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PLAINTIFF'S EXHIBIT

SH-2712

Wednesday
September 5, 1979

Exhibit 1a

Part IV

Environmental Protection Agency

Requirements for Preparation, Adoption,
and Submittal of State Implementation
Plans; Approval and Promulgation of
State Implementation Plans

LAM 012081

DPMC-08456

ENVIRONMENTAL PROTECTION AGENCY

[40 CFR Parts 51 and 52]

[FRL 1300-6]

Requirements for Preparation, Adoption, and Submittal of SIP's; Approval and Promulgation of State Implementation Plans

AGENCY: Environmental Protection Agency.

ACTION: Proposed Rules.

SUMMARY: EPA proposes to amend its regulations for the prevention of significant deterioration 40 CFR 51.24, 52.21 (1978) in response to a court decision that overturned those regulations in major respects. EPA also proposes changes to its regulations affecting new source review in nonattainment areas, including restrictions on further major source growth and requirements under EPA's Emission Offset Interpretative Ruling, 40 CFR Part 51 App. S, and section 173 of the Act, to conform those rules to the court decision.

DATES: The deadline for submitting written comments is October 5, 1979.

ADDRESSES: Comments. Comments should be sent (in triplicate if possible) to Central Docket Section (A-130), Washington, D.C. Attn: Docket No. A-79-35.

Docket: In accordance with section 307(d) of the Clean Air Act, 42 U.S.C. 7607(d), EPA has established a docket for this rulemaking. It bears Docket No. A-79-35. The docket is an organized and complete file of all significant information submitted to or otherwise considered by EPA during this rulemaking. The contents of the docket will serve as the record in the case of judicial review under section 307(b) of the Act, 42 U.S.C. 7607(b). The docket is available for public inspection and copying between 8 a.m. and 4 p.m., Monday through Friday, at EPA's Central Docket Section, Room 2903B. A reasonable fee may be charged for copying.

PUBLIC HEARINGS: EPA intends to hold public hearings on the proposals in this notice in September in San Francisco, California, and Washington, D.C. The exact times and places will be announced in due course.

FOR FURTHER INFORMATION CONTACT: Michael Trutna, Standards Implementation Branch (MD-15), Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, 919/541-5292.

SUPPLEMENTARY INFORMATION:

Outline

- I. Background:
 - A. Prevention of Significant Deterioration.
 - B. Requirements Relating to Nonattainment Areas.
- II. Highlights.
- III. Transition:
 - A. PSD Part 52 Regulations.
 - B. Nonattainment Regulations.
 - C. PSD and Nonattainment SIP Revisions.
- IV. Potential To Emit.
- V. Fifty-Ton Exemption.
- VI. Fugitive Emissions.
- VII. Fugitive Dust Exemption.
- VIII. Source/Facility/Installation:
 - A. Definition of Source.
 - B. Sources Subject to PSD Requirements.
 - C. Sources Subject to Nonattainment Requirements.
 - D. Summary.
- IX. Modification:
 - A. No Net Increase.
 - B. Restrictions on Construction.
 - C. Accumulation.
- X. "De Minimis" Exemptions.
- XI. Geographic Applicability:
 - A. Designated Nonattainment Areas.
 - B. Designated Clean Areas.
 - C. VOC Sources.
 - D. Interstate Pollution.
- XII. Pollutant Applicability.
- XIII. Baseline Concentration.
- XIV. Best Available Control Technology.
- XV. Ambient Monitoring.
- XVI. Notification.
- XVII. PSD SIP Revisions:
 - A. Equivalent State Programs.
 - B. Baseline Area.
 - C. State Monitoring Exemption.
- XVIII. Additional Issues:
 - A. Innovative Control Technology.
 - B. Modified Permits.
 - C. Non-profit Institutions.
 - D. Portable Facilities.
 - E. Secondary Emissions.
 - F. Economic Impact Assessment.
 - G. Comments.

I. Background

A. Prevention of Significant Deterioration. In 1974, EPA promulgated regulations to prevent emissions of sulfur dioxide (SO₂) and particulate matter (PM) from significantly deteriorating air quality in areas where concentrations of those pollutants were lower than the applicable national ambient air quality standards (NAAQS). 39 FR 42510 (codified at 40 CFR 52.21 (1977)). EPA made those regulations part of the State Implementation Plan (SIP). The prevention of significant deterioration (PSD) regulations prohibited the construction of any new source or modification in certain categories, unless EPA or a delegate state had issued a permit evidencing that the source or modification would apply "best available control technology" (BACT) for SO₂ and PM, and that emissions of those pollutants from the source or modification would

not cause significant deterioration of air quality in any area.

On August 7, 1977, the President signed the Clean Air Act Amendments of 1977 (1977 Amendments) into law. Pub. L. No. 95-95, 91 Stat. 685. Those amendments established a new set of PSD requirements as Part C of Title I of the Clean Air Act (Act). See Sections 160-169, 42 U.S.C. 7470-79. The new requirements follow the outline of the old regulations, but are more elaborate and in many ways more stringent. The 1977 Amendments also directed that each SIP was to contain the new requirements. See Sections 161, 110(a)(2)(D) and (J), 42 U.S.C. 7471, 7410(a)(2)(D) and (J).

In response to that mandate, EPA promulgated two sets of PSD regulations on June 19, 1978. One set specified the minimum requirements that a PSD SIP revision would have to contain in order to warrant EPA approval. 43 FR 26380 (codified at 40 CFR 51.24 (1978)) (hereinafter, the "Part 51 regulations"). The other set comprehensively amended the old PSD regulations and incorporated into them the new PSD requirements. 43 FR 26388 (codified at 40 CFR 52.21 (1978)) (hereinafter, the "Part 52 regulations"). EPA intended that, until it had approved a PSD SIP revision for a state, the permitting of new sources and modifications to be constructed in its clean areas would continue under the new Part 52 regulations. The United States Court of Appeals for the District of Columbia Circuit subsequently affirmed that approach. *Citizens To Save Spencer County v. EPA*, 12 ERC 1961 (March 27, 1979).

Many industrial and environmental groups petitioned the same court for review of the substantive provisions of both the Part 51 and Part 52 regulations. On June 18, 1979, the court issued a decision that upheld some of those provisions and overturned others. *Alabama Power Company v. Costle*, 13 ERC 1225. In its opinion the court merely summarized its rulings, but promised supplemental, comprehensive opinions in due course, probably by "the end of this summer." *Id.* at 1227 n.7. The court also invited the parties to file petitions for reconsideration, several of which were filed but have not yet been acted upon. In an order that accompanied the summary opinion, the court stayed the effect of its decision until it had issued the supplemental opinions. The purpose of this procedure, the court explained, was "to enable EPA to proceed as soon as possible to commence rulemaking or other proceedings necessary to promulgate those revisions in the PSD regulations required by (the court's)

rulings, and to take other prudent action to effectuate congressional policies." *Id.* at 1227.

By this notice, EPA is beginning the process the court had in mind. It is here proposing various amendments to the PSD regulations. Some of those amendments would replace the provisions rejected by the court; others would add entirely new provisions to supplement the replacement provisions. Each of the proposals is discussed in detail in material which follows this background section.

B. Requirements Relating to Nonattainment Areas. The only regulations before the court in *Alabama Power* are EPA's PSD regulations. They are therefore the only regulations directly affected by the court's decision. However, several statutory definitions and other concepts addressed in *Alabama Power* are also relevant to the statutory requirements for areas where pollution exceeds the national ambient air quality standards (nonattainment areas). By this notice, EPA is proposing changes to its regulations for nonattainment areas, to conform the regulations to the decisions in *Alabama Power*.

There are three separate sets of nonattainment requirements affecting the review of new or modified major stationary sources, each applicable under a different set of circumstances. First, before July 1, 1979, EPA's Emission Offset Interpretative Ruling (offset ruling) governed new construction that would cause or contribute to a violation of a standard. The offset ruling will still be effective in the future but only in a few, limited instances. The current, revised offset ruling was published by EPA on January 16, 1979, 44 FR 3274.

Second, after June 30, 1979, state plans which satisfy the requirements of Part D, Title I, of the Act (42 USC 7501 and following) are to be in effect for areas designated as nonattainment areas under section 107(d) of the act, 42 U.S.C. 7407(d). EPA has published several notices about what constitutes an acceptable Part D plan revision. See 43 FR 21673 (May 19, 1978), 44 FR 8311 (February 9, 1979), 44 FR 20372 (April 4, 1979), 44 FR 25243 (April 30, 1979), 44 FR 38583 (July 2, 1979). In situations where a Part D plan was not due by July 1, 1979, the offset ruling continues to apply (e.g., where a violation of an ambient standard is discovered in a designated attainment area, or where the deadline for a Part D plan for a secondary standard is postponed under section 110(b) of the Act, 42 U.S.C. 7410(b)).

Finally, for areas where Part D plans are due but where the plan either does not satisfy Part D or is not carried out in

accordance with Part D, the Act in sections 110(a)(2)(I) and 173(4) provides for restrictions on major new source construction. 42 U.S.C. 7410(a)(2)(I) and 7503(4). On July 2, 1979, EPA issued a ruling implementing this restriction, and invited comment on additional language to clarify how the statutory restriction will apply. 44 FR 38471, 38583, (July 2, 1979), 44 FR 42195, 42246 (July 19, 1979).

The key aspect of these nonattainment requirements that is affected by *Alabama Power* involves the definition of the new and modified stationary sources that are subject to stringent preconstruction permitting conditions. In the January 16, 1979 revision to the offset ruling, EPA adopted virtually the same definitions of "major source" and "major modification" as were adopted in the PSD regulations and were overturned in *Alabama Power*. EPA stated in the preamble to the offset ruling that those definitions were also applicable to state permitting programs required under Part D. EPA also ruled that the definitions apply to the prohibition on construction under section 110(a)(2)(I) (except that the cut-offs to limit review of sources with low allowable emissions do not apply to section 110(a)(2)(I)). 44 FR at 3276 (col. 1).

Although the definitions were adopted as final action in the offset ruling, EPA invited additional comment.

The statutory language on which the "major source" and "major modification" definitions were based is very similar for the nonattainment programs as for PSD, and the reasoning in the June 18 *Alabama Power* decision generally appears to be applicable to both. The comments on the nonattainment definitions invited in the January 16 notice have therefore been rendered irrelevant by the court decision, and EPA is now proposing new definitions.

Those sections of this preamble which relate to the definitions of "major source" and "major modification" therefore discuss nonattainment requirements as well as the PSD regulations. Where the concepts and goals of nonattainment and PSD differ, we are proposing and seek comment on alternative approaches consistent with the distinctive goals of each. In addition, the discussion on "Geographic Applicability" addresses the nonattainment requirements. The court did not directly address the nonattainment requirements so EPA offers here two alternative approaches for comment.

Because of the importance of resolving these questions expeditiously, today's proposal does not have an

accompanying economic impact evaluation. Such an evaluation will be performed and be made available for public comment prior to promulgation.

The discussion which follows first highlights the proposed PSD and nonattainment changes and then focuses in detail on each of them.

II. Highlights

A. Proposed Regulations Affecting New Source Review in Both Nonattainment and PSD Areas:

1. **Potential to Emit:** The regulations proposed today would again make major construction projects subject to new source review (NSR) on the basis of increased potential to emit. Under the proposal the annual emission potential of a source would be determined after the application of air pollution controls rather than before as was generally done under the existing regulations. In calculating annual potential emissions of a source, maximum annual rated capacity, year-round hours of operation, and any enforceable permit conditions on the type of materials combusted or processed will be used.

2. **Fugitive Emissions:** Fugitive emissions, as proposed, means those emissions released directly into the atmosphere without passing through a stack, chimney, vent or other functionally equivalent opening. Fugitive emissions are proposed not to be considered when determining the annual emissions potential of a stationary source except when such emissions come from specified industry types.

3. **Source:** Source means any building structure, facility, or installation which emits or may emit any regulated pollutant. "Building, structure, facility or installation" means plant in PSD areas and in nonattainment areas except where the growth prohibitions would apply or where no adequate SIP exists or is being carried out. "Building, structure, or facility" means plant and "installation" means the individual emission unit within the plant for these nonattainment review situations. The manner in which source is defined places a vital role in determining when NSR would apply. When installation is defined differently than facility, more changes at major stationary sources would be subject as major modifications (see below).

4. **Major Modification:** The proposal would subject changes in the design or operation of a major stationary source to NSR only if (1) a significant net increase in the potential emissions of a pollutant for which the source is major would occur, or (2) cumulative net increases in the potential emissions of a pollutant regulated under the Act occur

at the same source after the applicable NSR time of concern that in total would exceed the applicable 100/250-ton threshold. The proposal, unlike the existing regulations, would allow certain emission reductions occurring at the same source to offset any increases due to proposed construction and avoid review. If a source has the potential to emit more than it is legally allowed to emit, no offset credit could be taken by a source for reducing its potential emissions down to the allowed level.

5. *No Tiered Review:* Under the existing regulations, only those sources and modifications which have large uncontrolled emission potential and also increased allowable emissions equal to or greater than 50 tons per year would receive a detailed review. All major sources and major modifications are now fully covered as discussed elsewhere.

6. *Preconstruction Notice:* Under the proposed regulations, an owner or operator of certain sources would be required to give written preconstruction notice to the applicable reviewing authority in lieu of getting a permit. This requirement would apply to (1) construction not qualifying as major modifications due to sufficient offsetting emission reductions, (2) emission reductions to be used for future offset credit in (1), and (3) construction not qualifying as major stationary sources due to application of air pollution controls not generally required by the SIP or 40 CFR Parts 60 and 61. The notice would contain a schedule of the applicable emissions changes and a demonstration that the proposed reductions are or would be sufficient and enforceable.

B. Proposed Changes Specific to Nonattainment Requirements

1. *Major Modification:* The same basic definitional structure for "major stationary source" and "major modification" is being proposed for both nonattainment requirements and PSD requirements. The principal difference is the extent to which emission decreases may be used to offset increases at the same major stationary source to determine whether the source is "modified" and needs a permit.

a. *Emissions Baseline for Modification:* The proposed regulations would generally subject a change at a major source to review only if a significant net increase in the potential to emit a nonattainment pollutant for which the source is major. An exception is that no credit may be taken for reducing those potential emissions which are greater than allowable emissions. In nonattainment areas where the offset ruling or Part D NSR

would apply, the applicable SIP would generally define the allowable emissions baseline for reduction credit.

b. *"Bubble" Exemption:* The use of offsets inside the same source is called the "bubble." EPA proposes use of the definition of "source" (see above) to limit the use of the bubble under nonattainment requirements in the following respects:

i. Part D SIPs that include all requirements needed to assure reasonable further progress and attainment by the deadline under section 172 and that are being carried out need not restrict the use of a plantwide bubble, the same as under the PSD proposal.

ii. Part D SIPs that do not meet the requirements specified must limit use of the bubble by including a definition of "installation" as an identifiable piece of process equipment. New or modified major-source installations would require NSR permits regardless of any offsetting emission reductions elsewhere in the facility. A change or a series of changes that do not result in a significant net increase in the installation's potential to emit, and do not constitute a reconstruction of the installation, will not be subject to NSR permitting requirements.

iii. The offset ruling is proposed to also include a definition of "installation" with the effect described in paragraph ii.

iv. The restriction on construction for inadequate Part D SIPs (or failure to carry out the same) under section 110(a)(2)(1) is proposed to include a definition of "installation." However, unlike the situation described in paragraph ii, no bubble will apply, and any significant increase in the nonattainment pollutant for which the source is major would be subject.

2. *Regulatory Transition:* EPA intends to promulgate regulations within 90 days after issuance of the final *Alabama Power* opinion by the U.S. Court of Appeals. Such changes would generally apply to any future permitting situations after promulgation, but sources compelled to meet more restrictive requirements under the old regulations may apply to the applicable permitting authority to reevaluate such requirements. A change in a permit which would make the SIP no longer adequate to demonstrate attainment would require an accompanying SIP revision to ensure attainment would not be jeopardized.

The proposed changes also affect how state adopted NSR programs may be approved for designated nonattainment areas. EPA generally proposes to approve any state plan that would meet the existing SIP approval criteria or the

criteria proposed today. Restrictions on growth would be implemented using the existing definitions affecting source applicability until today's regulations are promulgated.

3. *Geographic Applicability:* The proposed regulations would apply the applicable nonattainment NSR requirements throughout the area designated as nonattainment. The existing regulations now allow a source within a designated nonattainment area to demonstrate that it would construct in a clean portion and affect significantly no dirty portion of the nonattainment area. Growth prohibitions, Part D, or the offset ruling would also apply when a proposed major source or major modification in a clean area would significantly impact a nonattainment area.

C. Proposed Changes Specific to PSD Requirements

1. *Baseline Concentration:* The term "baseline concentration" is used in an abstract sense to establish the starting point for defining significant deterioration occurring from area and minor sources of PM and SO₂. Under the existing regulations, a uniform August 7, 1977 baseline date was established for all PSD areas of the country. Today's proposal would establish the baseline date as the time after August 7, 1977 that the first permit application by a proposed major source or major modification (subject to the regulations as promulgated) is filed for a clean area designated under section 107(d)(1)(D) or (E). The baseline date once established for any designated clean portion of an Air Quality Control Region (AQCR) would apply to all clean parts of the AQCR designated under section 107(d)(1)(D) or (E) for PM and SO₂.

2. *Best Available Control Technology (BACT):* The regulations today propose that the BACT requirements apply to all pollutants regulated under the Act for which the major construction would create significant net emission increases. The existing requirements require BACT only for those pollutants for which the proposed construction would be major.

3. *Ambient Monitoring:* The proposed regulations generally will call for more extensive ambient monitoring both before and after construction. The proposal would extend the preconstruction requirement for an analysis of the air quality existing at the areas affected by the proposed construction to all pollutants regulated under the Act and not just criteria pollutants as the existing PSD regulations require. The new monitoring requirements apply to any pollutants regulated under the Act without regard

to whether such pollutant emissions individually qualify the proposed construction as being major. Under today's proposal, PM and SO₂ data as required would be used to improve modeling predictions of increment availability to future sources. Regulations governing the adoption of acceptable PSD SIPs are also proposed to be revised to indicate when state authorities can accept less than one year's continuous air quality data for a criteria pollutant.

4. *"De Minimis" Cutoffs:* The regulations proposed today would exempt on a pollutant specific basis major modifications from all permit requirements and new major sources on a pollutant specific basis from all requirements when emissions of the particular pollutant are below a specified *de minimis* or significant emission rate. *De minimis* air quality levels are also proposed as guidance for exempting from PSD monitoring requirements on a pollutant specific basis a major new source or major modification with net emission increases that cause air quality impacts below the specified values.

