condition that the State submit by December 31, 1986, a definition of the term "Federally enforceable" and provision for making Federally enforceable all limitations, conditions, and offsets, including permit restrictions, relied upon under the plan, and in the interim, implement these provisions in a manner consistent with EPA requirements.

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40 CFR Part 52

[A-5-FRL-2864-7]

Approval And Promulgation of Implementation Plans; Michigan

AGENCY: U.S. Environmental Protection Agency (USEPA).

ACTION: Final rulemaking.

SUMMARY: Today's action announces USEPA's final rulemaking for the State of Michigan's revised Rule 336.1371, existing rule 336.1372, and new rule 336.1373 related to the control of fugitive dust emissions.

This Notice of Final Rulemaking incorporates into the Michigan State Implementation Plan (SIP) revised Rules 336.1371, 336.1372 and newly promulgated Rule 336.1373, because they provide a framework for the development of fugitive dust control programs. In addition, this notice disapproves Michigan's Total Suspended Particulate (TSP) SIP because it does not meet the Reasonable Available Control Technology (RACT) requirements of section 172(b)(3) of Part D of the Clean Air Act for fugitive dust sources located in nonattainment areas. New source restrictions, pursuant to section 110(a)(2)(I) of the Clean Air Act in the Michigan primary TSP nonattainment areas are effective 30 days from the date of publication of this notice.

EFFECTIVE DATE: September 19, 1985.

ADDRESSES: Copies of this revision to the Michigan SIP are available for inspection at: The Office of the Federal Register, 1100 L Street NW., Room 8401, Washington, D.C. 20408.

Copies of the SIP revision, public comments on the notice of proposed rulemaking and other materials relating to this rulemaking are available for inspection at the following addresses: (It is recommended that you telephone Ms. Toni Lesser, at (312) 886-6037, before visiting the Region V office.)

U.S. Environmental Protection Agency, Region V, Air and Radiation Branch (5AR-26), 230 South Dearborn Street, Chicago, Illinois 60601

U.S. Environmental Protection Agency, Public Information Reference Unit, 401 M Street SW., Washington, D.C. 20460

Michigan Department of Natural Resources, Air Quality Division, State Secondary Government Complex, General Office Building, 7150 Harris Drive, Lansing, Michigan 48821.

FOR FURTHER INFORMATION CONTACT: Ms. Toni Lesser, (312) 886-6037.

SUPPLEMENTARY INFORMATION:

Background

USEPA conditionally approved Michigan's TSP SIP for nonattainment areas required by Part D of the CAA on May 6, 1980, (45 FR 29790) and May 22, 1981, (46 FR 27923). One of the conditions for final approval was that the State adopt and submit regulations requiring the application of Reasonably Available Control Technology (RACT) for the control of all traditional sources of fugitive particulate emissions for at least the Wayne County primary TSP nonattainment area. On March 6, 1981, Michigan submitted existing Rules 336.1371 and 336.1372 to satisfy this condition. In addition, the Michigan Department of Natural Resources (MDNR) subsequently submitted three separate letters to USEPA containing clarification and commitments as to how Rules 336.1371 and 336.1372 would be implemented to obtain control programs from sources of fugitive emissions in the primary TSP nonattainment area.

On November 15, 1982 (47 FR 51389), USEPA approved Rules 336.1371 and 336.1372, based on and including the additional commitments contained in the three letters, as revisions to the Michigan SIP. Rule 336.1371 established a discretionary procedure by which the Michigan Air Pollution Commission (Commission) was authorized, but not required, to request sources in attainment or non-attainment areas to develop and submit fugitive dust control programs to be incorporated into enforceable permits or administrtive orders. The required elements of such programs were set forth in Rule 336.1372. These rules were approved as representing RACT, as mandated by Section 172(b)(3) of the Clean Air Act.

Court Actions

USEPA's approval was challenged by the Natural Resources Defense Council (NRDC) in January 1983; *NRDC* v. *USEPA*, No. 83-3027 (6th Circuit). USEPA was granted a voluntary remand to reconsider its approval, and USEPA re-evaluated its approval of Rules 336.1371 and 336.1372 in light of issues raised by NRDC in its petition for review.

On December 2, 1983, (48 FR 54377), USEPA proposed to withdraw its approval of, and also disapprove, Rules 336.1371 and 336.1372. Defects in the rules' enforceability and the failure of the State of Michigan to cure these defects by obtaining enforceable RACT-based programs for the appropriate tugitive dust sources in the primary nonattainment area were the primary reasons for this proposed disapproval.

On October 1, 1984, the U.S. Court of Appeals for the Sixth Circuit directed Michigan to submit final fugitive dust rules by April 30, 1985. The State's submittal of April 25, 1985, was intended to satisfy this requirement. The Court also directed USEPA to propose action on the new rules and to take final action on that proposal, as well as the December 1983 proposal, by August 1, 1985.

State Action

The State of Michigan, on April 25, 1985, formally submitted its rules for the control or industrial fugitive particulate emissions from sources located in TSP attainment and nonattainment areas. Michigan's newly proposed industrial fugitive dust SIP consists of three rules: Revised Rule 336.1371, existing Rule 336.1372, and new Rule 336.1373. As revised and resubmitted, R336.1371 and R336.1372 apply only in TSP attainment areas. New Rule 336.1373 applies only in TSP nonattainment areas.

Michigan's Proposed Rule 336.1371 addresses the procedures and requirements for the development of fugitive dust control programs for facilities located in attainment areas. Rule 336.1372 remains unchanged from the State's original submittal which was approved by USEPA on November 15, 1982 (47 FR 51398). However, pursuant to revised Rule 336.1371, both rules are now limited in applicability to attainment areas.

Michigan's new Rule 336.1373 establishes fugitive dust control requirements for sources located in TSP nonattainment areas. These areas are listed in Table 36 of Rule 336.1371. The provisions of Rule 336.1373 apply to virtually all fugitive emission sources/operations, except for operations involving grain handling and drying (USEPA'a Technical Support Document dated April 25, 1985, contains a detailed analysis of the rules).

