

solid tumors may simply represent statistical variation.

(j) Nussbaum, "Survivor Studies and Radiation Standards." (Bull. of the Atomic Scientists 41:62- (1985).)

The principal thesis of this article was that cancer risks from low level radiation exposure are significantly higher than would be expected on the basis of internationally accepted standards for radiation protection. The author questioned the reliance upon the atomic bomb survivor data noting that the data collection did not begin until 1950. He noted that during the interval between 1945 and 1950, the survivors had experienced harsh weather conditions and inadequate food and medical supplies and poor sanitation services. He suggested, therefore, that those surviving until 1950 experienced the equivalent of the healthy worker or "survivor" effect with the result that the death rate among these individuals should have been significantly lower than the national average for Japan. Since it was not, the author questioned the conclusion that the only correlation with exposure was increased mortality due to cancer. The author also criticized other studies and put forward several studies which are contended to be supportive of the author's thesis that radiation is far more dangerous than officially acknowledged.

Commentary: The Committee noted that the author failed to note the existence of a number of studies and reviews which refute or question the papers that the author relied upon. Consequently, the Committee did not

believe that the paper was credible and that it had little relevance to the veteran population of interest. The Department agrees with this assessment.

(k) Zufan, et al., "Epidemiological Investigation of Mutational Disease in the High Background Radiation Area of Jiangjiang, China." (J. Radiat. Res. 27:141-150 (1986).)

This paper concerns an Epidemiological investigation of whether or not there is a higher rate of mutation-based disease (cancer, hereditary disease, and congenital defects) in inhabitants exposed to high levels of background radiation versus those that were exposed to normal levels of background radiation in a control area. The annual individual external exposure to environmental gamma radiation was 330 millirad per year in the high background radiation area and 114 millirad per year in the control area. The interim conclusions reported by the authors were: (1) no statistically significant differences were noted for total nor site specific cancer mortality rates between the two areas; (2) the rates for hereditary disease and congenital defects were almost identical in the two areas; and (3) a higher frequency of Down's Syndrome was noted in the high background area which may be due to the age of the mothers at the time of birth as well as the age distribution of the children examined. The authors noted that further study was needed before conclusions could be arrived at.

Commentary: The Committee had difficulty assessing this paper because

of the incomplete presentation of data. The Department agrees with this assessment and notes that while the study was well formulated, it does need to be extended to gain credibility and/or ability.

Summary Comments and Conclusions

This group of 11 papers again indicates how difficult it is to produce incontestable epidemiological evidence. In spite of many projects being well covered and much effort being applied to their planning, implementation and interpretation, few ultimately withstand expert scrutiny and fewer shift the balance of existing precepts. Our solid knowledge is hard earned. For the most part, the questions that were elusive in the first pass of research remain difficult and yield to answers reluctantly.

Nevertheless, some advances have been suggested, if not established, such as the probably radiogenic qualities of multiple myeloma, the resilience of the body exposed to low doses of ionizing radiation, and some of the possible responses of the skin to radiation exposure.

Several items demonstrated the difficulty of dealing with stochastic effects which we know occur but which we cannot so easily identify in the pool. The uncertainty creates problems of judgment and, as some of the papers show, opens the issues at hand to a wide range of political and emotional interpretations that further compound the quest for objectivity.

[FR Doc. 89-15252 Filed 6-27-89; 8:45 am]

BILLING CODE 8320-01-M

Sunshine Act Meetings

Federal Register

Vol. 54, No. 123

Wednesday, June 28, 1989

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMITTEE ON EMPLOYEE BENEFITS OF THE FEDERAL RESERVE SYSTEM

TIME AND DATE: 2:30 p.m., Monday, July 3, 1989.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, NW., Washington, DC 20551.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

9. The Committee's agenda will consist of matters relating to: (a) The general administrative policies and procedures of the Retirement Plan, Thrift Plan, Long-Term Disability Income Plan, and Insurance Plan for Employees of the Federal Reserve System; (b) general supervision of the operations of the Plans; (c) the maintenance of proper accounts and accounting procedures in respect to the Plans; (d) the preparation and submission of an annual report on the operations of each of such Plans; (e) the maintenance and staffing of the Office of the Federal Reserve Employee Benefits System; and (f) the arrangement for such legal, actuarial, accounting, administrative, and other services as the Committee deems necessary to carry out the provisions of the Plans.

Specific items include: Salary administration for the Office of Employee Benefits.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Dated: June 26, 1989.

William W. Wiles,
Secretary of the Board

[FR Doc. 89-15431 Filed 6-26-89; 2:55 pm]

BILLING CODE 6210-01-M

FEDERAL RESERVE SYSTEM BOARD OF GOVERNORS

"FEDERAL REGISTER CITATION OF PREVIOUS ANNOUNCEMENT: 54 FR 26139, June 21, 1989.

PREVIOUSLY ANNOUNCED TIME AND DATE OF THE MEETING: 11:00 a.m., Monday, June 26, 1989.

CHANGES IN THE MEETING: Addition of the following closed item(s) to the meeting:

Consideration of exception from the Board's policy on partisan political service by an employee of the Federal Reserve System.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452-3204.

Date: June 26, 1989.

Jennifer J. Johnson,
Associate Secretary of the Board

[FR Doc. 89-15434 Filed 6-26-89; 3:27 pm]

BILLING CODE 6210-01-M

NATIONAL TRANSPORTATION SAFETY BOARD

TIME AND DATE: 9:30 a.m. Thursday, July 6, 1989.

PLACE: Board Room, Eighth Floor, 800 Independence Avenue, SW., Washington, DC 20594.

STATUS: The first three items are open to the public. The last item is closed under Exemption 10 of the Government in Sunshine Act.

MATTERS TO BE CONSIDERED:

1. Railroad Accident Report: Head-On Collision Between Iowa Interstate Railroad Extra 470 West and Extra 406 East, Altoona, Iowa, July 30, 1988.

2. Marine Accident Report: Fire On Board the Bahamian Passenger Ship SCANDINAVIAN STAR, Gulf of Mexico, May 15, 1988.

3. Reconsideration of Probable Cause: Aircraft Accident—Grand Canyon Airlines, Inc., and Helitech, Inc., Midair Collision, Grand Canyon National Park, June 18, 1986.

4. Opinion and Order: Administrator v. Thorn, Docket SE-8153; disposition of respondent's appeal.

FOR MORE INFORMATION CONTACT: Bea Hardesty, (202) 382-6525.

Bea Hardesty,
Federal Register Liaison Officer,
June 23, 1989.

[FR Doc. 89-15343 Filed 6-26-89; 8:57 am]

BILLING CODE 7533-01-M

Corrections

Federal Register

Vol. 54, No. 123

Wednesday, June 28, 1989

This section of the FEDERAL REGISTER contains editorial corrections of previously published Presidential, Rule, Proposed Rule, and Notice documents. These corrections are prepared by the Office of the Federal Register. Agency prepared corrections are issued as signed documents and appear in the appropriate document categories elsewhere in the issue.

DEPARTMENT OF AGRICULTURE

Agricultural Marketing Service

7 CFR Part 998

[Docket No. FV-89-040]

Marketing Agreement 146 Regulating the Quality of Domestically Produced Peanuts; Relaxation of Outgoing Quality Regulations and Changes in the Terms and Conditions of Indemnification for 1989 Crop Peanuts

Correction

In rule document 89-14135 beginning on page 25439 in the issue of Thursday, June 15, 1989, make the following corrections:

1. On page 25442, the table heading "INDEMNIFIABLE GRADES" should be flush with the left margin and the

heading "Maximum Limitations" should be centered immediately above the table.

2. On the same page, in the table, in the fourth column, in the 10th line, the entry corresponding with "Runner U.S. Splits (not more than)" should read "2.00".

BILLING CODE 1505-01-D

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

Office of the Secretary

24 CFR Part 570

[Docket No. R-89-1440; FR-2647]

RIN 2501-AA83

Urban Development Action Grants (UDAG) Program; Changes to Project Selection System

Correction

In rule document 89-11736 beginning on page 21388 in the issue of

Wednesday, May 17, 1989, make the following correction:

On page 21390, in the second column, in the third column of the table, under the heading "Maximum points" the third entry should read "33".

BILLING CODE 1505-01-D

NATIONAL LABOR RELATIONS BOARD

29 CFR Part 103

Collective-Bargaining Units in the Health Care Industry

Correction

In rule document 89-9654 beginning on page 16336 in the issue of Friday, April 21, 1989, make the following corrections:

1. On page 16343, in the first column, in the eighth line, "herein" should read "therein".
2. On page 16344, in the third column, in the fourth complete paragraph, in the fifth line "necessary" should read "necessity".

BILLING CODE 1505-01-D

Registered Federal Trade

**Wednesday
June 28, 1989**

Part II

Environmental Protection Agency

**40 CFR Parts 51 and 52
Requirements for the Preparation,
Adoption, and Submittal of
Implementation Plans; Air Quality, New
Source Review; Final Rules**

ENVIRONMENTAL PROTECTION AGENCY**40 CFR Parts 51 and 52**

[AD-FRL 3603-7]

Requirements for the Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: On August 25, 1983, EPA proposed amendments to its regulations addressing the construction of new and modified stationary sources of air pollution (48 FR 38742). The EPA proposed changes in eight areas of those regulations and provided additional guidance in three other areas. Today's notice announces final action on that part of the August 25 proposal dealing with "Federal enforceability" of emissions controls and limitations at a source. Essentially, EPA is retaining the existing Federal enforceability requirement. However, EPA is clarifying its regulation to specify that stationary source operating permits issued by a State may be treated as federally enforceable in certain situations, provided that the State's operating permit program has been approved by EPA and incorporated into the State implementation plan (SIP) under section 110 of the Clean Air Act (Act).

DATES: This action is effective on June 28, 1989.

ADDRESS: The public docket for this rulemaking, A-82-23, is available for public inspection and copying between 8:00 a.m. and 4:00 p.m., Monday through Friday, at EPA's Central Docket Section (LE-131), Room M-1500, Waterside Mall, 401 M Street, SW., Washington, DC. A reasonable fee may be charged for copying, as provided by the Act.