5. *Major Modification:* In determining whether a "no net increase" in emissions would occur for purposes of PSD, the regulations as proposed would no longer credit emission reductions on the basis of how the emissions being reduced would affect the available PSD increment. Today's PSD regulations would parallel nonattainment NSR in that the emissions baseline for determining a no net increase would be the lesser of potential emissions or allowable emissions.

Use of a plant wide "bubble" is permitted under PSD in determining if a significant increase would occur in the potential to emit a pollutant for which the source is major.

6. *Regulatory Transition:* As discussed above in the case of nonattainment permit reviews, the proposed changes would generally be prospective with regard to future PSD permits. EPA expects that when the regulations as proposed become final, sources that obtained PSD permits under the existing PSD regulations would have 90 days to have their permits reevaluated under the new rules.

The proposed changes also affect how PSD SIPs may be approved. EPA proposes to approve any state plan that would meet the existing 40 CFR Part 51 regulations or the revised regulations proposed today, but states will have to revise their plans to conform to the regulations as promulgated. The revised definitions for baseline and major

construction will be retroactive for purposes of increment consumption.

7. *Geographic Applicability:* The proposed regulations would generally apply the requirements of PSD review to all areas designated under section 107(d)(1)(D) or (E). However, even where an area is designated as nonattainment under section 107, PSD review would apply when a proposed source would have a significant impact on a clean area in another state. EPA has petitioned the court to restore the existing PSD requirements which protect clean areas from new source emissions regardless of the location of the source.

III. Transition

A. *PSD Part 52 Regulations.* As described above in the background information of this preamble, the court in *Alabama Power Company v. Costle* communicated its decisions on the PSD regulations in the form of a summary opinion. Simultaneously, it stayed the effect of those decisions until it had considered any petition for reconsideration and issued supplemental opinions explaining the decisions and disposing of any petitions.¹ The court adopted this unusual procedure partly to allow EPA to begin as soon as possible to overhaul the regulations. The procedure, however, has raised many questions about what rules should govern PSD preconstruction review and for how long. What follows are EPA's answers to those questions.

First, EPA is proposing a set of amendments which would replace, or delete entirely, each of the provisions the court has declared invalid. EPA intends to promulgate the amendments in final form as soon as possible after the issuance of the supplemental opinions. EPA may be able to promulgate some amendments sooner than others, since the supplemental opinions of the court may well leave little or no room for discretion on certain issues. An example of such an issue is whether Congress intended the key phrase "potential to emit" in the statutory definition of "major emitting facility" to refer to controlled emissions. On some issues, though, the Agency will have more room for discretion. For example, the court has ruled that EPA has broad discretion to define the term "facility" through legislative rulemaking.

¹ EPA has petitioned the court for reconsideration of its decision on geographic applicability. Industry petitioners have petitioned as to the decision on the definition of "modification" on the regulation of pollutants other than sulfur dioxide and particulate matter, and on the modeling of stack heights. Where relevant these decisions are described in later sections of this preamble.

13 ERC at 1229. Since such rulemaking may result in extensive public comment, it may take EPA longer to promulgate a definition of "facility" than a new definition of "potential to emit."

Next, to avoid any moratorium on permitting, the Agency is treating the existing regulations as being in effect now. It is therefore continuing to process applications for permits under them. EPA intends to continue operating under the existing regulations for so long as, and to the extent that, they remain unchanged. To make this possible, it has moved the court for a further stay of the effect of its decisions. If granted, the stay would last until EPA completes this rulemaking or until 90 days after the issuance of the supplemental opinions, whichever comes first. If EPA requires more than the extra 90 days on some issues, it will move the court for additional time.

EPA intends to put the replacement provisions governing PSD applicability into effect immediately upon promulgation. Each would then apply to any proposed source or modification which had not filed a complete PSD application by the time of the promulgation of the provision.² Making the regulations immediately effective would eliminate the delay and expense of the permitting process for sources not covered by the regulation.³ Examples of the provisions that EPA intends to make effective immediately upon promulgation are the definitions of "potential to emit," "stationary source," "facility," and "modification."

Many PSD permits will have been issued by the time EPA completes its overhaul of the regulations. EPA is proposing here that such permits would remain in effect, but would be rescinded upon a showing that a source or modification would not need a permit under the new regulations. See proposed § 52.21(w). A permittee would have only 90 days from the time the overhaul is complete to make that showing. In this way, projects which Congress never intended to undergo PSD review could obtain relief from the constraints of their PSD permit. At the same time, EPA would be able to evaluate individual decisions on applicability and keep its records straight. It should be noted that,

² When an applicant can show a reasonable and good faith effort to submit all information necessary for permit issuance, the permitting authority may consider an application as being complete for purposes of avoiding the new more restrictive requirements of the final PSD or nonattainment NSR regulations, as applicable.

³ If an applicant believed the new regulations would exclude his facility, he could withdraw his application at any time. Alternatively, he could ask EPA to delay the processing of it. In either case, EPA would not reserve increment for the applicant.

if a source or modification were later found to be causing or contributing to an increment violation, additional controls might be necessary. See 40 CFR 51.24(a)(3) (1978).

The proposed definition of "major modification" except where the growth sanctions would apply defines that term as any significant net increase in potential emissions at a major stationary source. In contrast, the existing definition defines it as any gross increase in potential (uncontrolled) emissions above 100 or 250 tons per year, depending on source type. 40 CFR 52.21(b)(2) (1978). The proposed definition may sweep into PSD review some modifications that the existing definition would not. That would occur if a particular gross increase at the site of an existing major stationary source would be under the 100/250-ton threshold, but would not be offset by sufficient contemporaneous emission reductions at the same site. In addition, under the existing regulations the potential to emit calculation can account for limited hours of operation whereas it cannot under today's proposal. EPA believes that such modifications and sources with limited operating hours can be grandfathered from all future permitting requirements. It is therefore proposing an amendment to § 52.21(i) which would provide that preconstruction review does not apply to any new or modified source obtaining all necessary approvals under the SIP before the date the proposed definitions of "major modification" and "potential to emit" come into effect and on which physical construction would commence within 18 months of this date (or any earlier time required under the SIP) if it would not have been a major modification or major stationary source under the existing regulations. See proposed § 52.21(i)(7).

Aside from the new provisions which would govern PSD applicability, EPA is proposing provisions which would establish new substantive requirements. Examples are the provisions which would require any major stationary source to perform air quality analysis and to have BACT for any regulated pollutant that it emits in significant amounts. See proposed paragraphs (n)(1) and (j)(2) of § 52.21. EPA intends to make such provisions effective upon final promulgation and to apply them only to construction projects whose applications for a permit were not complete before this time. In addition, special interim rules apply during the first year that the new regulations would be effective to the pollutant specific collection of continuous monitoring data

when it would not have been required under the existing regulations. The Administrator generally will require less than a year's worth of data on a prorated basis. An affected source would be required to gather data over the time period from the effective date of the new regulations until the date that the source would file an otherwise complete PSD application.

Finally, in some cases the proposed definitions would redefine the baseline date, which marks the time that area and minor source growth would consume the available PSD increment. Consequently emissions from some sources which consumed increment under the existing regulations would now be counted as baseline emissions. (See discussion on "Baseline Concentration.")

The existing regulations contain various rules for the grandfathering of major stationary sources and major modifications. In essence, they generally provide that the existing regulations do not apply to a source or modification which received certain permits by March 1, 1978, and commenced construction by March 19, 1979. See 40 CFR 52.21(i) (2)-(4) (1978). The proposals in this notice would not affect the substance of those grandfather provisions. Also, it should be noted that EPA proposed in a recent *Federal Register* notice to amend the deadlines for "commencing" construction in those provisions. See 44 FR 42722 (July 16, 1979). EPA will probably promulgate the proposed amendment before it completes this rulemaking.

To the existing grandfather provisions, EPA is proposing to add two new provisions to make explicit principles that are merely implicit now. One would state that a source or modification to which the regulations apply must have a PSD permit before construction on it may begin. See proposed § 52.21(i) (1) and (2). The other would state that the existing preconstruction requirements do not apply to any source or modification on which construction commenced before August 7, 1977, the date of enactment of the Clean Air Act Amendments of 1977. This provision would merely put into the regulations what section 168(b) of the Act already provides. See 42 U.S.C. 7478(b).

B. Nonattainment NSR Regulations. For implementation of the offset ruling and the restrictions on new sources under sections 110(a)(2)(I) and 173(4) of the Act, EPA proposes to advise the states to require generally the same transition principles as for PSD. Provisions of the final regulations which will be more stringent than existing

requirements would apply to all applications not complete by the time the final regulations appear in the *Federal Register*. Provisions of the final regulations which will be less stringent than existing requirements could apply (unless the state has in the attainment demonstration relied upon more stringent requirements) to all sources and modifications which had not received a permit before the final regulations are promulgated.

Unlike the case of PSD, the Administrator does not believe that EPA should be directly involved in any efforts by individual sources to overturn certain more restrictive aspects of permits issued under the existing requirements. First, air quality levels worse than those judged adequate to safeguard public health and welfare are involved. Rescinding of permits in such areas might jeopardize the applicable attainment strategy approved in the plan or at least consume in part the growth allowance identified in the attainment demonstration. Therefore, any action taken to rescind a permit must be accompanied by a formal revision to the SIP so as to adjust the attainment demonstration. Next, the plan can use various control methods and strategies in demonstrating attainment by the prescribed date. This, at the state's option, can include a more restrictive NSR policy in order to comply with the attainment mandate. Finally, states have generally issued the permits, not EPA. Permitted sources that want relief from the conditions of permit issued under the existing regulations should, therefore, apply to the applicable state reviewing authority for a reevaluation. Such sources should remember that for several reasons the state may not be able to rescind a permit.

C. PSD and Nonattainment SIP Revisions. As discussed above, the review of permit applications will be governed by the existing regulations until the regulations are amended. However, a more flexible approach is needed for review and approval of SIP revisions. In brief, EPA proposes for now to approve a SIP revision if it satisfies either the existing EPA regulations or the regulations proposed in this notice.

It is essential that states adopt and EPA approve new source review programs without delay. The July 1, 1979 deadline creates particular urgency for nonattainment plans, and the Act and EPA policy call for prompt state adoption of PSD plans as well. Most state plans already prepared have been designed to satisfy EPA's existing regulations. To avoid delay in getting

state plans submitted and approved. EPA proposes to accept for the time being any plan that satisfies EPA's existing regulations, even if the plan does not satisfy all requirements as interpreted in *Alabama Power*. This approach is legally acceptable because the court's mandate is stayed and section 406(d) of the 1977 Amendments establishes that states have time to come into compliance after EPA regulations are altered.

Plans developed to satisfy existing regulations will in some respects be more stringent than the court has ruled are required by law. To encourage prompt submittal and approval of plans that have already been developed, EPA will take a realistic approach toward subsequent relaxation of such plans. EPA proposes to approve any state-submitted relaxation so long as the revised SIP meets all requirements proposed in this rulemaking. This proposal approval would apply to only plans that would meet, as a minimum, the proposed regulations and not the more lenient alternative approaches discussed in the preamble. The Administrator does reserve the option to approve SIPs where the decision may depend upon the final court opinion with the understanding that the state will have to revise its plan to comply with EPA's final regulations. If EPA's final regulations are in any respect less stringent than the proposed regulations, EPA will then permit further relaxation if a state so wishes.

In some respects EPA's final regulations implementing *Alabama Power* will be more stringent than the existing regulations, and may be more stringent than the regulations now being proposed. States will have additional time after EPA promulgates final regulations to submit revisions making the SIPs at least as stringent as the EPA regulations then required.

Even during the interim period, however, a plan will not be acceptable if it meets a combination of old and new requirements in such a way that it is less stringent than would be allowed under either the old or new set of requirements. For example, in determining what modifications need permits, the proposed new requirements are more stringent than the old ones in setting the level of emissions (significant net increase), but are more lenient in allowing contemporaneous reductions to be considered (the "bubble") in determining whether that level of emissions is surpassed. It would not be acceptable for a plan to apply the old, generally more lenient emission level in

combination with the new more lenient bubble.

Over the past several months, EPA has invited comment on the proposed approval of individual SIP revisions designed to satisfy requirements for PSD or nonattainment, or both. Additional proposals will be published in the period before final regulations are published implementing *Alabama Power*. EPA intends to take final action on individual SIP submittals prior to the time it can complete its review of comments solicited by this notice. Therefore, this notice may be considered a part of the notice of proposed rulemaking applicable to each individual SIP submittal. To the extent issues discussed here are relevant to whether a particular plan submittal should be approved, commenters may address those issues in comments on the particular plan submittal. Comments on a particular plan may be submitted to the appropriate EPA Regional Office during the comment period established in the proposed rulemaking on the particular plan submittal. If the discussion published today requires alteration of any comments on a plan for which the comment period has already ended, the commenter should contact the appropriate EPA Regional Office immediately so that the issue can be appropriately dealt with.

In summary, EPA proposes to find SIPs now approvable if they meet the minimum requirements of either existing EPA regulations, or the regulations now being proposed. EPA strongly urges that, where a state has prepared a plan that satisfies existing requirements but has not yet submitted it to EPA for approval, the state should submit it without delay. There will be opportunity later to revise the plan in accordance with *Alabama Power*.

IV. Potential To Emit

The preconstruction review requirements of section 165 of the Act apply to any "major emitting facility." 42 U.S.C. 7475. Under section 169(1), that term means any stationary source which emits or has "the potential to emit" 100 tons per year or more of any pollutant and comes within any of 28 specified categories. It also includes any other source with "the potential to emit" 250 tons per year or more of any pollutant. 42 U.S.C. 7479(1).

The scope of the category "major emitting facility" obviously depends largely on the meaning of the phrase "potential to emit." Many more sources would fall into the category if the phrase referred to the amount of pollution that a source would emit without pollution

controls than if it referred to the amount a source would emit with such controls.

In the PSD regulations promulgated on June 19, 1978, EPA defined "potential to emit" in general as "the capability at maximum capacity to emit a pollutant in the absence of air pollution control equipment." 40 CFR 51.24(b)(3), 52.21(b)(3) (1978) [emphasis added]. The court in *Alabama Power Company v. Castle* rejected EPA's interpretation. In its view Congress intended "potential to emit" to refer to controlled emissions:

We think the fairly discernible meaning of the statute . . . is that an emitting facility is "major" within the meaning of section 169(1), only if it either (1) actually emits the specified annual tonnage of any air pollutant, or (2) has the potential, when operating at full design capacity, to emit the statutory amount . . . In our view the design capacity of the facility takes into account not only its maximum production capacity (which EPA uses) but also the design controls on emissions. (13 ERC at 1228.)

In response to the court's decision, EPA is proposing to amend the definitions of "potential to emit" in the existing PSD regulations. As proposed, the new definitions would provide that the term means "the capability at maximum capacity to emit a pollutant after the application of air pollution control equipment." See proposed §§ 51.24(b)(3) and 52.21(b)(3) (emphasis added). Thus, whether a source is "major" would depend primarily upon what control equipment has been incorporated into its design.

The existing definition of "potential to emit" also states:

Annual potential shall be based on the maximum annual rated capacity of the source, unless the source is subject to enforceable permit conditions which limit the annual hours of operation. (40 CFR 51.24(b)(3), 52.21(b)(3) (1978) [emphasis added].)

Under that sentence, a source can escape PSD reviews, if the person proposing the source binds himself in a state NSR permit to limit sufficiently the hours of operation, that is, to operate at less than full design capacity. In *Alabama Power*, the court plainly thought that the calculation of a source's "potential to emit" should be based on its full design capacity 13 ERC at 1228. EPA therefore is proposing to delete the "unless" clause. It intends to rule out the possibility of a source escaping PSD review merely because of a voluntary limitation on hours of operation. This action also makes it possible to minimize stress placed on the short term increments by sources of intermittent operation with low annual but high daily emissions. EPA would therefore generally presume that a source can

physically operate 24 hours per day, 365 days per year. The Administrator asks for comment on the need to adjust this assumption to the extent that new sources would have limited hours of operation due to physical incapability of operating 24 hours a day year round.

Such an exemption would follow the Administrator's proposal to discount the amount of credit that can be claimed for reductions at existing sources because of physical incapability on the part of the affected emission unit(s) (see discussion in "Modification").

The existing definition recognizes not only limitations on hours of operation, but also limitations on the amount of material to be combusted or processed:

Enforceable permit conditions on the type or amount of material combusted or processed may be used in determining the potential emission rate of a source. (40 CFR 51.24(b)(3), 52.21 (b) (3) (1978) (emphasis added).)

For the same reasons that EPA is proposing to delete the clause relating to hours of operation, it is proposing to delete the words "or amount" in the sentence quoted above.

In calculating a source's "potential to emit" under the proposed definition many other variables would have to be considered. Among them are the efficiency of the proposed control equipment, the sulfur content of any coal to be burned at the source, and the applicability of fugitive emissions. First, in line with the court's opinion, EPA will assume that the "air pollution control equipment incorporated into the design of the facility will function to control emissions in the manner reasonably anticipated when the calculation is made." 13 ERC at 1228 (emphasis added). Second, with respect to the sulfur content of any coal to be burned, EPA generally intends to use a long-term, nominal average. For determining increment consumption, however, it typically will use a 30-day average. Finally, how EPA intends to deal with the problem of fugitive emissions is discussed in a subsequent section of this notice.

The definition of "potential to emit" is important not only to PSD preconstruction review, but also to NSR under the offset ruling, 44 FR 3274, and under the statutory requirements for nonattainment areas. It is also important to the determination of what sources and modifications are subject to the restrictions on construction in sections 110(a)(2)(T) and 173(4) of the Act. EPA is proposing for each of those nonattainment programs the same definition of "potential to emit" that it is proposing for the PSD program. EPA also intends that definition to be

implemented for those programs in the same way as for PSD.

EPA has traditionally distinguished for the purposes of NRS review between the direct emissions of a source and its "secondary emissions." (See discussion on "Additional Issues.") In revising the offset ruling in January 1979, the Agency added a definition of "secondary emissions" and a provision describing for what purposes and under what circumstances those emissions are to be taken into account. See FR 3281, 3283, 3283-84 (January 16, 1979). EPA is proposing to add a definition of that term to the PSD regulations and to the proposed nonattainment provisions relating to SIP revisions and restrictions on construction. The Agency is also proposing to add to each the definitions of "potential to emit" in those sets of provisions a statement that "secondary emissions" are to be excluded in determining whether a source or modification is "major." How the Agency would treat those emissions for other purposes, including PSD air quality impact analysis, is described below.

