ORAL ARGUMENT SET FOR JANUARY 25, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 02-1387 (and consolidated cases) COMPLEX

STATE OF NEW YORK, *et al.*,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

Petition for Review of Final Action of the
United States Environmental Protection Agency

PROOF BRIEF OF ENVIRONMENTAL INTERVENOR-RESPONDENTS

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DATED: August 30, 2004

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CERTIFICATE OF ENVIRONMENTAL INTERVENOR-RESPONDENTS AS TO PARTIES, RULINGS, AND RELATED CASES

Intervenors Alabama Environmental Council, American Lung Association, Clean Air Council, Communities for a Better Environment, Environmental Defense, Group Against Smog and Pollution, Michigan Environmental Council, Natural Resources Defense Council, Ohio Environmental Council, Scenic Hudson, Sierra Club, and Southern Alliance for Clean Energy ("Environmental Intervenors") submit this certificate as to parties, rulings, and related cases.

(A) Parties and Amici

(i) Parties, Intervenors, and Amici Who Appeared in the District Court

These cases are consolidated petitions for review of final agency actions, not appeals from the ruling of a district court.

(ii) Parties to These Cases

Industry Petitioners are Utility Air Regulatory Group, Alabama Power Co., Appalachian Power Co., Arizona Public Service Co., Arkansas-Missouri Power Co., Baltimore Gas and Electric Co., Boston Edison Co., Carolina Power and Light Co., Centerior Energy Corp., Cleveland Electric Illuminating Co., Toledo Edison Co., Central and South West Services, Inc.,

Kansas City Power and Light Co., Kentucky Power Co., Kentucky Utilities Co., Central Power and Light Co., Public Service Co. of Oklahoma, Southwestern Electric Power Co., West Texas Utilities Co., Central Hudson Gas and Electric Co., Central Illinois Light Co., Central Illinois Public Service Co., Cincinnati Gas and Electric Co., Columbus Southern Power Co., Commonwealth Edison Co., Consolidated Edison Company of New York, Inc., Dayton Power and Light Co., Delmarva Power and Light Co., Detroit Edison Co., Duke Power Co., Duquesne Light Co., Florida Power and Light Co., Florida Power Corp., Georgia Power Co., Gulf Power Co., Illinois Power Co., Indiana Michigan Power Co., Indianapolis Power and Light Co., Iowa Public Service Co., Long Island Lighting Co., Louisville Gas and electric Co., Madison Gas and Electric Co., Minnesota Power Co., Mississippi Power Co., Monongahela Power Co., Montaup Electric Co., New England Power Co., New York State Electric and Gas Corp., Niagara Mohawk Power Corp., Northern Indiana Public Service Co., Oglethorpe Power Corp., Ohio Edison Co., Pennsylvania Power Co., Ohio Power Co., Ohio Valley Electric Corp., Oklahoma Gas and Electric Co., PacifiCorp Electric Operations, Pacific Gas and Electric Co., Pennsylvania Power and Light Co., Philadelphia Power and Light Co., Potomac Edison Co., Potomac Electric Power Co., PSI Energy, Inc., Public Service Company of New Mexico, Public Service Electric and Gas Co., Salt River Project, Savannah Electric and Power Co., South Carolina Electric and Gas Co., Southern California Edison Co., Tampa Electric Co., Tucson Electric Power Co., Union Electric Co., Virginia Power, West Penn Power Co., Wisconsin Electric Power Co., Wisconsin Power and Light Co., Wisconsin Public Service Corp., Edison Electric Institute, National Rural Electric Cooperative Association, American Public Power Association, Consumers Power Co., NSR Manufacturers Roundtable, Alliance of Automobile Manufacturers, American Boiler Manufacturers Association, American Chemistry Council, American Forest and Paper

Association, Inc., American Iron and Steel Institute, American Petroleum Institute, Council of Industrial Boiler Owners, National Association of Manufacturers, National Mining Association, National Petrochemical and Refiners Association, Portland Cement Association, Newmont Mining Co., National Environmental Development Association's Clean Air Regulatory Project, and the Clean Air Implementation Project.

Government Petitioners are People of the State of California, State of Connecticut, State of Delaware, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, State of New Hampshire, State of New Jersey, State of New York, Commonwealth of Pennsylvania Department of Environmental Protection, State of Rhode Island, State of Vermont, and State of Wisconsin; District of Columbia, City of New York, City and County of San Francisco, and twenty-six cities and towns in the State of Connecticut (Town of Cornwall, Town of East Hartford, Town of Easton, Town of Greenwich, City of Groton, City of Hartford, Town of Hebron, Town of Lebanon, City of Middletown, City of New Haven, City of New London, Town of Newtown, Town of North Stonington, Town of Pomfret, Town of Putnam, Town of Rocky Hill, Town of Salisbury, City of Stamford, Town of Thompson, Town of Wallingford, Town of Washington, City of Waterbury, Town of Westbrook, Town of Weston, Town of Westport, Town of Woodstock); California Air Resources Board, Monterey Bay Unified Air Pollution Control District, Sacramento Metropolitan Air Quality Management District, San Joaquin Valley Air Pollution Control District, Santa Barbara County Air Pollution Control District, South Coast Air Quality Management District, Ventura County Air Pollution Control District, and Yolo Solano Air Quality Management District.

Environmental Petitioners are the same as Environmental Intervenors listed above and Delaware Nature Society.

Respondent is the United States Environmental Protection Agency.

Group I State Intervenors are State of Alaska, Attorney General of the State of Indiana, State of Kansas, State of Nebraska, State of North Dakota, State of South Carolina, State of South Dakota, State of Utah, and Commonwealth of Virginia.

Group II State Intervenors are the same as Government Petitioners. Industry Intervenors are the same as Industry Petitioners, plus Illinois State Chamber of Commerce and Illinois Environmental Regulatory Group.

(iii) *Amici* in These Cases

Amici for Petitioners are Senator Hillary Rodham Clinton, Senator Jon S. Corzine, Senator James M. Jeffords, Senator Patrick J. Leahy, Senator Barbara Boxer, Senator Frank Lautenberg, Senator Charles E. Schumer, Senator Jack Reed, Clean Air Trust, American Thoracic Society, American College of Chest Physicians, National Association for the Medical Direction of Respiratory Care, and Anne Arundel County, Maryland.

Amicus for Respondent is State of Florida.

(iv) Circuit Rule 26.1 Disclosures for Environmental Petitioners

Alabama Environmental Council. Alabama Environmental Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in Alabama Environmental Council.

Alabama Environmental Council, a nonprofit corporation organized and existing under the laws of the State of Alabama, works to protect and preserve Alabama's natural heritage.

American Lung Association. American Lung Association has no parent companies, and no publicly held company has a 10% or greater ownership interest in American Lung Association.

American Lung Association, a nonprofit corporation organized and existing under the laws of the State of Maine, is a national organization dedicated to the conquest of lung disease and the promotion of lung health.

Clean Air Council. Clean Air Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in Clean Air Council.

Clean Air Council, a nonprofit corporation organized and existing under the laws of the Commonwealth of Pennsylvania, uses public education, community advocacy, and government oversight to ensure enforcement of environmental laws in its efforts to improve air quality throughout Pennsylvania and Delaware.

Communities for a Better Environment. Communities for a Better Environment has no parent companies, and no publicly held company has a 10% or greater ownership interest in Communities for a Better Environment.

Communities for a Better Environment (CBE) is a 501(c)(3) nonprofit corporation organized and existing under the laws of the State of California. CBE has approximately 20,000 members in California and is dedicated to improving the quality of the environment in California and throughout the United States.

Environmental Defense. Environmental Defense has no parent companies, and no publicly held company has a 10% or greater ownership interest in Environmental Defense.

Environmental Defense, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization that links science, economics, and law to create innovative, equitable, and cost-effective solutions to the most urgent environmental problems.

Group Against Smog and Pollution. Group Against Smog and Pollution has no parent companies, and no publicly held company has a 10% or greater ownership interest in Group Against Smog and Pollution.

Group Against Smog and Pollution, a nonprofit corporation organized and existing under the laws of the Commonwealth of Pennsylvania, is dedicated to creating a healthy, sustainable environment, with a focus on improving air quality in the Pittsburgh region.