FOR FURTHER INFORMATION CONTACT: For Federal enforceability issues (except operating permits), Mr. David Solomon, EPA, New Source Review Section, Office of Air Quality Planning and Standards (MD-15), Research Triangle Park, North Carolina 27711; (919) 541-5375, (FTS) 629-5375. For operating permit issues, Mr. Kirt Cox, EPA, Air Quality Management Division, Office of Air Quality Planning and Standards (MD-15), Research Triangle Park, North Carolina 27711; (919) 541-5399, (FTS) 629-5399.

SUPPLEMENTARY INFORMATION:**I. Introduction**

In August 1980, EPA extensively revised its regulations concerning the preconstruction review of new and modified stationary sources under the Act, 42 U.S.C. 7401-7642, in response to *Alabama Power Company v. Costle*, (the *Alabama Power* case) 636 F.2d 323 (D.C. Cir. 1979) (see 45 FR 52676, August 7, 1980). Five sets of regulations resulted from those revisions. One set, 40 CFR 51.166 (formerly 40 CFR 51.24), specifies the minimum requirements that a prevention of significant deterioration (PSD)¹ program must contain in order to warrant approval by EPA as a revision to a SIP under section 110 of the Act. Another set, 40 CFR 52.21, establishes the Federal PSD program, which is currently applied in many States as part of the SIP. Another set, consisting of two regulations, 40 CFR 51.165 (a) and (b) (formerly 40 CFR 51.18 (j) and (k)), specifies the elements of an approvable State permit program for preconstruction review in, or affecting, nonattainment areas. The fourth set, 40 CFR Part 51, Appendix S, embodies the nonattainment area Emissions Offset Interpretative Ruling (Offset Ruling), previously revised in January 1979 (44 FR 3273). The fifth set, 40 CFR 52.24, embodies the construction moratorium which applies in certain nonattainment areas.

In the fall of 1980, numerous organizations petitioned the U.S. Court of Appeals for the D.C. Circuit to review various provisions of those PSD and nonattainment preconstruction regulations. The court consolidated those petitions with a collection of challenges to the 1979 revisions to the Offset Ruling in *Chemical Manufacturers Association (CMA) v. EPA*, No. 79-1112 (D.C. Cir.). In June 1981, EPA began negotiations with the industry petitioners to settle the *CMA* case. The EPA entered into a comprehensive settlement agreement with the *CMA* petitioners in February 1982. Subsequently, the court granted a stay of the case pending implementation of the settlement agreement.

In the settlement agreement, EPA committed to propose certain amendments set forth in Exhibit A to eight parts of the regulations pertaining to new source review (NSR or

preconstruction review)², to provide guidance in three additional areas, and to take final action on the proposals. On August 25, 1983, EPA published a notice of proposed rulemaking in accordance with that agreement (48 FR 38742). Among other things, EPA proposed to delete from certain provisions the requirement that controls or limitations on a source's emissions must be "federally enforceable" (i.e., enforceable by EPA) in order to be considered in determining whether a new or modified source will be "major" and therefore subject to PSD or nonattainment permitting requirements (applicability determination). The EPA also proposed to delete the requirement in § 51.18(j)(3)(ii)(e) (now § 51.165(a)(3)(ii)(e)) that emissions reductions obtained by one source from another (offsets) in order to obtain a nonattainment permit be federally enforceable.³

In the August 25, 1983 notice of proposed rulemaking, the Administrator stated that EPA would review comments on the proposed amendments carefully and with an open mind in order to make an independent judgment on their merits prior to taking any final action. The EPA has since received extensive public comment, including that presented at a public hearing held on September 29, 1983.

Today EPA is taking final action on the proposed changes to the "Federal enforceability" provisions. Essentially, as discussed in detail below, EPA is retaining the existing "Federal enforceability" requirements without change. However, EPA is amending the definition of "federally enforceable" and 40 CFR 52.23 to specify that State-issued operating permits are federally enforceable under certain circumstances. In another notice being published today, EPA is also taking final action on the remaining August 25, 1983 rulemaking proposals. Accordingly,

¹ An NSR, or preconstruction review, is required as part of a SIP under 40 CFR Part 51, Subpart I (formerly 40 CFR 51.18 and 51.24) to ensure that construction or modification of a source will not cause violations of the State's control strategy or interfere with attainment or maintenance of a NAAQS. An NSR program includes permit programs satisfying the Act's requirements for review of major stationary sources in nonattainment and PSD areas (40 CFR 51.165(a) and 51.166) under circumstances described in more detail later in this notice. In addition to the major source NSR provisions, which are the focus of this rulemaking, virtually all States have a general NSR program applying to most minor sources.

² A basic requirement of nonattainment NSR of a potential major source is that the applicant for a nonattainment construction permit must show that its new emissions will be offset by emission reductions elsewhere (42 U.S.C. 7503(1)).

³ A PSD program refers to requirements that must be met in an area designated as being in attainment of a national ambient air quality standard (NAAQS) or unclassifiable (see 40 CFR 51.166 and 52.21). Areas that are designated as nonattainment for a NAAQS must meet certain other requirements aimed at ultimate attainment of the NAAQS (see, e.g., 40 CFR 51.165(a) (formerly 40 CFR 51.18(j)) and 52.24).

today's final actions fulfill EPA's commitments under Exhibit A of the CMA settlement agreement.

II. Background of Federal Enforceability Requirements

The five sets of PSD and nonattainment regulations promulgated in 1980 aim their substantive preconstruction review requirements at new "major stationary sources." Each set of rules defines a "major stationary source" as any stationary source that would have the potential to emit certain specified amounts of air pollutants (e.g., 40 CFR 51.165(a)(1)(iv) and 52.21(b)(1)). In each case, "potential to emit" is then defined as the "maximum capacity of a stationary source to emit a pollutant under its physical and operational design," but any limitation⁴ on the capacity of a source to emit a pollutant is treated as part of its design only if the control or limitation is federally enforceable (e.g., id. at § 51.165(a)(1)(iii) and 52.21(b)(4)). The regulations then define "federally enforceable" as "enforceable by the Administrator" (e.g., id. at § 52.21(b)(17)).⁵ The definition of "federally enforceable" adds that limitations that are enforceable by the Administrator include (but are not limited to) limitations imposed by: (1) The SIP itself, (2) a Federal PSD construction permit issued under 40 CFR 52.21 or any construction permit issued under regulations approved by EPA in accordance with Subpart I of 40 CFR Part 51 or 40 CFR 51.166, (3) a new source performance standard (NSPS) promulgated under section 111 of the Act (see 40 CFR Part 60), or (4) a national emission standard for hazardous air pollutants (NESHAP) promulgated under section 112 (see 40 CFR Part 61). In practice, EPA previously has declined to consider most other types of limitations as being "federally enforceable," including limitations that are enforceable by the Administrator under statutes other than the Clean Air Act.

⁴ As used in the rules and throughout this notice, "limitations" on a source's capacity to emit include such things as pollution control equipment, restrictions on operating hours, and restrictions on types or quantity of fuels to be used (see 40 CFR 51.165(a)(1)(iii)).

⁵ The EPA's primary enforcement authority in such cases derives from section 113 of the Act, which authorizes EPA, under certain conditions, to enforce violations of a SIP and of certain orders and emissions standards. The EPA may also enforce, under section 304(a) of the Act, against any person: (1) Who violates any emissions standard or limitation (or order issued) under such standards or limitations, (2) or who constructs any new or modified major stationary source without a proper PSD or nonattainment construction permit, or (3) who violates any conditions of such a permit.

In effect, those definitions require EPA and State authorities, in calculating the potential to emit of a proposed new source for a particular pollutant, to assume that the source would emit the pollutant at the maximum rate that the source could physically emit it, unless the source were subject to a limitation on its operation that EPA could enforce directly.

Each of the five sets of regulations also aims its substantive NSR requirements at "major modifications," a term which includes any significant net emissions increase at a major stationary source. The accounting system for determining such significant increases closely parallels the one described above for determining whether new sources exceed specific emission thresholds⁶ (e.g., id. at § 52.21(b)(2)). Specifically, the regulations define a "net emissions increase" as the amount by which the sum of: (1) The increase in "actual" emissions from the proposed change, and (2) any contemporaneous and otherwise "creditable" increases and decreases in "actual" emissions at the source would exceed zero (e.g., id. at § 52.21(b)(3)(i)). The regulations then provide that a contemporaneous decrease in emissions is creditable only to the extent that it "is federally enforceable at and after the time that actual construction on the particular change begins" (e.g., id. at § 52.21(b)(3)(vi)(b) (emphasis added)).

Since a proposed new unit at an existing source has yet to produce emissions, each set of regulations also defines the actual emissions of any such change as its potential to emit (e.g., id. at § 52.21(b)(21)(iv)). The definition of "potential to emit," as noted above, contains a requirement for Federal enforceability of controls and limits.

Finally, for sources already in operation, each set of regulations provides that actual emissions, when they cannot be determined, may be presumed to equal any source-specific allowable emissions for the unit (e.g., id. at § 52.21(b)(21)(iii)). The definition of allowable emissions, like the definition of potential to emit, also requires, in many cases, Federal enforceability of any applicable limitations (e.g., id. at § 52.21(b)(16)).

The general purposes of the Federal enforceability requirements were: (1) To

⁶ For PSD purposes, pollutants currently included in this review are: (1) The pollutants for which a NAAQS, NSPS, or NESHAP exists; and (2) their precursors (e.g., 40 CFR 52.21(b)(2)(i) and (b)(23)(i)). For nonattainment purposes, they are the pollutants for which NAAQS exist and their precursors (see 45 FR 52711 (August 7, 1980) [col. 3]; 40 CFR 51.165(a)(1)(v)(A)).

corroborate, through the procedures for obtaining SIP revisions or federally approved construction permits, that any voluntarily imposed limits on a source's capacity to emit are, in fact, part of its physical and operational design, and that any claimed limitations will be observed; (2) to ensure that an entity with strong enforcement capability has legal and practical means to make sure that such commitments are actually carried out; and, generally, (3) to support the goal of the Act that EPA be able to enforce all relevant features of SIPs that are necessary for attainment and maintenance of NAAQS and PSD increments (see 48 FR 38748, August 25, 1983).