USEPA's Action

On May 30, 1985 (50 FR 23028), USEPA published a notice of proposed

rulemaking which proposed the following actions:

- USEPA reaffirmed its proposal to withdraw its approval and disapprove Michigan's existing Rules 336.1371 and 336.1372 for Part D purposes, [i.e., insofar as they apply to TSP nonattainment areas as discussed in the December 2, 1983, rulemaking (48 FR 543771)].
- USEPA proposed to incorporate into the Michigan SIP the amended R336.1371 to replace the existing R336.1371 provisions, since amended R336.1371 provides a framework for the development of fugitive dust control programs in attainment areas.
- USEPA stated that existing R336.1372 would remain incorporated within the State's TSP SIP insofar as it applies to TSP attainment areas.
- USEPA proposed to incorporate into the Michigan SIP new Rule 336.1373. The new Rule 336.1373 provides a framework for the development of fugitive dust control programs in nonattainment areas.
- USEPA proposed to disapprove the overall Michigan Part D TSP SIP as not being adequate to meet the requirements of Part D of section 172(b) of the CAA.
- USEPA stated that, if final action is taken to withdraw approval and disapprove of the current federally approve fugitive dust rules, and USEPA finally disapproves the newly submitted fugitive dust Rule 336.1373 because it fails to satisfy the Part D requirements, then the new source restriction of section 110(a)(2)(I) of the CAA would apply in Michigan's primary TSP nonattainment areas.

USEPA's proposed rulemaking dated May 30, 1985 (50 FR 23028), provided a 30-day comment period. USEPA received 17 public comments. A detailed analysis of all the comments is contained in USEPA's Technical Support Document (TSD) dated July 23, 1985. In addition, USEPA received six comments on its proposal to withdraw approval of Michigan's Rules 336.1371 and 336.1372 (December 2, 1983; 48 FR 54377).

Below is a summary of all the comments received related to USEPA's December 2, 1983, and May 30, 1985, rulemaking actions and USEPA's responses to those comments.

Comments on USEPA's Proposal To Withdraw Approval of Rules 336.1371 and 336.1372 (December 2, 1983; 48 FR 54377)

A. *Comment:* USEPA cited several provisions of former Rule 336.1371 which it claims give the Michigan Air Pollution Control Commission too much discretion in controlling significant sources of fugitive dust as required by section 172(b)(3) of the Clean Air Act. USEPA misunderstands how these provisions operate or are intended to operate:

(1) USEPA cited as a deficiency that the requirement in Rule 336.1371 to submit a fugitive dust control program applies only to persons notified by the Commission, but Rule 336.1371 does not obligate the Commission to notify anyone. The "upon notification" language of Rule 336.1371(1) was a matter of form and was not intended to imply that the Commission had the legal option not to notify subject sources.

(2) USEPA cited as a deficiency that a person who challenges the Commission's notification under Rule 336.1371(4) seems to have an indefinite time in which to submit a program. There is no validity to this claim, since a program must be submitted within 6 months, and only an affirmative action by the Commission on a petition could remove this requirement.

(3) USEPA cited as a deficiency that, if a person submits no program or an inadequate program, the Commission "may", but need not, establish an approvable program, under Rule 336.1371 (5) and (6). While it is true that the Commission is not obligated to establish a program if an acceptable one is lacking, it is also true that none of the Commission's rules contain such a requirement. Clearly the Commission intends to establish programs if they are necessary.

(4) USEPA cited as a deficiency that under Rule 336.1371(7), a person need implement a program only after it has been approved by the Commission, but the Commission is not required to approve or disapprove any program within a specified time period. Given that the Commission is charged with protecting the public health and welfare, it does not legally have the options of taking no action on an inadequate program or of approving it. Such abuses of discretion would be subject to judicial review.

Response: USEPA's responses paragraph by paragraph are as follows:

(1) USEPA must evaluate rules as written rather than how they might have been intended to be written. There is no requirement of the Commission in Rules 336.1371 and 336.1372 to issue a notification to anyone. In fact, it was only in response to indirect pressure from USEPA that the Commission took its first action in November 1983, to notify source owner/operators in the Wayne County primary TSP nonattainment area. That action came 2½ years after Rules 336.1371 and 336.1372 became effective at the State level.

(2) USEPA sees little basis in Rule 336.1371 for the commentor's position. The Agency continues to believe that Rule 336.1371 is, at best, unclear in this regard, and, at worst, provides an indefinite time period to submit a program for a source whose owner/operator has challenged the Commission's notification to submit.

(3) See Response to Comment A.1.

(4) Section 172(b)(2) of the Clean Air Act requires, for nonattainment areas, "implementation of all reasonably available control measures as expeditiously as practicable." In light of this requirement, USEPA believes that it should not approve a rule which depends on discretionary Commission action for effective implementation.

When the effective implementation of a rule may depend heavily on State judicial review to correct abuses of discretion, it cannot be considered to be "as expeditious as practicable."

B. *Comment:* Discretion cannot and should not be eliminated in the development and application of rules. Discretion is appropriate when it provides the regulatory flexibility necessary for sound program administration.

Response: USEPA fails to see how correction of the rule deficiencies which it cited would result in elimination of all discretion or unsound program administration. The deficiencies cited by USEPA grant excessive discretion to the Commission which conflicts with the requirements of Part D of the CAA, such as the discretion not to apply the rules to any fugitive dust sources. This point is underscored by the fact that the rules, which were clearly intended to result in RACT fugitive dust control in TSP nonattainment areas as expeditiously as practicable, have failed to directly produce any significant fugitive dust control programs or any control of major fugitive dust sources in Wayne County since their promulgation in 1981.

C. *Comment:* The commentor disagrees with the argument of the Natural Resources Defense Council (NRDC) that USEPA could not approve Rules 336.1371 and 336.1372 as meeting the requirement for RACT because Michigan failed to submit a technical or economic analysis showing that the measures required by Rule 336.1372 constitute RACT. The commentor states that this argument is contrary to law and fact, because the Courts have said that the USEPA may supply such analysis where it is missing, and USEPA claims to have done so.

Response: USEPA agrees with the commentor that the Courts have said that the USEPA may supply technical or

economic analysis, vis-a-vis RACT, where it is missing (U.S. Court of Appeals for the Sixth Circuit, *National Steel* vs *Gorsuch*, 1983). USEPA also agrees that, when it approves Rule 336.1371 and 336.1372 on November 15, 1982 (47 FR 51398), it did so "in part on the basis of EPA studies of fugitive dust control techniques generally" (48 FR 54378).

However, in reconsidering its approval of Rule 336.1371 and 336.1372, USEPA evaluated technical information acquired to date on fugitive dust control technologies. USEPA submits that, with its present knowledge, it would not propose to approve Rules 336.1371 and 336.1372 as meeting the RACT requirement. The primary reason for this failure is that the rules would allow the Commission to approve control measures of less-than-RACT control effectiveness. For example, a program could be approved which required an unpaved road to be controlled with water applied once per day. Emission control effectiveness might be less than 50 percent in this case. The Agency's operative definition of RACT [memorandum from Roger L. Strelow, December 9, 1976; published in 7 Environment Reporter, Current Developments (BNA) 1210 (1976) and referenced at 45 FR 59198 (September 8, 1980)] requires the "lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility." A control program which calls for water to be applied once per day cannot be considered RACT (even if the road is lightly travelled). A rule that would allow such a result, or allow approval of programs with widely different emission reduction potentials for the same source category cannot be considered to ensure the implementation of RACT. In its comments on the subject rulemaking (i.e., proposal to withdraw approval) the Natural Resources Defense Council (NRDC) made essentially this point.