Michigan Environmental Council. Michigan Environmental Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in Michigan Environmental Council.

Michigan Environmental Council, a nonprofit corporation organized and existing under the laws of the State of Michigan, is dedicated to addressing threats to Michigan's environment, promoting alternatives to urban blight and suburban sprawl, advocating for a sustainable environment and economy, protecting Michigan's water legacy, promoting cleaner energy, and working to diminish environmental impacts on children's health.

Natural Resources Defense Council. Natural Resources Defense Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in Natural Resources Defense Council.

Natural Resources Defense Council, a corporation organized and existing under the laws of the State of New York, is a national nonprofit organization dedicated to improving the quality of the human environment and protecting the nation's endangered natural resources.

Ohio Environmental Council. The Ohio Environmental Council has no parent companies, and no publicly held company has a 10% or greater ownership interest in The Ohio Environmental Council.

The Ohio Environmental Council, a nonprofit corporation organized and existing under the laws of the State of Ohio, works to inform, unite, and empower Ohio citizens to protect the environment and conserve natural resources.

Scenic Hudson. Scenic Hudson has no parent companies, and no publicly held company has a 10% or greater ownership interest in Scenic Hudson.

Scenic Hudson is a nonprofit corporation organized and existing under the laws of the State of New York and is dedicated to protecting and enhancing the scenic, natural, historic, agricultural and recreational treasures of the Hudson River and its valley.

Sierra Club. Sierra Club has no parent companies, and no publicly held company has a 10% or greater ownership interest in Sierra Club.

Sierra Club, a corporation organized and existing under the laws of the State of California, is a national nonprofit organization dedicated to the protection and enjoyment of the environment.

Southern Alliance for Clean Energy. Southern Alliance for Clean Energy has no parent companies, and no publicly held company has a 10% or greater ownership interest in Southern Alliance for Clean Energy.

Southern Alliance for Clean Energy, a nonprofit corporation organized and existing under the laws of the State of Tennessee, is a regional organization working in eight southeastern states on energy issues, and dedicated to finding positive solutions to the negative impacts of power production by working for clean air policies and promoting the use of renewable energy and implementation of energy efficiency practices.

(B) Rulings Under Review

There are five final agency actions at issue in these consolidated cases: 45 Fed. Reg. 52676 (Aug. 7, 1980); 57 Fed. Reg. 32314 (July 21, 1992); 67 Fed. Reg. 80186 (Dec. 31, 2002); 68 Fed. Reg. 11316 (Mar. 10, 2003); and 68 Fed. Reg. 63021 (Nov. 7, 2003).

(C) Related Cases

This Court has determined that these consolidated cases are related to *State of New York, et al. v. U.S. Environmental Protection Agency*, D.C. Cir. Case No. 03-1380 (and consolidated cases). December 24, 2003 Order at 2, *State of New York, et al. v. U.S. Environmental Protection Agency*, D.C. Cir. 02-1387 (and consolidated cases) and No. 03-1380 (and consolidated cases).

DATED: August 30, 2004.

Respectfully submitted,

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*Authorities upon which we chiefly rely are marked with asterisks.

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STATUTES AND REGULATIONS

Pertinent statutes and regulations appear in a separate addendum.

ISSUES PRESENTED

1. Whether the Clean Air Act allows or requires NSR applicability to hinge on whether a change will increase a unit's maximum hourly emissions rate.

2. Whether EPA's description of its 1980 NSR rules in its 2002 preamble constitutes final agency action ripe for review.

3. Whether the Clean Air Act allows or requires an emissions increase to be exempted from NSR, simply because the increase does not exceed allowable emissions.

STATEMENT OF THE CASE AND STATEMENT OF FACTS

The Clean Air Act's "New Source Review" ("NSR") provisions are meant to ensure that emissions from new and modified sources will not interfere with efforts to attain national ambient air quality standards ("NAAQS"), or cause significant deterioration of air quality in areas that are attaining NAAQS. *See* 42 U.S.C. §§7503(a)(1)(A), 7470. A new or modified source located in a NAAQS "attainment" area must, *inter alia,* ensure that emissions will not exceed allowable pollution "increments," and must utilize the "best available control technology." *Id.* §7475(a)(3), (a)(4). A new or modified source in a "non-attainment" area must meet the "lowest achievable emissions rate" and offset any emissions increase. *Id.* §7503(a)(2), (a)(1)(A).

The industry petitions challenge EPA's regulatory definition of an NSR-triggering "modification" -- specifically, the method for determining whether a change "increases the amount of any pollutant emitted." Industry's arguments are presented in two briefs, one by several industry entities ("Industry") and another by Newmont Mining Corporation

("Newmont"). Environmental Intervenors Natural Resources Defense Council, *et al.*, submit the present brief opposing Industry's and Newmont's arguments.

SUMMARY OF ARGUMENT

Industry claims that an emissions-increasing change does not trigger NSR unless it also results in "an increase in the facility's maximum hourly emissions rate -- i.e., an increase in its existing capacity to emit." Ind. Br. 6. That claim contravenes the Act, which hinges NSR applicability on whether a physical or operational change increases the "amount" of any air pollutant "emitted;" ignores legislative history showing that Congress considered and rejected a capacity-based test; and undermines the Act's purposes.

Industry's assertion that Congress in 1977 ratified a capacity-based test is meritless. Congress did not ratify the pre-1977 regulatory approach to defining a modification, and in any event, the pre-1977 regulations upon which Industry's ratification argument rests did not prescribe a capacity-based test.

EPA's 2002 statement describing its previously-promulgated 1980 actual-to-potential test was neither final agency action nor ripe for review.

Finally, Newmont's claim that an emissions increase should be measured against a source's pre-change "allowable" emissions violates the Act's plain meaning.

ARGUMENT

I. INDUSTRY'S PROPOSED CAPACITY-BASED TEST CONTRAVENES THE STATUTE, ITS HISTORY, AND PURPOSES.

Under §111(a)(4), a physical or operational change at a source triggers NSR if it "increases the amount of any air pollutant emitted by such source." Industry argues that the emissions impacts of a physical or operational change must be assessed under a two-part test. To trigger NSR under Industry's test, a change must both "increase the emitting capacity of the

existing unit" and "increase annual emissions at the source." Ind. Br. 2-3 (first emphasis added). Industry argues that this two-part test is "statutorily required." *Id.* 13.

EPA's brief defends the agency's rejection of Industry's proposed two-part test, arguing that the matter is governed by Step Two of *Chevron, USA v. NRDC*, 467 U.S. 837 (1984), and that the agency's interpretation merits deference. EPA Br. 37. While EPA acted correctly in rejecting Industry's two-part test, Environmental Intervenors respectfully submit that EPA was required to reject it. The Industry test must be rejected under *Chevron* Step One as contrary to the plain meaning of the statute, or in the alternative under *Chevron* Step Two as unreasonable.

A. Industry's Proposed Capacity-Based Test Contravenes the Act.

To trigger NSR under Industry's test, it is not enough that a physical or operational change increases a source's emissions. On the contrary, Industry contends that an emissions-increasing change does not trigger NSR unless it also increases the unit's "capacity to emit," *i.e.*, its "maximum emission rate." Ind. Br. 28, 2 (emphasis added). This argument is untenable.

Industry's brief represents an especially egregious violation of Justice Frankfurter's three imperatives of statutory interpretation: "(1) Read the statute; (2) read the statute; (3) read the statute!" *See In re England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004) (internal quotations and citation omitted). Nowhere in its brief does Industry explain how its capacity-based test is even consistent with, much less required by, the words Congress used in §111(a)(4).

§111(a)(4). That silence is understandable, because §111(a)(4) refutes Industry's test. That section expressly provides that a physical or operational change triggers NSR if it "increases the amount of any air pollutant emitted by such source." §111(a)(4) (emphasis added). Congress's express focus is on the "amount" of the air pollutant "emitted" by the source, not on the source's "capacity to emit" or "maximum emission rate." *See Alabama Power Co. v. Costle*,

636 F.2d 323, 353 (D.C. Cir. 1980)("Plainly, the pollutants that sources 'emit' is a reference to some measure of actual emissions")(emphasis added). Thus, Industry's attempt to insert a capacity-based step into the §111(a)(4) applicability test is decisively refuted by §111(a)(4)'s plain language.