III. Proposed Amendments to the Federal Enforceability Requirements

Shortly after the Federal enforceability requirements were promulgated, several parties to the CMA settlement agreement, representing industry, challenged requirements for Federal enforceability in the "potential to emit" and "net emissions increase" definitions, in court and in administrative petitions for reconsideration. They claimed that the Federal enforceability requirements were unnecessary and unduly burdensome. Specifically, they claimed that each approved SIP already prohibits construction of a new major stationary source or major modification without a PSD or nonattainment construction permit. Accordingly, any company that builds a project that emits, or has the potential to emit, pollution in excess of the applicable thresholds for classification as "major," without first obtaining such a permit, would be in violation of the law and therefore subject to subsequent enforcement action by EPA. Thus, they argued, EPA does not need the Federal enforceability requirement to deter a source operator from using a non-Federal control or limit to escape PSD or nonattainment NSR and then violating those controls or limits since, even if EPA could not enforce the limitations, it could enforce the prohibition against construction or modification without a PSD or nonattainment permit and shut down the source.⁷

The petitioners also pointed out that, to obtain a federally enforceable limitation, a company would have to apply to the State agency for the change

⁷ The industry parties apparently assumed EPA would be aware of any actual violations of limitations and thresholds, but did not elaborate on that or on how monitoring of actual emissions would be as effective in preventing violations as the current regulations.

and then await whatever public procedures and EPA scrutiny were required. As a result, industry contended, a company could experience substantial expense and delay just in obtaining the necessary limitation.

In the August 25, 1983 notice of proposed rulemaking, EPA stated preliminarily that the Federal enforceability requirement might be unnecessary to some extent and that it would consider deleting it. The proposal was based on the possibility of delay and consequent expense that could arise from processing certain construction permit limitations or revising the SIP to make the applicable limitations federally enforceable. However, EPA emphasized that it still intended to achieve the purposes for which Federal enforceability was originally designed (48 FR 38748, August 25, 1983). Nonetheless, EPA was inclined at that time to think that the purposes of the Federal enforceability requirements could also be served by a requirement that limitations be enforceable by State or local governments, provided that such limitations were discoverable by EPA and the public (id). Accordingly, EPA proposed to: (1) Delete the word "federally" from the term "federally enforceable" in the definitions of "potential to emit," "net emissions increase," "allowable emissions," and "major modification,"⁸ and from § 51.18(j)(3)(ii)(e) (now § 51.165(a)(3)(ii)(e)) (regarding offsets);⁹ and (2) to replace the definition of "federally enforceable" with an expanded definition of "enforceable" (including discoverable limitations enforceable under State or local law).

IV. Summary of Comments on August 1983 Proposal¹⁰

A. Comments Generally Supporting the Proposal

As expected, many industry representatives expressed strong support for the proposed deletion of the Federal enforceability requirements. Most of these comments also supported the proposed new definition of "enforceable," although two industry

associations suggested that no definition of "enforceable" was necessary.

In addition to the arguments discussed in the preceding section, the industry commenters made several general assertions in support of the proposal. First, they argued that since State and local operating permits and other requirements are still enforceable by the non-Federal authorities, source operators would comply with the State and local limitations even without Federal enforcement. Second, several commenters claimed that Federal enforceability requirements are inconsistent with the requirement in section 101 of the Act that State and local authorities be given primary responsibility for preventing and controlling air pollution. Third, all the industry commenters asserted that elimination of the Federal enforceability requirement would substantially reduce red tape and the delays and costs of obtaining a federally enforceable permit or SIP limitation. Fourth, several commenters claimed that Federal enforceability in the definition of "potential to emit" is inconsistent with the decision of the D.C. Circuit Court of Appeals in the *Alabama Power* case, 636 F.2d 323 (1979). In that case, the court clarified that a source's potential to emit must be based on actual emissions or "design capacity" for emissions of a source, including the effects of pollution control equipment required by law to be included in the design. The commenters argued that this focus on actual emissions or design implicitly requires EPA to give credit, in calculating a source's emission potential, for any controls or limitations required by State or local law or permits, even if they are not federally enforceable.

Fifth, several commenters argued that citizen enforcement of State and local permit limitations under the citizen suit provisions of section 304 of the Act would be preserved, even without the additional requirement of Federal enforceability, provided that the State/local permit processes are "coherent" and the permits themselves remain on file.¹¹

¹¹ Two industry commenters also alleged that the 1980 Federal enforceability requirements were procedurally invalid because, in their view, EPA did not provide adequate prior notice or opportunity to comment on the concept and lacked adequate record support for the requirement. The EPA disagrees with those comments and believes that the 1980 requirements were a logical outgrowth of the preceding proposal (44 FR 51924, September 5, 1979) and were amply supported by the rulemaking record at the time. However, those comments are now moot. Any possible procedural defects in the 1980 rules regarding Federal enforceability have been cured by this rulemaking.

One commenter also suggested, contrary to the position EPA took in the proposal, that offset credits should be considered enforceable (by a State, if not by EPA) even if the source providing the offset is not bound to reduce its emissions by a permit or other State limitation, provided that the offset source stipulates to the State that it will reduce its emissions and that the SIP allows such stipulations. The commenter argued that a State could enforce such a stipulation under its authority to prevent violations of the SIP.

B. Comments Opposing the Proposal

Several State air quality programs and environmental groups strongly opposed the proposed deletion of the Federal enforceability requirements on several grounds. First, the association of State and Territorial Air Pollution Program Administrators (STAPPA) commented that even though State and local governments have primary pollution control responsibility, they need the support of a credible Federal enforcement program to be most effective.

Two commenters asserted that Federal enforceability is the only effective means of assuring, during applicability determinations, that limitations are really intended to be observed and for assuring that offsets and limits are actually implemented. These commenters apparently felt that State and local enforcement is often less vigorous and effective than Federal enforcement, especially in light of the economic and other pressures some businesses can exert on State and local enforcement authorities. One commenter felt that the procedures involved in obtaining a federally enforceable limitation or offset are the only effective means of assuring that EPA and the public have a chance to identify and evaluate the intended limitation in advance.

With regard to offsets, one commenter pointed out that section 173 of the Act requires offset commitments to be "legally binding" and that when Congress enacted section 173, in 1977, it implicitly ratified EPA's Offset Ruling which required Federal enforceability. Thus, the commenter concluded, legally binding commitments probably refer to federally enforceable commitments.

Finally, the same commenter argued that citizen enforcement of offset transactions under section 304 would only be effective, as a practical matter, if the records of all such transactions are centrally located (i.e., at EPA's Regional Offices) in a standardized system, as they are under the existing

⁸ The definitions of "major modification" exempt from applicability determinations certain increases in operating hours and switches in fuel or material used, unless the increase or switch is barred by a federally enforceable limit (e.g., 40 CFR 52.21(b)(2)(iii)(e)(1)).

⁹ Although external offsets are not used to avoid nonattainment NSR, the purposes of requiring Federal enforceability of such offsets are essentially the same as for requiring Federal enforceability of limitations used to avoid such review.

¹⁰ A more detailed "Summary of Comments" has been placed in the public docket for this rulemaking.

Federal enforceability regulations. This commenter also criticized the proposal as it would affect Federal enforcement efforts, since enforcement actions against sources already constructed could be more difficult than action taken prior to construction.

V. Decision and Response to Comments

After consideration of the comments and reevaluation of the preliminary statements made in the August 1983 proposal, EPA has decided to retain the Federal enforceability requirement in all the provisions discussed above. In addition, to provide full internal consistency within the Federal enforceability provisions of 40 CFR Part 51, Appendix S (known as the "Offset Ruling"), EPA is, in a separate document also being published in today's *Federal Register*, amending section IV.C.3. of the Offset Ruling to clarify that emissions offsets involving reduced operating hours or source shutdowns must, like all emissions offsets, be federally enforceable (see Appendix S, section II.A.6.(v)(b)). In light of today's decision, EPA will not add the proposed new definition of "enforceable" to the regulations. However, as discussed below, EPA is clarifying that State operating permits may be treated as federally enforceable under certain conditions. This clarification will reduce any problems which may arise from the Federal enforceability requirements. The clarification is formally indicated by slight amendments to the definition of "federally enforceable" and to 40 CFR 52.23.

A. Federal Enforceability Is Necessary to Ensure That Limitations and Reductions Are Implemented

Since sources may avoid the protective requirements of PSD and nonattainment NSR by relying on State or local limitations or reductions, it is essential to the integrity of the PSD and nonattainment program that such State or local limitations be actually and effectively implemented.¹² The EPA continues to believe, as it did in 1980 (45 FR 52688-89), that Federal enforceability is both necessary and appropriate to ensure that such limitations and reductions are actually incorporated into a source's design and followed in practice.

The EPA agrees with those commenters, including STAPPA, who asserted that Federal enforceability is

necessary to support State and local enforcement efforts. Although EPA believes that most State and local governments are committed to effective enforcement of their permit programs, it is true—as STAPPA and some environmental commenters pointed out—that the level of State and local enforcement is uneven, and that some States and localities have been unwilling or unable to enforce their programs effectively. It follows that, in the absence of a Federal enforcement capability to back up State and local efforts, there would be somewhat less incentive for sources to actually observe non-Federal limitations or, in the case of offsets, to make the reductions for which credit has already been given. The EPA cannot agree, contrary to the suggestions of some source operators, that State and local enforcement alone would always provide enough incentive to source operators to ensure adequate compliance.

The EPA also believes, as suggested by some environmental commenters, that, absent Federal enforcement capability, some State and local governments would be more susceptible to economic and other pressures from industry that could actually make State and local enforcement less effective than it currently is.¹³ Conversely, the presence of a Federal ability to enforce limitations and reductions can give State and local bodies more leverage in dealing with sources to ensure compliance and should make such bodies more effective in their enforcement efforts.

The EPA also agrees with those commenters who pointed out that the processes by which federally enforceable limits or offset reductions are imposed (e.g., public notice and comments, notification to EPA) are the best and most reliable ways to ensure, in advance, that a source actually intends to observe a limitation or make a reduction in the future. Whether the limitation is contained in a SIP revision or a State permit issued under regulations approved by EPA and included in the SIP, public notice and opportunity for participation prior to construction is virtually guaranteed. At

that point, EPA, or anyone else, can analyze the record to determine: (1) Whether a proposed limitation or reduction will produce the benefits claimed, (2) whether the applicant is seriously committed to the limitation, and (3) whether practical means to monitor compliance exist. Even though EPA has confidence that most State and local procedures would allow for some sort of public scrutiny even if Federal enforceability were deleted and the proposed expanded definition of "enforceable" adopted, there would be no assurance that every permit or limitation would receive effective scrutiny.