D. *Comment:* Industry stated that there should be no lower limit on the cost associated with RACT so long as the control objective is achieved.

Response: USEPA agrees; however, the control objective is the "lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technological and economic feasibility." As long as more money will buy better technology and more emission control, the cost that is required by RACT is determined by "economic feasibility."

Comments on USEPA's Proposal Concerning New and Revised Rules 336.1371, 336.1372, and 336.1373 (May 30, 1985; 50 FR 23028)

E. *Comment:* USEPA must approve Rule 336.1373 for the purposes of Part D because it is enforceable and requires RACT. In particular:

(1) The applicability and enforceability defects of the former rules (i.e., deficiencies in former Rules 336.1371–336.1372 as cited by USEPA at 48 FR 54378) have been remedied.

(2) Rule 336.1373 is consistent with USEPA's criteria for RACT as contained in Region V's letter to Michigan DNR, dated July 9, 1984.

(3) USEPA cannot justifiably use the results of the Illinois fugitive dust rule to judge the acceptability of Michigan's Rule 336.1373. Michigan improved substantially on the Illinois model in an effort to ensure RACT.

Response: USEPA's responds to this three-part comment as follows:

(1) USEPA agrees that the four deficiencies cited by the Agency at 48 FR 54378 with regard to the existing Rules 336.1371–336.1372 have been remedied by the new proposed Rule 336.1373. Because USEPA determined that Rule 336.1373 provided an enforceable framework for obtaining control programs, it proposed to approve it, pursuant to Section 110 of the Clean Air Act, for application in nonattainment areas. However, USEPA does not agree that Rule 336.1373 represents RACT for sources of fugitive dust emissions as required by Part D. The primary problem is that the rule allows the Commission too much discretion in approving source-specific control programs.

The rule, like the existing Rules 336.1371, 336.1372, only describes in general terms what control measures are acceptable for inclusion into control programs, but does not provide any criteria for determining whether (and therefore does not assume that) a given control technology will achieve RACT-level control. For example, field test data on the effectiveness of different fugitive dust control techniques clearly indicates that the frequency and conditions of application of a dust suppressant have a direct impact on the control efficiencies achieved. Rule 336.1371 provides that suppressant be applied "on a regular basis, as needed, in accordance with the operating program" submitted by the source and approved by the Commission. The State has made no determination as to what range of application frequencies would ensure emission reductions equal to RACT.

Paragraph (2)(a)(vi) of Rule 336.1373 requires operating programs submitted by sources to include "estimated frequency of application of dust suppressant" and establishes the following standard by which the Commission shall determine the approvability of an operating program:

> Such operating program shall be designed to significantly reduce fugitive dust and shall reduce the fugitive emissions to a level that a particular source is capable of achieving by the application of control technology that is reasonably available, considering technological and economic feasibility.

This approach does not satisfy the CAA's requirement that Part D Plans ensure application of at least RACT in nonattainment areas. RACT is defined by USEPA as the "lowest emission limit that a particular source is capable of meeting by the application of control technology that is reasonably available considering technology and economic feasibility" (emphasis added). The standard in the rule would allow Commission approval of less of the control efficiency achieved by the technology. Rule 336.1373 contains no emission limit or range of acceptable emission limits but merely creates a regulatory framework for establishing emissions limits through Commission approval of control programs.

(2) USEPA does not agree with this comment. In the July 9, 1984, letter, Region V indicated to Michigan that the best guide to determining RACT was the definition of RACT itself. The definition cited is the Agency's operative definition of RACT as set forth in the memorandum from Roger Strelow, dated December 9, 1976 (referenced at 45 FR 59198; September 8, 1980).

The July 9, 1984, letter did not state that a procedural rule like that submitted by Michigan would satisfy the RACT requirement.

(3) It is true that Rule 336.1373 is not identical to Illinois Rule 203(f) Working with Rule 203(f) as a model, Michigan revised it in several respects that generally had a clarifying and tightening effect. (This is not the case with regard to the property-line opacity limit which is zero percent in the Illinois rule, but five percent in Rule 336.1373. However, USEPA continues to view this property-line limit in both cases as essentially uneforceable.) Despite these revisions, USEPA continues to believe that Rule 336.1373, as submitted, will not ensure that RACT will be required as necessary for Part D purposes. USEPA's reasoning has already been presented above. In addition, USEPA continues to believe that the failure of the Illinois rule to obtain RACT-level permits and control

plans, as discussed in USEPA's technical support document of April 25, 1985, is relevant to Michigan's Rule 336.1373, since the latter rule continues to allow wide discretion by the Commission in determining acceptable control program content. In fact, 336.1373(2)(a)(vi)(A)–(G) which specify the items to be included in an operating program "at a minimum", were not revised from the Illinois rule model. Programs approved under the Illinois rule were characterized by vague and unenforceable requirements such as road sweeping, or dust suppressant application "as necessary."

F. *Comment:* Disapproval would be contrary to the Clean Air Act mandate (and case law) which gives the State the primary responsibility for determining and enforcing RACT. Lacking more detailed guidance from USEPA as to RACT, and recognizing the importance of source-specific factors, Michigan's rule is entirely reasonable and appropriate.

Response: USEPA agrees that the burden of determining RACT falls first upon the State. The Federal role is one of review and concurrence through the SIP process. Michigan cannot be said to have made a determination(s) of RACT for the fugitive dust sources in TSP non-attainment areas, by adopting basically a regulatory framework for the submittal and review of control programs, and a test not ensuring RACT (as discussed above) for the determination of RACT approvability of those programs. The Clean Air Act places the duty on the State to establish enforceable RACT-based emission limitations as part of the approved SIP.

USEPA agrees that source-specific factors are important in the determination of RACT. In fact, the Agency's definition of RACT emphasizes the case-by-case nature of this determination by the words, "that a particular source is capable of meeting . . ." (emphasis added). Nevertheless, USEPA cannot approve as RACT only a rule/plan to get control programs unless the required content of those programs is sufficiently well specified so as to insure RACT on each source.

G. *Comment:* Disapproval would be arbitrary and capricious because it would be a complete reversal, without adequate rationale, of USEPA's position in approving and defending the Illinois rule.

Response: USEPA addressed this comment in its testimony before the Commission on January 15, 1985. As stated above, USEPA does not believe that the revisions made to the Illinois rule model in the development of Rule 336.1373 are sufficient to ensure that the type of vague and less-than-RACT control programs that resulted in Illinois will not result in Michigan.