Legislative history. Industry invokes the legislative history, citing the 1977 House Report's statement that "existing sources ... and their emissions' [sic] capacity are 'grandfathered'" under PSD. H. Rep. 294, 95th Cong., 1st Sess. 144 (May 12, 1977), *cited in* Ind. Br. 8. But Industry neglects to mention that the 1977 amendments rejected the House bill's capacity-based approach.

Specifically, the cited House report language addressed a House bill provision that would have premised the PSD "baseline concentration" on "plant capacity in existence." 1977 H.Rep. 297 (§160(c)(2)(E)(i))(emphasis added). However, as this Court has noted, the House bill's reference to plant capacity was deleted from the enacted version of the 1977 Amendments. *See Alabama Power*, 636 F.2d at 380-81. Accordingly, the accompanying committee report language cited in Industry's brief offers no support for a capacity-based test. *See, e.g., Bluewater Network v. EPA*, 370 F.3d 1, 14 (D.C. Cir. 2004) (where bill language was dropped prior to enactment, committee report's discussion of that language was "irrelevant").

Far from supporting Industry's capacity-based argument, the cited legislative history undercuts it. The 1977 House bill further confirms that the 1977 Congress knew how to craft a "capacity"-based test. Congress could have adopted such a test for purposes of defining a "modification," but did not do so.

Statutory purpose. "A statute should ordinarily be read to effectuate its purposes rather than frustrate them." *U.S.A. v. Barnes*, 295 F.3d 1354, 1364 (D.C. Cir. 2002). Indeed, the "object

and policy" of a statute guides interpretation even under *Chevron* Step One. *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1067-68 (D.C. Cir. 1998). Here, Industry's proposed interpretation would undermine NSR's core purpose.

Under §111(a)(4), the statutory focus is on whether there has been a change that "increases the amount of any pollutant emitted" by a source. Nonattainment NSR seeks to prevent such increases from interfering with progress towards NAAQS attainment, *see* EPA Opening Merits Brief in *Chevron, U.S.A. v. NRDC*, S. Ct. 82-1005 (Aug. 31, 1983), 1982 Lexis U.S. Briefs 1005, while PSD seeks to prevent such increases from significantly deteriorating air quality. *See id.* §7470 (listing five statutory purposes of PSD NSR, each of which includes air quality). In briefing the present case, EPA has confirmed that NSR's purpose is "to limit emissions increases resulting from physical or operational changes," EPA Br. 73-74 (emphasis in original), and Industry itself indicates that "the focus of NSR is on protecting 'ambient' air quality." Ind. Br. 8.

Industry's capacity-based test fundamentally disserves the air quality concerns that are at the heart of NSR. Under Industry's test, a source can greatly increase its actual emissions of harmful air pollutants, as long as the emitting unit's capacity to emit does not increase.[1]

People do not breathe capacity, they breathe emissions. Industry's attempt to shunt aside that fundamental reality undermines NSR's core purposes, and must be rejected.

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[1] While Industry's proposed two-part test includes a component addressing annual emissions (step two), that component applies only to changes that increase capacity under the first step. *See* Ind. Br. 1-2.

B. Congress Did Not Ratify a Capacity-Based Test.

Lacking support in the statute, Industry seeks refuge in a congressional ratification argument. Specifically, Industry argues that Congress in 1977 intended to "codify" the approach to modifications set forth in EPA's pre-1977 NSPS and PSD regulations, by "adopting the pre-existing definition of 'modification' of these regulations into NSR." Ind. Br. 25, 34. From this purported ratification, Industry jumps to the assertion that Congress intended to adopt a capacity-based test. This argument too must fail.

As demonstrated below, Congress did not ratify the pre-1977 regulatory approach to defining a modification, and in any event, the pre-1977 regulations upon which Industry's ratification argument rests did not prescribe a capacity-based test.

(1) Congress Did Not Ratify EPA's Pre-1977 Regulatory "Modification" Test.

As EPA explains, caselaw cautions against lightly assuming congressional ratification of agency regulations. EPA Br. 38-39. That is especially true here.

First, Industry has pointed to no evidence that Congress was even aware of the modification test set forth in EPA's pre-existing regulations. In rejecting a ratification argument, the Supreme Court cautioned that "[w]e are extremely hesitant to presume general congressional awareness of the Commission's construction based only upon a few isolated statements in the thousands of pages of legislative documents." *Securities and Exchange Commission v. Sloan,* 436 U.S. 103, 121 (1978). *See also Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 169 (2001). *A fortiori*, where Industry has pointed to no evidence of congressional awareness, its ratification argument must fail.

Second, Industry points to no evidence that Congress expressed approval of the "modification" test set forth in the pre-1977 NSPS and PSD regulations. The statutory language

defining "modification" for NSR cross-references only §111(a)(4) itself, not EPA's regulations. 42 U.S.C. §§7479(2)(C), 7501(4), *quoted in* Ind. Br. 7 n.14. Likewise, legislative history expressing intent "to conform to usage in other parts of the Act," 123 Cong. Reg. 36331 (daily ed.) (Nov. 1, 1977)[JA___] (emphasis added), *quoted in* Ind. Br. 7 n.14, falls far short of ratifying a test that appeared in regulations. *Cf.* Ind. Br. 25 (mischaracterizing the above legislative history by claiming that Congress "stated an express intent to codify the 'usage' under NSPS and existing PSD regulations")(emphasis added).

(2) The Pre-1977 NSPS and PSD Regulations Did Not Contain a Capacity-Based Test.

Even if the 1977 Congress did ratify the "modification" test set forth in the pre-1977 NSPS and PSD regulations—which it did not—neither of these regulations contained a capacity-based test.

First, the pre-1977 NSPS regulations did not define modification with reference to a facility's "capacity to emit" or "maximum emission rate." *See* Ind. Br. 28, 2 ¶ 1. To the contrary, those rules defined "modification" to include, *inter alia*, "any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which this standard applies) emitted into the atmosphere by that facility." *See* 40 Fed. Reg. 58416, 58418 (December 16, 1975)(§60.2(h))[JA___](emphasis added).

Indeed, in proposing to adopt this definition, EPA explained that the "new phrase 'emitted into the atmosphere' clarifies that for an existing facility to undergo a modification there must be an increase in actual emissions." 39 Fed. Reg. 36946/3 (October 15, 1974)[JA___](emphasis added). Moreover, EPA explained: "The Administrator considered defining 'modification' so that increases in pre-controlled (potential) emissions would be considered modifications. However, the proposed definition of modification is limited to

increases in actual emissions in keeping with the intent of section 111 of controlling facilities only when they constitute a new source of emission." *Id.* Finally, EPA confirmed that the regulatory test for what constitutes an NSPS modification would be "sensitive ... to the overall increase in total emissions to the atmosphere." *Id.* 36947/1[JA___].

Likewise, another provision of the pre-1977 NSPS regulations provided for measuring modifications with reference to the facility's "emissions rate," expressed as "kg/hr of any pollutant discharged into the atmosphere." *See* 40 Fed. Reg. at 58419(§60.14)[JA___](emphasis added). Industry's proposed test would insert the word "maximum," converting the test to one addressing "maximum emission rate." Ind. Br. 2 ¶ 1 (emphasis added).

The pre-1977 PSD regulations defined "modification" as, *inter alia*, a physical or operational change "which increases the emission rate of any pollutant." *See* 39 Fed. Reg. 42510, 42514 (Dec. 5, 1974)(40 C.F.R. § 52.01(d))[JA___].[2] When promulgating that definition, EPA explained that it intended for it to be consistent with the definition in the NSPS regulations, *id.* 42513[JA___], which, according to EPA's explanation earlier that year, applied to "actual" emissions increases, *see* p. 7, *supra*. Ignoring the clear regulatory language requiring PSD review for a change "which increases the emission rate of any pollutant," Industry now pretends as though the test was whether a change would increase a source's "maximum emission rate." *See* Ind. Br. 25-26 (emphasis added).