V. 50-Ton Exemption

In the existing PSD regulations, EPA in general exempts from full PSD review any major stationary source or major modification which would have allowable emissions for each of its pollutants of less than 50 tons per year, 1,000 pounds per day, or 100 pounds per hour, whichever is more restrictive (hereinafter, a "50-ton source"). Specifically, an applicant for a permit for a 50-ton source does not have either to show that the source would have BACT or to provide an ambient impact assessment. See 40 CFR 51.24(j)(2), (k), 52.21(j)(2), (k) (1978). The exemption does not apply in certain narrow circumstances. *Id.*

In *Alabama Power*, the court thought that its ruling on "potential to emit" made a ruling on the 50-ton exemption "academic," since no 50-ton source would ever be "major" if "potential to emit" referred to controlled emissions. 13 ERC at 1228-29. Nevertheless, it remanded the exemption to the Agency for reconsideration and noted that the Agency had exceeded its authority in establishing the exemption. *Id.* In response, EPA is proposing to delete the provisions which embody the exemption. It is also proposing to delete parallel provisions in the offset ruling, 44 FR 3274.

EPA, however, is proposing to add to the PSD regulations another similar exemption for certain modifications. This exemption would track section 165(b) of the Act closely. See 42 U.S.C.

7475(b). Essentially a source qualifying for the exemption would face a limited air quality review for SO₂ and PM, including insulation from the monitoring requirement. Use of the exemption would be restricted to those 50 tons or less modifications of SO₂ or PM after application of BACT which would impact no Class I area and would not interfere with the attainment of PM and SO₂ standards. In addition, the exemption, as proposed, would be applicable to the cumulative total of net emission increases occurring since August 7, 1977, at a plant existing on that date.

VI. Fugitive Emissions

In determining under the existing PSD and nonattainment NSR regulations whether a stationary source or modification has the potential to emit 100 or 250 tons per year of a pollutant, EPA commonly takes into account all of the emissions of that pollutant, at least to the extent that they are reasonably quantifiable. Whether or not the emissions would be "fugitive" has so far been immaterial in requiring permits. For example, EPA has generally regarded strip mines as candidates for PSD review, since it would include the dust from the haul roads, storage piles, and other surfaces at such a mine in determining whether it is "major." See 43 FR 26395 (June 19, 1978).

In *Alabama Power*, the court held that "fugitive emissions" are to be included in determining whether a source or modification is "major" "only if and when EPA issues an appropriate legislative rule." 13 ERC 1231. The court did state, however, that once the permitting requirements otherwise applied, then fugitive emissions and nonfugitive emissions at the same source were to be considered in performing the permit analysis. In so holding, the court indicated that EPA had not yet gone through the requisite rulemaking. With respect to the meaning of the term "fugitive emissions," the court recognized that the Act nowhere defines it. *Id.* at 1230 n.18. Nevertheless, it discerned that Congress intended "fugitive emissions" to refer to those emissions which emanate from other than a point, such as a stack or chimney. *Id.* at 1230 n. 14. "Fugitive dust," the court thought, refers to fugitive emissions of particulate matter. *Id.* at 1230 n.14. It should be noted that those meanings differ from the ones EPA has traditionally given the two terms. See, e.g., 41 FR 55560 n.3 (December 21, 1976).

In response to the court's holdings, EPA is proposing that certain industrial fugitive emissions, to the extent reasonably quantifiable, may be

included in determining whether a source of modification is "major." The actions described below apply to regulations both PSD and nonattainment NSR.

First, EPA is proposing to define "fugitive emissions" as those emissions which do not pass through an opening which the owner or operator uses for ventilation, such as a stack, chimney, roof vent or roof monitor. See proposed §§ 51.24(b)(20) and 52.21(b)(20). EPA would also delete the existing definition of "fugitive dust" at 40 CFR 51.24(b)(6) and 52.21(b)(6) (1978).

Second, EPA is proposing to incorporate into the existing regulations the principle that rulemaking must precede the inclusion of "fugitive emissions" in an applicability determination by adding the following line to the definitions of "potential to emit": "Fugitive emissions shall not be included in determining potential, except with respect to the following stationary sources: . . ."

Finally, the Agency is proposing to list the following stationary sources whose fugitive emissions are to be taken into account: (1) Coal cleaning plants, (2) kraft pulp mills, (3) portland cement plants, (4) primary zinc smelters, (5) iron and steel mill plants, (6) primary aluminum ore reduction plants, (7) primary copper smelters, (8) municipal incinerators, (9) hydrofluoric, sulfuric, or nitric acid plants, (10) petroleum refineries, (11) lime plants, (12) phosphate rock processing plants, (13) coke oven batteries, (14) sulfur recovery plants, (15) carbon black plants, (16) primary lead smelters, (17) fuel conversion plants, (18) sintering plants, (19) secondary metal production plants, (20) chemical process plants, (21) fossil fuel-fired boilers, (22) petroleum storage and transfer units, (23) taconite ore processing plants, (24) glass fiber processing plants, (25) charcoal production plants, (26) fossil fuel-fired steam electric plants, and any other stationary source category which, at the time of the applicability determination, is being regulated under section 111 or 112 of the Act.

EPA believes that there is no reason why a source of a particular pollutant regulated under the Act should escape review because the emissions of the pollutant are fugitive, when a source of the same pollutant has to get a permit if the emissions are not fugitive. In both cases, the emissions would deteriorate air quality regardless of how they emanate. Thus, it serves the purposes of NSR to scrutinize the one as well as the other. EPA is focusing first on the sources listed above because its experience in quantifying the "fugitive

emissions" from such sources is, in general, greater than its experience in quantifying such emissions from other sources. See, e.g., U.S. EPA, *Compilation of Air Pollutant Emission Factors* (AP-42) (3d ed., August 1977). The Administrator over the next several months will consider the need for additional source types to be added to the list beyond those which would be newly regulated under 40 CFR Parts 60 and 61, including strip mines.

VII. Fugitive Dust Exemption

The existing PSD regulations provide that any "fugitive dust" from a major stationary source or major modification is to be ignored in determining what the effect of the source or modification on air quality would be. 40 CFR 51.24(k)(5), 52.21(k)(5) (1978). Because of its decision on "fugitive emissions" and apparently because it thought EPA had no authority to establish the exemption, the court remanded it to the Agency for further consideration. 13 ERC at 1231. In response, EPA is proposing to delete the provisions which embody the exemption. The Agency is also proposing to delete a parallel provision in the offset ruling. 44 FR 3274.

VIII. Source/Facility Installation

A. *Definition of "Source"*. In its existing PSD regulations and the offset ruling, EPA has defined "stationary source" as "any structure, building, facility, equipment, installation, or operation (or combination thereof) which is located on one or more contiguous or adjacent properties and which is owned or operated by the same person (or by persons under common control)." EPA also defined "facility" as an "identifiable piece of process equipment." 40 CFR 51.24(b)(4), (5), 52.21(b)(4), (5); 40 CFR Part 51, Appendix s, sections II.A.1 and 2, as amended 44 FR 3282.

In *Alabama Power* the court said that the definition of "stationary source" in section 111(a)(3) governs PSD review. Slip op. at 11. Section 111(a)(3) defines "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. 7411(a)(3). The court stated that EPA may not add items to this list, Slip op. at 11. In conformance with the court's opinion EPA is proposing to delete the terms "equipment", "operation" and "combination thereof" from the definition of stationary source in both the PSD and nonattainment regulations. The court also found that EPA exceeded its statutory authority in the way in which it tried to apply preconstruction review to both a single building, structure, facility or

installation, which is permitted by section 111(a)(3), and a combination of such units. Slip op. at 12. EPA therefore proposes to delete the term "combination thereof" from the definition of stationary source.

The court did, however, state that EPA has substantial discretion to define the terms in the definition of source—that is, building, structure, facility, or installation—to include a wide range of pollution-emitting sources. Slip op. at 11. The components of "source" could be defined differently for PSD purposes than for the purposes of other provisions of the Act. Slip op. at 12, note 13. The key constraint on EPA's discretion is that "the definitions applicable to each set of provisions must be reasonably appropriate for the purposes of those sections." *Id.* The same court has earlier stated that, in defining the components of source, "EPA is guided by a reasoned application of the terms of the statute it is charged to enforce, not by an abstract 'dictionary' definition." *ASARCO, Inc. v. EPA*, 578 F.2d 319, 324 note 17 (D.C. Cir. 1978). These two court opinions instruct the Agency to analyze the statutory purposes of the various PSD and nonattainment NSR provisions and define the terms "building," "structure," "facility," and "installation" to carry out best the statutory intent of the provisions.

B. *Sources Subject to PSD Requirements*. One of the fundamental purposes of PSD is to maintain air quality better than the ambient standards. This purpose can best be served if NSR applies to the largest industrial grouping that, as a practical matter, industry and the reviewing authorities can reasonably deal with as a single unit. EPA believes the appropriate grouping is all emitting activities on contiguous or adjacent property and under common control—typically an industrial plant.

For PSD, EPA believes that a large industrial grouping is the appropriate unit for review of both construction of new plants and new and modified pieces of process equipment at existing plants. Applying PSD review to large groupings rather than separate pieces of process equipment ensures adequate review of new plants. EPA believes that unit-by-unit review, without plant-wide review, would fail to protect air quality standards and increments. Large new plants could be constructed at one site as a collection of individual process units, each below the potential-to-emit threshold, and thereby escape review altogether. If clustering of new growth were permitted without preconstruction

review, increments and even standards could easily be violated.

While increased protection of air quality might be achieved by reviewing groupings even bigger than a plant, review of larger groupings is infeasible. New units not on adjacent property or under common control would be an awkward grouping to evaluate and regulate. Therefore, PSD review will apply to groupings of new construction no larger than a plant.

Plant-wide review also serves the basic purposes of PSD when pieces of equipment are being built or modified at existing plants. With plant-wide review, industry can construct new and modified equipment without a permit, by reducing emissions enough that net emissions at the plant do not increase. (Allowing use of offsetting emission reductions within the source to avoid NSR is called the "bubble" approach. For discussion of the bubble, see "Modification"). The purposes of PSD are served, because assuring that there will be no net increase in emissions from the plant also assures that the construction will not interfere with maintaining good air quality.

Permitting offsets only within individual process units would go beyond maintaining the status quo. While additional emission reductions beyond existing levels are needed to attain standards in nonattainment areas (see discussion in the next section), such reductions are ordinarily unnecessary to meet the purposes of the PSD program. In addition, the review itself would not make sense relative to PSD goals, if new units at sources with offsetting plant-wide decreases were forced to undergo review. Sources might be required to model and monitor increment consumption when air quality is expected to improve or stay the same. In addition, application of the bubble on a plant-wide basis encourages voluntary upgrading of equipment, and growth in productive capacity.

Since obtaining offsets is often less expensive and less time-consuming than obtaining a PSD permit, providing industry with the offset option will facilitate upgrading of production capacity, and encourage application of improved controls to obtain offsets. Permitting plant-wide use of offsets provides the greatest opportunity for both of these desirable results. Thus, plant-wide review is the preferred approach under PSD for reviewing construction of both new plants, and new and modified pieces of equipment at existing plants.

For these reasons, EPA proposes that PSD review apply to a large grouping of pollutant-emitting activities, like an

industrial plant. To accomplish this, EPA proposes to define "building, structure, facility, or installation" to mean a grouping of activities on contiguous or adjacent properties and under common control. The term "grouping" is intended to include a plant consisting of a single isolated activity, as well as a plant consisting of many activities.

C. Sources Subject to Nonattainment Requirements.

1. Purpose to be Served by Nonattainment NSR Definitions. Unlike the PSD provisions, the nonattainment provisions are primarily intended not merely to prevent excessive increases in emissions, but to reduce emissions. This fundamental difference in purpose requires a different approach to defining the sources that will be subject to NSR. To assure adequate review, EPA believes that both entire plants and individual pieces of equipment must be subject to NSR. The one exception under EPA's proposal is for areas subject to fully complete SIPs satisfying Part D requirements. In these areas, where attainment is assured, NSR need apply only to entire plants.

To assure adequate review of new plants, a large grouping must be subject to nonattainment NSR for the reasons discussed above for PSD. To do otherwise would allow a new plant that is divided into separate process units, each below the potential emission threshold, to escape review. New emissions could thus be added to the existing violation, without review, making attainment virtually impossible. Therefore, EPA believes that nonattainment programs, like PSD programs, must apply NSR to entire plants.

EPA believes that pieces of process equipment within plants should also be subject to NSR under nonattainment programs. This would prevent use of plant-wide offsets for increases from construction or modification of major pieces of process equipment. The plant-wide bubble is less appropriate for nonattainment programs than for PSD programs because it only holds emissions constant. Nonattainment programs, in contrast to PSD programs, must positively reduce emissions.

If increases from construction of new or modified pieces of process equipment could be offset on a plant-wide basis the construction would make attainment of the standards substantially more difficult. For each nonattainment area, there are only a limited number of cost-effective ways to reduce existing emissions enough to attain standards. If the cost-effective opportunities to reduce emissions are used to offset

equally large increases from new construction, then other, less cost-effective ways to reduce emissions must be found to achieve attainment.

Therefore, to ensure that construction within existing plants does not make attainment of the standards more difficult, nonattainment programs must provide for NSR new and modified pieces of equipment. The NSR requirements will assure that the most stringent controls are applied to new and modified equipment, and that more than offsetting reductions in existing emissions are obtained to assure adequate continued progress toward attainment. The nonattainment requirements also ensure that other sources in the state, owned or operated by the same owner, are in compliance with SIP requirements needed for attainment.

This policy argument is strongly supported by the legislative history. Even where demolition of obsolete equipment reduces emissions, Congress indicated that construction of replacement equipment should be subject to NSR under nonattainment programs without regard to the offsetting reductions:

Thus, [under the offset ruling and Part D NSR requirements,] a new source is still subject to such requirements as "lowest achievable emission rate" even if it is constructed as a replacement for an older facility resulting in a net reduction from previous emission levels.⁴ (Statement of Senator Muskie, 123 Cong. Rec. at S 13702 col. 2 (daily edition, August 4, 1977)).

2. Proposed Definitions. To implement this specific expression of Congressional intent, as well as the general purposes of the nonattainment provisions discussed above, EPA is proposing to define "source" to include not only plant-wide groupings of activities, but also individual pieces of process equipment. "Building, structure or facility" would be defined as a large grouping of activities (a plant) and "installation" would be defined as an "individual piece of process equipment."

These definitions would prevent use of plant-wide bubble for all new and modified major pieces of process equipment. ("Major" means having high enough potential emissions to be a major stationary source. "Minor" means having less than that.) The plant-wide bubble would still serve to avoid NSR, when emissions from a new or modified minor piece of equipment (or from some activity like a coal pile that is not an installation) are offset by enough

⁴ Then, as now, "facility" was defined in EPA's offset ruling as a piece of process equipment.

⁵ Referred to hereafter as "facility."

reductions at the plant so that there is no net increase in emissions at the plant. Furthermore, in accordance with the Congressional intent noted above, a replacement of an older piece of equipment would be treated as a new installation, regardless of any reductions from previous emission levels. A "reconstruction" would be treated in the same way as a replacement, when the capital cost of the new improvements exceeds 50% of a comparable replacement.

The proposed definitions tend to limit applications of the huddle, by defining certain large kinds of sources and certain small kinds of sources, and recognizing that some small sources are included within the boundaries of large sources. This approach is consistent with both the language of the Act and the interpretation in *Alabama Power*.

Congress, in defining "source" as any "structure, building, facility, or installation" must have contemplated that some of these components could be defined to be smaller than others and that the small components could be found within the large components. Defining some sources as small enough to be within the boundaries of larger-defined sources is also consistent with the court's instruction not to define source as a "combination" of facilities, installations, or other single source units. The proposed regulations define "facility" not as a combination of narrowly-defined sources, but rather as an independently-defined entity. This single entity is composed of a grouping of emitting activities (which individually may or may not be sources)* meeting requirements of common control and adjacency. This plant definition is exactly the sort of "common sense industrial grouping" that the court said is a proper subject for NSR. Slip op. at 12.

The court stated that the same definitions of facility, building, structure, and installation, must govern the determination of not only whether there is a new major stationary source subject to NSR, but also whether there is a modified major stationary source subject to NSR. Slip op. at 21. EPA's definitions adhere strictly to this principle. Major facilities and major installations constitute both the new sources and the modified sources

subject to NSR. Under these definitions, construction that is neither a new nor a modified major facility may be a new or modified installation, and vice versa. Congress, in defining "source" to include several items in the alternative, provided for such a result where necessary to achieve the purposes of the Act.

The following illustrates how the nonattainment NSR definitions would work. Suppose a firm proposed to construct three pieces of process equipment on a single plant site. Each piece of equipment would be an "installation," and the entire plant would be a "facility." Each installation would be a "source" and the entire facility would be a "source." If the installations would have annual potential emissions of 40, 190, and 150 tons per year, respectively, the facility would have potential emissions of 380 tons per year:

Installation (A)—40 tons per year (minor source).

Installation (B)—190 tons per year (major source).

Installation (C)—150 tons per year (major source).

Facility (A)—380 tons per year (major source).

Permits would be needed for the three major sources: Installation (B), Installation (C), and Facility (A). Since the permit for Facility (A) would, as a practical matter, cover all three installations, only a single permit application would be needed.

Suppose next that the firm proposed to modify Installation (C) to increase emissions by 70 tons, and decrease contemporaneously the emissions of Installation (B) by the same amount. There would be no modification of Facility (A), whose total emissions would remain the same, but there would be a modification of Installation (C), whose emissions would increase by 70 tons. A permit would be needed for the modification of Installation (C).

If installation (B) were then modified to increase its emissions by 50 tons, but there were contemporaneous reductions of the same amount at the same Installation (B), no net increase in emissions would occur at either Installation (B) or at Facility (A) (technically, there would be no "modification"), and no permit would be needed. If there were a 20-ton increase at Installation (A) and a

contemporaneous 25-ton decrease at Installation (C), there would be a modification of minor Installation (A), whose net emissions increased, but no modification of major Facility (A), whose net emissions decreased, and no permit would be needed.

3. *Nonattainment Programs to Which the Proposed Definitions Apply.* The definitions described above are to apply to sources subject to the offset ruling and to restrictions on construction under sections 110(a)(2)(I) and 173(4) of the Act. EPA also proposes that these definitions apply to "incomplete" state plans under Part D of the Act. Incomplete plans are those that do not yet show reasonable further progress and attainment of the ambient standards, based exclusively on currently adopted, approved, and enforceable requirements. Incomplete plans therefore include any plan where approval under part D is conditioned on submission of additional material by the state, any plans containing state-adopted schedules for submission of additional material,⁷ and any plans where additional submissions are needed by July 1, 1982, as required by section 129(c) of the 1977 Amendments (note under 42 U.S.C. 7502). Since incomplete plans do not yet include all requirements needed for attainment, EPA believes that the definitions described above, including the definition of "installation," are needed for the reasons discussed above.