H. *Comment:* USEPA's disapproval would be arbitrary and capricious because insufficient technical data exist to develop a source-category-specific rule that sets forth detailed but generic RACT requirements.

Response: USEPA does not agree with this comment. While the Agency agrees that data on the effectiveness of control techniques for non-process fugitive dust sources is not abundant, it believes the existing data to be adequate to determine RACT. USEPA notes that the bibliography attached to MDNR's comment letter which the letter says (p. 2) was the result of "a literature search of all available documents and studies performed on fugitive dust control" conspicuously lacks a number of published reports that a comprehensive literature search would have included, such as the following:

Iron and Steel Plant Open Source Fugitive Emission Control Evaluation and Report. Midwest Research Institutes for U.S. Environmental Protection Agency, August 31, 1983.

Extended Evaluation of Unpaved Road Dust Suppressants in the Iron and Steel Industry. Final Report. Midwest Research institute for USEPA, October 7, 1983.

Cost Estimates for Selected Fugitive Dust Controls Applied to Unpaved and Paved Roads in Iron and Steel Plants. Final Report Midwest Research Institutes for USEPA, April 26, 1984.

Determination of the Decay in Control Efficiency of Chemical Dust Suppressants on Unpaved Roads. Cusino, Muleski, Cowherd. Paper given at Symposium on Iron and Steel Pollution Abatement Technology, Pittsburgh, PA. November 1982.

I. *Comment:* USEPA's requirement that all individual fugitive dust control programs be submitted as source-specific SIP revisions is redundant and demeaning of the State's errors.

Response: Given USEPA's responsibilities under the Clean Air Act and its determination, as stated previously, that Rule 336.1373 does not ensure RACT, the Agency has no choice but to disapprove the rule for not meeting the requirements of Part D. USEPA is not prescribing any particular approach for the State to meet Part D requirements. The State may want to submit all the individual control programs for sources in nonattainment areas as source-specific SIP revisions.

Alternatively, the State may want to develop a new regulation that does not call for the development of individual programs.

USEPA's review cannot be considered redundant since, as already pointed out, the "test" of acceptability in the State rule is not the same test that USEPA would use for review. USEPA would use its definition of RACT (Strelow memo).

J. *Comment:* According to MDNR, certain exemptions and other provisions of Rule 336.1371 about which USEPA expressed concern (in its TSD of April 25, 1985) are not problems of any substance:

(1) USEPA expressed concern that the requirements for a facility which submits an unacceptable program, or a program which is disapproved by the Commission, are not defined. This concern is unfounded because the owner/operator is required by 336.1373 (2)(a)(vi) to submit within 90 days a program which contains all the necessary elements to fully comply with the rule. If he fails to do so, the source is in noncompliance and can be subject to enforcement action.

(2) USEPA's concern about the grain handling and grain drying exemption is unfounded because there is only one grain handling/drying source in the primary nonattainment area, and its operations which might generate fugitive dust emissions are fully enclosed.

(3) USEPA's concern about the exemption provided by 336.1373(2)(a)(ii) relating to storage piles is unfounded because, based on modeling results, MDNR believes that all storage piles in the primary nonattainment area have ambient impacts. For this reason, the exemption could not be utilized.

(4) USEPA's concern that the property-line opacity limit is unenforceable is irrelevant, because all fugitive dust sources subject to this limit will be subject to the specific requirements of a source control plan. The opacity limit is not a critical element in obtaining RACT level control.

(5) USEPA's concern about the 50 tpy applicability cut-off for storage piles is not appropriate because USEPA has already approved a less restrictive exemption in Illinois.

(6) USEPA's concern about certain language of the rule such as "on a regular basis" and "as needed" is unfounded because 336.1373(2)(a)(vi) requires the kind of specific information on dust suppressant application, etc., to be submitted as a part of the program submittal.

Response: USEPA's responses are as follows:

(1) USEPA continues to believe that the Rule 336.1373 is unclear in this respect. It is not clear if an owner/operator whose program is disapproved

by the Commission has an additional 90 days for submittal of a revised program, or has only the remainder of the first 90-day period.

(2) The information supplied by the commentor, MDNR, alleviates USEPA's concern but does not eliminate it, since legally enforceable requirements to ensure maintenance of this source-specific RACT-level control would still be missing.

(3) USEPA accepts MDNR's judgment regarding the ambient impact of fugitive emissions from storage piles and notes that it reinforces the justification for RACT control. Given MDNR's position on this exemption, USEPA questions why the exemption should be retained at all. USEPA continues to believe that, because the criteria necessary to determine its valid application in a specific case are lacking, the exemption is open to abuse.

(4) USEPA continues to believe that the property-line opacity limit is unenforceable for the reasons cited in the TSD of April 25, 1985. The commentor (MDNR) appears to be saying that the property-line opacity limit is not a feature of the rule that can be depended upon to obtain any control beyond that agreed to in the source-specific control program. USEPA would agree with this evaluation.

(5) In the Illinois case, the State made a demonstration that very few storage piles, when aggregated by material type, have potential emissions less than 50 tpy. USEPA realizes now that it erred in approving this exemption in the Illinois rule, because the analysis artifically aggregated piles that were, in fact, separate. Therefore, the analysis did not accurately reflect the real impact of the exemption.

The exemption in Rule 336.1373 is more restrictive due to the added language: and "where such piles are located within a facility with kpotential particulate emissions from all sources exceeding 100 tons per year . . .". USEPA continues to believe, however, that technical support justifying it should be provided.

(6) USEPA's determination that Rule 336.1373 would not necessarily ensure the implementation of RACT through the control (i.e., operating) programs it requires has been explained previously in this document.

L. *Comment:* Commentors claimed that the proposed action was inconsistent with Appendix B to 40 CFR Part 50.

Response: This is incorrect. Appendix B is simply a list of some available control techniques:

2.2 . . . Reasonable precautions can be taken to prevent particulate matter from becoming airborne. Some of these reasonable precautions include . . .

Appendix B does not show that the Michigan rules meet the RACT requirement in Section 172(b)(3).

L. *Comment:* Commentors argued that it would be unlawful for the Administrator to find that the Michigan rules do not constitute RACT, when he had found that similar rules in Illinois and Wisconsin did constitute RACT.

Response: This is incorrect. The Administrator should make this decision on its merits. The Administrator is not bound to follow the same approach he used in an earlier decision, if he finds that approach was inappropriate. "The Administrator is expected to treat experience not as a jailor, but as a teacher." *Shawmut Association* v. *SEC*, 146 F.2d 791, 796–97 (1st Cir. 1945). *See NRLB* v. *J. Weingarten, Inc.*, 420 U.S. 251, 264–66 (1975).