[2] In addition, unlike the pre-1977 NSPS regulations, the pre-1977 PSD regulations did not specify a unit of measurement for determining whether a facility's emissions "rate" would increase. *See* 39 Fed. Reg. 42514[JA___]. As EPA had explained earlier that year in its NSPS proposal, a facility's emissions "rate" could be measured in a variety of ways, including on an hourly, daily, or yearly time frame. *See* 39 Fed. Reg. at 36947/1[JA___].

There is no merit to Industry's claim that exclusions in the pre-1977 regulations "reflected Congress' intent that only those activities that increase a facility's existing design capacity to emit would trigger NSPS," Ind. Br. 5, and that a change "would result in an increase in 'actual emissions' only if it first increases the unit's hourly emissions rate." *Id.* 14 (emphasis in original). The "design"-based exclusions and hours-of-operation exclusion in the pre-1977 regulations were all exclusions from "change in the method of operation" -- not from "physical change" or from "increases the amount of any air pollutant emitted." *See* 36 Fed. Reg. 24876, 24877/2-3 (Dec. 23, 1971)(NSPS)(40 C.F.R. § 60.2(h))[JA____]; 39 Fed. Reg. 42514/2-3 (PSD)[JA___]. Thus, if a physical change increased emissions -- via an hours-of-operation increase, a production-rate increase, or otherwise -- then there was a "modification." *See* EPA Br. 48.

In sum, as of 1977, neither the PSD regulations nor the NSPS regulations defined "modification" to include only those changes that increased a source's "capacity to emit" or "maximum emission rate."[3] Thus, even if the 1977 Congress intended to ratify the regulatory NSPS or PSD definition of "modification," that intent would not support Industry's proposed test.[4]

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[3] EPA's use of a maximum hourly emissions rate test to determine NSPS applicability beginning at some point in the 1980s has no bearing on whether Congress ratified such a test in 1977. As demonstrated above, neither the text of the pre-1977 regulations nor the accompanying preambles referred to a capacity-based test.

[4] The legislative history of the 1990 CAA Amendments provides further evidence that Congress did not intend to ratify a capacity-based NSR modification test. At that time, Congress was considering an amendment that would have exempted a utility modification from NSR if it did not "result in an increase in the modified plant's maximum potential to emit." April 3, 1990 Senate Debate on S. 1630 (McClure Amendment), *reprinted in* A Legislative History of the Clean Air Act Amendments of 1990, vol. 4 (U.S. Senate Committee on Public Works, S. Prt. 103-38, 103d Cong., 1st Sess.), at 6966[JA___]. That amendment was defeated, *id.* 6978-

(... footnote continued next page)

C. Industry Does Not Believe Its Own Ratification Argument.

Even on its face, Industry's ratification argument is unavailing because it is internally inconsistent. Though Industry claims that Congress intended NSR to be governed by the "modification" test set forth in the pre-1977 NSPS and PSD regulations, (Ind. Br. 6, 25), it advocates an NSR test that differs substantially from the test that Congress purportedly ratified.

Specifically, while the pre-1977 NSPS and PSD regulations treated any physical or operational change that increases "the emission rate" as a modification, *see* pp. 7-8, *supra*, Industry's proposed test would exempt some such changes. Specifically, Industry would exempt those changes that increase the hourly emissions rate (step one of Industry's test) but not annual emissions (step two). Ind. Br. 2, 8.[5]

If Industry were correct that Congress intended for the NSR modification test to be the same as the test set forth in the pre-1977 NSPS and PSD regulations, then it would be unlawful for EPA to exempt from NSR physical and operational changes that are covered by those regulations. Yet, this is exactly the approach advocated by Industry. That inconsistency undermines Industry's proposed test.

In short, Industry's contention that EPA illegally rejected Industry's proposed test is wrong. That conclusion holds, whether the applicable EPA interpretation was enunciated in 1980

(.... footnote continued from previous page)
79[JA___-___], because *inter alia* such a test would allow substantial increases in emissions. *Id.* 6966-67[JA___-___] (Senator Chafee). Thus, Congress preserved the then- and still-existing definition of "modification."

[5] As indicated *supra*, Industry would read the pre-1977 regulations as addressing the "maximum emission rate" rather than the "emission rate." Even if that reading were accepted *arguendo*, Industry's test would still exempt some sources who show an increase in maximum emission rate -- specifically, it would exempt those sources whose maximum hourly emission rate increases (step one) but whose annual emissions do not increase (step two).

or 2002.

Finally, Industry appears to suggest that, because Congress adopted the same statutory definition of "modification" for NSPS and NSR, EPA's NSR definition must track its NSPS definition. Ind. Br. 25. As noted previously, however, Industry itself does not believe its own argument, because it urges that NSR applicability and NSPS applicability be judged under different tests. Ind. Br. 14, 23 n.40. For its part, EPA argues that the differing purposes of NSR and NSPS justify differing regulatory definitions. EPA Br. 37-42. Assuming *arguendo* that a single regulatory test were required for both NSR and NSPS, however, Industry's proposed test must still fail, because it contravenes the language of § 111(a)(4). *See* pp. 3-5, *supra*.

II. EPA'S DESCRIPTION OF THE 1980 RULES IN THE 2002 PREAMBLE IS NOT FINAL AGENCY ACTION RIPE FOR REVIEW.

Industry's challenge to EPA's 2002 preamble statement on the actual-to-potential test should be rejected on finality and ripeness grounds. That statement did not adopt any new interpretation of the 1980 rules, but instead attempted to explain the changes made by the 2002 rule revisions. *See* EPA Br. 64. Thus, the challenged preamble statement does not meet the test for final agency action: it neither "mark[s] the consummation of the agency's decisionmaking process," nor determines the "rights and obligations" of any party. *See, e.g., Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022 (D.C. Cir. 2000).

Moreover, given that EPA expressly disavows the position Industry imputes to the agency, Industry's challenge should be rejected on ripeness grounds. *See American Iron & Steel Institute v. EPA*, 115 F.3d 979, 990 (D.C. Cir. 1997)(where EPA explained that it had not adopted the regulatory interpretation challenged by petitioners, "[s]o long as the agency adheres to this [permissible] reading, the petitioners' challenge to these procedures is not ripe.").

III. NEWMONT'S ALLOWABLES-BASED TEST IS UNLAWFUL.

Newmont argues that EPA acted unlawfully in prohibiting states from using a source's "allowable emissions" to calculate its pre-change emissions level. Newmont Br. 8. In making this argument, however, Newmont fails to offer even a single Clean Air Act citation in support of its position. *See* Newmont Br. 8-10. The reason for Newmont's omission is clear: the plain statutory language requires NSR in connection with "any" physical or operational change "which increases the amount of any air pollutant emitted by such source." §111(a)(4)(emphasis added). Newmont's approach would violate the plain meaning of this statutory language by broadly exempting any increase in the amount of pollutants "emitted" by a source, up to the amount the source was allowed to emit prior to the change.

Newmont's conflation of what is being "emitted" with what a source is allowed to emit not only contravenes §111(a)(4), but also ignores other Clean Air Act provisions showing that Congress knew how to refer to allowable emissions when it wished to do so. Enacted in the same 1977 Amendments that adopted §111(a)(4) into NSR, §173(a)(1)(A) requires new and modified sources proposed to be located in non-attainment areas to ensure that "total allowable emissions from existing sources in the region" will be less than "total emissions from existing sources ... prior to the application for such permit." 42 U.S.C. §7503(a)(1)(A)(emphasis added). *See* Pub. L. 95-95, § 129(b), 91 Stat. 784 (August 7, 1977).[6] Newmont's attempt to erase Congress' distinction between what is "emitted" by a source and how much pollution the source is "allowed" to emit must be rejected.

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[6] The 1990 Amendments made changes to § 173(a)(1)(A), but retained the language quoted in the text.