Similarly, as one environmental group pointed out, the current Federal enforceability requirement facilitates citizen enforcement of offsets (and, implicitly, other limitations) under section 304 of the Act, since all permits and commitments meeting the definition of Federal enforceability must undergo some public scrutiny and are kept in standardized files in EPA's Regional Offices. By contrast, without such a requirement, as under the proposed definition of "enforceable," the only records of many such transactions would be scattered around various State and local offices and would be more difficult to obtain. At a minimum, this could make citizen enforcement more difficult and costly and, therefore, less effective as a means of ensuring that limitations and reductions are actually implemented.¹⁴

For the reasons discussed above, EPA disagrees with those industry commenters who claimed that nonfederally enforceable State and local permits, if discoverable, would be an adequate substitute for Federal enforceability. The absence of potential Federal enforcement could result in: (1) Less incentive for sources to observe limitations; (2) more pressure on, and incentive for, State and local authorities to relax enforcement; and (3) decreased opportunities for effective citizen enforcement. Mere discoverability of permit limitations would not necessarily correct any of these problems, although it could create somewhat greater

¹³ The EPA also recognizes, as pointed out by the California Air Resources Board, that absent a nationwide, Federal enforcement presence, industry would be inclined to build, or move, sources to States with the least effective enforcement efforts. Such a possibility would give businesses more leverage over the State governments and could foster a competition among the States to actually relax enforcement efforts. The legislative history of the 1977 Act confirms that Congress intended the PSD requirements (by setting minimum criteria to be met in all States) to reduce such competition (H.R. Rep. No. 95-294, 95th Cong., 1st Sess. 140 (1977)).

¹² Similarly, it is important to the statutory goals of the nonattainment permit program (e.g., that all new construction is accompanied by offsets to assure "reasonable further progress" toward attainment, section 173(1)(A)) that external offsets from outside sources be actually implemented.

¹⁴ In addition, it is not certain that nonfederally enforceable State permit limitations or other commitments could be enforced under section 304 at all. That section allows citizen suits against any person who violates any limitation under the Act or any order issued by a State with respect to such a limitation, or who proposes to construct or does construct a major new source without a PSD or nonattainment construction permit (42 U.S.C. 7604(a)(1)). While violations of federally enforceable permit limitations may be subject to section 304 citizen suits, violations of nonfederal limitations or offsets arguably might not be.

incentives for compliance than would exist without it. Moreover, discoverability could itself pose practical problems, for both EPA and citizens, in those situations where the State or local permit process is incomplete or poorly organized or recorded.

The EPA also believes, contrary to some commenters' suggestions, that EPA's authority to enforce the prohibitions in most SIP's and in the Act (see sections 110(a)(2)(I), 165(a)(1), 167, and 304(a)(3)) against construction of major sources without a PSD or nonattainment permit (see also sections 113 and 167 of the Act) is not a completely satisfactory substitute for the current Federal enforceability requirements.¹⁵ The commenters claimed that if any sources escaped PSD or nonattainment permit requirements solely because of a nonfederally enforceable State or local limitation, and later violated that limitation, then EPA could treat that source as major and enforce the construction prohibitions to maintain the integrity of the PSD and nonattainment programs (see 40 CFR 51.166(r)(2)) (formerly 40 CFR 51.24(r)(2)).¹⁶ However, the exercise of this authority depends in large part on EPA's ability to show that the new source or modification is actually emitting a pollutant at levels above the relevant annual threshold. This is much more difficult in practice than showing that an instantaneous emissions limitation in a federally enforceable permit has been exceeded. This is often difficult to do as a practical matter and may be even more difficult in situations involving nonfederally enforceable permits or limitations where EPA had little or no notice of, or opportunity to participate in, that process. In addition, courts may be less willing to order strict compliance with the PSD and nonattainment construction prohibitions in those situations (e.g., to shut down the major source until the appropriate permit is obtained), given the impact that such an order could have on the source operator's investment and operation. In short, EPA does not believe that the ability to enforce PSD and nonattainment

construction prohibitions, in these cases, in the absence of current Federal enforceability, would be a sufficient deterrent to prevent violation of nonfederally enforceable limitations or to maintain the integrity of the PSD and nonattainment programs.¹⁷

In summary, EPA has concluded that the specific purposes for which the Federal enforceability requirement was originally intended, and to which EPA recommitted itself in the August 1983 proposal, cannot be fully or adequately achieved in the absence of Federal enforceability. The EPA recognizes that those purposes—i.e., corroboration prior to construction or modification that limitations will be included in a source's design and observed in operation, and the presence of a strong enforcement authority capable of holding a company to its commitments—can sometimes be achieved by State or local authorities implementing nonfederal limitations. However, in general, State and local enforceability alone will not fully assure that those purposes are met across the nation. Rather, State and local enforcement, supplemented by potential Federal enforcement of limitations, is a much more effective and efficient method of achieving those goals and protecting the integrity of the PSD and nonattainment NSR programs.

The EPA also recognizes, however, as several commenters pointed out, that the Federal enforceability requirements could result in some lengthy and expensive delays in obtaining federally enforceable permits or SIP revisions. However, some delays can be minimized by streamlined processes for certain SIP revisions, including the direct final rulemaking process (47 FR 27073, June 23, 1982). The latter procedure can often be used by EPA to process and publish noncontroversial SIP revisions in less than 6 months. More significantly, today's action clarifies that States have the option of implementing a program pursuant to which State operating permits could be treated as federally enforceable. Pursuant to this approach, States have the option of adopting certain permit processing procedures such that operating permits issued under them would be considered federally enforceable, with no need for the individual permits to be submitted as SIP revisions. Such a program can reduce the potential for delay which exists in the present system, while

serving to enhance the permitting process generally.

B. Federal Enforceability Is Consistent With the Requirements of the Act and the Alabama Power Case

Several industry commenters claimed that Federal enforceability is inconsistent with various provisions of the Act and with the decision in the *Alabama Power* case. The EPA disagrees.

First, EPA disagrees with those commenters who claimed that Federal enforceability is inconsistent with section 101(a)(2) of the Act, which states that regulation of air pollution sources is the primary responsibility of States and local governments. The EPA has always recognized this and encouraged and assisted the States in exercising their responsibility. The fact is, however, that the Federal enforceability requirements do not supersede or interfere with State and local governments' responsibility or their ability to take the primary role in regulating sources. Rather, as STAPPA recognized, the Federal enforceability requirements supplement and provide necessary support to State/local enforcement efforts. Indeed, as discussed above, Federal enforceability may promote more effective State/local enforcement by giving sources more incentive to comply and providing the States and localities more leverage over industrial sources. In any case, consistent with the primary role of State/local governments, EPA generally would not get involved in enforcing limitations unless those other bodies failed to enforce adequately.

Moreover, the Act itself, far from requiring EPA to remove itself from the enforcement of limitations or offsets, expressly authorizes EPA to enforce violations of SIP's by any person (which includes many source limitations under the definition of federally enforceable), with due deference to State/local primacy (see sections 113 and 167 of the Act). Thus, Congress intended that EPA play an important role in the enforcement of SIP requirements, and the Federal enforceability requirements are consistent with that intent.

The EPA also disagrees with those commenters who claimed that the Federal enforceability of limitations in the potential to emit definition is inconsistent with Congress' intent in using that term in section 169 of the Act.¹⁸ Those commenters pointed out

¹⁸ The definition of "major emitting facility" in section 169, which is based on a source's potential to emit, on its face applies only to the PSD program.

Continued

¹⁵ The EPA did suggest in the August 1983 proposal that that authority would help make the Federal enforceability requirements unnecessary (48 FR 38747). However, EPA did not suggest that this could be a complete substitute for the existing requirements.

¹⁶ In some such cases, the State probably could enforce the PSD and nonattainment construction prohibitions as well. However, as discussed above, States may be less willing or able to do so in the absence of potential EPA enforcement than they now are.

¹⁷ The comment of one industry source that stipulations by a source to reduce emissions for offset purposes should be considered enforceable by a State is now moot, since EPA has decided to retain the Federal enforceability requirement.

that the court in the *Alabama Power* case found that a source's potential to emit must be based on its design capacity, including pollution control equipment required by law to be installed and used at the source (636 F.2d at 354). However, the court declined to express any opinion on whether, and to what extent, legal limitations on the operation of a source should be included in a source's design capacity (id. at 355 n.73). The industry commenters suggested, nonetheless, that Congress intended any legal limitations, including operational limits, whether or not enforceable by EPA, to be included in a source's design capacity.

However, EPA does not believe that anything in the court's opinion, or in the language, or in the legislative history, of section 169 requires that every legal limitation, of any type, be included in a source's design capacity. In fact, the court implicitly left it to EPA's discretion (in the first instance) to determine what type of operational limits, if any, should be credited to a source (id.). The EPA believes that it is within its discretion in requiring Federal enforceability of an operational limit before including it in a source's design, consistent with the court's analysis of "potential to emit" (see 45 FR 52688, August 7, 1980).