The Administrator is not singling out Michigan for special harsh treatment, as the commenters imply. He is currently applying his view of the law uniformly. On October 11, 1984, USEPA proposed to disapprove Indiana's industrial fugitive dust regulation, 325 IAC 6–5, because the regulation does not meet Part D requirements (see 49 FR 39869).

Similarly, in 1983 USEPA advised Ohio that its rule OAC 3745–17–08 could not be approved as meeting Part D requirements with respect to industrial fugitive dust sources without commitments to extensive changes in the implementation of the rule (letter to Ohio EPA from USEPA dated October 28, 1983.) Consequently, Ohio has proposed revisions to the rule aimed at satisfying the requirements of Part D.

M. *Comment:* Commentors objected that it would be unreasonable, or even impossible, for Michigan to adopt rules establishing RACT for broad categories of sources, and that the Administrator, therefore, must approve the Michigan rules.

Response: This is incorrect. The Administrator did not state that any Michigan rules establishing RACT must do so by categories, broad or otherwise. The Administrator simply proposed that the current rules cannot be said to constitute RACT.

N. *Comment:* Commentors objected that the Administrator improperly proposed to require Michigan to submit future control programs for sources in attainment areas as plan revisions.

Response: This is incorrect. The Administrator did not propose to require Michigan to submit such programs. He simply noted that such programs would not be part of the federally-approved plan unless Michigan submitted them, and the Administrator approved them as such. (50 FR 23030, col. 1).

O. *Comment:* Commentors objected that the Administrator's proposed action would be inconsistent with *Citizens for a Better Environment* v. *USEPA*, 649 F.2d 522 (7th Cir. 1983) ("*CBE*").

Response: This is incorrect. *CBE* did not consider whether rules like Michigan's meet the RACT requirement. Rather, it considered whether the Illinois rules were enforceable, and required control as expeditiously as practicable.

P. *Comment:* Commenters objected that the new source restrictions in section 110(a)(2)(I) of the Act should not be in effect immediately upon the Administrator's final action.

Response: This is incorrect. Section 110(a)(2)(I) provides that every plan must include certain restrictions on new sources "unless . . . such plan meets the requirements of Part D of this subchapter (relating to nonattainment)". This requirement is implemented by 40 CFR 52.24(a), a regulation inserted into the plans of all States, including Michigan. If USEPA has determined that the Michigan plan does not meet the Part D requirement for RACT in nonattainment areas, the new source restrictions of Section 110(a)(2)(I) will, therefore, apply as a matter of law.

Agency policy is not to the contrary. The commentors refer to the Agency's policy for States that do have plans meeting Part D (48 FR 50686, 50690 col. 3—50691 col. 1; November 2, 1983. ("Failure to Attain by December 31, 1982"); 50 FR 13130, 13134–13135; April 2, 1985.) Some such areas will receive notices of deficiency and will be required to revise their plans. But none of this affects the application of section 110(a)(2)(I) to plans that do not meet Part D.

Q. *Comment:* Commentors objected that the Administrator's proposed action would be inconsistent with *Bethlehem Steel Corporation* v. *Gorsuch*, 742 F.2d 1028 (7th cir. 1984).

Response: This is incorrect. The Administrator proposed to approve the Michigan rules in their entirety. The Administrator also proposed that inclusion of the rules in the plan will be insufficient to meet the RACT requirement. Section 110 does not forbid the Administrator to approve a State's revision of its plan simply because further revision is still needed. Bethlehem does not suggest otherwise.

R. *Comment:* Commentors objected that the Administrator had not complied with the Regulatory Flexibility Act, 5 U.S.C. 601 et seq.

Response. This is incorrect. The Act requires that the Administrator analyze certain issues. 5 U.S.C. 603(b), (c), 604(a). Section 605(a) provides that "any Federal Agency may perform the analyses required by Sections . . . 603 and 604 of this title in conjunction with or as a part of any other . . . analysis required by any other law. . . ." All of the analysis required by the Act was performed as part of the rulemaking and contained in either the rulemaking notices or the docket. It should be noted that the Administrator's proposed actions are limited to approving the Michigan rules, and finding that the plan does not meet the RACT requirement. Since these actions are limited, and are required by law, the analysis required by the Act is quite limited. For example, the Administrator proposes to impose no compliance requirements under section 603(b)(4); he is merely approving State requirements (See 46 FR 8709; (January 27, 1981). No alternatives under section 603(c) and 604(a)(3) are legally available.

S. Comment: Commenters objected that the Administrator was required to prepare and consider a regulatory impact analysis under Executive Order 12291, 46 FR 13493 (February 19, 1981).

Response: This is incorrect. Section 3 of that Order requires such an analysis only for major rules. This action is not a major rule. (See 50 FR 23030, col. 3). Commenters provided no evidence for their argument that the impacts of the action are so great as to make it a major rule. It should also be noted that to the extent the Administrator's action is required as a matter of law, any regulatory impact analysis would have no bearing on the outcome.

USEPA has reviewed all comments related to the Michigan fugitive dust regulations with respect to its December 2, 1983, and May 30, 1985, rulemaking actions. USEPA has concluded that the Michigan particulate regulations submitted on April 25, 1985, are inadequate to ensure that enforceable RACT-based fugitive emissions control requirements will be imposed on sources of fugitive emissions in Michigan's TSP nonattainment areas.

Today's Action

USEPA is today disapproving the Michigan TSP SIP because it lacks control requirements reflecting RACT Part D for TSP fugitive emissions sources in nonattainment areas, in violation of the requirements of section 172(b) of the Clean Air Act. The SIP is, therefore, deficient, pursuant to section 110(a)(2)(H) of the Clean Air Act. Today's action causes the new source restrictions in section 110(a)(2)(I) of the Clean Air Act to apply in the Michigan primary TSP nonattainment areas (see 40 CFR 52.24a.)

This action also withdraws USEPA's November 15, 1982, approval (47 FR 51398) and disapproves Michigan's Rules 336.1371–336.1372 as a revision to its TSP SIP, insofar as they apply to nonattainment areas.

This action incorporates into the Michigan SIP, the amended R336.1371 submitted by Michigan on April 25, 1985, to replace the existing R336.1371, on the basis that amended R336.1371 provides a framework for the development of fugitive dust control programs in attainment areas. Michigan's existing Rule 336.1372 remains incorporated into the State's TSP SIP, insofar as it applies to sources in TSP attainment areas.

USEPA incorporates into the Michigan SIP, new Rule 336.1373 because it provides a framework for the development of fugitive dust control programs in nonattainment areas that lacks control requirements, reflecting RACT for the TSP fugitive dust sources in nonattainment areas in violation or the requirements of section 172(b) of Part D of the CAA.