There is no merit to Newmont's claim that a test based on actual emissions would lead to absurd results by "penalizing sources for operating at a lower level of emissions," Newmont Br. 9, and by "forcing cyclical industries to emit at higher rates than otherwise warranted in order to avoid losing permitted production capacity." *Id.* 7. Here, Congress intended "to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate[d] to occur from air pollution." 42 U.S.C. §7470(1). *See also* pp.4-5, *supra* (describing the purposes of the NSR program). Because it is the "amount" of a pollutant "emitted" that affects public health, there is no absurdity in basing NSR applicability on whether there has been an increase in the amount emitted. Newmont's uncorroborated speculations about such a test (*i.e.*, that the test allegedly might cause sources to keep pre-change emissions higher than necessary) come nowhere close to the "extraordinarily convincing" demonstration needed to depart from the plain meaning of the statute. *See Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001).

Newmont also claims that EPA failed to explain why it rejected an allowables-based approach to calculating emissions increases. Newmont Br. 11. But an allowable emissions approach would violate the Act, and no EPA explanation could change that. *Cajun Elec. Power Coop., Inc. v. FERC*, 924 F.2d 1132, 1136 (D.C. Cir. 1991) *(Chevron* Step One is de novo, without deference).

Finally, though Newmont criticizes EPA's ten-year lookback period as being too short to encompass a mining operation's business cycle, Newmont Br. 12-13, that issue is not before the Court because Newmont has not raised a challenge to the ten-year lookback provisions, which are a feature of EPA's actual-to-actual emission test. To the contrary, the sole issue Newmont has presented is whether NSR applicability can be based on allowable emissions. *See id.* 1 (issue

presented). Because Newmont's allowable emissions argument must be rejected for reasons stated above, Newmont's petition must be denied.

In any event, Newmont's claim that a mining operation's business cycle can exceed twenty years (*id.* 6) underscores the absurdity of a business-cycle approach. Under Newmont's approach, increases in recent emission levels could evade NSR safeguards unless they also represent an increase over much higher pollution levels prevalent a quarter-century ago. Whatever the length of a business cycle may be for any particular industry, Newmont's approach is not a colorable reading of the statutory NSR provisions -- which require review of changes that "increase[] the amount of any air pollutant emitted," in order to ensure continued progress towards attainment and to prevent significant deterioration of air quality.

CONCLUSION

For the foregoing reasons, the Industry and Newmont petitions should be denied.

DATED: August 30, 2004.

Respectfully submitted,

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CERTIFICATE REGARDING WORD LIMITATION

Counsel hereby certifies that, in accordance with Federal Rule of Appellate Procedure 32(a)(7)(C), the foregoing **Proof Intervenor Brief of Environmental Petitioners** contains 4,050 words, as counted by counsel's word processing system.

DATED: August 30, 2004

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STATUTES AND REGULATIONS

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reason of the taking effect of Pub.L. 95–95, see section 406(a) of Pub.L. 95–95, set out as an Effective and Applicability Provisions of 1977 Acts note under section 7401 of this title.

Section 16 of Pub.L. 91–604 provided that:

"(a)(1) Any implementation plan adopted by any State and submitted to the Secretary of Health, Education, and Welfare, or to the Administrator pursuant to the Clean Air Act [this chapter] prior to enactment of this Act [Dec. 31, 1970] may be approved under section 110 of the Clean Air Act [this section] (as amended by this Act) [Pub.L. 91–604] and shall remain in effect, unless the Administrator determines that such implementation plan, or any portion thereof, is not consistent with the applicable requirements of the Clean Air Act [this chapter] (as amended by this Act) and will not provide for the attainment of national primary ambient air quality standards in the time required by such Act. If the Administrator so determines, he shall, within 90 days after promulgation of any national ambient air quality standards pursuant to section 109(a) of the Clean Air Act [section 7409(a) of this title], notify the State and specify in what respects changes are needed to meet the additional requirements of such Act, including requirements to implement national secondary ambient air quality standards. If such changes are not adopted by the State after public hearings and within six months after such notification, the Administrator shall promulgate such changes pursuant to section 110(c) of such Act [subsec. (c) of this section].

"(2) The amendments made by section 4(b) [amending sections 7403 and 7415 of this title] shall not be construed as repealing or modifying the powers of the Administrator with respect to any conference convened under section 108(d) of the Clean Air Act [section 7415 of this title] before the date of enactment of this Act [Dec. 31, 1970].

"(b) Regulations or standards issued under title II of the Clean Air Act [subchapter II of this chapter] prior to the enactment of this Act [Dec. 31, 1970] shall continue in effect until revised by the Administrator consistent with the purposes of such Act [this chapter]."

Prior Provisions

A prior section 110 of Act July 14, 1955, was renumbered section 117 by Pub.L. 91–604 and is set out as section 7417 of this title.

Modification or Rescission of Implementation Plans Approved and In Effect Prior to Aug. 7, 1977

Nothing in the Clean Air Act Amendments of 1977 [Pub.L. 95–95] to affect any requirement of an approved implementation plan under this section or any other provision in effect under this chapter before Aug. 7, 1977, until modified or rescinded in accordance with this chapter as amended by the Clean Air Act Amendments of 1977, see section 406(c) of Pub.L. 95–95, set out as an Effective and Applicability Provisions of 1977 Acts note under section 7401 of this title.

Modification or Rescission of Rules, Regulations, Orders, Determinations, Contracts, Certifications, Authorizations, Delegations, and Other Actions

All rules, regulations, orders, determinations, contracts, certifications, authorizations, delegations or other actions duly issued, made, or taken by or pursuant to Act July 14, 1955, the Clean Air Act, as in effect immediately prior to the date of enactment of Pub.L. 95–95 [Aug. 7, 1977] to continue in full force and effect until modified or rescinded in accordance with Act July 14, 1955, as amended by Pub.L. 95–95 [this chapter], see section 406(b) of Pub.L. 95–95, set out as an Effective and Applicability Provisions of 1977 Acts note under section 7401 of this title.

§ 7411. Standards of performance for new stationary sources

[CAA § 111]

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Envi-

PART B—OZONE PROTECTION

§§ 7450 to 7459. Repealed. Pub.L. 101–549, Title VI, § 601, Nov. 15, 1990, 104 Stat. 2648

HISTORICAL AND STATUTORY NOTES

Section 7450, Act July 14, 1955, c. 360, Title I, § 150, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 126, 91 Stat. 725, set forth the Congressional declaration of purpose.

Section 7451, Act July 14, 1955, c. 360, Title I, § 151, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 126, 91 Stat. 726, set forth Congressional findings.

Section 7452, Act July 14, 1955, c. 360, Title I, § 152, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 126, 91 Stat. 726, set forth definitions applicable to this part.

Section 7453, Act July 14, 1955, c. 360, Title I, § 153, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 126, 91 Stat. 726, related to studies by the Environmental Protection Agency.

Section 7454, Act July 14, 1955, c. 360, Title I, § 154, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 126, 91 Stat. 728, and amended Pub.L. 96–88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695, related to research and monitoring activities by Federal agencies.

Section 7455, Act July 14, 1955, c. 360, Title I, § 155, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 126, 91 Stat. 726, related to reports on the progress of regulation.

Section 7456, Act July 14, 1955, c. 360, Title I, § 156, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 126, 91 Stat. 729, authorized the President to enter into international agreements to foster cooperative research.

Section 7457, Act July 14, 1955, c. 360, Title I, § 157, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 126, 91 Stat. 729, related to promulgation of regulations.

Section 7458, Act July 14, 1955, c. 360, Title I, § 158, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 126, 91 Stat. 730, set forth other provisions of law that would be unaffected by the provisions of this part.

Section 7459, Act July 14, 1955, c. 360, Title I, § 159, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 126, 91 Stat. 730, related to the authority of the State to protect the stratosphere.

Effective Date of Repeal

Repeal of sections 7450 to 7459 effective Nov. 15, 1990, except as otherwise provided, see section 711(b) of Pub.L. 101–549, set out as a note under section 7401 of this title.

Savings Provisions

Suits, actions or proceedings commenced under this chapter as in effect prior to Nov. 15, 1990, not to abate by reason of the taking effect of amendments by Pub.L. 101–549, except as otherwise provided for, see section 711(a) of Pub.L. 101–549, set out as a note under section 7401 of this title.

Similar Provisions

For provisions relating to stratospheric ozone protection, see section 7671 et seq. of this title.