However, EPA believes that complete Part D SIPs, which contain adopted and enforceable requirements sufficient to assure attainment, may apply the

approach proposed above for PSD, with plant-wide review but no review of individual pieces of equipment. Use of only a plant-wide definition of source will permit plant-wide offsets for avoiding NSR of new or modified pieces of equipment. However, this is only appropriate once a SIP is adopted that will assure the reductions in existing emissions necessary for attainment. See 44 FR 3276 col. 3 (January 16, 1979). If the level of emissions allowed in the SIP is low enough to assure reasonable further progress and attainment, new construction or modifications with enough offset credit to prevent an emission increase should not jeopardize attainment. Protection of attainment under the SIP is also assured by not permitting offset credit for emission reductions required by the approved SIP (see "Modification").

However, for sources subject to restrictions on construction in sections 110(a)(2)(I) and 173(4), EPA believes that no offsets should be permitted.⁸ EPA

*For example, a coal pile is not a piece of process equipment, and is, therefore, not an "installation" under the proposed definitions. However, it is an emitting activity, and can therefore be part of a "facility" under the proposed definitions. The Agency recognizes that the emissions from the coal pile would be fugitive emissions and subject to regulation as discussed in the section on "Fugitive Emissions."

⁷For a discussion of conditional approvals and schedules, see 44 FR 20372 (April 4, 1979) and 44 FR 38583 (July 2, 1979).

⁸Reconstructed major installations, regardless of whether they are considered "modifications" even under the restrictive definition of major modification, are new major sources subject to the restrictions on construction.

proposes to accomplish this through the definition of "major modification," rather than the definition of the components of "source." This is discussed in the section on "Modification".

EPA is considering one other approach for nonattainment areas.

Under this approach, all components of "source" would be defined as pieces of process equipment, and none would be defined as plants. NSR would apply to new pieces of equipment, regardless of offsets elsewhere in the plant. For modifications of existing pieces of equipment, offsetting reductions within the same piece of equipment could be considered in determining whether there is a significant net increase in emissions. However, under this alternative approach, new or modified minor installations would never be subject to review, regardless of whether they are part of a major plant.

Since numerous individual pieces of process equipment typically have less than 100 tons per year potential, and would escape preconstruction review even though they are part of a single plant with over 100 tons potential emissions, this approach would allow much new construction to take place without preconstruction review. This problem could be counteracted somewhat, by requiring that state plans provide for close tracking of new minor source construction. However, as discussed above, EPA believes that failing to review entire new plants would create enough risk of massive new emissions that this approach is undesirable.

D. Summary. In summary, EPA is proposing two different ways to define source for different kinds of NSR programs:

(1) For PSD and complete Part D SIPs, review would apply only to plants, with an unrestricted plant-wide bubble.

(2) For the offset ruling, restrictions on construction, and incomplete Part D SIPs, review would apply to both plants and individual pieces of process equipment, causing the plant-wide bubble not to apply for new and modified major pieces of equipment.

In addition, for the restrictions on construction, EPA is proposing to define "major modification" so as to prohibit the bubble entirely. Finally, an alternative discussed but not favored is to have only pieces of process equipment reviewed, resulting in no plant-wide bubble and allowing minor pieces of equipment to escape NSR regardless of whether they are within a major plant.

EPA invites comment generally on what approach should be used for each type of program.

IX. Modification

A. No Net Increase. Under current EPA regulations, a modification is "major" if potential emission increases from the modification would equal or exceed the applicable 100/250-ton threshold. The court in *Alabama Power* rejected this approach. It held that a change in a major stationary source is subject to PSD review if it results in a net increase in the source's potential to emit. The court also held that any emission increase which is entirely offset by contemporaneous emission reductions at the source would not be considered a modification. Slip op. 20-22. These rulings are incorporated into the proposed regulations for both PSD and nonattainment NSR provisions. The one exception is construction restrictions under sections 110(a)(2)(I) and 173(4), for which EPA proposes not to consider offsetting reductions in determining whether there is a modification.

While the court addressed the amount of increase that triggers review, it did not address which pollutants must be increased to trigger review. The court, thus, did not object to EPA's current approach of requiring preconstruction review only if the increase in potential emissions is for a pollutant for which the source is a major source. Nor did the court object to EPA's current approach of aggregating small increases in emissions occurring after the time of program concern (e.g., August 7, 1977 for PSD) to determine whether they add up to enough in total to make the source a major source subject to preconstruction review. Therefore, these two aspects of existing regulations are being retained.

The fact that review is necessary only if there is an increase for a pollutant for which the source is a major source is not inconsistent with the Act's instructions that PSD requirements apply to all pollutants emitted. If any one pollutant initiates PSD review, then review is required for all pollutants emitted in greater than *de minimis* amounts but if no one pollutant triggers review, then review is not required for any pollutant emitted.

The court's ruling requires additional guidance on how the new definition of modification will be implemented, what "contemporaneous" change means, what emission offsets are creditable, and how "net increase" is calculated. It should be noted that the topic of net emission increases is distinct from the more general topic of emission offset banking, although they are closely

related. Banking is discussed in the Federal Register notice regarding EPA's offset ruling, 44 FR 3274 (January 16, 1979).

1. Implementation. The regulations proposed today would require that any emission increases at a stationary source which would qualify as a major modification, were it not for sufficient contemporaneous emission reductions occurring within the source, must be reported to the Administrator or reviewing authority (the state governmental body responsible for issuing permits is called the reviewing or permitting authority). In addition, a source must report emission decreases which it wishes to use as future offset credit. EPA intends the reporting requirement to fill a need for preconstruction notice and not to act as a time-consuming substitute for a permitting program. For more discussion of the preconstruction notice requirements, see the section of this preamble entitled "Notification."

2. Contemporaneous Reductions. Under the court decision, a modification is a change, or series of contemporaneous changes, that results in a net increase in potential to emit. The term "change" derives from the definition of "modification" under section 111(a)(4), and means "any physical change in, or change in the method of operation of, a stationary source." Only an actual physical change in, or change in the method of operation of, a major stationary source may be considered in calculating contemporaneous decreases. In addition, because a source's potential to emit is calculated based on full design capacity assuming year-round, 24-hour-a-day operation, only an actual change that reduces design capacity can be credited as an offset in calculating whether a net increase has occurred. For example, imposition of a legal obligation to reduce operating hours or operating loads will not, by itself, qualify as an actual change decreasing potential to emit. In contrast, an actual change that permanently reduces the source's maximum production capacity, such as disconnecting an entire process, would qualify for credit.

The proposal would exempt an emissions increase from PSD review if equal reductions in emissions occur at the same source contemporaneously with the emissions increase. In the court's view, this exemption has the advantage of deferring or avoiding the cost of review while providing an incentive to industry to upgrade air pollution control equipment.

A narrow interpretation of the term "contemporaneous" would restrict

creditable emission reductions to those occurring at the same time as the emission increases being offset. This, however, would undercut the incentive to upgrade controls, since it is not always possible for a source owner to effect the necessary reductions at exactly the right time. Although the term "contemporaneous" appears to preclude a formal, open-ended banking system for previously-achieved emission reductions at the same source, it is not so limited as to require simultaneous offsetting. Requiring sources to continue operation of obsolete equipment, simply to preserve offset credit, makes little economic or air quality sense.

To provide some latitude for crediting emission reductions, EPA is proposing to credit any reported reduction that would occur after the effective date of the promulgated regulations but before the proposed emission increases are scheduled to occur. For shutdowns and curtailments occurring before these regulations are promulgated, offset credit may be retained if the source files a notice within 90 days after promulgation recording the previous shutdown or curtailment. A follow-up notice would also be required to document the construction schedule for the increase to be offset and to ensure that the applicable offsets are enforceable under the SIP. Failure to identify such a timetable or to comply with it will prevent use of the earlier emission reductions to offset that increase. This, in turn, may require the affected owner or operator to obtain a NSR permit.

3. Emission Offset Baseline.

Additional guidance is necessary on how to determine if proposed emission reductions at a stationary source are sufficient in type and amount to offset prospective emission increases at the same source, assuming the changes are contemporaneous. The basic rule contained in the regulations is that a new increase in a source's potential to emit occurs whenever the sum of increases minus the sum of the decreases is greater than zero. The size of the increase or decrease for a particular emission unit is generally determined by the difference between the unit's potential to emit before and after the change or series of changes.

As mentioned in "Potential To Emit," the Administrator believes that potential emissions of an existing source can be no greater than its actual emission capacity. If a source is no longer physically able to operate at its maximum design capacity, its potential to emit is limited accordingly. For a source physically constrained from

operating at maximum capacity, offset credit will be based on its potential emissions, taking into account physical constraints on operation at maximum capacity. For example, an obsolete unit which has been shut down for several years due to severe operational difficulties would not offer any offset credit to new construction. If potential emission calculations did not account for physical incapacities inherent in the operation of existing sources, a source could offset new usable production capacity with old unusable production capacity and thereby avoid preconstruction review. A common result would be significant and unreviewed increases in actual emissions. If this were permitted, increments and standards could be severely impacted or even exceeded.

This policy continues a philosophy which was implicit in several requirements of the existing PSD regulations and offset ruling. For example, under existing regulations and today's proposal, a source's operation over a one- to two-year period is considered in calculating the size of an emission reduction. If a source has not been operating at full capacity for a significant part of the one- to two-year period, it is considered to be physically incapable of operating at full capacity and its emission reduction credit will be calculated based on its operation for the one- to two-year period. A source owner or operator may overcome the presumption of physical incapability if he shows that it was not physical incapability that caused the low production rates.

Physical incapability includes situations where one part of an existing source cannot be used at its full capacity because its capacity is larger relative to the rest of the associated units, and therefore its output is limited by the capacity of the other units. In addition, if a plan is unsafe for a certain level of operation or has obsolete or worn-out components which cannot be routinely replaced, its potential to emit would be limited by these conditions.

Under the proposal, emission reductions must be reported to the permitting authority to receive future offset credit (see "Notification"). EPA would accordingly allow full credit for a systematic phase-down or production curtailment at a source if it is reported in advance to the permitting authority. Industry would be allowed to phase in orderly growth without running highly polluting, obsolete units at full operation, simply to accrue maximum offset credit.

An adjustment to the potential emissions rule is needed in a case where

potential emissions are greater than allowable emissions. In such a case, no credit may be taken for reducing potential emissions down to allowable emissions. This adjustment is needed to implement Congress' intent, as interpreted in *Alabama Power*, that offsets should be permitted as an incentive to upgrade air pollution controls. Slip op. at 21. Where the improvement in control technology would be legally required under the SIP, the source should not be permitted to take credit for making the legally required decrease. This approach appears in the offset ruling, which was endorsed by Congress. The 1977 Amendments provide that the emissions baseline for calculating offsets under the ruling must be the state plan requirement in effect at the time the source applies for a permit. See section 129(a)(1) of the 1977 Amendments (note under 42 U.S.C. 7502(a)(1)).

In addition, allowing offset credit for independently required reductions would make it difficult for the SIP to reduce total emissions in an area where standards or increments are violated. If such offsets were allowed, a source that came into compliance with a required emission limitation could then use the same reduction to offset increases in emitting capacity such that no net increase would occur. Total emissions for the source would remain the same and the violation would still exist. The proposed regulations would avoid this unacceptable result by prohibiting the source from taking credit for such a reduction.

"Allowable emissions" are defined as the most stringent of (1) any new source performance standard or standard for hazardous pollutants applicable to the construction under review,* (2) applicable SIP emission limits, or (3) the emission rate specified as an enforceable permit condition. Where there are any enforceable emission limits that must be complied with in the future, and which are different from the limit currently required, the most stringent of the present and future emission limitations is used in determining the allowable emissions.

To continue existing regulations and policies, the Administrator intends that each candidate reduction meet all of the following criteria:

(1) It must be enforceable under the applicable SIP, either through a SIP

* Here the applicable performance standard or standard for hazardous pollutants refers to the standard that a particular source is subject to and not new standards or revisions of existing standards which affect the relevant source category but that would not apply to the particular source.

revision or an alteration of the source's permit.

(2) It must be for the same pollutant as the emission increase and have comparable impacts to health and welfare, Section IV.C.4. of the offset ruling, involving credit for hydrocarbon substitution, should apply. The criteria outlined in the proposed policy statement on state implementation of the "bubble" concept for existing sources (44 FR 3743 col. 1) January 16, 1979, would also apply. Accordingly, reductions of pollutants within the same pollutant categories but with different health or ambient air impacts cannot be traded against each other.

(3) It must not have been already committed to in the SIP.

(4) Air quality need not improve or stay the same at every location affected by the proposed construction, but on balance the affected area should not be adversely impacted.

The Administrator recognizes a problem associated with crediting offsets as defined. Under today's proposal there is a possible incentive to seek a loose BACT requirement when undergoing PSD review in order to lay an early claim to an excess amount of the increment. If an applicant obtains approval of proposed construction under a loose BACT requirement, he could then alter the proposal to provide for the installation of the better controls so as to offset a future expansion at the same site without full PSD review. The Administrator asks for comments on how best to address this problem.

B. Restrictions on Construction. EPA is proposing that the bubble should not apply at all for areas subject to construction restrictions under section 110(a)(2)(I) or 173(4). For these provisions, EPA is proposing to define "major modification" as any change in, or change in the method of operation of a major stationary source that results in any increase in the potential to emit of a pollutant for which the source is major if the increase exceeds the *de minimis* cutoff for the pollutant. (See "*De Minimis* Exemptions").

EPA believes that the *Alabama Power* decision, establishing that internal offsets must be permitted in determining applicability of PSD to modifications, does not apply to section 110(a)(2)(I) or 173(4) restrictions on construction. The offset ruling was essentially an interim policy to allow some further growth while adequate plan revisions were developed. EPA believes that in terminating the offset ruling on June 30, 1979, and restricting further major construction until Part D plans are approved and implemented, Congress intended to terminate not only offset

transactions between different sources but also those within the same plant. In light of this intent, not permitting internal offsets is particularly important because most offset transactions permitted under the offset ruling have involved offsets inside the same source.

This interpretation is also required to avoid undermining the purpose of the restrictions on construction. As discussed in the "Source/Facility/Installation" section of the preamble, when a source matches an emission reduction with an equal amount of increased emissions from new construction, the nonattainment problem gets harder to solve. This is especially true where there is no adequate SIP that demonstrates attainment. EPA believes that the restriction on construction was designed to stop the problem from becoming worse and provide an incentive for states to submit and carry out corrective SIPs. Allowing offset credit for reductions would instead provide an incentive for sources to seek delays in the adoption of acceptable state plans. Delay would allow sources more time to convert reductions into offsets before a plan requiring those reductions can be adopted and approved.

An alternative to prohibiting the bubble outright may be to allow no offset credit for reducing potential emissions down to the level that would be required if reasonably available control technology (RACT) were applied. Since RACT is required in approvable Part D SIPs, the effect would be to discount credit for reductions that would be legally required if an approvable SIP were in place. Such a policy would preserve the incentive to submit adequate SIP revisions for affected areas.

While Congress removed a similar RACT baseline from the offset ruling, in section 129(a) of the 1977 Amendments, EPA does not believe that Congress prohibited a similar approach where areas do not have, or have failed to implement, acceptable Part D plans. A major drawback to this approach, however, is that RACT may be difficult to define in the absence of a full regulatory proceeding, such as those required for SIP submission and approvals. Therefore, EPA is proposing instead to prohibit internal offsets in areas subject to construction restrictions. However, EPA also invites comment on the alternative approach of permitting offset credit in areas where the growth prohibitions apply if RACT were first applied.

C. Accumulation. As noted above, EPA proposes to continue the current policy of requiring NSR for a source when aggregate new emissions from

individually minor units at the same site, after an applicable date, are sufficient to qualify the series of changes as a major modification. For PSD review, the date from which emissions increases are aggregated is August 7, 1977, (40 CFR 51.24(b)(2), 40 CFR 52.21(b)(2)) and for sources subject to the offset ruling, December 21, 1976, 44 FR 3283, col. 1 (January 16, 1979). These dates continue current EPA policy. For sources subject to Part D plans and restrictions on construction affecting designated nonattainment areas, the applicable date for accumulation will also be December 21, 1976. Accumulating net emission increases from that date forward ensures that modifications resulting in emissions which Congress defined as major will be subject to review under a Part D plan or else to the restrictions on growth. In addition, these sources received notice as of December 21, 1976 that accumulation could later subject them to nonattainment review.

EPA is proposing one change to its existing accumulation provision to conform it to the court's decision. The current accumulation regulation aggregates emission increases after an applicable date, with no credit given for contemporaneous emission decreases. The court, however, defined modification as a net increase in potential to emit. To make the accumulation provision consistent with this definition, EPA is proposing that a source be subject to NSR when the aggregate net increase in its potential to emit after the applicable date qualifies it as a major stationary source. As in the existing regulations, only net emission increases after August 7, 1977 for PSD sources, and December 21, 1976 for sources subject to nonattainment requirements will be considered in determining if a source is subject to NSR.

Under this approach, if a modification at a minor source results in a net increase in emissions, such that its aggregate net increases in potential emissions since the date of concern exceeds the applicable 100/250-ton threshold, the modification will be subject to review. This approach requires review for a single modification to a minor source constructed before the applicable date when the modification results in a net increase in potential emissions of over the applicable 100/250-ton threshold.

Once a series of individual minor changes accumulates to a major modification, questions arise concerning the degree of review that would apply to the earlier emission increases. In general, today's proposal would focus

the requirement to apply BACT or LAER on only that emissions increase which makes the source subject to review. On the other hand, total aggregated emissions from the source will be of concern when performing air quality tests. Such tests include increment analysis for PSD sources and those relevant to emission offsets for sources subject to nonattainment NSR. Any subsequent modification at the source resulting in a net increase in potential to emit that exceeds the *de minimis* cutoff will be subject to NSR.

The accumulation approach as modified to conform with the court's decision closes a loophole in EPA's current regulations. Previously, a modification was not subject to review unless it increased a source's potential emissions by 100 or 250 tons per year, whichever was applicable. Under both the existing and proposed accumulation provision, a power plant constructed after the date of concern which emits 90 tons of SO₂ and then adds a new 50 ton SO₂ boiler, would be subject to control technology requirements for the 50-ton unit and to air quality review for the entire facility. Under the existing provision, if the plant then added another 90-ton boiler, however, the boiler would not be subject to existing review requirements because it would not meet the 100-ton threshold. This is true because the current regulations allow the accumulation slate to be wiped clean after a permit was obtained. Under the approach proposed today, any net increase in potential to emit after the source becomes major is subject to review. Consequently, the next 90-ton increase would be subject to review, unless there were sufficient contemporaneous emission decreases.

The *de minimis* exemption, as discussed more fully in the section on "De Minimis Exemptions," would also apply to emissions from major modifications on a cumulative basis. Once a minor source is subject to review because its aggregate potential emissions make it major, any future net emission increase will also be reviewed unless it qualifies as a *de minimis* increase. However, any future *de minimis* net increase from a modification will be cumulated with net increases from subsequent modifications to determine if total net increases exceed the applicable *de minimis* cutoff.