In the *Alabama Power* case, the court concluded that whether a source is major depends on its maximum actual emissions or its design capacity, which includes anticipated functioning of pollution controls (636 F.2d at 353). It then referred to pollution controls required by law as examples where the functioning of such controls can be anticipated. Essentially, the court said that EPA must predict a source's future maximum emissions in determining design capacity and that pollution controls required by law are a reasonable means of predicting such future emissions. Although the court did not otherwise indicate how EPA should make such predictions, the court was evidently referring to predictions of actual emissions (id.). The EPA believes, therefore, that Congress (and the court) intended, or would have intended, such predictions to be reliable and reasonably accurate projections of

future emissions.¹⁹ As discussed above, EPA does not believe that nonfederally enforceable limitations are as likely to be as uniformly observed as federally enforceable limits and that requiring Federal enforceability is the best and most effective way to ensure maximum compliance by sources with limits. Thus, EPA believes that the Federal enforceability requirement is the most appropriate and reliable way to predict maximum future emissions and that it is, therefore, consistent with section 169 to define "potential to emit" to include that requirement (see 45 FR 52688).²⁰

Similarly, EPA believes (as one commenter pointed out) that the Federal enforceability requirement in 40 CFR 51.165(a)(3)(ii)(e), requiring all emissions offsets used to satisfy the nonattainment preconstruction review requirements to be federally enforceable, is consistent with the requirement of section 173 that such offsets must be "legally binding." The 1977 legislative history of the Act supports that interpretation of section 173. It is clear that Congress was well aware at the time that EPA was then operating under an early (1976) version of an Offset Ruling (41 FR 55524, December 21, 1976) (see, e.g., 42 U.S.C. 7502 note (1982) H.R. Rep. No. 95-294, supra, at 13-14, 208). Congress implicitly ratified the 1976 Offset Ruling approach by giving each nonattainment State the option of choosing to remain under that Offset Ruling indefinitely, and by requiring that that Offset Ruling remain in effect²¹ in every State, unless and

until the State revised its SIP to comply with the nonattainment provisions in sections 172-173 (See 42 U.S.C. 7502 note; H.R. Rep. No. 95-294, supra, at 208; H.R. Rep. No. 95-564 (Conf. Rep.), 95th Cong., 1st Sess. 156 (1977)). The 1976 Offset Ruling, in turn, required that offsets be enforceable by EPA as well as by States and private parties (41 FR 55530). As one commenter correctly observed, since there is no indication in the legislative history that Congress intended to revise that early Federal enforceability requirement in the Offset Ruling, it is likely that the reference to legally binding offsets in section 173 was based on that same concept. Thus, 40 CFR 51.166(a)(3)(ii)(e) is consistent with section 173.²²

Moreover, Federal enforceability is often even more appropriate and more important for offsets in nonattainment permits than it is for limitations that are used by a source to avoid nonattainment permits. In the latter situations, even if the limitations were not federally enforceable, EPA would still have potential power to enforce construction prohibitions against sources that subsequently become major by virtue of their failure to observe such limitations. By contrast, without Federal enforceability of offsets, EPA would have no such leverage against an external offset source where that source fails to make the promised emissions reduction. For the same reasons that State and local enforcement are not, in general, an adequate substitute for Federal enforceability in the context of making applicability determinations, they are even less satisfactory in the context of offsets.

C. Response to Other Comments

One industry commenter, although urging EPA to drop the Federal enforceability requirement in general, argued that EPA should retain Federal enforceability in the definition of "major modification." That definition exempts certain fuel switches and increases in operating hours from being considered as modifications, even if they would increase emissions from the source,

¹⁹ In fact, the two examples the court gave (636 F.2d at 353) of controls required by law—i.e., NSPS and SIP provisions—are included in EPA's definition of "federally enforceable." Moreover, as the court indicated, Congress meant for major sources to be those that actually emit certain amounts of a pollutant, either at present or in the future (id.). It would not make sense for a source to be given credit for future emission limitations if there is no reasonable expectation that those limitations will actually be observed.

²⁰ For essentially the same reasons Federal enforceability is an appropriate part of the definition of allowable emissions, which may be used to define a new unit's actual emissions in applicability determinations (e.g., 40 CFR 52.21 (b)(2)(iii)). Since Congress meant for the statutory PSD and nonattainment requirements to apply only to sources actually emitting major quantities of pollutants, (see the *Alabama Power* case, 636 F.2d at 352-53), it follows that any method used to estimate actual emissions (other than direct measurement) should be as reliable and accurate as possible. Federal enforceability of emissions limitations is the best available means of estimating actual emissions for a new unit which has yet to produce any emissions.

²¹ Congress intended that EPA have authority to amend the Offset Ruling (see 42 U.S.C. 7502; H.R. Rep. No. 95-294, supra, at 211), as EPA did in 1979 and 1980. A few areas are subject to that Offset Ruling.

²² For essentially the same reasons that Federal enforceability of external offsets is consistent with the Act, Federal enforceability of internal emission reductions as an element of avoiding nonattainment or PSD permits is also consistent with the Act. Under the definition of "net emissions increase" (e.g., 40 CFR 52.21(b)(3)), a modification at a source may escape classification as "major" if its creditable (i.e., federally enforceable) emission decreases are large enough. If emission offsets in nonattainment permits must be federally enforceable, it makes sense that internal reductions used to escape such permit requirements should be no less enforceable.

However, those terms are equally applicable to NSR under the Offset Ruling, nonattainment requirements under Part D of Title I of the Act, and the construction prohibitions of sections 110(a)(2)(I) and 173(4) (see 45 FR 52688, August 7, 1980). Therefore, EPA's "potential to emit" definition is the same in all the PSD and nonattainment regulations, and EPA's analysis of what Congress (and the court) meant by potential to emit applies to all those regulations.

unless those changes were prohibited by a federally enforceable (construction) permit condition. The industry commenter apparently feared that deletion of the requirement for Federal enforceability of such prohibitions in that definition, as proposed in the 1983 notice of proposed rulemaking, would work against industry since it would require many more fuel switches and operating hour changes to be counted as modifications than under the current rules. In fact, the commenter suggested that EPA increase the number of changes exempt from the modification definition by completely eliminating any reference to prohibited changes.

The EPA has decided not to amend the definition of major modification. The EPA believes that all NSR definitions should be as consistent as possible and that deleting the requirement for Federal enforceability in the definition of major modification would be inconsistent with its decision to retain Federal enforceability elsewhere. Moreover, the proposed revision of that definition could have created confusion and uncertainty as to which State and local prohibitions were enforceable. The EPA also agrees with the commenter that deletion of the word "federally" potentially could increase the number of prohibited fuel switches and other changes dramatically and could largely defeat the purpose for which the exemption was originally intended.

On the other hand, EPA must reject the commenter's suggestion that the definition be revised to exclude all fuel switches and operating hour changes from being considered modifications. One of the purposes of the Federal enforceability provision in the current definition is to support the prohibitions against such changes in SIP construction permits by making a violation of such a prohibition grounds, if the modification is major, for requiring a new PSD or nonattainment permit. The EPA believes this provision provides valuable added incentive to sources to comply with their permit limitations, and EPA is not persuaded that it should give up that leverage.

Another industry commenter suggested that if EPA deleted the Federal enforceability requirements and substituted a broader definition of "enforceable," as proposed, that the definition be narrowed to include only enforceability under Federal, State, or local air pollution control laws. Since EPA has decided not to adopt the proposed definition of enforceable, that comment is now moot.

D. General Enforcement Issues

Although EPA today concludes that it is appropriate to retain the Federal enforceability requirement, EPA agrees with the suggestions of some commenters that its authority to enforce prohibitions against construction of major sources which lack PSD or nonattainment permits through the "source obligation" regulations (e.g. 40 CFR 52.21(r) (1)-(4)) is an important deterrent to sources which might otherwise construct without a PSD or nonattainment NSR permit. Moreover, EPA believes that these regulations are significantly enhanced by the presence of the Federal enforceability requirement. If the permit obtained by a source is to be given status as federally enforceable in order to avoid NSR, it must have met the notice, source information, practical enforceability, and other strictures set forth in this document.

These same qualities of a federally enforceable permit make it much easier to determine, at a later date, whether the terms or intent of the permit have been violated and, if so, what enforcement action is appropriate. There are three options available to EPA for when a federally enforceable State permit has been or will be violated.

One option is simply to enforce, under section 113, the limitations in the permit which enabled the source to avoid NSR in the first instance, with the result that the source retains its minor status. This is appropriate where, despite the permit violations, it appears that the source intends to adhere to the emissions limitations in the future. However, EPA retains the right to enforce the PSD or nonattainment NSR violation as well.

The second option is to invoke the "source obligation" regulations, e.g., 40 CFR 52.21(r)(4), and treat the source as major by requiring it to obtain a PSD or nonattainment major source permit. This course is appropriate where the source, through a change in business plans, or through the belated realization that its original plans cannot accommodate the design or operational limitations reflected in its minor source permit, can no longer adhere to the limitations in that permit, and so exceeds them. As discussed in the preamble to the 1980 regulations, this option is also appropriate where the source (after receipt of its minor source permit) notifies the permitting authority in advance of its changed plans or expectations and the need for a future relaxation of the limitations in its current permit, without actually violating those limitations before obtaining a major source permit (see 45

FR 52689). Under either set of circumstances, pursuant to the "source obligation" regulations, EPA treats the source "as though construction had not yet commenced" for PSD and nonattainment permitting purposes.

The EPA believes that the exceedance or relaxation of a minor source permit, and the subsequent obtaining of a major source permit through compliance with the "source obligation" regulation, may not routinely involve penalties or additional sanctions other than those provided in section 113 for any period in which the source actually exceeded the limitations in its minor source permit. The EPA today clarifies, though, that a third general enforcement option is necessary and available under the Act and EPA's regulations in certain situations.

This third enforcement option is appropriate where EPA determines that a source obtained a permit containing limitations allowing it to escape preconstruction review as a major new source or major modification, not for the purpose of adhering to those limitations for an appreciable period of time in accordance with some legitimate business plan, but primarily with an intent to construct, and possibly begin operation of, a major new source or major modification without first obtaining a PSD or nonattainment permit. In such circumstances, EPA enforces the "source obligation" regulations, as in option two above, and requires the source to obtain a PSD or nonattainment permit "as though construction had not yet commenced." In keeping with the retrospective orientation of the "source obligation" regulations, however, EPA also looks to the beginning of actual construction on the new source or modification for purposes of additional enforcement action under sections 113 and 167 as well. Thus, under these circumstances, EPA treats the original permit obtained by the source, which previously allowed it to enjoy minor status, as not "federally enforceable" from the time construction begins on the new source or modification in question. It follows that EPA also treats the source's "potential to emit," as defined in 40 CFR 52.21(b)(4), as not being limited by the restrictions in the original permit. The net result is that EPA deems the new source or modification to have been major ab initio, and EPA considers seeking injunctive relief, civil penalties, and criminal sanctions, as appropriate, against the source under sections 113 and 167 from the beginning of actual construction.

The EPA today also wishes to briefly discuss the need and appropriate circumstances for resort to the third enforcement option. As a general matter, it is abundantly clear that Congress intended the NSR provisions in Parts C and D to require preconstruction review of major new sources and modifications. See, e.g., sections 160(5), 165(a), 165(e)(1) and (2), 110(a)(2)(I), 172(a)(1), 172(b)(6), and 173. The evident air quality planning and technology-forcing purposes of the Act's NSR provisions make the reasons for Congress' choice of statutory framework equally obvious. It is much easier, both in technical and practical terms, to consider the air quality impacts and pollution control requirements of a major new source of air pollution before it has been constructed and has begun operation rather than after. Nevertheless, there is a need to accommodate sources which, for legitimate business reasons, have constructed and begun operation as minor sources, but later discover that they now do, or in the future will, emit air pollutants at levels that will require them to be treated as major. In those circumstances, postconstruction review is unavoidable, and the "source obligation" regulations in 40 CFR 52.21(r)(4) and elsewhere are designed to fulfill this need.

