U.S. Fish and Wildlife Service, 634 ARLSQ, 1849 C St., NW, Washington, DC 20240. Comments received, if any, on these proposed special hunting regulations and tribal proposals will be available for public inspection during normal business hours in Room 634-Arlington Square Building, 4401 N. Fairfax Drive, Arlington, VA.

FOR FURTHER INFORMATION CONTACT: Dr. Keith A. Morehouse, Office of Migratory Bird Management, U.S. Fish and