Finally, if a minor source becomes major through accumulation of its emissions and the source is located in a PSD area where no baseline date applies, that source's application for a major modification permit will trigger a baseline date for the area. The baseline

date would be the date a complete application for the major modification is filed and not the date on which the first unit of the then-minor source was constructed.

X. "De Minimis" Exemption

In the *Alabama Power* decision, the court provided that EPA may exempt from review those situations determined to be *de minimis*. Specifically, the court stated: "The Agency does possess authority, inherent in the statutory scheme, to overlook circumstances that in context fairly may be considered *de minimis*." Slip op. at 10. The court spoke of the administrator's ability to exempt from review modifications with small net increases and to dispense with the BACT and monitoring requirements through the application of *de minimis* thresholds for those pollutants emitted by an otherwise subject source. The court did limit the Administrator's discretion in formulating such exemption cutoffs by stating that a cost-effectiveness rationale would not be appropriate.

The Administrator is today proposing to exercise this authority by establishing a pollutant specific exemption system that excludes or limits review of proposed construction having emissions or air quality impacts below certain values. Table 1 contains for each pollutant regulated under the Act an emission cutoff that would be considered insignificant or *de minimis*. Table 1 would have two principal uses. First, it would be used to show that the net increase associated with a modification would be *de minimis* for all pollutants for which the source is major. In nonattainment areas, this demonstration would involve only the nonattainment pollutant(s), while a showing for all regulated pollutants for which the source is major would be required of modifications at major stationary sources in PSD areas. A successful showing would exempt a modification from PSD and nonattainment permit requirements. However, such a source would be required to provide notice to the Administrator and, therein, make the *de minimis* demonstration [see section on "NOTIFICATION"]. The proposed regulations incorporate the *de minimis* concept by requiring that major modifications have a significant net increase in potential emissions.

Table 1—Guidelines for Significant Emission Rates

Pollutant and Emission Rate

Carbon monoxide—100 tons per year.
Nitrogen dioxide—10 tons per year.

Total Suspended particulates—10 tons per year.
Sulfur dioxide—10 tons per year.
Ozone—10 tons per year of volatile organic compounds.
Lead—1 ton per year.
Mercury—2 tons per year.
Beryllium—0.004 ton per year.
Asbestos—1 ton per year.
Fluorides—0.02 ton per year.
Sulfuric acid mist—1 ton per year.
Vinyl chloride—1 ton per year.
Total Reduced Sulfur:
Hydrogen sulfide—1 ton per year.
Methyl mercaptan—1 ton per year.
Dimethyl sulfide—1 ton per year.
Dimethyl disulfide—1 ton per year.
Reduced Sulfur Compounds:
Hydrogen sulfide (see above).
Carbon disulfide—10 tons per year.
Carbonyl sulfide—10 tons per year.

Even if a modification cannot be shown to be minor, Table 1 can be used to limit the pollutants for which BACT must be applied or an air quality analysis done. If a modification to a source is subject to review because it results in a significant net increase in potential emissions of a pollutant for which the source is major, or a new source is subject to review because it will have the potential to emit a regulated pollutant in major amounts, the source may still avoid BACT or an air quality analysis for other pollutants it emits if it emits such pollutants in *de minimis* amounts. Table 1 identifies the emission cutoffs that would trigger the need for control technology and ambient review for those other pollutants. Thus, when a major stationary source or modification is subject to PSD review because of potential emissions of one or more pollutants the review would apply to only those other pollutants which the source would have the potential to emit in amounts above those proposed in Table 1. No notice requirement is necessary for these pollutants since the source or modification would make the *de minimis* demonstration as part of its permit application.

Table 2 is proposed as an additional mechanism to limit the air quality review for certain pollutants which the source would have the potential to emit in significant amounts but which have an insignificant ambient impact. This may occur frequently since many of the emission values in Table 1 were derived from the air quality levels in Table 2 in a preliminary analysis that used very conservative modeling assumptions. The values in Table 2 represent a small fraction of those ambient levels deemed to be protective of public health and welfare. Table 2 does not apply to pollutants for which a new major source would emit in excess of the applicable 100/250-ton threshold nor does it apply

to major construction that would locate in a nonattainment area or would adversely impact a Class I area.

Table 2—Guidelines for Significant Ambient Air Quality Impacts

Pollutant and Air Quality Impact

Carbon monoxide—500 $\mu\text{g}/\text{m}^3$, 8-hour avg.

Nitrogen dioxide—1 $\mu\text{g}/\text{m}^3$, annual.

Total suspended particulates—5 $\mu\text{g}/\text{m}^3$, 24-hour.

Sulfur dioxide—5 $\mu\text{g}/\text{m}^3$, 24-hour.

Ozone—¹⁰

Lead—.03 $\mu\text{g}/\text{m}^3$, 3-month.

Mercury—.01 $\mu\text{g}/\text{m}^3$, 24-hour.

Beryllium—.005 $\mu\text{g}/\text{m}^3$, 24-hour.

Asbestos—1 $\mu\text{g}/\text{m}^3$, 1-hour.

Fluorides—.01 $\mu\text{g}/\text{m}^3$, 24-hour.

Sulfuric acid mist—1 $\mu\text{g}/\text{m}^3$, 24-hour.

Vinyl chloride—1 $\mu\text{g}/\text{m}^3$, maximum value.

Total reduced sulfur:

Hydrogen sulfide—1 $\mu\text{g}/\text{m}^3$, 1-hour.

Methyl mercaptan—.5 $\mu\text{g}/\text{m}^3$, 1-hour.

Dimethyl sulfide—.5 $\mu\text{g}/\text{m}^3$, 1-hour.

Dimethyl disulfide—.2 $\mu\text{g}/\text{m}^3$, 1-hour.

Reduced sulfur compounds:

Hydrogen sulfide (see above).

Carbon disulfide—200 $\mu\text{g}/\text{m}^3$, 1-hour.

Carbonyl sulfide—200 $\mu\text{g}/\text{m}^3$, 1-hour.

In order to utilize Table 2, sources are required to use a preliminary screening technique to determine if their air quality impact will exceed the acceptable *de minimis* guidelines. The screening technique is set forth in *Guidelines for Air Quality Maintenance Planning and Analysis Vol. 10 (Revised): Procedures for Evaluating Air Quality Impact of New Stationary Sources* (October 1977, U.S. EPA, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711). If a source's ambient impacts are expected to exceed the *de minimis* guidelines using this conservative technique, it may elect to do a more sophisticated modeling analysis to demonstrate a *de minimis* impact. Upon a showing that the anticipated impact of a regulated pollutant would be less than significant, a major stationary source or major modification would not face the detailed ambient impact analyses of PSD for that pollutant (subject to the exceptions noted above). Thus, such a source would not be required to do an analysis for its impact on increments and standards. Nor would such a source be required to analyze its effect on soils, vegetation, and visibility or to conduct any ambient monitoring studies.

The following is an example of how the proposed dual *de minimis* approach would work. Suppose a new source

subject to PSD would emit 275 tons of SO_2 but only 5 tons per year of PM and 50 tons per year of both nitrogen dioxide (NO_x) and volatile organic compounds (VOC). A BACT analysis would be necessary for SO_2 , NO_x , and VOC but not for PM. An ambient air quality analysis would be required for SO_2 . The source could do a screening analysis to determine if an ambient analysis is also required for NO_x . No ambient analysis would be required for the VOC emissions because the potential VOC emissions are under 100 tons per year.

The numbers proposed in Table 2 for criteria pollutants reflect the levels of significant impact promulgated in the existing PSD regulations on June 9, 1978 (43 FR 26398), while the *de minimis* air quality guidance proposed for beryllium, fluorides, and mercury has been derived from health effects data contained in the report entitled "Effects of Trace Contaminants from Coal Combustion"—proceedings of an ERDA workshop conference August 2-6, 1976. The remaining *de minimis* air quality guidance was formulated following a review of state ambient air quality standards, state emission regulations, and background documents used to develop standards under 40 CFR Parts 60 and 61. The one exception to this pattern in Table 2 is ozone. The Administrator here is proposing the major source cutoff of 100 tons per year as the value to trigger ambient concern after BACT has been applied. A background document will be issued by EPA providing the methodology, data, and references used in developing both Table 1 and 2.

The Administrator would like to point out that the proposed *de minimis* numbers, particularly the air quality values, may be too high or too low. Because of the urgency associated with today's proposal, the numbers identified in Tables 1 and 2 are not supported by extensive analysis. Public comment or followup investigations may result in changes in the numbers in the final package.

Although the values in Table 1 and Table 2 are subject to change, the Administrator believes that *de minimis* guidelines are necessary. EPA believes that these exemptions are not only justified by the associated insignificant air quality impacts but also by administrative necessity. The potential administrative burden of processing permits for nearly every minor change at a major stationary source appears unmanageable. For example, if no *de minimis* exemption were provided, any new element in an oil refinery, including a valve or small space heater, would be

subject to NSR. In the Agency's view, neither air quality nor efficient administrative operation are served by requiring preconstruction review for such changes, or for new sources with a comparable impact.

In addition to requesting comments on the proposed values in Tables 1 and 2, the Administrator solicits comments regarding the need for both air quality and emission *de minimis* numbers and the need to put either directly into the regulations.

XI. Geographic Applicability

This section addresses issues raised by the court's interpretation of the geographic applicability of the PSD regulations. Four major topics are discussed: (1) sources constructing in designated nonattainment areas, (2) sources constructing in designated attainment or unclassifiable areas, (3) VOC source considerations, and (4) interstate pollution.

A. Designated Nonattainment Areas. In the *Alabama Power* decision, the court held that the PSD provisions apply only to major sources either locating in areas specifically designated as attainment or unclassifiable under section 107 ("clean air areas"), or locating in any area from which the source would substantially impact a clean air area in another state.

EPA has filed a petition for reconsideration regarding the court's restriction of the geographic applicability of the PSD provisions of the Act. In the petition, EPA argues that Congress intended PSD review to apply to major construction, whether located inside or outside a designated nonattainment area, that would significantly impact any clean area. The Agency argued further that, even if the court does not accept EPA's entire position, the court should rule that the PSD provisions should apply to any major construction that would impact a Class I area or a tribal reservation. The Administrator believes that as much as 40 percent of the total acreage of the mandatory Class I areas is located in or adjacent to formally designated nonattainment areas, and must be protected against the impact of new construction in the nonattainment areas.

Today's proposal conforms to the court's June 18, 1979 opinion. EPA would require permits only for major construction occurring in designated attainment or unclassifiable areas or for construction in a designated nonattainment area that would significantly impact a clean air area in another state. If the court alters its opinion as EPA asked it to do, EPA will have to reconsider this proposal.

¹⁰ No *de minimis* air quality level is proposed for ozone. However, any net increase of 100 tons per year of volatile organic compounds subject to PSD would be required to perform an ambient impact analysis, including the gathering of ambient air quality data.

EPA is also proposing to extend NSR under section 173 and the offset ruling, and the Part D restrictions on growth, to cover major sources everywhere in the designated nonattainment area. This rule would apply regardless of whether the source could demonstrate that it would not significantly impact the specific point(s) of violation. This would be a change to the current policy, which now allows a source to be exempt from nonattainment requirements if it makes such a demonstration.

The above change is needed to overcome a very significant shortcoming that would otherwise be created in the regulatory system. Under the current regulations, proposed major sources in designated nonattainment areas with no significant impact on the violations could be exempted from nonattainment requirements because they are made subject to PSD preconstruction review requirements. But, under *Alabama Power* and the regulations now being proposed, such major sources would usually not be subject to PSD requirements. It would be inequitable and contrary to the apparent statutory purpose to allow such major sources to be totally exempt from any preconstruction review permit requirements, including no minimum emission control requirement and no evaluation of air quality impact. Therefore, EPA proposes to eliminate the shortcoming by extending nonattainment requirements to all major sources constructing in designated nonattainment areas. If the court accepts EPA's petition for rehearing, and extends PSD requirements to more sources in designated nonattainment areas, EPA may reconsider this proposal.

B. Designated Attainment and Unclassifiable Areas. The court's decision in the *Alabama Power* case addressed only the issue of whether the PSD requirements of the Act apply to sources in designated nonattainment areas. The court did not address the issue of whether the Agency may apply the nonattainment preconstruction permit requirements of the Act to sources locating in areas designated attainment or unclassifiable.

Currently, major sources in designated attainment or unclassifiable areas that would cause or contribute to a violation of a standard anywhere, are required to meet all applicable nonattainment requirements. These include state plan requirements adopted to meet Part D of the Act for neighboring designated nonattainment areas, and offset ruling requirements for newly discovered violations in areas designated

attainment or unclassifiable.¹¹ In addition, EPA has proposed that the restriction on construction for a designated nonattainment area with an inadequate (or inadequately implemented) Part D plan should apply to major construction outside of the area, if it would significantly impact on any point(s) of violation in the area. (44 FR 38585, July 2, 1979.)

Although specific regulatory language is not being proposed, EPA is considering changing its policy on the applicability of nonattainment requirements to sources in designated clean areas. Under the approach being considered, nonattainment requirements would only apply to proposed major construction either inside a designated nonattainment area, or proposed in a designated clean area for a site where an ambient standard is actually violated. State plan requirements providing for NSR under section 173 of the Act would apply only to major construction within the designated nonattainment area. Likewise, the restrictions on construction for failure to have or carry out a Part D plan would apply to major construction only within the designated nonattainment area. The offset ruling would apply to major source construction at a site where the standard is violated within a designated clean area.

Major construction that would have a significant impact on a violation of a standard anywhere, but locating where the standard is attained, would still have to reduce its impact enough so that it would not cause or contribute to the violation. The source could reduce its impact the needed amount by applying more emission controls, by obtaining offsets, or both.

EPA has earlier proposed the legal argument that the existing, more restrictive approach is required by section 165(a)(3)(B). This section states that no source subject to PSD review may be constructed unless the permit applicant demonstrates that the source will not cause or contribute to air pollution in excess of any national ambient air quality standard in any air quality region. In the earlier proposal, EPA stated the view that this provision applies to any source whose own emissions, irrespective of offsets, causes or contributes to the violation, 44 FR 38584 (July 2, 1979). In the proposal, EPA interpreted the literal language of section 165(a)(3)(B) as forbidding any such source to construct at all. EPA saw this prohibition overridden only if the source satisfied all conditions of the offset ruling or a state plan program

under section 173. If no Part D plan were in effect and carried out after the deadline for having such a plan, EPA then proposed that the restrictions on construction described in sections 110(a)(2)(1) and 173(4) would apply, through strict application of the language of section 165(a)(3)(B). EPA invites comment on whether the more relaxed approach now under consideration would satisfy the requirements of section 165(a)(3)(B).

This change in approach is not required by the court's opinion in *Alabama Power*. The court's decision was based on its interpretation of the phrase "any area to which this part applies" in section 165 and a review of other provisions in the Act. In contrast, section 172(b)(6) simply states that nonattainment preconstruction review should apply to "new and modified major stationary sources." There is no language limiting Part D review to sources in any particular area. Likewise, the offset ruling which was ratified by Congress in section 129 of the 1977 Amendments, applies by its terms to all sources wherever located, that cause or contribute to an ambient violation. Finally, section 165 requires that prior to construction a source cannot create a violation anywhere. There is no comparable language in Part D saying that Part D sources must protect PSD increments. All of these factors tend to distinguish the nonattainment program from the PSD program, so that *Alabama Power* should not be viewed as governing geographic applicability of nonattainment requirements.

Although neither the court's opinion nor the statute prohibit the application of nonattainment requirements to PSD sources, EPA believes that there may be significant policy and administrative reasons for limiting the applicability of nonattainment NSR in this way. The PSD requirement of BACT and air quality offsets (i.e., an impacting source must offset its contribution to a violation anywhere) provides sufficient air quality protection for an area that is neither designated nonattainment nor is actually violating the standard. Application of all nonattainment requirements to PSD sources will be burdensome to both the permitting authority and the permit applicant.

On the other hand, there may be important program reasons for having the offset ruling continue to apply, along with PSD requirements, to proposed construction at a site designated as clean but where there is a violation of the standard. Construction at a site where there is a violation ordinarily has the greatest impact on the violation, and

¹¹ See 44 FR 3275 col. 4, January 16, 1979.

is therefore most in need of stringent nonattainment controls. In addition, retaining offset ruling requirements for construction at sites with ambient violations would reduce any incentive states and sources might otherwise have to include too much territory within the boundaries of designated clean areas. This approach is legally permissible because, as explained above, EPA believes nonattainment requirements including the offset ruling may apply regardless of the applicable designation. However, EPA also invites comment on whether such construction should be totally exempt from nonattainment requirements including the offset ruling, as is proposed for other construction in designated clean areas.

In addition, if EPA should adopt this applicability approach, EPA seeks comments on whether states should be allowed time to consider adjusting boundaries of existing area designations before EPA changes its policy.

C. Geographic Applicability for VOC Sources. Whatever approach is taken on the legal and policy issue discussed above, it will be necessary to determine, as a factual matter, whether a standard is violated at any particular site, and whether a major source at that site would significantly contribute to a violation elsewhere. This raises particular difficult issues for sources of volatile organic compounds.

On publishing its offset ruling on January 16, 1979, the Agency sought public comment on applicability issues specific to sources of volatile organic compounds (VOC) that would impact an area of ozone NAAQS violation. Atmospheric simulation techniques are generally not available to estimate the air quality impact of an individual VOC source. In the offset ruling, the Agency proposed the policy that, in lieu of modeling, a major VOC source would be subject to review, as significantly contributing to the violation, if it proposed construction within 36 hours travel time of a nonattainment monitor, under wind conditions associated with the ozone concentrations found to exceed the NAAQS for ozone.

Comments were solicited on the final establishment of the "36 hour rule." Industry comments have raised significant questions on the technical basis for the rule. Also, states with thorough ozone monitoring networks commented that the rule gave a competitive economic advantage to states with less sufficient monitoring systems. Other comments noted that the 36 hour rule presents an all-or-nothing situation requiring full or no offsets. The requirement for full offsets at potentially long distances from a nonattainment

monitor was considered inequitable treatment of VOC sources which (1) would not be able to avoid the nonattainment requirements by reducing emissions so that the impact is less than significant, (2) would be subject to offset requirements even if the source is significantly farther away from the violation than would be required for particulate or sulfur dioxide sources that impact on PM or SO₂ violations, and (3) would be subject to offset requirements based on less rigorous technical estimates than required for PM and SO₂ sources.

In response to the comments received, the Agency proposes to eliminate the 36 hour rule as a criterion for determining whether or not a VOC source will impact a nonattainment area. Under the proposal, EPA would assume that proposed construction would have a significant impact on an ozone violation only if the source is physically within the boundaries of a designated nonattainment area or is at a site in another area where the ozone standard is actually violated. If a source were in a designated attainment or unclassifiable area at a site where there is no violation of the ozone standard, EPA proposes to treat the source as having no significant impact on any ozone violation anywhere.