At the same time, in keeping with the general legislative purpose, it is necessary that EPA take steps to prevent owners or operators from turning the statutory scheme on its head by using federally enforceable minor source permits in a manner inconsistent with the statute and with EPA's intention. In particular, EPA must discourage sources that would manipulate the NSR system by improperly obtaining minor status for a new source or modification. This could occur, for example, where the owner or operator's purpose is, from the start, to construct a new source or modification that would not be economically viable for any appreciable period of time if it were restricted to emitting at minor levels. If the source could construct, and even begin operation, under a minor source permit, and shortly thereafter obtain a postconstruction PSD or nonattainment permit when it is convenient to exceed minor emissions levels, with no possibility of other sanctions, it might encourage many owners or operators to proceed in this fashion. The result would be that the exception—postconstruction review in narrow, unavoidable circumstances—could swallow the general rule of preconstruction review. This result was

not intended by Congress or EPA, and cannot be allowed.

It is not possible to set forth, in detail, the circumstances in which EPA considers an owner or operator to have evaded preconstruction review in this way, and thus subjected itself to enforcement sanctions under sections 113 and 167 from the beginning of construction. This is ultimately a question of intent. However, EPA will look to objective indicia to establish that intent. For example, if an application for a Federal PSD permit is filed at or near the same time as a State minor source permit, EPA will carefully scrutinize the transaction. The EPA will also look carefully at the economic realities surrounding a transaction. For instance, where it appears obvious that a proposed source or modification, by its physical and operational design characteristics, could not economically be run at minor source levels for an appreciable length of time, EPA will take notice. Examples include the construction of an electric power generating unit, which by its nature can only be economical if it is used as a base-load facility, that is proposed to be operated as a peaking unit, and the construction of a manufacturing facility with a physical capacity far greater than the limits specified in a minor source permit. The EPA may consider how a project's projected level of operation was portrayed to lending institutions, and may examine other records concerning projected demand or output. Significant discrepancies between operating levels as portrayed in these documents and operating restrictions in a minor source permit would justify consideration of enforcement action.

The EPA wants to emphasize, that under the third enforcement option, it does not generally seek monetary penalties, or any remedies other than those provided in the "source obligation" regulations, except in those cases where it believes it could show to the satisfaction of a court that a source owner or operator had obtained a minor source permit with the purpose of obtaining, after construction, a major source permit, so as to evade preconstruction review. The EPA in no way seeks to discourage or intends to penalize those owners or operators who accept emissions limitations in pursuit of legitimate business purposes, and who in good faith later seek a relaxation of those limitations. As discussed above, the "source obligation" regulations and section 113 enforcement sanctions (for any period in which minor source permit limits are actually exceeded) provide a complete remedy in those situations.

There is no need to revise the text of the NSR rules to explicitly provide for this third enforcement option. The "source obligation" regulations do not by their terms preclude—or even address—the issue of civil penalties or other enforcement action under sections 113 and 167. Similarly, it is not necessary to specify in the definitional provisions that a minor source permit obtained in order to evade the Act's preconstruction review requirements is invalid for the purpose of "federally enforceable" limitations on a source's "potential to emit," and cannot be used as a shield against enforcement action. Implicit in any regulatory scheme is the unwillingness to countenance fraud, misrepresentation, or other misuse, particularly where the result would contravene the underlying statutory or regulatory purposes. Today's action clarifies the purposes served by the EPA regulations in question and outlines the circumstances in which their misuse may lead to enforcement action.²³

VI. State Operating Permit Program

A. Introduction

As noted above, today's final action includes clarification of EPA's policy on implementing its definition of Federal enforceability. Under this policy clarification, all terms and conditions contained in State operating permits will be considered federally enforceable, provided that the State's operating permit program is approved by EPA and incorporated into the applicable SIP under section 110 of the Act, and provided that the operating permit meets certain requirements.²⁴ This clarification of the Federal enforceability definition can minimize the time and expense required to obtain federally enforceable limitations. The EPA believes that by encouraging States to adopt federally enforceable operating permit programs, EPA has largely satisfied certain objections to the current definition of "federally enforceable" voiced by industry commenters.

²³ Today's action also serves to clarify that EPA never intended that the source obligation regulations would serve to insulate a source owner or operator from penalties or other enforcement sanctions in cases of fraud or other misuse involving minor source permits. Any contrary interpretation that might be drawn from the preamble to the 1980 regulations (see 45 FR 52689) is thus inaccurate, and is hereby rejected.

²⁴ Various local air pollution programs operate air quality programs under their own regulations, which are approved into the SIP. The reader should understand that "State" operating permit programs encompass those local programs with jurisdiction over only part of a State as well as to statewide programs.

As discussed above, EPA recognizes that its previous application of the definition of "federally enforceable" could sometimes cause delay or expense in obtaining a limitation or control that EPA considers federally enforceable. That application of the definition treats, as federally enforceable, PSD construction permits issued under 40 CFR 51.166 (formerly 40 CFR 51.24) or 52.21, as well as all construction permits issued under regulations approved pursuant to 40 CFR 51.160-165 (formerly 40 CFR 51.18).²⁵ Under § 52.23, "[f]ailure to comply with * * * any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources" is a violation of the implementation plan and may result in enforcement action under section 113 of the Act.

The EPA has always been concerned with the prompt processing of SIP revisions and permits. For example, to minimize delay in processing certain types of SIP revisions, EPA previously set up a streamlined process called direct final rulemaking (47 FR 27073 (June 23, 1982)). That process can shorten EPA's time for processing SIP revisions, in noncontroversial cases, to less than 6 months. The EPA will continue to use that procedure to process source-specific SIP limitations whenever possible.

The EPA is today emphasizing a more fundamental way to minimize delay and expense. Specifically, EPA is expressly expanding its definition of "federally enforceable" to include limitations and controls imposed in State operating permits, provided that the applicable State operating permit program has been approved by EPA as meeting certain conditions and has been incorporated in an appropriate SIP, and that the permit in fact conforms to the requirements of the approved program.

B. Discussion

State operating permit programs, although in common use in many States, have not been required to be included in

the SIP,²⁶ although some States have voluntarily submitted various types of operating permit programs to EPA for approval and inclusion in a SIP. The EPA has authority to approve such programs into SIP's under section 110(a)(2) (B) and (D) of the Act. A few of these programs (e.g., Oregon's, 49 FR 36843 (September 20, 1984) and 51 FR 12324 (April 10, 1986) and Idaho's, 51 FR 22811 (June 23, 1986)) provide for sophisticated permit review and procedural safeguards. The EPA has already concluded that permits issued under those programs are federally enforceable. In addition, some States have operating permit programs that are not included in a SIP.

Traditionally, with a few exceptions such as Oregon and Idaho, EPA has not considered State operating permits, *per se*, to be federally enforceable.²⁷ However, EPA believes it has the authority to enforce limitations in certain types of operating permits and to consider operating permits as federally enforceable if they are issued pursuant to permitting programs (approved into the SIP) that meet the following criteria:

(1) The State operating permit program (i.e., the regulations or other administrative framework describing how such permits are issued) is submitted to and approved by EPA into the SIP.²⁸

(2) The SIP imposes a legal obligation that operating permit holders adhere to the terms and limitations of such permits (or subsequent revisions of the permit made in accordance with the approved operating permit program) and provides that permits which do not conform to the operating permit program

requirements and the requirements of EPA's underlying regulations may be deemed not "federally enforceable" by EPA.

(3) The State operating permit program requires that all emissions limitations, controls, and other requirements imposed by such permits will be at least as stringent as any other applicable limitations and requirements contained in the SIP or enforceable under the SIP, and that the program may not issue permits that waive, or make less stringent, any limitations or requirements contained in or issued pursuant to the SIP, or that are otherwise "federally enforceable" (e.g. standards established under sections 111 and 112 of The Act).

(4) The limitations, controls, and requirements in the operating permits are permanent, quantifiable, and otherwise enforceable as a practical matter.

(5) The permits are issued subject to public participation. This means that the State agrees, as part of its program, to provide EPA and the public with timely notice of the proposal and issuance of such permits, and to provide EPA, on a timely basis, with a copy of each proposed (or draft) and final permit intended to be federally enforceable. This process must also provide for an opportunity for public comment on the permit applications prior to issuance of the final permit.

States are free to continue issuing operating permits that do not meet the above requirements. However, such permits would not be "federally enforceable" for NSR and other SIP purposes. The EPA anticipates that some States may choose to continue current practices rather than alter their permit programs so as to render operating permits federally enforceable, particularly with respect to small sources. Other States may wish to subject only certain types or classes of permits to these requirements. For example, a State may decide to not follow public participation procedures for, and not submit to EPA, large numbers of permits for very small sources, because the State has no intention of using such permits as external emissions offsets, to qualify as a minor source or "net out" of NSR, or to demonstrate attainment of the NAAQS. The EPA expects that States will, for purposes of clarity and administrative efficiency, indicate within the federally enforceable permits that they are being accorded such status.

The above five criteria are modeled on the requirements for issuance of federally enforceable construction

²⁵ Sections 51.160-163 [formerly § 51.18 (a)-(i)] specify criteria for all new sources under section 110 (a)(2)(D) and (a)(4) of the Act that NSR programs must meet to be included in a SIP. Sections 51.165 (a) and (b) [formerly § 51.18 (j) and (k)], respectively, establish additional criteria that must be met for approval of construction permit programs under Part D of the Act for major new sources in nonattainment areas. However, EPA may also approve construction permit programs meeting §§ 51.160-51.163 that do not satisfy § 51.165 (a) or (b), including construction permit programs for nonmajor sources. Permits issued under programs approved pursuant to §§ 51.160-51.163 are federally enforceable.

²⁶ Section 110(a)(2)(D) of the Act does require that a SIP include a "program to provide for * * * regulation of the modification, construction, and operation of any stationary source including" permitting programs for major sources. Similarly, section 172(b)(6) requires that a nonattainment SIP "require permits for the construction and operation of new or modified major stationary sources." However, those statutory provisions regarding operation of a source are satisfied by the requirement in EPA's rules that the terms of a PSD or nonattainment construction permit remain in effect throughout the life of the source (unless modified lawfully) (40 CFR 52.21(w)(1)) (see also section 173 of the Act (treats nonattainment permits to construct and operate as if they were one)).