Under Executive Order 12291, today's action is not "Major". It has been submitted to the Office of Management and Budget (OMB) for review.

Under section 307(b)(1) of the Clean-Air Act, petitions for judicial review of this action must be filed in the United States Court or Appeals for the appropriate circuit by 60 days from the date this notice appears in the **Federal Register**. This action may not be challenged later in proceedings to enforce its requirements. [See section 307(b)(2)].

List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Sulfur dioxide, Nitrogen dioxide, Lead, Particulate matter, Carbon monoxide, Hydrocarbons, Intergovernmental relations.

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

Dated: August 1, 1985.

Lee M. Thomas,

Administrator.

PART 52—[AMENDED]

Part 52 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

Subpart X—Michigan

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

Authority: 42 U.S.C. 7401–7642.

1. Section 52.1170, is amended by adding paragraph (c)(79) to read as follows:

§ 52.1170 Identification of plan.

* * * * *

(c) * * *

(79) On December 2, 1983, USEPA proposed to withdraw its approval of Michigan's fugitive dust regulations. On April 25, 1985, the State of Michigan submitted revised Rule 336.1371, existing Rule 336.1372, and new Rule 336.1373. However, they did not meet the requirements of Part D of section 172(b); and USEPA, therefore, withdrew its approval of these submittals, disapproved these submittals, and instituted new source restrictions for major sources in the Michigan primary Total Suspended Particulate (TSP) nonattainment areas on [insert date of publication]. USEPA incorporates revised Rule 336.1371 and newly submitted Rule 336.1373 into the Michigan State Implementation Plan because they provide a framework for the development of fugitive dust control programs at the State level in Michigan. USEPA retains Rule 336.1372, which is already incorporated into the Michigan SIP, insofar as it applies to sources in TSP attainment areas. This paragraph supercedes Paragraph (C)(61) of this section.

(i) Incorporation by reference.

(A) Michigan Department of Natural Resources Rules 336.1371 and 336.1373 (Fugitive Dust Regulations), as adopted on April 23, 1985.

2. Section 52.1173 is amended by revising paragraph (a) to read as follows:

§ 52.1173 Control strategy: Particulates.

(a) *Part D—Disapproval.* The following specific revisions to the Michigan Plan are disapproved:

(1) Rule 336.1331, Table 31, Item C: Emission limits for Open Hearth Furnaces, Basic Oxygen Furnaces, Electric Arc Furnaces, Sintering Plants, Blast Furnaces, Heating and Reheating Furnaces.

(2) Rules 336.1371 (Fugitive dust control programs other than areas listed in table 36.), 336.1372 (Fugitive dust control programs; required activities; typical control methods.) and 336.1373 (Fugitive dust control programs; areas listed in table 36.) for control of industrial fugitive particulate emissions sources.

[FR Doc. 85-19742 Filed 8-19-85 8:45 am]

BILLING CODE 6560-50-M

40 CFR Parts 261 and 266

[SWH-FRL-2883-8]

Hazardous Waste Management System; Definition of Solid Waste; Technical Corrections

AGENCY: Environmental Protection Agency.

ACTION: Technical Corrections to the Definition of Solid Waste Final Rulemaking.

SUMMARY: On January 4, 1985, EPA promulgated a final rule which dealt with the question of which materials being recycled (or held for recycling) are solid and hazardous wastes. This rule also provided general and specific standards for various types of hazardous waste recycling activities. EPA issued technical corrections to this rule on April 11, 1985. Since that time, EPA has identified several other provisions that require technical correction or clarification. This notice makes these changes and modifies the previous publication accordingly.

EFFECTIVE DATE: These corrections become effective on August 20, 1985.

FOR FURTHER INFORMATION CONTACT: RCRA Hotline, toll free, at (800) 424–9346 or at (202) 382–3000. For technical information contact Matthew A. Straus, Office of Solid Waste [WH–562B], U.S. Environmental Protection Agency, 401 M St. SW., Washington, D.C. 20460, (202) 475–8551.

SUPPLEMENTARY INFORMATION:

I. Technical Corrections to Rule

A. Interim Exemption for Hazardous Waste-Derived Fuels Produced From Wastes From Petroleum Refining, Production, or Transportation

On January 4, 1985, EPA amended its existing definition of solid waste. 50 FR 614. This rulemaking defined which materials being recycled (or held for recycling) are solid wastes. EPA promulgated certain technical amendments to these rules on April 11, 1985. 50 FR 14216. One of these corrections concerned the regulatory status of hazardous waste-derived fuels produced from oil-bearing hazardous wastes from petroleum refining, production, and transportation. The technical amendment clarified that such fuels are presently exempt from regulation, pending a substantive decision as to whether regulation is necessary to protect human health and the environment. See 50 FR 14218; see also 50 FR 26389, June 26, 1985, likewise stating that such fuels are presently exempt from regulation.

There is a drafting error in the April 11 technical rule, however, in that the interim exemption was placed in § 266.30 of the regulations. This provision applies to hazardous waste fuels burned in boilers or industrial furnaces; thus, the interim exemption would appear to apply only when the hazardous waste-derived fuel from petroleum refining is to be burned in these types of devices. But fuels can be burned in other devices—in certain space heaters or engines not of integral design, for example—and the Agency intended that these hazardous waste-derived fuels be exempt without regard for the type of unit in which they are burned. We consequently are placing the interim exemption in § 261.6(a)(3), which provision exempts recyclable materials from regulation. These particular hazardous waste fuels thus are presently exempt from regulation without regard for the nature of the device in which they are burned.

This exemption is also applicable to oil reclaimed from petroleum refining hazardous wastes prior to insertion or reinsertion into the petroleum refining process (and, as already stated in the preceding paragraph, to fuels resulting from refining of the reclaimed oil). Such reclaimed oil, *i.e.*, oil reclaimed from petroleum refining hazardous waste, is not presently subject to regulation. This leaves in place the regulatory scheme of the May 19, 1980 rules, whereby such reclaimed oils are exempt from regulation. See 50 FR 647/3. The Agency is determining if and how to regulate such reclaimed oil as part of the rulemaking on hazardous waste fuels proposed on January 11, 1985. See 50 FR 1684.

There are two further points of clarification. As drafted in the April 11 notice, the interim exemption applied to all fuels exempt from the labeling requirements of RCRA section 3004(r). Section 3004(r) applies to hazardous waste-derived fuels produced from, or otherwise containing, oil-bearing hazardous wastes from petroleum refining, production, and transportation that are reintroduced into particular parts of the petroleum refining process. Questions have been raised about the precise scope of some of the terms in section 3004(r). On reflection, EPA does not believe it necessary to refer to section 3004(r) to express its intent to provide an interim exemption. Consequently, we are revising the interim exemption to refer to fuels from petroleum refining that include as ingredients (i.e., that are produced from or otherwise contain) oil-bearing hazardous wastes from normal petroleum refining, production, or transportation practices. We note that these hazardous wastes can be generated off-site, and the resulting fuels are covered by the interim exemption. (Cf. section 3004(r)(3) which also is not limited to wastes generated on-site.) We also note, as we did on April 11 (50 FR at 14218/2), that these wastes must be indigenous to the petroleum refining, production, or transportation process, and so would not include such wastes as spent pesticides.