The monitoring required for a PSD permit would in most cases indicate whether the particular site attains the ozone standard.¹² However, in some cases, a source located in a designated clean area with potential emissions over 100 tons but less than 250 tons will not be subject to PSD review but may be subject to review under the offset ruling.¹³ Unlike PSD, the offset ruling does not require monitoring. For any sources covered by this ruling, but not PSD, it may therefore be necessary to determine, without monitoring of the particular site, whether the ozone standard is violated. To simplify such determinations, EPA is considering whether a violation measured at one monitor should be presumed to extend throughout the entire county where the monitor is located, or to some other area around the monitor thought to be representative of air quality. Comment is invited on the question of how far around a monitored violation the

¹² The Agency currently allows a source to subject itself to the full offset ruling requirements without preconstruction VOC monitoring to allow immediate commencement of construction, so long as post-construction monitoring is undertaken to determine whether there is a violation requiring a SIP revision under Part D.

¹³ The offset ruling applies to all sources with potential emissions of 100 tons or more, while for PSD some kinds of sources are not subject to review unless potential emissions are 250 tons or more.

standard violation should be presumed to extend. In the absence of monitoring data, there would be a presumption that the standard is attained throughout an area designated as attainment.

The Agency is of the opinion that exceedances of the ozone standard can be found in all directions from a major city. Thus, a source proposing to locate upwind of a nearby city should expect to find ozone NAAQS exceedances when monitoring according to EPA's monitoring procedures found in *Ambient Air Monitoring Guidelines for Prevention of Significant Deterioration*, OAQPS No. 1.2-096, U.S. EPA, Research Triangle Park, North Carolina 27711. A policy memorandum outlining the background data for this decision has been made a part of the Docket.¹⁴

D. Interstate Pollution. The court's discussion of the geographic applicability of PSD raises issues concerning interstate pollution. The court in *Alabama Power* gave new emphasis to protection against interstate pollution of PSD areas, pointing to sections 160(4) and 110(a)(2)(E)(i) of the Act as prohibiting emissions that would interfere with another state's PSD plan. *Alabama Power*, Slip op. at 26-27. The Agency seeks comment on when a source should be subject to review because of its interstate impacts and how to set emission limits necessary to protect against pollution that interferes, or may interfere, with another state's PSD measures.

The Agency intends to continue using the already established levels of significance for determining whether an impact on a Class II or III area warrants review. See, e.g. 43 FR 26398 (June 19, 1978). EPA also proposes to maintain its current policy of allocating increment consumption equally at state lines in cases of interstate disputes. Comments are sought on this approach. Finally, EPA is considering whether interference with another state's PSD program is adequately prevented by permitting sources located in one state but impacting on another state, to use one-half of the remaining increment at the points of impact in the other state. EPA solicits comments on whether interstate protection should be broadened to require compliance with emission limitations or other PSD requirements contained in the plan of the substantially impacted state.

XII. Pollutant Applicability

The regulations proposed today would maintain the practice of determining

¹⁴ June 28, 1979, memorandum from Walter C. Barber to David G. Hawkins regarding Policies for New or Modified VOC Sources.

pollutant by pollutant whether a source is subject to PSD review, nonattainment review or both. However, in accordance with the *Alabama Power* decision, once a source is subject to PSD review, it must meet the applicable control technology and air quality analysis requirements for each pollutant. For nonattainment NSR, only emissions of the nonattainment pollutant are subject to the applicable review requirements.

Under today's proposal, a modification would be subject to PSD if it would result in a significant net increase in the emissions of any regulated pollutant for which the source is major. In addition, the area must be designated attainment or unclassifiable for the pollutant, or designated nonattainment if the source impacts a PSD area in another state. In contrast, the NSR requirements of section 173, the offset ruling, or the section 110(a)(2)(I) construction restrictions would apply only to a modification which would result in a significant net increase in the amount of the nonattainment pollutant which the source already emits in major amounts (i.e., 100 or more tons per year). A large addition or a series of small additions since the applicable time of concern at an existing "minor" source would be treated as a "major modification": *Provided*, That the net emissions resulting from the addition or additions, in conjunction with the emissions from the existing minor source would exceed the applicable threshold for a major stationary source (see discussion on "Accumulation" in "Modification").

The applicability of the proposed regulations to new sources is more straightforward. For PSD, a new source is subject to review if its potential to emit any pollutant regulated under the Act would make it a major stationary source. Nonattainment review applicability again requires that the nonattainment pollutant be potentially emitted in major amounts.

Examples of the proposed applicability follow:

(1) Construction of a new plant with potential emissions of 500 tons per year (tpy) SO₂ and 50 tpy hydrocarbons (HC) locating in an area designated attainment for SO₂ but nonattainment for ozone would be subject to PSD preconstruction review for both pollutants. PSD review (BACT and air quality analysis requirements) applies to any pollutant emitted by the source once the source is subject to review for one pollutant.

(2) Construction of the same plant described in example (1) in a nonattainment area for both SO₂ and ozone would be subject solely to

applicable nonattainment provisions for SO₂. No PSD or nonattainment requirements would be applicable for HC because nonattainment requirements apply only to pollutants for which the source is major. This assumes that the source would affect no clean air area in another state.

(3) A modification to the example (1) plant which would cause a significant net increase in both SO₂ emissions and HC emissions would be subject to PSD review for SO₂ as well as HC. Nonattainment review for the net HC emission increase would not be applicable unless the new construction would itself qualify as a major modification.

(4) Modification at an existing source of 50 tpy SO₂ emissions, itself constructed since December 21, 1976, in a nonattainment area for SO₂, adding a new unit with 90 tpy SO₂ emissions, would subject the source to nonattainment requirements.

(5) Construction of a new source with potential emissions of 500 tpy HC and 50 tpy SO₂ locating in an ozone nonattainment area would subject the source only to nonattainment review. Since the source is not major for other pollutants regulated under the Act for which the area is designated unclassifiable or attainment, PSD would not apply.

(6) Modification to a source with emissions of 500 tpy SO₂ and 50 tpy HC in an area designated nonattainment for both SO₂ and ozone, resulting in 20-ton net increases in the level of emissions for both pollutants, would subject the source to applicable nonattainment provisions only for the SO₂ emission increase. There is no requirement in the nonattainment provisions of the Act, comparable to the requirement in the PSD provisions, that subjects a source to review for all regulated pollutants it emits once it is subject to review for one pollutant.

(7) A new source with potential emissions of 150 tpy of PM located in an area designated attainment for PM but impacting on a violation in a designated nonattainment area to which a Part D plan applies. Under the regulations proposed today, the source would be subject to both PSD and nonattainment requirements (see "Geographic Applicability" discussion). This would include application of LAER, certification of statewide compliance by other sources owned or operated by the source owner or operator, sufficient offsets to insure reasonable further progress in the nonattainment area, preconstruction monitoring and increment analysis.

(8) A new plant which would be a 50-tpy source of both SO₂ and HC proposes to construct in an area designated nonattainment for SO₂ and ozone. Neither PSD nor any nonattainment NSR under section 173, the offset ruling, or the section 110 restrictions on construction would apply.

XIII. Baseline Concentration

The term "baseline concentration" generally means the actual ambient concentration levels of pollutants in an area as of the applicable baseline date. This term is applicable only for sources of SO₂ and PM. The baseline concentration of an area is important because all emissions not counted in the baseline concentration count against allowable increments.

EPA's current regulations set a uniform baseline date of August 7, 1977 (40 CFR 51.24(b)(11), 52.21(b)(11) (1978)) as explained at 43 FR 26400 (June 19, 1978). The court in *Alabama Power* found that this uniform baseline date deviated impermissibly from section 169(4) of the Act, which generally defines baseline in terms of the ambient concentration existing at the time of the first application for a permit in an area. Slip op. at 37.

As a consequence of the court's decision, EPA proposes to remove the uniform baseline date of August 7, 1977, and set the baseline concentration at the time after August 7, 1977, "of the first application for a permit in an area subject to this part." Section 169(4), 42 U.S.C. 7479(4).

In order to implement the mandate expressed in section 169(4), EPA generally intends to define "area subject to this part" on the basis of AQCRs. When a major stationary source or major modification for any pollutant regulated under the Act applies for a PSD permit in a part of an AQCR designated as unclassifiable or attainment under section 107(d)(1) (D) or (E) ("clean air areas"), it establishes the baseline date for both PM and SO₂ in all parts of the AQCR that are designated attainment or unclassified for these pollutants.

As mentioned in the section entitled "Transition," the new definitions of major stationary source and major modification would be used to trigger baseline dates after August 7, 1977. The baseline date would be the time that an application for such major construction was filed which was substantially complete for purposes of complying with the applicable PSD regulations. Therefore, sources applying for PSD permits under the existing regulations which would not qualify as major construction under the final regulation,

would not trigger the baseline date. Similarly, sources that were not subject to the existing regulations but would be under the final ones would not have triggered the baseline date since no PSD application was filed. This definition is proposed to conform to the court's mandate, to minimize administrative and technical problems, and to preserve future growth options to the states.

The phrase "area to which (the PSD) part applies" in section 165 includes clean air areas and those nonattainment areas for which major construction is proposed that would have a substantial impact on a clean air area in another state. Clean air areas must be AQCR's or portions thereof. Section 107, 42 U.S.C. 7407. EPA's proposed definition of "area" for purposes of the section 169(4) baseline date thus comports with the term "area" as used in sections 107 and 165. EPA, however, has asked the court to reconsider and broaden its interpretation of "area" in section 165 and should the court do so, EPA's proposal under 169(4) might be affected.

In formulating its proposed definition of "area subject to (the PSD) part," EPA weighed the ease of administration under competing interpretations. The courts have recognized that a policy of regularity and simplicity in regulation should be respected. See, e.g., *Hercules, Inc. v. EPA*, 12 ERC 1376, 1394 (1978). Under EPA's proposal, the baseline date is uniform for all clean air areas throughout an AQCR. This minimizes the administrative problems that would result from the profusion of different baseline starting points in the same AQCR. For example, if "area" was defined by a source's area of impact, cumbersome recordkeeping procedures would be required. As more sources applied for PSD permits, areas of source impact would begin to overlap and the system would grow more complex. Such a system would be difficult for EPA to implement at a national level.

The Administrator does recognize that the AQCR proposal as the baseline area would also have some potential for implementation problems. Consider the case where a PSD source would locate in one AQCR but would also impact significantly a neighboring AQCR in the same state. Under today's proposal, such a source would trigger only the baseline date in the AQCR of location although it would consume increment in the adjacent AQCR. The Administrator specifically requests comment on the idea that only one baseline date should be established in the above example.

The proposal also reflects the Administrator's continuing concern that EPA's temporary implementation of the PSD program preserve future growth

options of the state. 43 FR 26401 (June 19, 1978). Many states have, in some cases, designated clean air areas more narrowly than by AQCR. If a state can in its revised SIP define "area" for purposes of baseline concentration as narrowly as a designated portion of an AQCR this might have the effect of establishing a later baseline date for some areas and increasing the amount of increment available for growth. This might be attractive to a state, especially if it feels the administrative and technical problems caused by proliferating baseline dates could be overcome. However, if EPA were to define "area" as each clean air area designation or source impact area, a state that wanted to expand the definition to AQCR-wide or statewide to ease administrative or technical problems might feel constrained from doing so. This is because the expansion of "area" might result in an earlier baseline date such that less increment would be available for future growth. See the additional discussion in "PSD SIP REVISIONS." Therefore, EPA is proposing to allow states some flexibility in defining "area" to which a baseline date applies.

EPA specifically solicits comments on its proposed definition of "area subject to (the PSD) part." Commenters are urged to address the legal, administrative and technical effect of any other definition, as well as the effect on future growth options of the states.

Finally, EPA generally intends to continue the actual emissions concept (explained at 43 FR 26400 (June 19, 1978)) in calculating baseline concentration as of the applicable baseline date. In the June 19, 1978 promulgation, EPA outlined certain exceptions to a strict use of an actual emissions concept made necessary by certain real world concerns. For example, sources that would increase actual emissions by expanding hours of operation (allowed under the SIP) or as a result of a SIP relaxation pending on or before the baseline date, were granted relief under the current regulations. The Administrator is proposing to continue such exemptions and believes that another situation may require similar attention.

Specifically, large groups of gas-fired boilers in the Gulf Coast area have been permitted to burn oil due to a possible natural gas shortage in the future. The affected units involve burners that could have accommodated such a fuel-switch before January 6, 1975 as well as some that were altered to accommodate the alternate fuel after this date.

XIV. Best Available Control Technology

Section 165(a) of the Act provides in part that any "major emitting facility" to be constructed in a PSD area must apply best available control technology (BACT) "for each pollutant subject to regulation under this Act emitted from, or which results from, such facility." 42 U.S.C. 7475(a)(4). In the existing PSD regulations, EPA limited the BACT requirement to each pollutant for which a major stationary source or major modification would be "major." 40 CFR 51.24(i)(1), 52.21(j)(1) (1978). For example, if a major stationary source in one of the 28 categories would emit only 50 tons per year of carbon monoxide, it would not have to apply BACT for that pollutant.

In *Alabama Power*, the court held that EPA had no authority to limit the BACT requirement in that way. Slip op. at 31. It did hold, though, that EPA has authority to apply *de minimis* thresholds to the BACT requirement, as long as they are "formulated with reasoned consideration for their context, with attention to the nature of the pollutant involved." *Id.*

In response to the court's decision, EPA is proposing to require a major stationary source or major modification to apply BACT for each regulated pollutant that it would emit. See proposed §§ 51.24(j)(1) and 52.21(j)(1).

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proposed §§ 51.24(i)(1) and 52.21(i)(1). As noted in the section on "Transition," this new requirement would apply only to a source or modification whose application for a PSD permit is not complete before the requirement comes into effect.

EPA believes that closely tailored *de minimis* exemptions may be unnecessary, since in setting BACT, the permitting authority may take into account the relative cost of the various control alternatives. See sections 169(3), 42 U.S.C. 7479(3); 40 CFR 51.24(b)(10) (1978). Except where a standard of performance for new sources imposed a minimal level of stringency, the authority could decide that BACT for a pollutant emitted in minor amounts was no control at all, in view of the high cost of any control. Nevertheless, the Administrator has proposed *de minimis* emission rates (see section on "De Minimis Exemptions") which would apply to the applicable BACT and LAER requirements. The reader is asked to comment on the need for the proposed *de minimis* levels.

XV. Ambient Monitoring

In upholding the environmental petitioners' challenges to EPA's PSD monitoring regulations (40 CFR 51.24(n), 52.21(n) (1978)), the court identified three areas where the regulations fell short of the statutory mandate in section 165(e) of the Act: The pollutants for which monitoring is required; required uses of monitoring data; and guidelines for state exemption authority. Therefore, EPA is proposing to amend its PSD regulations to correct shortcomings in the existing monitoring requirements. In addition, EPA is proposing the use of certain *de minimis* criteria which would govern the requirement for monitoring data as part of an air quality analysis. The *de minimis* criteria are discussed in the "De Minimis Exemptions" section of the preamble. Discussion of the state exemption guidance is found in the preamble under "PSD SIP REVISIONS."

A. *Preconstruction Monitoring.* The court held that section 165(e)(1) of the Act requires an ambient air quality analysis "for each pollutant subject to regulation under the Act" prior to applying for a PSD permit. Presently, EPA's regulations require monitoring only for pollutants for which national ambient air quality standards exist (criteria pollutants). There are a number of pollutants for which no national standards exist (noncriteria and hazardous pollutants), but which are regulated under new source performance standards (40 CFR Part 60) and national emission standards for hazardous pollutants (40 CFR Part 61).

EPA intends to comply with the court's ruling by requiring an ambient air quality analysis for all regulated pollutants. The analysis generally will be required to include ambient monitoring data. To meet the monitoring requirement, a proposed source will have to establish an appropriate monitoring network prior to applying for a PSD permit, or will have to gather and analyze representative air monitoring data resulting from ongoing monitoring activities.

Preconstruction monitoring data will not be required where the estimated impact of a pollutant emitted from a proposed source, as determined by modeling, is lower than the *de minimis* air quality level and the source is not a major stationary source for the pollutant. An explanation of how the *de minimis* exemption applies to monitoring requirements is in the preamble section of "De Minimis Exemptions."

EPA will perform a case-by-case analysis of a proposed source which impacts a Class I area, even though a proposed source may demonstrate that its impact falls below the *de minimis* level. In such cases, monitoring data may be required where it is determined that the proposed source will significantly impact the Class I area. Guidance on this and other monitoring situations addressed in today's proposal will be further described in a revised version of the *Ambient Monitoring Guidelines for Prevention of Significant Deterioration (PSD)*, OAQPS 1.2-096, U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Research Triangle Park, N.C. 27711, originally published in May 1978. Copies of this revised guideline may be obtained for review and comment by writing to EPA's Monitoring and Data Analysis Division (MD-14) at the above address.

For certain noncriteria pollutants, including sulfuric acid mist, carbon disulfide, carbonyl sulfide, methyl mercaptan, and dimethyl disulfide, EPA currently lacks acceptable measurement methods, reference materials, and internal quality control procedures to perform or evaluate monitoring. EPA recognizes its obligation under the court's decision to make a good-faith effort to develop monitoring techniques for these pollutants, as well as to improve existing techniques for other pollutants. Therefore, the Agency will begin work on developing reliable ambient measurement techniques for these pollutants. Until such time as appropriate monitoring techniques are available, EPA will require use of

modeling to estimate the air quality impact of these pollutants. As monitoring techniques are developed, notices of availability will be published in the Federal Register and sources will be required to apply these techniques.

In meeting the requirements for preconstruction monitoring, representative air quality data, as determined through modeling, may be appropriate for some sources. In particular, representative data may be adequate for isolated sources, where few, if any other sources, would affect background concentrations in the source's area of impact. EPA solicits comment on the use of representative air quality data in general and specifically for isolated sources.

Aside from the listed noncriteria pollutants, monitoring techniques are available and monitoring requirements will be phased in as discussed in the "Transition" section. EPA recognizes, however, that currently available monitoring techniques for some of these pollutants may be experimental in nature. In addition, as to some pollutants, other components of an acceptable monitoring system, including standard reference materials, internal and external quality control procedures, and network and siting criteria, may not be fully developed. With these limitations in mind, EPA intends to implement noncriteria and hazardous pollutant monitoring requirements on a case-by-case basis. The Agency will consider the state-of-the-art and the reliability of data in determining what techniques will be required.