PART C—PREVENTION OF SIGNIFICANT DETERIORATION OF AIR QUALITY

Subpart I—Clean Air

§ 7470. Congressional declaration of purpose

[CAA § 160]

The purposes of this part are as follows:

(1) to protect public health and welfare from any actual or potential adverse effect which in the Administrator's judgment may reasonably be anticipate [1] to occur from air pollution or from exposures to pollutants in other media, which pollutants originate as emissions to the ambient air) [2], notwithstanding attainment and maintenance of all national ambient air quality standards;

(2) to preserve, protect, and enhance the air quality in national parks, national wilderness areas, national monuments, national seashores, and other areas of special national or regional natural, recreational, scenic, or historic value;

(3) to insure that economic growth will occur in a manner consistent with the preservation of existing clean air resources;

(4) to assure that emissions from any source in any State will not interfere with any portion of the applicable implementation plan to prevent significant deterioration of air quality for any other State; and

(5) to assure that any decision to permit increased air pollution in any area to which this section applies is made only after careful evaluation of all the consequences of such a decision and after adequate procedural opportunities for informed public participation in the decisionmaking process.

(July 14, 1955, c. 360, Title I, § 160, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 127(a), 91 Stat. 731.)

1 So in original. Probably should be "anticipated".

2 So in original. Section was enacted without an opening parenthesis.

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1977 Acts

Section effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub.L. 95–95, set out as a note under section 7401 of this title.

Guidance Document

Section 127(c) of Pub.L. 95–95 provided that not later than 1 year after Aug. 7, 1977, the Administrator publish a guidance document to assist the States in carrying out their functions under part C of Title I of the Clean Air Act [this part] with respect to pollutants for which national ambient air quality standards are promulgated.

(2) The Administrator may disapprove the redesignation of any area only if he finds, after notice and opportunity for public hearing, that such redesignation does not meet the procedural requirements of this section or is inconsistent with the requirements of section 7472(a) of this title or of subsection (a) of this section. If any such disapproval occurs, the classification of the area shall be that which was in effect prior to the redesignation which was disapproved.

(c) Indian reservations

Lands within the exterior boundaries of reservations of federally recognized Indian tribes may be redesignated only by the appropriate Indian governing body. Such Indian governing body shall be subject in all respect to the provisions of subsection (e) of this section.

(d) Review of national monuments, primitive areas, and national preserves

The Federal Land Manager shall review all national monuments, primitive areas, and national preserves, and shall recommend any appropriate areas for redesignation as class I where air quality related values are important attributes of the area. The Federal Land Manager shall report such recommendations, within [2] supporting analysis, to the Congress and the affected States within one year after August 7, 1977. The Federal Land Manager shall consult with the appropriate States before making such recommendations.

(e) Resolution of disputes between State and Indian tribes

If any State affected by the redesignation of an area by an Indian tribe or any Indian tribe affected by the redesignation of an area by a State disagrees with such redesignation of any area, or if a permit is proposed to be issued for any new major emitting facility proposed for construction in any State which the Governor of an affected State or governing body of an affected Indian tribe determines will cause or contribute to a cumulative change in air quality in excess of that allowed in this part within the affected State or tribal reservation, the Governor or Indian ruling body may request the Administrator to enter into negotiations with the parties involved to resolve such dispute. If requested by any State or Indian tribe involved, the Administrator shall make a recommendation to resolve the dispute and protect the air quality related values of the lands involved. If the parties involved do not reach agreement, the Administrator shall resolve the dispute and his determination, or the results of agreements reached through other means, shall become part of the applicable plan and shall be enforceable as part of such plan. In resolving such disputes relating to area redesignation, the Administrator shall consider the extent to which the lands involved are of sufficient size to allow effective air quality management or have air quality related values of such an area.

(July 14, 1955, c. 360, Title I, § 164, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 127(a), 91 Stat. 733, and amended Nov. 16, 1977, Pub.L. 95–190, § 14(a)(42), (43), 91 Stat. 1402; Nov. 15, 1990, Pub.L. 101–549, Title I, § 108(n), 104 Stat. 2469.)

[1] So in original. Probably should be "paragraphs".

[2] So in original. Probably should be "with".

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1990 Acts

Amendment by Pub.L. 101–549 effective Nov. 15, 1990, except as otherwise provided, see section 711(b) of Pub.L. 101–549, set out as a note under section 7401 of this title.

1977 Acts

Section effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub.L. 95–95, set out as a note under section 7401 of this title.

Savings Provisions

Suits, actions or proceedings commenced under this chapter as in effect prior to Nov. 15, 1990, not to abate by reason of the taking effect of amendments by Pub.L. 101–549, except as otherwise provided for, see section 711(a) of Pub.L. 101–549, set out as a note under section 7401 of this title.

§ 7475. Preconstruction requirements

[CAA § 165]

(a) Major emitting facilities on which construction is commenced

No major emitting facility on which construction is commenced after August 7, 1977, may be constructed in any area to which this part applies unless—

(1) a permit has been issued for such proposed facility in accordance with this part setting forth emission limitations for such facility which conform to the requirements of this part;

(2) the proposed permit has been subject to a review in accordance with this section, the required analysis has been conducted in accordance with regulations promulgated by the Administrator, and a public hearing has been held with opportunity for interested persons including representatives of the Administrator to appear and submit written or oral presentations on the air quality impact of such source, alternatives thereto, control technology requirements, and other appropriate considerations;

(3) the owner or operator of such facility demonstrates, as required pursuant to section 7410(j) of this title, that emissions from construction or operation of such facility will not cause, or contribute to, air pollution in excess of any (A) maximum allowable increase or maximum allowable concentration for any pollutant in any area to which this part applies more than one time per year, (B) national

ambient air quality standard in any air quality control region, or (C) any other applicable emission standard or standard of performance under this chapter;

(4) the proposed facility is subject to the best available control technology for each pollutant subject to regulation under this chapter emitted from, or which results from, such facility;

(5) the provisions of subsection (d) of this section with respect to protection of class I areas have been complied with for such facility;

(6) there has been an analysis of any air quality impacts projected for the area as a result of growth associated with such facility;

(7) the person who owns or operates, or proposes to own or operate, a major emitting facility for which a permit is required under this part agrees to conduct such monitoring as may be necessary to determine the effect which emissions from any such facility may have, or is having, on air quality in any area which may be affected by emissions from such source; and

(8) in the case of a source which proposes to construct in a class III area, emissions from which would cause or contribute to exceeding the maximum allowable increments applicable in a class II area and where no standard under section 7411 of this title has been promulgated subsequent to August 7, 1977, for such source category, the Administrator has approved the determination of best available technology as set forth in the permit.

(b) Exception

The demonstration pertaining to maximum allowable increases required under subsection (a)(3) of this section shall not apply to maximum allowable increases for class II areas in the case of an expansion or modification of a major emitting facility which is in existence on August 7, 1977, whose allowable emissions of air pollutants, after compliance with subsection (a)(4) of this section, will be less than fifty tons per year and for which the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur oxides will not cause or contribute to ambient air quality levels in excess of the national secondary ambient air quality standard for either of such pollutants.

(c) Permit applications

Any completed permit application under section 7410 of this title for a major emitting facility in any area to which this part applies shall be granted or denied not later than one year after the date of filing of such completed application.

(d) Action taken on permit applications; notice; adverse impact on air quality related values; variance; emission limitations

(1) Each State shall transmit to the Administrator a copy of each permit application relating to a major emitting facility received by such State and provide notice to the Administrator of every action related to the consideration of such permit.

(2)(A) The Administrator shall provide notice of the permit application to the Federal Land Manager and the Federal official charged with direct responsibility for management of any lands within a class I area which may be affected by emissions from the proposed facility.

(B) The Federal Land Manager and the Federal official charged with direct responsibility for management of such lands shall have an affirmative responsibility to protect the air quality related values (including visibility) of any such lands within a class I area and to consider, in consultation with the Administrator, whether a proposed major emitting facility will have an adverse impact on such values.

(C)(i) In any case where the Federal official charged with direct responsibility for management of any lands within a class I area or the Federal Land Manager of such lands, or the Administrator, or the Governor of an adjacent State containing such a class I area files a notice alleging that emissions from a proposed major emitting facility may cause or contribute to a change in the air quality in such area and identifying the potential adverse impact of such change, a permit shall not be issued unless the owner or operator of such facility demonstrates that emissions of particulate matter and sulfur dioxide will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area.