Second, certain persons have raised the question of whether there is any regulatory distinction between fuels "produced from" hazardous waste and those "containing" hazardous waste, as these terms are used in amended 40 CFR 261.2(c)(2) (B) and (C). The Agency intends no such distinction. Nor did the Congress. See RCRA amended section 3004(q), noting that hazardous waste fuels are those produced from hazardous waste, or that "*otherwise* contai(n)" hazardous waste (emphasis added). Fuels produced from hazardous waste thus are a subset of the class of fuels containing hazardous waste. EPA's amended definition of secondary materials that are wastes when burned for energy recovery is coextensive with this statutory provision. 50 FR 630 (January 4, 1985). The Agency also stated repeatedly in the preamble to the amended definition of solid waste that it claimed authority over all hazardous waste-derived fuels, without regard for how they are generated. Thus, EPA indicated that any fuels that "include hazardous wastes as ingredients" are themselves wastes; that any fuels "derived from these [hazardous] wastes [are] defined as solid wastes"; and that when hazardous wastes are "incorporated into fuels . . . fuels containing these wastes . . . remain solid wastes." 50 FR at 625 n.12, 629/2, and 636/1. Consequently, when a person uses a hazardous waste as a component in the fuel process, the output of the process is defined as a waste (assuming listed wastes are involved, or that the waste-derived fuel exhibits a hazardous waste characteristic). (The question of if and how to regulate such wastes remains for future rulemakings.)

The Agency also notes that these same principles apply with respect to waste-derived products that are used in a manner constituting disposal—they are wastes when a hazardous waste is used as a component of the process that produces them. See, e.g., 50 FR 627–628 (rejecting a standard based on simple mixing) and amended § 266.20(b) (EPA has jurisdiction over hazardous waste-derived products even where incorporated wastes have been

chemically reacted and are not separable by physical means).

In order to eliminate any possible uncertainty on this point, however, the Agency has decided to revise the language of § 261.2(c)(1) (use constituting disposal) and (c)(2) (burning for energy recovery) to recite the language from the Hazardous and Solid Waste Amendments of 1984 (HSWA). Thus, (a) hazardous secondary materials used to produce a fuel or used to produce a material that is applied to the land are defined as wastes; and (b) hazardous secondary materials otherwise contained in such waste-derived products are defined as wastes. In both cases, the waste-derived product is defined as a waste (assuming it too is hazardous as provided in § 261.3) and is potentially subject to regulation under Subtitle C of RCRA.

B. Interim Exemption for Hazardous Waste-Derived Fuels From Iron and Steel Production

On April 11, 1985, EPA also clarified that hazardous waste-derived coke from the iron and steel industry is not subject to regulation when the only hazardous wastes used in the coke-making process and from iron and steel production. This interim exemption was also placed in § 266.30(b) and so is limited by the type of unit in which the waste-derived coke is burned. To avoid any unintended limitation on the scope of this interim exemption, we are now placing it in § 261.6(a)(3).

C. Regulation of the Process of Recycling

EPA stated in the preamble to the final rule that EPA does not presently regulate the actual process of recycling (with the exception of certain uses constituting disposal), only the storage, transport, and generation that precedes it. 50 FR 642/1. The Agency included this thought in §§ 261.6(c)(2) and 266.35 of the regulations, but forgot to include it in § 261.6(c)(1). We consequently are amending § 261.6(c)(1) to state that the enumerated requirements only apply to recyclable materials stored before they are recycled.

D. Correction to Subpart G of Part 266

Subpart G of Part 266 contains rules for spent lead-acid batteries being reclaimed. Due to a typographical error, this provision was misnumbered as "§ 266.30". The correct numbering is § 266.80. Today's notice corrects this error.

E. Clarification of Part A Permit Requirements

In the April 11, 1985 notice, EPA indicated that facilities located in States which do not have finally authorized or interim authorized permit programs need to submit new or amended Part A permit applications to EPA by July 5, 1985. 50 FR 14217/3. Although accurate for States without any EPA authorization, this statement was not correct with respect to Phase I interim authorized States. If a State has any form of authorization, its universe of wastes (as approved by EPA) defines the universe of RCRA regulated entities within the State. Program Implementation Guidance 82-1, November 20, 1981. Thus, a person managing a waste that is not yet part of such an authorized State's universe of hazardous waste is not presently required to submit a Part A application. The new or amended application would have to be submitted when the State's universe of wastes has been amended to reflect changes to Part 261 and has been authorized by EPA.

II. Regulatory Impact

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirements of a Regulatory Impact Analysis. Since this notice simply makes typographical and technical corrections and does not change the previously approved final rule, this rule is not a major rule, and, therefore no Regulatory Impact Analysis was conducted.

List of Subjects in 40 CFR Parts 261 and 266

Hazardous wastes, Recycling.

Dated: August 12, 1985.

Allyn M. Davis,

Acting Assistant Administrator for Solid Waste and Emergency Response.

For the reasons set out in the preamble, Title 40 of the Code of Federal Regulations is amended as follows:

PART 261—IDENTIFICATION AND LISTING OF HAZARDOUS WASTE

1. The authority section for Part 261 continues to read as follows:

Authority: Secs. 1006, 2002(a), 3001, and 3002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6902, 6912(a), 6921, and 6922).

2. In § 261.2(c)(1)(i), paragraph (B) is revised to read as follows:

§ 261.2 Definition of solid waste.

* * * * *

(c) * * *

(1) * * *

(i) * * *

(B) Used to produce products that are applied to or placed on the land or are otherwise contained in products that are applied to or placed on the land (in which cases the product itself remains a solid waste).

* * * * *

3. In § 261.2(c)(2)(i), paragraph (C) is removed and paragraph (B) is revised to read as follows:

§ 261.2 Definition of solid waste.

* * * * *

(c) * * *

(2) * * *

(i) * * *

(B) Used to produce a fuel or are otherwise contained in fuels (in which cases the fuel itself remains a solid waste).

* * * * *

4. In § 261.6(a)(3), paragraphs (v), (vi), and (vii) are added to read as follows:

§ 261.6 Requirements for recyclable materials.