B. *Post-construction Monitoring.* In addition to the pre-application monitoring requirements already described, today's proposal includes discretionary authority for EPA to require post-construction monitoring to determine the effects of source emissions on allowable increments. In addition, post-construction monitoring can be particularly useful in validating increment consumption predictions made through modeling. Accordingly, EPA intends to require post-construction monitoring from large sources of particulate matter and sulfur dioxide, such as power plants, smelters, refineries, and iron and steel mills, to help assess actual increment consumption. Other sources whose emissions are estimated to result in air quality levels approaching and allowable increment or a national ambient air quality standard may also be required to submit post-construction monitoring data.

C. *Required Use of Monitoring Data.* The court ruled that EPA's current regulations are incomplete, since they

require monitoring only to determine whether an applicable national ambient standard will be exceeded. The court, noted that section 165(e)(2) provides that continuous air quality monitoring data must also be used to determine whether increments will be exceeded. The court recognized that modeling techniques would be the principal device relied upon for the projection of the impact on air quality emissions from a regulated source, but they envisioned that monitoring would "impose a certain discipline on the use of modeling techniques." Moreover, the court indicated that the widespread use of monitoring would enhance the development of sophisticated monitoring techniques and the collection of a data base for each pollutant.

EPA agrees that monitored ambient data is valuable for such purposes as validating and refining models and, in some cases, providing a direct measure of increment consumption. In accordance with the court's opinion, EPA plans to place a greater emphasis on the development and use of monitoring data.

However, use of monitoring data will always be limited to some degree. First, air quality impacts of a proposed source must necessarily be based on modeling, not monitoring. Second, several actual emission changes that would be detected by an ambient monitor are not considered to consume increment. For example, emissions from any source commencing construction prior to January 6, 1975, but completed at some later date, do not count against increments. Third, a state may exempt certain emission changes which otherwise would be counted against increment. Potential exemptions include federally ordered fuel switches, temporary emissions, and new sources outside the United States. Finally, with limited exceptions, section 123 prohibits a source from receiving credit for the dispersive effects of a stack height which exceeds good engineering practice. Consequently, if a source's emissions are counted against increment and its stack height exceeds good engineering practice, its emissions must be calculated as though emitted from a good engineering practice height. A monitor will reflect air quality impacts based on actual stack height.

In view of these limitations, EPA believes that for the present monitoring data will be most productive in checking the accuracy of models. To some extent, monitoring data may be used to measure increment consumption, particularly in cases where there are few or no other sources in the area of a proposed new

source or modification, or where all sources located in the area of concern have emissions which count against the increment. In any case, where an applicant or other party believes that a model required by EPA has either overpredicted or under predicted the air quality impact of a source, monitoring data will be evaluated to the extent possible to determine whether modeling adjustments are necessary.

Over time, the development of more sophisticated monitoring techniques may permit increased use of monitoring data to track increment consumption and establish ambient baselines, as well as improve the level of confidence in modeling.

XVI. Notification

Each person who plans to construct a source or modification must determine initially whether it is "major." Currently, EPA does not actively police these negative determinations. In particular, the Administrator does not require any notice of the construction of any source or modification which is indeed not "major." As a result, if an owner or operator believes that his construction would not be "major," he is free to construct the source or modification without a construction permit and without notifying the appropriate permitting authority. Undoubtedly, few persons making a negative determination would give any notice of construction to the reviewing authority.

In view of the new definitions of "potential to emit" and "modification" proposed today, the Administrator believes preconstruction notice is now necessary for certain sources. Since "potential to emit" refers to controlled emissions and "major modifications" to net increases only, the scope of PSD preconstruction review will shrink dramatically with many more sources having the opportunity to construct or modify without preconstruction review. In EPA's judgment, the borderline cases where mistakes or evasion could occur will increase sufficiently to justify scrutiny.

Based on the Administrator's authority under section 114 to require any owner or operator to provide information and make reports as the Administrator may reasonably require, EPA is proposing a preconstruction notice requirement to review source determinations of inapplicability. The notice requirement would appear in entirely new paragraphs, §§ 51.24(v) and 52.21(v) for PSD and in subparagraph 41 of section II of EPA's offset ruling.

Under the proposed regulations, an owner or operator of certain sources would be required to give written

preconstruction notice to the Administrator 90 days in advance of beginning on-site construction. The notice requirement would apply to (1) emission changes not qualifying as major modifications due to sufficient emission reductions, and (2) sources not qualifying as major stationary sources due to application of air pollution controls not generally required by the applicable SIP or 40 CFR Parts 60 and 61. The notice must state specifically the nature and timing of the applicable emission changes and contain a demonstration that the proposed reductions are sufficient, enforceable, and contemporaneous with increases. After an owner or operator would provide an acceptable notice, no construction permit would be required.

The Administrator is also proposing that if a proposed construction project either fails to provide the required notice or to construct in accordance with information within the notice, it would be considered to be in violation of the applicable SIP. Sections 52.21(s) and 51.24(s). Merely providing notice should not be construed as satisfying all other applicable responsibilities under the Act, and a source which improperly constructs would do so in violation of the SIP.

Difficulty may arise in determining when contemporaneous intrasource emission tradeoffs have occurred or will occur. The Administrator, therefore, is also proposing to require written notice from source owners intending to take future offset credit from soon-to-occur shutdowns or cleanup. Such notice would be given at the time the emission reductions would be accomplished and would give details as to what emissions are being reduced. With this approach the source owner will add certainty to his ability to claim reductions, and less review time will be needed by the reviewing agency to verify the credibility of controversial emission reductions.

Finally, for nonattainment areas with an approved, enforceable SIP, the Administrator is considering the notice mechanism to implement the intrasource compliance requirement under section 173. Under this approach, in addition to determining if no net increase would occur at a facility (plant), the source would have to notify the reviewing authority that all emission units at that plant are in compliance with the applicable SIP. The Administrator solicits comment on this proposal.

XVII. PSD SIP Revisions

Comments are solicited on three issues concerning the development of acceptable PSD plans by states. The

issues are: (1) The ability of states to submit different but effective PSD programs, (2) the flexibility that states have to define the baseline area for PSD, and (3) the state monitoring exemption.

A. Equivalent State Programs. During the past year, states have submitted PSD portions of their SIPs that deviate considerably from the existing 40 CFR 51.24 regulations. Under existing regulations, the Administrator can only approve different PSD requirements submitted by states that individually are more stringent than the corresponding 40 CFR Part 51 regulations. As a result, few opportunities are left for approval of different, but effective, state PSD programs. Today the Administrator is requesting comment on the existing approach.

While Part C is quite specific on the type of PSD program that would be acceptable, portions of the Act may allow the states to use equivalent methods to meet statutory objectives (such as section 110(a)(2)(D)). The Administrator believes some flexibility in approving state plans should also apply to the PSD program. In addition, there are policy reasons for permitting equivalent state PSD programs. States should be allowed some latitude to develop PSD programs more closely tailored to their individual goals and needs. *Provided*, That the state PSD program would uphold the objectives of Part C. Such programs would conceivably identify several potential improvements in terms of administrative ease and some opportunities for additional emissions control.

The Administrator is today specifically seeking comments on what provisions under 40 CFR 51.24 allow any flexibility for innovative state programs and whether allowing such flexibility would undercut the need for consistent nationwide implementation of PSD review. Comment is also solicited on how EPA can verify whether a proposed state program will offer an equivalent or improved system for implementing PSD.

To facilitate comment, the Administrator is asking for response on an approach which would permit variation in state plans for certain requirements. Under this approach, states could not satisfy the following requirements of 40 CFR 51.24 with alternative regulations:

- a. Maximum allowable increments.
- b. Modeling techniques.
- c. Class I area protection.
- d. Notice to the Administrator or the applicable Federal Land Manager for significant actions.
- e. New (grass roots) major stationary source applicability.

f. NSPS, NESHAPS minimum requirements for BACT determinations.

States would be permitted to meet the following requirements of 40 CFR 51.24 with different but equivalent state regulations or implement them with considerable discretion:

- a. BACT determinations.
- b. Design and amount of data needed for monitoring purposes.
- c. Establishing *de minimis* levels for BACT and air quality review.
- d. Temporary exclusions from increment consumption.
- e. Banking of emissions for future offsets.
- f. Source information and analysis required of the applicant.
- g. Public participation after providing the opportunity for public hearing.

In determining if a state program with several requirements differing substantively from 40 CFR 51.24 satisfy those requirements, overall program equivalence would be based on the ability of the state system to capture as many emissions as would the 40 CFR 51.24 regulations.

B. Baseline Area. A more specific issue related to state flexibility in developing PSD plans involves the definition of the area affected by the baseline date. Under the proposed amendment, the Part 51 regulations, like the Part 52 regulations, would define "area subject to this part" on the basis of AQCRs. Under that definition, the baseline date would be set for every part of an AQCR designated unclassifiable or attainment under section 107(d)(1) (D) or (E), 42 USC 7407(d)(1) (D) or (E), when the first major stationary source locating in any such part of the same AQCR applies for a PSD permit. (See "BASELINE CONCENTRATION").

This definition is proposed to minimize administrative and technical problems and to preserve future growth options of the states. As discussed in "BASELINE CONCENTRATION," EPA believes that a state may in its revised SIP define "area" for purposes of baseline concentration to be any specific AQCR portion that it had designated as attainment or unclassifiable. Conversely, a state for administrative reasons could define "area" as being the entire state.

EPA specifically solicits comments on its proposed regulatory guidance to states for defining "area subject to this part" in section 169(4). Comments should address the legal, administrative, and technical effects of other proposals, as well as effects on future growth options of the states.

C. State Monitoring Exemption. In the court's ruling, it was indicated that EPA

did not provide the states with adequate guidance to determine when less than one calendar year of data may be used to perform a complete and adequate analysis of continuous air quality monitoring data. Subsection 165(e)(2) stipulates that such partial exemptions from monitoring shall be applied "in accordance with regulations promulgated by the Administrator." Guidance addressing shorter periods of time was included in the *Air Monitoring Guidelines for Prevention of Significant Deterioration* (section 2.7, Duration of Monitoring). To comply with the court ruling, EPA proposes to promulgate the appropriate material in the PSD regulations.

Under this proposal states would be allowed to accept less than one calendar year of data for PM, SO₂, CO, and NO_x monitoring if the applicant demonstrates that data obtained during a shorter time period, but no less than four months, account for the maximum air quality levels that can be expected. In the case of ozone, monitoring requirements must account for those months in which the average daily maximum temperatures exceed 20° C (68° F) in the area under study, or for the four months of the year with the warmest average maximum temperature for areas where there are not at least four months with average maximum temperatures greater than 20° C (68° F).

It should be noted that this amendment applies only to pollutants for which a national ambient air quality standard exists since section 165(e)(2) does not apply to noncriteria pollutants. Guidance on the amount of monitoring data required for noncriteria pollutants will be added to the *Air Monitoring Guidelines for Prevention of Significant Deterioration* at the same time that the guideline is revised to address other monitoring criteria.

XVIII. Additional Issues

The Administrator is today proposing certain regulatory changes which are not required by the *Alabama Power* decision. These changes are minor corrections considered necessary to make the PSD regulations as consistent as possible with the nonattainment requirements for NSR. The specific changes proposed today involve: (1) Use of the section 111(j) waiver for innovative control technology to meet BACT; (2) new source review requirements to modify existing construction permits; (3) applicability of PSD review to modified nonprofit health or educational facilities; (4) amount of notice required from relocating PSD sources; and (5) applicability of PSD to secondary emissions. In addition, this

section contains discussions on the economic impact of the proposed regulations and how to comment on this rulemaking.

A. Innovative Control Technology. Section 111(j) of the Act provides for the issuance of waivers to sources which propose use of control technology the Administrator determines to be innovative. Under section 111(j), one or more waivers from the new source performance standards (NSPS) may be issued for a period of up to seven (7) years. A waiver may be issued if the Administrator determines that:

- (1) The innovative technology has not been adequately demonstrated;
- (2) The innovative technology has a substantial likelihood of meeting the NSPS at lower cost in terms of energy, economic, or non-air quality environmental impacts;
- (3) The source would not cause or contribute to an unreasonable risk to public health, welfare or safety; and
- (4) An excessive number of such waivers, as determined by the Administrator, have not been granted.

The waiver is to include conditions necessary to assure that the source will not prevent attainment and maintenance of ambient standards and to assure that the authorized system will function properly.

The Act offers no indication as to how a source that obtains a section 111(j) waiver should be treated for purposes of PSD review. Since a large number of NSPS sources are also subject to PSD, the Administrator is concerned that failure to accommodate section 111(j) sources under PSD would tend to discourage the development of newer, more effective control technologies.

In the June 19, 1978 Federal Register, the Administrator solicited comment on making the innovative control waiver applicable to BACT determinations under the PSD program. Since no adverse comments were received, the Administrator is today proposing specific regulatory language defining how the section 111(j) waiver applies to BACT determinations. Today's amendments to the PSD regulations provide that BACT for a source with a section 111(j) waiver would be defined as the innovative control equipment for which the waiver has been granted and would include an emission limitation and a schedule for meeting that limitation. Paragraph (u) as proposed specifies that a section 111(j) source may satisfy the air quality analysis requirement by modeling its projected emissions after the 111(j) controls are installed. Any increased level of emissions which might occur during the waiver period would be treated as

temporary and as having an insignificant impact on air quality. The Administrator specifically solicits comments on EPA's authority to allow temporary violations of increments, especially in Class I areas, due to 111(j) waivers while not allowing temporary violations of the ambient standards.

In addition, the Administrator proposes to modify 40 CFR 52.21 to accommodate PSD sources which propose to use innovative control technology, but which are not subject to NSPS and therefore not eligible for section 111(j) waivers. Under the proposal, these sources would receive the same treatment as sources eligible for section 111(j) waivers. Subparagraph (u)(2) outlines criteria by which the Administrator may determine whether a proposed PSD source's control technology is "innovative." The criteria track the requirements established for section 111(j) waivers.

Once a proposed technology is determined to be innovative, the Administrator must establish a schedule for meeting the BACT emission limit. The schedule, which will be specified as part of the BACT requirement, should take into consideration the design, installation, and capital cost of the technological system or systems being used. In no case may the schedule (including any extension) extend beyond seven years after PSD permit issuance, or 111(j) waiver issuance, or four years after the source commences operation, whichever is earlier.

The regulations include a provision for bringing into compliance any source whose waiver is terminated because it has failed to achieve BACT with the innovative system or failed to demonstrate that the system will not cause or contribute to an unreasonable risk of public health, welfare or safety. Such a source will be granted an extension for whatever minimum period of time the Administrator feels is necessary to achieve BACT. The extension may not exceed three years.

B. Modified Permits. The Administrator is also proposing to add a new paragraph (t) which would require that PSD-permitted sources obtain, under certain circumstances, modified or new PSD permits. Similarly, subsection H is proposed to be added to section II of the offset ruling. The new requirements are intended to resolve the current uncertainty regarding the obligations of a source and a reviewing authority when changes are necessary in an approved construction permit.

Under today's proposal, a permitted source would be required to modify its permit if it obtained a permit and then, prior to commencement of operation,

altered its design capacity such that emissions increased significantly but less than the applicable 100/250 tons threshold. Here the term significantly refers to that pollutant-specific emission rate which would equal or exceed the rate identified in Table 1 (see section on "De Minimis Exemptions"). In addition, if design capacity and potential emissions were decreased prior to commencement of operation, the permit should be modified to reflect the change. Such information is vital for tracking the PSD increment that is available to other new sources.

A source would also be required to obtain a modified permit when, prior to commencement of operation, it proposed changes in the nature of its process equipment such that the potential emissions from the newly planned equipment would not equal or exceed the applicable 100/250 tons threshold. Finally, a modified permit would be required for a source that obtained a permit under the existing regulations which limited its hours of operation and then later, decided to increase its operating hours.

Proposed sources which increase design capacity such that net potential emissions would increase by greater than 100/250 tons per year and proposed sources which plan new process equipment, potentially emitting 100/250 tons per year, must obtain new permits. Such sources would likely require a more extensive review, possibly requiring more than 90 days for completion.

The Administrator wishes to point out that during the time of application for a modified permit the affected source would retain increment rights only for those specific points of emissions which were permitted originally. For example, consider a source that obtains a permit to build a 1600 tons/day (dry pulp) lime kiln and then decides to scale down the final construction to 1500 tons/day and build a 20 megawatt steam generator as well. Assume the potential emissions of each pollutant emitted by the steam generator would be less than 100 tons per year. The source would need a modified permit to reflect the addition of the generator and the decrease in the size of the lime kiln. The generator emissions would have to be evaluated against the available increment at the time of the proposed permit modification after all other complete applications filed before this time. The fact that the lime kiln's increment usage would be reduced does not mean that any increment rights are transferable to the steam generator, because the generator would not be an originally permitted

emission point. If the generator's emissions were over 100 tons per year, the source would require a new permit.

C. Nonprofit Institutions. Under the existing regulations, upon written request by the Governor of a state, the PSD permitting requirements would not apply to a nonprofit health or educational institution to be located in that state. The Administrator is proposing that this exemption apply to modified nonprofit health or educational institutions as well as those newly constructed.

D. Portable Facilities. Under existing regulations, previously permitted PSD sources which propose to relocate must provide a thirty (30) day notice. Based on experience in implementing these regulations, the Administrator is proposing to change the thirty (30) day notice to one which reflects a reasonable amount of time, to be not less than ten (10) days. This would enable sources with extremely short time delays between construction projects, such as portable asphalt batch plants, to better comply with the intent of the regulations.

E. Secondary Emissions. The Administrator is today incorporating into the PSD regulations the definition of secondary emissions in the offset ruling (44 FR 3274). Under this proposal, secondary emissions would mean emissions from new or existing sources which occur as a result of the construction and/or operation of a major source or major modification, but do not necessarily come from the source itself. Secondary emissions would include, but would not be limited to:

(a) Emissions from ships or trains coming to or from a source or modification, or

(b) Emissions from off-site support sources which would be constructed or would otherwise increase emissions as a result of the construction of a major source.

Under today's proposal, secondary emissions would not count in determining the potential to emit of a source. In addition, when the source is otherwise subject to PSD review, the BACT requirement would not apply to secondary emissions. However, secondary emissions, where well-known and quantifiable, would be taken into account in assessing if an otherwise subject source would cause or contribute to a violation of any applicable increment or standard.

F. Economic Impact Assessment. Section 317 of the Act requires an economic impact assessment for regulations and revisions to regulations issued under Part C. Executive Order 12044 similarly requires an impact

assessment for significant regulatory actions. The Agency has not yet conducted either assessment for several reasons. First, a preliminary assessment suggests that many fewer sources will be subject to review under the new definition of potential to emit. As many as three-quarters of the sources subject to review under the existing regulations will not require permits under the regulations proposed today. Moreover, the application of a plant-wide definition of source for PSD would allow replacements and reconstructions at existing units to offer escape review.

While many fewer sources may be subject to review, the impact of certain new requirements, such as PSD monitoring for other pollutants, remains to be assessed. The Administrator believes that such additional costs under today's proposal would, on balance, be more than offset by the reduced economic impacts associated with the issuance of fewer permits.