(ii) In any case where the Federal Land Manager demonstrates to the satisfaction of the State that the emissions from such facility will have an adverse impact on the air quality-related values (including visibility) of such lands, notwithstanding the fact that the change in air quality resulting from emissions from such facility will not cause or contribute to concentrations which exceed the maximum allowable increases for a class I area, a permit shall not be issued.

(iii) In any case where the owner or operator of such facility demonstrates to the satisfaction of the Federal Land Manager, and the Federal Land Manager so certifies, that the emissions from such facility will have no adverse impact on the air quality-related values of such lands (including visibility), notwithstanding the fact that the change in air quality resulting from emissions from such facility will cause or contribute to concentrations which exceed the maxi-

um refineries, lime plants, phosphate rock processing plants, coke oven batteries, sulfur recovery plants, carbon black plants (furnace process), primary lead smelters, fuel conversion plants, sintering plants, secondary metal production facilities, chemical process plants, fossil-fuel boilers of more than two hundred and fifty million British thermal units per hour heat input, petroleum storage and transfer facilities with a capacity exceeding three hundred thousand barrels, taconite ore processing facilities, glass fiber processing plants, charcoal production facilities. Such term also includes any other source with the potential to emit two hundred and fifty tons per year or more of any air pollutant. This term shall not include new or modified facilities which are nonprofit health or education institutions which have been exempted by the State.

(2)(A) The term "commenced" as applied to construction of a major emitting facility means that the owner or operator has obtained all necessary preconstruction approvals or permits required by Federal, State, or local air pollution emissions and air quality laws or regulations and either has (i) begun, or caused to begin, a continuous program of physical on-site construction of the facility or (ii) entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of construction of the facility to be completed within a reasonable time.

(B) The term "necessary preconstruction approvals or permits" means those permits or approvals, required by the permitting authority as a precondition to undertaking any activity under clauses (i) or (ii) of subparagraph (A) of this paragraph.

(C) The term "construction" when used in connection with any source or facility, includes the modification (as defined in section 7411(a) of this title) of any source or facility.

(3) The term "best available control technology" means an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant. In no event shall application of "best available control technology" result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section 7411 or 7412 of this title. Emissions from any source utilizing clean fuels, or any other means, to comply with this paragraph shall not be allowed to increase above levels that would have been required under this paragraph as it existed prior to enactment of the Clean Air Act Amendments of 1990.

(4) The term "baseline concentration" means, with respect to a pollutant, the ambient concentration levels which exist at the time of the first application for a permit in an area subject to this part, based on air quality data available in the Environmental Protection Agency or a State air pollution control agency and on such monitoring data as the permit applicant is required to submit. Such ambient concentration levels shall take into account all projected emissions in, or which may affect, such area from any major emitting facility on which construction commenced prior to January 6, 1975, but which has not begun operation by the date of the baseline air quality concentration determination. Emissions of sulfur oxides and particulate matter from any major emitting facility on which construction commenced after January 6, 1975, shall not be included in the baseline and shall be counted against the maximum allowable increases in pollutant concentrations established under this part.

(July 14, 1955, c. 360, Title I, § 169, as added Aug. 7, 1977, Pub.L. 95–95, Title I, § 127(a), 91 Stat. 740, and amended Nov. 16, 1977, Pub.L. 95–190, § 14(a)(54), 91 Stat. 1402; Nov. 15, 1990, Pub.L. 101–549, Title III, § 305(b), Title IV, § 408(d), 104 Stat. 2583, 2631.)

HISTORICAL AND STATUTORY NOTES

References in Text

Enactment of the Clean Air Act Amendments of 1990, referred to in par. (3), probably means the date of enactment of such Act, Pub.L. 101–549, 104 Stat. 2399, which was approved Nov. 15, 1990.

Effective and Applicability Provisions

1990 Acts

Amendment by Pub.L. 101–549 effective Nov. 15, 1990, except as otherwise provided, see section 711(b) of Pub.L. 101–549, set out as a note under section 7401 of this title.

1977 Acts

Section effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub.L. 95–95, set out as a note under section 7401 of this title.

Savings Provisions

Suits, actions or proceedings commenced under this chapter as in effect prior to Nov. 15, 1990, not to abate by reason of the taking effect of amendments by Pub.L. 101–549, except as otherwise provided for, see section 711(a) of Pub.L. 101–549, set out as a note under section 7401 of this title.

Study of Major Emitting Facilities With Potential of Emitting 250 Tons Per Year

Section 127(b) of Pub.L. 95–95 provided that within 1 year after Aug. 7, 1977, the Administrator report to the Congress

(d) Duties of visibility transport commissions

A Visibility Transport Commission—

(1) shall assess the scientific and technical data, studies, and other currently available information, including studies conducted pursuant to subsection (a)(1) of this section, pertaining to adverse impacts on visibility from potential or projected growth in emissions from sources located in the Visibility Transport Region; and

(2) shall, within 4 years of establishment, issue a report to the Administrator recommending what measures, if any, should be taken under this chapter to remedy such adverse impacts. The report required by this subsection shall address at least the following measures:

(A) the establishment of clean air corridors, in which additional restrictions on increases in emissions may be appropriate to protect visibility in affected class I areas;

(B) the imposition of the requirements of part D of this subchapter affecting the construction of new major stationary sources or major modifications to existing sources in such clean air corridors specifically including the alternative siting analysis provisions of section 7503(a)(5) of this title; and

(C) the promulgation of regulations under section 7491 of this title to address long range strategies for addressing regional haze which impairs visibility in affected class I areas.

(e) Duties of Administrator

(1) The Administrator shall, taking into account the studies pursuant to subsection (a)(1) of this section and the reports pursuant to subsection (d)(2) of this section and any other relevant information, within eighteen months of receipt of the report referred to in subsection (d)(2) of this section, carry out the Administrator's regulatory responsibilities under section 7491 of this title, including criteria for measuring "reasonable progress" toward the national goal.

(2) Any regulations promulgated under section 7491 of this title pursuant to this subsection shall require affected States to revise within 12 months their implementation plans under section 7410 of this title to contain such emission limits, schedules of compliance, and other measures as may be necessary to carry out regulations promulgated pursuant to this subsection.

(f) Grand Canyon visibility transport commission

The Administrator pursuant to subsection (c)(1) of this section shall, within 12 months, establish a visibility transport commission for the region affecting the visibility of the Grand Canyon National Park.

(July 14, 1955, c. 360, Title I, § 169B, as added Nov. 15, 1990, Pub.L. 101–549, Title VIII, § 816, 104 Stat. 2695.)

1 So in original. Words "subsection (b) of this section" probably should be "paragraph (2)".

2 So in original. Probably should not be capitalized.

HISTORICAL AND STATUTORY NOTES

References in Text

The Clean Air Act Amendments of 1990, referred to in subsec. (b), probably means Pub.L. 101–549, Nov. 15, 1990, 104 Stat. 2399. For complete classification of this Act to the Code, see Short Title of 1990 Amendments note set out under section 7401 of this title and Tables.

The Federal Advisory Committee Act, referred to in subsec. (c)(4), is Pub.L. 92–463, Oct. 6, 1972, 86 Stat. 770, as amended, which is set out in Appendix 2 to Title 5, Government Organization and Employees.

Effective and Applicability Provisions

1990 Acts

Section to take effect Nov. 15, 1990, except as otherwise provided, see section 711(b) of Pub.L. 101–549, set out as a note under section 7401 of this title.

Savings Provisions

Suits, actions or proceedings commenced under this chapter as in effect prior to Nov. 15, 1990, not to abate by reason of the taking effect of amendments by Pub.L. 101–549, except as otherwise provided for, see section 711(a) of Pub.L. 101–549, set out as a note under section 7401 of this title.