* * * * *

(a) * * *

(3) * * *

(v) Fuels produced from the refining of oil-bearing hazardous wastes along with normal process streams at a petroleum refining facility if such wastes result from normal petroleum refining, production, and transportation practices;

(vi) Oil reclaimed from hazardous waste resulting from normal pertoleum refining, production, and transportation practices, which oil is to be refined along with normal process streams at a petroleum refining facility; or

(vii) Coke from the iron and steel industry that contains hazardous waste from the iron and steel production process.

* * * * *

5. In § 261.6(c) paragraph (1) is amended to read as follows:

§ 261.6 Requirements for recyclable materials.

* * * * *

(c)(1) Owners or operators of facilities that store recyclable materials before they are recycled are regulated under all applicable provisions of Subparts A through L of Parts 264 and 265 and Parts 270 and 124 of this Chapter and the notification requirement under section 3010 of RCRA, except as provided in paragraph (a) of this section. (The recycling process itself is exempt from regulation.)

* * * * *

PART 266—STANDARDS FOR THE MANAGEMENT OF SPECIFIC HAZARDOUS WASTES AND SPECIFIC TYPES OF HAZARDOUS WASTE MANAGEMENT FACILITIES

6. The authority citation for Part 266 continues to read as follows:

Authority: Secs. 1006, 2002(a), and 3004 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act of 1976, as amended (42 U.S.C. 6905, 6912(a), and 6924).

7. Section 266.30(b) is amended by deleting paragraphs (b)(3) and (b)(4).

8. FR Doc. 85–3 published in the Federal Register of January 4, 1985 (50 FR 614), is corrected by changing the section number "266.30" under Subpart G to "266.80" on page 667.

[FR Doc. 85–19708 Filed 8–19–85; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Part 799

[OPTS–42012B; TSH–FRL 2815–5b]

Identification of Specific Chemical Substance and Mixture Testing Requirement; Diethylenetriamine

Correction

In FR Doc. 85–12422, beginning on page 21398, as Part III, in the issue of Thursday, May 23, 1985, make the following correction:

On page 21412, second column, § 799.1575(c)(2)(i)(C), the fifth line should have read: "section or in the *in vivo* cytogenetics test conducted pursuant to paragraph (c)(2)(i)(B) of this section produces a positive result."

BILLING CODE 1505–01–M

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 2 and 97

Modification of Footnote US275 to the Table of Frequency Allocations

AGENCY: Federal Communications Commission.

ACTION: Order.

SUMMARY: The Federal Communications Commission amends Parts 2 and 97 of its Rules to prohibit secondary amateur operations in the 902–928 MHz band in the White Sands Missile Range. This action will provide protection to essential primary radiolocation and control operations at White Sands Missile Range.

EFFECTIVE DATE: September 29, 1985.

ADDRESS: Federal Communications Commission, 2035 M Street NW., Washington, D.C. 20554.

FOR FURTHER INFORMATION CONTACT: Mr. Fred Thomas, Office of Science and Technology, 1919 M Street NW., Washington, D.C. 20554, (202) 653–8162.

SUPPLEMENTARY INFORMATION:

List of Subjects

47 CFR Part 2

Frequency allocations.

47 CFR Part 97

Amateur radio.

Order

In the matter of amendment of parts 2 and 97 of the Commission's rules to prohibit amateur use of the 902–928 MHz band at White Sands Missile Range in southern New Mexico.

Adopted: August 5, 1985.

Released: August 15, 1985.

By the Commission.

1. This action restricts amateur operations in the 902–928 MHz band in the vicinity of White Sands Missile Range. In the Second Report and Order of General Docket 80–739, Implementation of the Final Acts of the 1979 WARC, the Commission allocated the 902–928 MHz band to the amateur service on a secondary basis; it allocated the band on a primary basis for Government radiolocation and for industrial, scientific and medical applications.[1] This band has recently been added by the Report and Order in PR Docket 84–960 to the frequencies listed in Part 97 as being available for amateur use.[2] However, the Department of the Army has informed the Commission that several critical radiolocation operations, including tracking and control operations of unmanned aircraft, require the use of frequencies in the 902–928 MHz band at the White Sands Missile Range in New Mexico and that amateur operations in this area could impair or seriously disrupt these operations. Therefore, the Army has requested that the Commission place restrictions on amateur operations in the 902–928 MHz band around the White Sands area.

2. In order to protect these critical military operations we are modifying footnote US275 to the Table of Frequency Allocations, § 2.106 of the Commission's Rules, and modifying § 97.7 of the Commission's Rules to restrict amateur operations in this band. The restrictions are as follows: In the band 902–928 MHz the amateur service is prohibited in the area of Texas and New Mexico bounded by latitude 31°41′ N. on the south, longitude 104°11′ W. on the east, latitude 34°30′ N. on the north and longitude 107°30′ W. on the west; in addition, outside this area but within 150 miles of these boundaries of White Sands Missile Range, New Mexico, the service is limited to a maximum peak envelope power output of 50 watts from the transmitter. The necessary amendments to Sections 2.106 and 97.7 of the Commission's Rules are contained in the Appendix.

3. In accordance with section 553 of the Administrative Procedures Act, which excludes matters involving military functions from the notice process (U.S.C. 553(a)(1)), no Notice of Proposed Rule Making will be issued in this matter.

4. Accordingly, it is ordered, that §§ 2.106 and 97.7 are amended as set forth in the Appendix. Authority for this action is contained in section 4(i) and 303(r) of the Communications Act of 1934, as amended. These amendments become effective September 29, 1985.

5. Point of contact on this matter is Fred Thomas, (202) 653–8162.

Federal Communications Commission.

William J. Tricarico,

Secretary.

Appendix

Parts 2 and 97 of Chapter I of Title 47 of the Code of Federal Regulations are amended as follows:

The authority citations in Parts 2 and 97 continue to read:

Authority: Secs. 4, 303, 48 Stat. 1066, 1082 as amended: 47 U.S.C. 154, 303.

PART 2—FREQUENCY ALLOCATIONS AND RADIO TREATY MATTERS; GENERAL RULES AND REGULATIONS

Section 2.106 is amended by revising the text of footnote US275 as follows:

§ 2.106 Table of frequency allocations.

* * * * *

US275 The band 902–928 MHz is allocated on a secondary basis to the amateur service subject to not causing harmful interference to the operations of Government stations authorized in this band or to Automatic Vehicle Monitoring (AVM) systems. Stations in the amateur service must tolerate any interference from the operations of industrial, scientific and medical (ISM) devices, AVM systems and

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[1] See Second Report and Order in General Docket No. 80–739 FCC 83–511, 49 FR 2357 (adopted November 8, 1983).

[2] See Report and Order in PR Docket No. 84–960 FCC 85–460 (adopted August 9, 1985).