Second, the Administrator has determined to propose regulations without an economic impact assessment to replace as quickly as possible the regulations struck down by the *Alabama Power* decision. The court stated that its purpose in issuing its summary opinion was "to enable EPA to proceed as soon as possible to commence rulemaking or other proceedings necessary to promulgate those revisions in the PSD regulations required by our rulings, and to take other prudent action to effectuate congressional policies." Slip op. at 7. In view of the court's directive and the need, identified both by industry and EPA in papers filed with the court, to maintain an ongoing PSD permit program, it is the judgment of the Administrator that this proposed rulemaking not be postponed until an economic impact assessment is prepared.

Finally, the Agency believes that the court's supplemental opinion may clarify which of several options proposed today should be adopted. Given the limited time and resources of the Agency, the Administrator believes that better use will be made of the Agency's resources if the economic assessment is performed after issuance of the court's supplemental opinion, and further clarification of which options the Agency will adopt. Consequently, the Administrator intends to prepare the required economic impact assessment after issuance of the court's supplemental opinion. This analysis will be made available for public comment upon completion and such comment will be taken into account in the promulgated regulations.

G. Comments. This rulemaking is proposed under authority of section 307(d) of the Act, 42 U.S.C. 7607(d). EPA solicits written comments on the proposals in this notice. The period for comment ends October 5, 1979.

Comments should be sent, in triplicate if possible, to the Central Docket Section, EPA, Room 2903B, Waterside Mall, 401 M Street, S.W., Washington, D.C. 20460, Attention: Docket No. A-79-35. EPA plans to hold public hearings on the proposals in September 1979 in San Francisco, California, and Washington, D.C. The hearings will be informal and legislative in nature. Transcripts will be taken. EPA will announce the exact time and place for the hearings in the near future. The written comments, transcripts of hearings, and other relevant documents will be available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, in the Central Docket Section.

(Secs. 101(b)(1), 110, 114, 160-69, and 301(a) of the Clean Air Act, as amended (42 U.S.C. 7401(b)(1), 7410, 7414, 7470-79, and 7601(a).)

Dated: August 22, 1979.

Douglas M. Costle,
Administrator.

Requirements for State PSD Plans

1. Title 40, Part 51 of the Code of Federal Regulations is proposed to be amended as follows:

In § 51.24 paragraphs (b)(1)-(6) and (11) are revised; (b)(18) is deleted; existing paragraphs (b)(12)-(17) are renumbered as (13)-(18); new (b)(12) and (20)-(23) are added; paragraphs (i)-(k) and (n) are revised; (t)-(v) are added. As revised and added those paragraphs read as follows:

§ 51.24. Prevention of significant deterioration of air quality.

(b) **Definitions.** For the purposes of this section:

(1) "**Major stationary source**" means: (i) Any of the following stationary sources of air pollutants which emit, or have the potential to emit, 100 tons per year or more of any pollutant regulated under the Clean Air Act (the "Act"): Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input, coal cleaning plants (with thermal dryers), kraft pulp mills, portland cement plants, primary zinc smelters, iron and steel mill plants, primary aluminum ore reduction plants, primary copper smelters, municipal incinerators capable of charging more than 250 tons of refuse per day, hydrofluoric, sulfuric, and nitric acid plants, petroleum refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants,

carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production plants, chemical process plants, fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input, petroleum storage and transfer units with a total storage capability exceeding 300,000 barrels, taconite ore processing plants, glass fiber processing plants, and charcoal production plants;

(ii) Notwithstanding the stationary source sizes specified in paragraph (b)(1)(i) of this section, any stationary source which emits, or has the potential to emit, 250 tons per year or more of any air pollutant regulated under the Act.

(2)(i) "Major modification" means any physical change in or change in the method of operation of a major stationary source, or series of contemporaneous physical changes in or changes in the method of operation of a major stationary source, that would result in a significant net increase in that source's potential to emit the pollutant for which the stationary source is major (or that would make the stationary source major taking into account all accumulated net increases in potential emissions occurring at the source, including any initial construction since August 7, 1977). The term "major modification" serves as the definition of "modification" or "modified" when used in the Act in reference to a major stationary source.

(iii) A physical change shall not include routine maintenance, repair and replacement.

(iii) A change in the method of operation, unless previously limited by enforceable permit conditions, shall not include:

(a) Use of an alternative fuel or raw material by reason of an order under sections 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation), a prohibition under the Power Plant and Industrial Fuel Use Act of 1978 (or any superseding legislation), or by reason of a natural gas curtailment plan pursuant to the Federal Power Act;

(b) Use of an alternative fuel or raw material, if prior to January 6, 1975, the source was capable of accommodating such fuel or material;

(c) Use of an alternative fuel by reason of an order or rule under section 125 of the Act;

(d) Change in ownership of the stationary source; or

(e) Use of refuse derived fuel generated from municipal solid waste.

(iv) Changes are "contemporaneous" only if reductions occur after a notice is

filed pursuant to paragraph (v)(4) and before operation of the emission unit or units that will result in emission increases. Also, to be "contemporaneous" all of the emission reductions must be completed and enforceable under the state plan before operation of the emission unit or units that will result in any emission increase. Where the new emission unit is a replacement for an emission unit that is being shut down in order to provide the necessary reductions, the reviewing authority may allow up to 180 days for shakedown of the new emission unit before the existing emission unit is required to cease operation.

(v) For a series of changes in a stationary source to satisfy the requirement of "no net increase," all of the following must be satisfied:

(a) All reductions and all increases must be for the same pollutant;

(b) The sum of all decreases must be greater than or equal to the sum of all increases;

(c) On balance the air quality of the affected area must not be adversely impacted.

(vi) In performing the calculation in paragraph (b)(2)(v) of this section to determine whether the sum of all decreases is greater than or equal to the sum of all increases the following rules shall apply:

(a) Subject to the following adjustments, the size of an increase or decrease is determined by the difference between the potential to emit of the change of emissions unit before and after the change.

(b) If potential to emit for a changed emission unit was initially higher than allowable emissions, then no offset credit may be taken for decreasing potential to emit down to allowable emissions.

(c) The requirement of 40 CFR Part 51, Appendix S, sections IV, C, 2 and 4 shall apply involving the amount of credit permissible for changing fuels and for replacing one hydrocarbon compound with another of lesser reactivity.

(3) "Potential to emit" means the capability at maximum design capacity to emit a pollutant after the application of air pollution control equipment. Annual potential shall be based on the maximum annual rated capacity of the stationary source assuming continuous year round operation. Enforceable permit conditions on the type of materials combusted or processed may be used in determining the annual potential. Secondary emissions do not count in determining annual potential. Fugitive emissions also do not count, except with respect to the following

stationary sources and then only to the extent quantifiable:

- (i) Coal cleaning plants
- (ii) Kraft pulp mills
- (iii) Portland cement plants
- (iv) Primary zinc smelters
- (v) Iron and steel mill plants
- (vi) Primary aluminum ore reduction plants
- (vii) Primary copper smelters
- (viii) Municipal incinerators
- (ix) Hydrofluoric, sulfuric, or nitric acid plants
- (x) Petroleum refineries
- (xi) Lime plants
- (xii) Phosphate rock processing plants
- (xiii) Coke oven batteries
- (xiv) Sulfur recovery plants
- (xv) Carbon black plants
- (xvi) Primary lead smelters
- (xvii) Fuel conversion plants
- (xviii) Sintering plants
- (xix) Secondary metal production plants
- (xx) Chemical process plants
- (xxi) Fossil fuel-fired boilers
- (xxii) Petroleum storage and transfer units
- (xxiii) Taconite ore processing plants
- (xxiv) Glass fiber processing plants
- (xxv) Charcoal production plants
- (xxvi) Fossil fuel-fired steam electric plants
- (xxvii) Any other stationary source category which, at the time of the applicability determination, is being regulated under section 111 or 112 of the Act.

(4) "Stationary source" means any structure, building, facility or installation which emits or may emit any air pollutant regulated under the Act.

(5) "Structure, building, facility or installation" means any grouping of pollutant-emitting activities which are located on one or more contiguous or adjacent properties and which are owned or operated by the same person (or by persons under common control).

(6) "Emission unit" means any part of a stationary source which emits or has the potential to emit any pollutant regulated under the Act.

(11) "Baseline concentration" means that ambient concentration level which exists at the time of the applicable baseline date, minus any contribution from major stationary sources and major modifications on which construction commenced on or after January 6, 1975. The baseline concentration shall include contributions from:

(i) The actual emissions of other sources in existence on the applicable baseline date, except that contributions from such existing sources to the extent

that a plan revision proposing less restrictive requirements affects such sources was submitted on or before the baseline date and was pending action by the Administrator on that date shall be determined from the allowable emissions under the plan as revised; and

(ii) The allowable emissions of major stationary sources and major modifications which commenced construction before January 6, 1975, but were not in operation by the applicable baseline date.

(12) "Baseline date" means, for every part of an Air Quality Control Region (AQCR) designated as unclassifiable or attainment under section 107(d)(1) (D) or (E) of the Act the date of the first complete application after August 7, 1977 for a permit under this section for any major stationary source or major modification in any part of the AQCR.

(20) "Secondary emissions" means emissions which occur or would occur as a result of the construction or operation of a major stationary source or major modification, but do not necessarily come from the major stationary source or major modification itself. For purposes of this section, secondary emissions must be specific and well defined, must be quantifiable, and must impact the same general area as the stationary source or modification which causes the secondary emissions. Secondary emissions may include but are not limited to:

(i) Emissions from ships or trains coming to or from the stationary source or modification; and

(ii) Emissions from any offsite support source which would be constructed or would not otherwise increase its emissions.

(21) "Innovative control technology" means any system of air pollution control that has not been adequately demonstrated in practice, but would have a substantial likelihood of achieving greater continuous emission reduction than any control system in current practice or of achieving at least comparable reductions at lower cost in terms of energy, economics, or nonair quality environmental impacts.

(22) "Fugitive emissions" mean those emissions which do not pass through a stack, chimney, vent, or other functionally equivalent opening.

(23) "Reconstruction" will be presumed to have taken place where the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost of a comparable entirely new stationary source. However, any final decision as to whether reconstruction has occurred

shall be made in accordance with the provisions of 40 CFR 60.15(f)(1)-(3). A reconstructed stationary source will be treated as a new stationary source for purposes of this section, except that use of an alternative fuel or raw material by reason of an order in effect under sections 2 (a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (or any superseding legislation), by reason of a natural gas curtailment plan in effect pursuant to the Federal Power Act, or by reason of an order or rule under section 125 of the Act, shall not be considered reconstruction. In determining best available control technology for a reconstructed stationary source, the provisions of 40 CFR 60.15(f)(4) shall be taken into account in assessing whether a standard of performance under 40 CFR Part 60 is applicable to such stationary source.

(i) Review of Major Stationary Sources and Major Modifications—Source Applicability and General Exemptions.

(1) The plan shall provide that no major stationary source or major modification shall be constructed unless, as a minimum, requirements equivalent to those contained in the paragraphs (j), (l), (n), (p), (r), (t), (v) of this section have been met.

(2) The plan shall provide as follows:

(i) The requirements of paragraphs (j) through (u) shall apply to any major stationary source or major modification that:

(a) Would be constructed in an area which is designated under section 107 as attainment or unclassifiable for a pollutant for which the source or modification would be major; or

(b) Would significantly impact an area in another state which is designated under section 107 as attainment or unclassifiable for a pollutant for which the source or modification would be major.

(ii) A major stationary source or major modification that is major for volatile organic compounds is also major for ozone.

(3) The plan may provide that requirements equivalent to those contained in paragraphs (j) through (u) of this section do not apply to any major stationary source that would be a nonprofit health or education institution or to any major modification that would occur at such an institution.

(4) The plan may provide that a portable stationary source which has received a permit under requirements equivalent to those contained in the subparagraphs of paragraph (j) through

(u) of this section, as applicable, may relocate without again being subject to those requirements, if—

(i) Emissions from the stationary source would not exceed its allowable emissions;

(ii) Emissions from the stationary source would impact no Class I area and no area where an applicable increment is known to be violated; and

(iii) Reasonable notice, not to be less than 10 days, is given to the reviewing authority prior to the relocation identifying the proposed new location and the probable duration of operation at the new location.

(j) *Control Technology Review.* The plan shall provide that—

(1) A major stationary source or major modification shall meet each applicable emission limitation under the State Implementation Plan plus each applicable emission standard and standard of performance under 40 CFR Parts 60 and 61.

(2) A major stationary source or major modification shall apply best available control technology for each pollutant regulated under the Act that it would emit in a significant amount.

(3) In the case of a major modification, the requirement for best available control technology shall apply only to each new or modified emission unit.

(4) For phased construction projects the determination of best available control technology shall be reviewed and modified as appropriate at the latest reasonable time prior to commencement of construction of each independent phase of construction.

(k) Exemptions from Impact Analyses.

(1) The plan may provide that with respect to a particular pollutant the requirements of paragraphs (l), (n) and (p) shall not apply to a proposed major stationary source or major modification if—

(i) The increase in allowable emissions of that pollutant from the stationary source or modification would impact no Class I area and no area where an applicable increment is known to be violated; and

(ii) The emissions of the pollutant are of a temporary nature including but not limited to those from a pilot plant, a portable facility, construction, or exploration.

(2) The plan may provide that with respect to sulfur dioxide or particulate matter the requirements of paragraphs (l), (n) and (p) of this section shall not apply to a modification of a major stationary source which was in existence on August 7, 1977, if—

(i) Any increase in allowable emissions of either of those pollutants after the application of best available

control technology would impact no Class I area:

(ii) Any such increase would cause or contribute to no violation of any national ambient air quality standard; and

(iii) Any increase in allowable emissions of any air pollutant regulated under the Act after application of best available control technology would be less than 50 tons per year.

(3) The requirements of paragraphs (l), (n), and (p) of this section shall not apply to a proposed major stationary source or major modification with respect to a particular pollutant if:

(i) The increase or net increase in emissions would impact no Class I area;

(ii) The increase or net increase in emissions is not significant or would cause no significant air quality impact; and

(iii) The increase or net increase in emissions would be less than 100 tons per year for stationary sources listed under (b)(1)(i) or 250 tons per year for other stationary sources.

(n) Monitoring—(1) Preapplication monitoring. (i) The plan shall provide that any application for a permit under this section shall contain an analysis of ambient air quality in the area the proposed stationary source or modification would affect for each pollutant regulated under the Act which the stationary source or modification would emit in a significant amount.

(ii) The plan shall provide that as necessary to determine whether emissions from the proposed stationary source or modification would cause or contribute to a violation of any maximum allowable increase or national ambient air quality standard in any area, the analysis required under paragraph (n)(1) of this section shall include continuous air quality monitoring data for any pollutant emitted by the stationary source or modification for which a national ambient air quality standard exists, except non-methane hydrocarbons.

(iii) The plan shall provide that the continuous air monitoring data required under paragraph (n)(1)(ii) of this section shall relate to, and shall have been gathered over the year preceding receipt of the complete application.

(iv) Notwithstanding paragraph (n)(1)(iii) of this section, the plan may provide that the owner or operator may submit less than one year of continuous air quality monitoring data for the analysis required under paragraph (n)(1) of this section, if—

(a) The owner or operator of a proposed stationary source or

modification demonstrates for total suspended particulates, sulfur dioxide, carbon monoxide, and nitrogen dioxide through historical data or dispersion models that the data for such shorter period of time, but not less than four months, will be obtained during a time period when maximum air quality levels can be expected.

(b) The data for ozone will be obtained for those months in which the average daily maximum temperatures exceed 20 degrees Celsius (68 degrees Fahrenheit) in the area under study, or for the four months of the year with the warmest average maximum temperatures for areas where there are not at least four months with average maximum temperatures greater than 20 degrees Celsius (68 degrees Fahrenheit). For calculating the daily maximum temperatures, a climatic record of at least ten years shall be used except where no record of that length which can be considered representative of the area exists.

(v) The owner or operator of a proposed stationary source or modification of volatile organic compounds who satisfies all condition of 40 CFR Part 51, Appendix S, section IV. A may provide post-construction monitoring data for ozone in lieu of providing preconstruction data for ozone as required under paragraph (n)(1)(i) of this section.

(2) Post-construction monitoring. The plan shall provide that the owner or operator of a proposed stationary source or modification shall, after construction of the stationary source or modification, conduct such ambient monitoring as the reviewing authority determines may be necessary to determine the effect emissions from the stationary source or modification may have, or are having on air quality in any area.

(3) Operation of monitoring stations. The plan shall provide that the owner or operator shall meet the requirements of appendix B to Part 58 of this chapter during the operation of monitoring stations for purposes of paragraph (n) of this section, as follows:

(i) No later than January 1, 1980, for existing stations, or

(ii) For new stations, at the time the station is put into operation.

(l) Modified Permits. (1) The owner or operator of a major stationary source or a major modification who obtains a permit under regulations developed pursuant to this section shall obtain a modified permit prior to beginning construction of any emission unit not authorized by the existing permit if:

(i) Prior to commencement of operation, the owner or operator would propose a change in design capacity of an emission unit or emission units which would significantly increase net potential emissions but not as much as 100 tons per year for stationary sources listed under paragraph (b)(1)(i) of this section or 250 tons per year for other stationary sources;

(ii) Prior to commencement of operation, the owner or operator would propose fundamental changes in the nature of the process equipment used such that the potential emissions from the changed emission unit or emission units would be significant but less than 100 tons per year for stationary sources listed in paragraph (b)(1)(i) of this section or less than 250 tons per year for other stationary sources; or

(iii) After obtaining a permit under this section which limits the hours of operation, the owner or operator proposes to increase the hours of operation.

(2) The owner or operator of a major stationary source or a major modification who obtains a permit under this section shall obtain a new permit prior to beginning any construction not authorized by the existing permit if, prior to commencement of operation, the owner or operator proposes:

(i) An increase in design capacity of one or more emission units which would increase net potential emissions of the stationary source by 100 tons or more per year for stationary sources listed in paragraph (b)(1)(i) of this section or by 250 tons or more per year for other stationary sources; or

(ii) Fundamental changes in the nature of the process equipment used such that the potential emissions from the changed emission unit or emission units would be 100 tons per year or more for stationary sources listed in paragraph (b)(1)(i) of this section or 250 tons or more per year for other stationary sources.

(3) The application for permit modification shall include:

(i) A demonstration that the requirements of paragraph (j) would be met, and

(ii) A demonstration that the increase in allowable emissions would not cause or contribute to a violation of any maximum allowable concentration or maximum allowable increase.

(4) The reviewing authority may approve the application, if

(i) He finds that the proposed construction will satisfy requirements substantially equivalent to those in paragraphs (j) through (r) of this section are met; and