²⁷ Although certain operating permits have not been considered federally enforceable, some of the terms and conditions appearing in such permits may be federally enforceable through other means. For example, if the terms of an operating permit are the same as those in a federally enforceable construction permit or the same as the limitations in a SIP or an NSPS, those terms are federally enforceable by virtue of EPA's authority to enforce the construction permit, the SIP, and the NSPS, but not the operating permit.

²⁸ EPA wishes to make it clear that no State is required to include operating permit programs in its SIP. Participation is voluntary.

permits. The first two general requirements outlined above are necessary so that EPA can invoke sections 113 and 167 of the Act and 40 CFR 52.23 to enforce the terms of the operating permit. These provisions essentially allow EPA to enforce against violations of an applicable SIP. By making the operating permit program part of the SIP and legally requiring, in the SIP, that permittees comply with such permits, any violation of such a permit will be enforceable under the SIP and subject to EPA enforcement.²⁹ In addition, by providing that an operating permit which does not conform to a SIP-approved program and EPA's underlying regulations may be deemed not "federally enforceable" by EPA, sources and States are placed on notice that EPA may find that such nonconforming permits cannot be used as external emissions offsets or to "net out" of PSD or nonattainment permitting requirements, or be considered as part of a State's demonstration of reasonable further progress toward attainment and maintenance of the NAAQS. Thus, for example, a State may issue an operating permit placing emissions limitations on an existing emissions unit at a source for the purpose of accommodating a new emissions unit at the source without triggering PSD review of the new emissions unit. If EPA later determines that permit conditions do not comport with EPA standards for enforceability, it may notify the permit-issuing agency and the source that EPA intends to enforce against the source for violations of PSD requirements regarding the new emissions unit if the operating permit conditions for the existing unit are not changed to EPA's satisfaction. For example, should EPA find that the limitations on the existing unit are not, in practical terms, enforceable (e.g., because of excessively long averaging times), EPA may deem those limitations not federally enforceable for purposes of the netting transaction, thereby triggering PSD review of the new unit.

The third condition is appropriate for two reasons. First, operating permit conditions that are at least as tight as existing SIP limitations will be consistent with, and promote the purposes of, section 110(a)(2)(B) of the Act, which requires all approvable SIP's to include "such * * * measures as may be necessary to ensure attainment and maintenance" of national ambient

standards.³⁰ Moreover, section 116 provides that where an emissions limitation is in effect under an applicable SIP, a State "may not adopt or enforce any emissions standard or limitation which is less stringent."

The permitting process may not be used to create exemptions from any requirement contained in the SIP. Any such waiver or variance must be created through a formal SIP revision. The EPA also recognizes that, in some cases, individuals could differ as to whether a particular limitation is "as stringent as" another limitation. The EPA encourages review authorities to express new limitations in terms similar to those in the SIP (e.g., with respect to averaging times) to facilitate comparison with the existing SIP limitation. Where compelling reasons weigh heavily in favor of expressing the new limitation in different terms than the current SIP limit, the burden to demonstrate the equal or greater stringency of the new limit rests with the State. Such demonstrations must accompany the proposed and final versions of any applicable permit action.

The fourth condition for Federal enforceability—that the permit limitations be enforceable as a practical matter—is an essential element in EPA's implementation of the existing Federal enforceability requirement. If permit limitations, whether in operating or construction permits, were not practical to enforce, the purposes for which Federal enforceability was intended could not be met. Thus, all emissions units must be reasonably described, and verifiable, enforceable emissions limits must be assigned to them. For example, an emissions limit expressed only in tons of pollution per year would not be considered practically enforceable. Useful guidance as to what makes a permit condition enforceable is, however, contained in a document issued by EPA on September 23, 1987 entitled "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency." That guidance contains a checklist which lists key areas to consider in determining enforceability. These areas include applicability, compliance date, specificity of conduct, any incorporation by reference, recordkeeping requirements, and exemptions and exceptions.

³⁰ Requiring federally enforceable permit limitations to be at least as stringent as other SIP limitations is also consistent with the existing rules for NSR construction permits which require that such permits not result in violations of the SIP control strategy or interfere with attainment or maintenance of the ambient standards (e.g., 40 CFR 51.160(a) (formerly 40 CFR 51.18(a))

Similarly, the fifth condition—that EPA and the public be notified and given opportunity to comment on the issuance of operating permits—is consistent with EPA's current practice for construction permits (e.g., 40 CFR 51.161 (formerly 40 CFR 51.18(h))) and would make enforcement by EPA and private citizens much more effective and practical. Public notice and opportunity for comment are important parts of an operating permit program, but the form of such notice is subject to debate. Some States regard individual newspaper notices for permit applications as needlessly expensive and time consuming, especially since they process many permit applications but few are controversial. Several States have addressed these concerns through the use of State administrative registers, notice and distribution mailing lists, or monthly multiple application notices. In reviewing SIP submittals for operating permit programs, EPA will consider these and other techniques for meeting the twin goals of procedural completeness and administrative efficiency as long as ample opportunity is provided for comment on permits prior to their final issuance.

It is important that EPA maintain an effective oversight of permit decisions made pursuant to these programs. The EPA is not now implementing a formal review program with procedural tools such as a veto provision to address inappropriate permitting actions (see, e.g., 40 CFR 123.44 with respect to certain permits issued under the Clean Water Act). However, EPA will comment on proposed permits as may be reasonable. The EPA stresses that, in order to implement this review, States will be required to provide draft permits to EPA for comment. In addition, the State must provide EPA with copies of all final permits upon their issuance. If permits are issued inconsistent with the SIP as discussed above, EPA will consider those permits to be invalid and will pursue such enforcement action as may be appropriate. It should be noted that EPA's intent is to review these permitting actions in parallel with, and within the same schedule as, routine State procedural steps. The EPA intends to work with State programs to minimize any delay or intrusiveness from this activity.

The EPA realizes that the above five program criteria are general and do not address many details of implementation. This is, in part, desirable: the EPA invites States to develop programs that are consistent with their program needs and resources. The EPA will consult with States on the approvability of their

²⁹ Section 52.23 also provides that a violation of a condition in a permit issued pursuant to an approved regulation for review of new or modified sources is also a violation of the SIP.

particular plan proposals. (It should be noted that an operating permit program will not become effective for the purposes described in this document until it is specifically so approved.) The EPA plans to issue further, more detailed, guidance as needed to assist States in developing and implementing approvable programs.

C. Policy and Regulation

The EPA believes that the definition of "federally enforceable" is broad enough to include operating permit limitations under the conditions discussed above, since it includes "all limitations and conditions which are enforceable by the Administrator" (id.). However, for the sake of clarity, EPA is amending the definition of federally enforceable to specify that operating permits issued under programs approved by EPA and incorporated into a SIP are federally enforceable.³¹

Similarly, even though 40 CFR 52.23—confirming that violations of SIP regulatory provisions and certain permits are subject to enforcement by EPA under section 113 of the Act—is broad enough to cover operating permit violations (under the previous conditions), EPA is also amending that section to clarify its applicability to operating permits. On the other hand, EPA does not believe that it is necessary to amend the "source obligation" regulations at 40 CFR 51.166(r)(2) (formerly 40 CFR 51.24(r)(2)) and 52.21(r)(4). As discussed previously, those sections require any source that was not subject to PSD permit requirements because of any enforceable limitation, and that later becomes "major" solely because of a relaxation in such a limitation, to undergo NSR as if it had not yet been constructed. This is in addition to possible enforcement action for violation of federally enforceable permit terms or circumvention of the preconstruction review requirements of the NSR program. The source obligation regulations extend, as written, to any source that used a federally enforceable operating permit limitation to avoid PSD NSR and later obtained a rescission or relaxation of that limitation. However, EPA will review each existing PSD SIP for any State seeking EPA approval of its operating permit program to ensure that the SIP contains a provision

meeting the requirements of 40 CFR 51.166(r)(2) with respect to operating permits. In such cases, if the current SIP provision does not extend to operating permits, EPA would require an appropriate SIP revision as a prerequisite to approval of the operating permit program.

The EPA will respond to questions from the public on all of the operating permit issues discussed in this notice. In particular, EPA will respond to views on the need for further guidance specifying in greater detail the substantive and procedural elements that should be contained in an approvable operating permits program. In this regard, EPA points out that any State program that contains essentially the same provisions indicated above as conditions "1"—"5" would almost certainly be approved by EPA. Useful examples of a State operating permit program are offered by Oregon and Idaho. Those programs provide that the proposed source and its projected emissions and pollution control techniques must be described in detail. The programs also provide for notice to the public of permit applications and an opportunity to comment prior to permit issuance. The process is not available for permits that would constitute relaxations of the SIP. Copies of each permit are submitted to EPA (e.g., Oregon Administrative Rules, Chapter 340-20). The EPA is not now suggesting that every State program would need to be substantially the same as Oregon's or Idaho's, only that those programs could be used as models for an operating permit program that EPA likely will approve for federal enforceability purposes.

The EPA will also consult with States on methods by which existing operating permits could be made federally enforceable under a subsequently approved State operating permits program. The EPA suggests that in these cases, where a State can show that the existing operating permits were issued pursuant to a program later approved by EPA, the State could also submit such permits in bulk as revisions to the SIP. Such revisions could be processed in much less time than if each permit were processed separately.³²

VII. Miscellaneous

A. Under Executive Order 12291, EPA must determine whether a regulatory action would be a major rule and therefore subject to the requirement for

preparation of a Regulatory Impact Analysis. This action is not a major rule because it merely retains the current regulatory requirements, while offering States a more efficient means of complying with those requirements. It, thus, will not have any significant new economic impacts.

As required by Executive Order 12291, this action has been submitted to the Office of Management and Budget (OMB) for review. Any written comments from OMB on this action and any EPA written responses have been placed in the docket for this proceeding.

B. Since today's action merely retains or clarifies the existing regulations and does not promulgate significant changes to any rules, section 317 of the Act regarding an economic impact assessment does not apply.

C. In accordance with the Regulatory Flexibility Act, 5 U.S.C. 605(b), I hereby certify that this action will not have a significant adverse impact on a substantial number of small entities, primarily because it retains the existing rules and creates no new burdens. Accordingly, no regulatory flexibility analysis is required.

D. The EPA has determined that this final EPA action has nationwide applicability. Accordingly, under section 307(b) of the Act, judicial review of this final action may be obtained only by filing a petition for review in the U.S. D.C. Circuit Court of Appeals within 60 days from the date of this notice. This action is not subject to judicial review in any subsequent civil or criminal proceedings for enforcement.

E. As provided by section 307(d)(1) of the Act, this rule is not subject to section 553(d) of the Administrative Procedure Act. Section 553(d) requires that substantive rules not take effect until 30 days after their publication unless they relieve a restriction or an agency finds good cause to make them effective sooner. Nevertheless, there is good cause to make this action effective immediately since it merely retains existing regulations while offering a more efficient means of implementation. Persons affected by the "Federal enforceability" requirements need not change their activities or plans in any way as a result of today's action, and a 30-day waiting period would serve no purpose.

F. Under Executive Order 12612, EPA must determine if a rule has federalism implications. Federalism implications refer to substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels

³¹ The subject proposal of August 25, 1983, although not specifically addressing this particular regulatory language, described the subjects and issues involved in detail. Today's regulatory clarification to reflect the policy on Federal enforceability is a logical outgrowth of the 1983 proposal for which EPA concludes that further notice and comment are unnecessary.

³² Alternatively, a State might simply choose to wait until it has an approved operating permit program included in its SIP and then either renew or reissue existing permits under the approved program.

of government. For those rules which have federalism implications, a Federalism Assessment is to be made.

The Executive Order also requires that agencies, to the extent possible, refrain from limiting State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. The Executive order provides for preemption of State law, however, if there is a clear congressional intent for the agency to do so. Any such preemption, however, is to be limited to the extent possible.

This final rule essentially retains the current rule as written. The action provides an opportunity for certain State operating permits to be considered federally enforceable, thus increasing State options for addressing the applicability of NSR rules to modified existing sources. Previously, the federally enforceable limits recognized by EPA for existing sources generally consisted of more time-consuming SIP revisions.

List of Subjects in 40 CFR

Part 51

Administrative practice and procedures, air pollution control, intergovernmental relations, reporting and recordkeeping requirements, ozone, sulfur oxides, nitrogen dioxide, lead, particulate matter, hydrocarbons, carbon monoxide.

Part 52

Air pollution control, ozone, sulfur oxides, nitrogen dioxide, lead, particulate matter, carbon monoxide, hydrocarbons.

Date: June 12, 1989.

William K. Reilly,
Administrator.

For reasons set forth in the preamble, Parts 51 and 52 of Chapter I of Title 40 of the Code of Federal Regulations are amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for Part 51 continues to read as follows:

Authority: Secs. 101(b)(1), 160-169, 171-178, and 301(a) of the Clean Air Act, 42 U.S.C. 7401(b)(1), 7410, 7470-7479, 7501-7508, and 7601(a).

2. Section 51.165 is amended by revising paragraph (a)(1)(xiv) to read as follows:

§ 51.165 Permit requirements.

(a) * * *

(1) * * *

(xiv) "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, Subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

3. Section 51.166 is amended by revising paragraph (b)(17) to read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(17) "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, Subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

* * * * *

4. Appendix S is amended by revising paragraph II.A.12 to read as follows:

APPENDIX S—EMISSION OFFSET INTERPRETATIVE RULING

* * * * *

II. * * *

A. * * *

12. "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, Subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

* * * * *

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

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

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

2. Section 52.21 is amended by revising paragraph (b)(17) to read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(17) "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, Subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

* * * * *

3. Section 52.23 is amended by revising the first sentence to read as follows:

§ 52.23 Violation and enforcement.

Failure to comply with any provisions of this part, or with any approved regulatory provision of a State implementation plan, or with any permit condition or permit denial issued pursuant to approved or promulgated regulations for the review of new or modified stationary or indirect sources, or with any permit limitation or condition contained within an operating permit issued under an EPA-approved program that is incorporated into the State implementation plan, shall render the person or governmental entity so failing to comply in violation of a requirement of an applicable implementation plan and subject to enforcement action under section 113 of the Clean Air Act. * * *

4. Section 52.24 is amended by revising paragraph (f)(12) to read as follows:

§ 52.24 Statutory restriction on new sources.

* * * * *

(f) * * *

(12) "Federally enforceable" means all limitations and conditions which are enforceable by the Administrator, including those requirements developed

pursuant to 40 CFR Parts 60 and 61, requirements within any applicable State implementation plan, any permit requirements established pursuant to 40 CFR 52.21 or under regulations approved pursuant to 40 CFR Part 51, Subpart I, including operating permits issued under an EPA-approved program that is incorporated into the State implementation plan and expressly requires adherence to any permit issued under such program.

[FR Doc. 89-14681 Filed 6-27-89; 8:45am]

BILLING CODE 6560-50-M

40 CFR Parts 51 and 52

[AD-FRL-3511-2a]

Requirements for Implementation Plans; Air Quality New Source Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On August 25, 1983, EPA proposed amendments to its regulations addressing the construction of new and modified stationary sources of air pollution which appear at 40 CFR 51.24 (now 40 CFR 51.166), 52.21, Appendix S to Part 51, 51.18(j) (now 51.165(a)) and 52.24 (see 48 FR 38742). That document presented eight areas of proposed rulemaking and additional guidance in three other areas. The EPA proposed those amendments and provided guidance in order to meet the terms of a settlement agreement between EPA and various industries and trade associations challenging the particular regulations in *Chemical Manufacturers Association (CMA) v. EPA*, D.C. Cir. No. 79-1112 (settlement agreement entered into February 22, 1982).

On October 26, 1984 (49 FR 43202), EPA took action on the component of the August 25, 1983 proposal dealing with fugitive emissions. This document constitutes final action on six of the seven other remaining issues in the August 25 proposal: (1) The definition of "significant" as it affects Class I area protection, (2) the innovative control technology waiver for sources which would impact Class I areas, (3) secondary emissions, (4) the crediting of source shutdowns and curtailments as emissions offsets in nonattainment areas, (5) banking of emissions offsets under 40 CFR Part 51, Appendix S, and (6) the requirement for health and welfare equivalence for netting. In addition, final action with respect to the other remaining issue, the Federal enforceability requirement, is being

published in parallel with this document.

DATES: This rule takes effect on June 28, 1989. Under section 307(b)(1) of the Clean Air Act (Act), 42 U.S.C. 7607(b)(1), petitions for judicial review must be filed on or before August 28, 1989, in the U.S. Court of Appeals for the D.C. Circuit.

ADDRESSES: Material relevant to this rulemaking may be found in Public Docket A-82-23. This docket is located in U.S. EPA's Central Docket Section (LE-131), Waterside Mall, M-1500, 401 M Street, SW., Washington, DC 20460. The docket may be inspected between 8:00 a.m. and 3:00 p.m. on weekdays and a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. David Solomon, New Source Review Section, Office of Air Quality Planning and Standards (MD-15), Research Triangle Park, North Carolina 27711; (919) 541-5375; FTS 629-5375.

SUPPLEMENTARY INFORMATION:

I. Introduction

On August 7, 1980, EPA extensively revised its regulations concerning the preconstruction review of new and modified stationary sources "new source review" (NSR) under the Act, 42 U.S.C. 7401-7642, in response to *Alabama Power Company v. Costle*, 636 F.2d 323 (D.C. Cir. 1979) (see 45 FR 52676). Five sets of regulations resulted from those revisions. The first set, 40 CFR 51.166 (formerly 40 CFR 51.24), specifies the minimum requirements that a prevention of significant deterioration (PSD) air quality permit program under Part C of the Act must contain in order to warrant approval by EPA as a revision to a State implementation plan (SIP). The second set, 40 CFR 52.21, delineates the Federal PSD permit program, which currently applies, as part of the SIP, in the roughly 20 States that have not submitted a PSD program meeting the requirements of 40 CFR 51.166. The third set, 40 CFR 51.165(a) and (b) (formerly 40 CFR 51.18 (j) and (k)), specifies the elements of an approvable State permit program for preconstruction review for nonattainment purposes under Part D of the Act. It elaborates on section 173 of the Act, 42 U.S.C. 7503. The fourth set, 40 CFR Part 51, Appendix S, embodies the "Emissions Offset Interpretative Ruling" (Offset Ruling), which EPA revised previously in January 1979 (44 FR 3274). The fifth set, 40 CFR 52.24, embodies the construction moratorium which EPA implements in certain nonattainment areas.

In the fall of 1980, numerous organizations petitioned the U.S. Court of Appeals for the D.C. Circuit to review various provisions of those PSD and nonattainment preconstruction regulations. Subsequently, the court consolidated those petitions into *CMA*, a collection of challenges to the 1979 revisions to the Offset Ruling. In June 1981, EPA began negotiations with the industry petitioners to settle the *CMA* case. The EPA entered into a comprehensive settlement agreement with those petitioners in February 1982. Subsequently, the court granted a stay of the case pending implementation of the agreement.

In the settlement agreement, EPA committed to propose certain amendments (set forth as Exhibit A of the agreement) to eight portions of the NSR regulations and to provide guidance in three additional areas, and to take final action on those proposals. Accordingly, EPA published a notice of proposed rulemaking in the August 25, 1983 *Federal Register* (48 FR 38742). The EPA noted that it would review the comments carefully and with an open mind and that it would take a new look at the proposals in order to make an independent judgment on the merits. The EPA received extensive public comment regarding the August 25, 1983 document, including that presented at a public hearing. In light of the public comments and on the basis of further evaluation, EPA has determined that it is appropriate to retain various portions of the regulations that had been proposed for deletion or revision, while making final certain other portions of the proposed changes.

The EPA addressed fugitive emissions in a separate *Federal Register* notice that was published on October 26, 1984 (49 FR 43202). This document constitutes final action on six of the remaining seven issues in the August 25, 1983 proposal.

With respect to the other remaining issue, Federal enforceability, EPA is today announcing, in a separate *Federal Register* item published in conjunction with this one, its decision to retain the Federal enforceability requirement.

Accordingly, today's final actions fulfill EPA's commitments under Exhibit A of the *CMA* settlement agreement.

II. Final Action on Proposal

A. Definition of "Significant"

1. Background

In revising the NSR regulations on August 7, 1980, EPA introduced provisions which use the term "significant." One of those provisions