PART D—PLAN REQUIREMENTS FOR NONATTAINMENT AREAS

Subpart 1—Nonattainment Areas in General

§ 7501. Definitions

[CAA § 171]

For the purpose of this part—

(1) Reasonable further progress

The term "reasonable further progress" means such annual incremental reductions in emissions of the relevant air pollutant as are required by this part or may reasonably be required by the Administrator for the purpose of ensuring attainment of the applicable national ambient air quality standard by the applicable date.

(2) Nonattainment area

The term "nonattainment area" means, for any air pollutant, an area which is designated "nonattainment" with respect to that pollutant within the meaning of section 7407(d) of this title.

(3) Lowest achievable emission rate

The term "lowest achievable emission rate" means for any source, that rate of emissions which reflects—

(A) the most stringent emission limitation which is contained in the implementation plan of

any State for such class or category of source, unless the owner or operator of the proposed source demonstrates that such limitations are not achievable, or

(B) the most stringent emission limitation which is achieved in practice by such class or category of source, whichever is more stringent.

In no event shall the application of this term permit a proposed new or modified source to emit any pollutant in excess of the amount allowable under applicable new source standards of performance.

(4) Modifications; modified

The terms "modifications" and "modified" mean the same as the term "modification" as used in section 7411(a)(4) of this title.

(July 14, 1955, c. 360, Title I, § 171, as added Aug. 7, 1977, Pub.L. 95-95, Title I, § 129(b), 91 Stat. 746, and amended Nov. 15, 1990, Pub.L. 101-549, Title I, § 102(a)(2), 104 Stat. 2412.)

HISTORICAL AND STATUTORY NOTES

Effective and Applicability Provisions

1990 Acts

Amendment by Pub.L. 101-549 effective Nov. 15, 1990, except as otherwise provided, see section 711(b) of Pub.L. 101-549, set out as a note under section 7401 of this title.

1977 Acts

Section effective Aug. 7, 1977, except as otherwise expressly provided, see section 406(d) of Pub.L. 95-95, set out as a note under section 7401 of this title.

Savings Provisions

Suits, actions or proceedings commenced under this chapter as in effect prior to Nov. 15, 1990, not to abate by reason of the taking effect of amendments by Pub.L. 101-549, except as otherwise provided for, see section 711(a) of Pub.L. 101-549, set out as a note under section 7401 of this title.

§ 7502. Nonattainment plan provisions in general

[CAA § 172]

(a) Classifications and attainment dates

(1) Classifications

(A) On or after the date the Administrator promulgates the designation of an area as a nonattainment area pursuant to section 7407(d) of this title with respect to any national ambient air quality standard (or any revised standard, including a revision of any standard in effect on November 15, 1990), the Administrator may classify the area for the purpose of applying an attainment date pursuant to paragraph (2), and for other purposes. In determining the appropriate classification, if any, for a nonattainment area, the Administrator may consider such factors as the severity of nonattainment in such area and the availability and feasibility of the pollution control measures that the Administrator believes may be necessary to provide for attainment of such standard in such area.

(B) The Administrator shall publish a notice in the Federal Register announcing each classification under subparagraph (A), except the Administrator shall provide an opportunity for at least 30 days for written comment. Such classification shall not be subject to the provisions of sections 553 through 557 of Title 5 (concerning notice and comment) and shall not be subject to judicial review until the Administrator takes final action under subsection (k) or (l) of section 7410 of this title (concerning action on plan submissions) or section 7509 of this title (concerning sanctions) with respect to any plan submissions required by virtue of such classification.

(C) This paragraph shall not apply with respect to nonattainment areas for which classifications are specifically provided under other provisions of this part.

(2) Attainment dates for nonattainment areas

(A) The attainment date for an area designated nonattainment with respect to a national primary ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable, but no later than 5 years from the date such area was designated nonattainment under section 7407(d) of this title, except that the Administrator may extend the attainment date to the extent the Administrator determines appropriate, for a period no greater than 10 years from the date of designation as nonattainment, considering the severity of nonattainment and the availability and feasibility of pollution control measures.

(B) The attainment date for an area designated nonattainment with respect to a secondary national ambient air quality standard shall be the date by which attainment can be achieved as expeditiously as practicable after the date such area was designated nonattainment under section 7407(d) of this title.

(C) Upon application by any State, the Administrator may extend for 1 additional year (hereinafter referred to as the "Extension Year") the attainment date determined by the Administrator under subparagraph (A) or (B) if—

(i) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plan, and

(ii) in accordance with guidance published by the Administrator, no more than a minimal number of exceedances of the relevant national ambient air quality standard has occurred in the area in the year preceding the Extension Year.

mentation plan revision which meets the requirements of section 110(a)(2)(I) [section 7410(a)(2)(I) of this title] and part D of Title I of the Clean Air Act [this part] not later than January 1, 1979. In the case of any State for which a plan revision adopted and submitted before such date has made the demonstration required under section 172(a)(2) of the Clean Air Act [subsec. (a)(2) of this section] (respecting impossibility of attainment before 1983), such State shall adopt and submit to the Administrator a plan revision before July 1, 1982, which meets the requirements of section 172(b) and (c) of such Act [subsecs. (b) and (c) of this section]."

§ 7503. Permit requirements

[CAA § 173]

(a) In general

The permit program required by section 7502(b)(6) of this title shall provide that permits to construct and operate may be issued if—

(1) in accordance with regulations issued by the Administrator for the determination of baseline emissions in a manner consistent with the assumptions underlying the applicable implementation plan approved under section 7410 of this title and this part, the permitting agency determines that—

(A) by the time the source is to commence operation, sufficient offsetting emissions reductions have been obtained, such that total allowable emissions from existing sources in the region, from new or modified sources which are not major emitting facilities, and from the proposed source will be sufficiently less than total emissions from existing sources (as determined in accordance with the regulations under this paragraph) prior to the application for such permit to construct or modify so as to represent (when considered together with the plan provisions required under section 7502 of this title) reasonable further progress (as defined in section 7501 of this title); or

(B) in the case of a new or modified major stationary source which is located in a zone (within the nonattainment area) identified by the Administrator, in consultation with the Secretary of Housing and Urban Development, as a zone to which economic development should be targeted, that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 7502(e) of this title;

(2) the proposed source is required to comply with the lowest achievable emission rate;

(3) the owner or operator of the proposed new or modified source has demonstrated that all major stationary sources owned or operated by such person (or by any entity controlling, controlled by, or under common control with such person) in such State are subject to emission limitations and are in compliance, or on a schedule for compliance, with all applicable emission limitations and standards under this chapter; and [1]

(4) the Administrator has not determined that the applicable implementation plan is not being adequately implemented for the nonattainment area in which the proposed source is to be constructed or modified in accordance with the requirements of this part; and

(5) an analysis of alternative sites, sizes, production processes, and environmental control techniques for such proposed source demonstrates that benefits of the proposed source significantly outweigh the environmental and social costs imposed as a result of its location, construction, or modification.

Any emission reductions required as a precondition of the issuance of a permit under paragraph (1) shall be federally enforceable before such permit may be issued.

(b) Prohibition on use of old growth allowances

Any growth allowance included in an applicable implementation plan to meet the requirements of section 7502(b)(5) of this title (as in effect immediately before November 15, 1990) shall not be valid for use in any area that received or receives a notice under section 7410(a)(2)(H)(ii) of this title (as in effect immediately before November 15, 1990) or under section 7410(k)(1) of this title that its applicable implementation plan containing such allowance is substantially inadequate.

(c) Offsets

(1) The owner or operator of a new or modified major stationary source may comply with any offset requirement in effect under this part for increased emissions of any air pollutant only by obtaining emission reductions of such air pollutant from the same source or other sources in the same nonattainment area, except that the State may allow the owner or operator of a source to obtain such emission reductions in another nonattainment area if (A) the other area has an equal or higher nonattainment classification than the area in which the source is located and (B) emissions from such other area contribute to a violation of the national ambient air quality standard in the nonattainment area in which the source is located. Such emission reductions shall be, by the time a new or modified source commences operation, in effect and enforceable and shall assure that the total tonnage of increased emissions of the air pollutant from the new or modified source shall be offset by an equal or greater reduction, as applicable, in the

better clarify to owners or operators what actions they must take and what action the Administrator will take. Section 60.15 of the regulations as revised specifies that reconstruction occurs upon replacement of components if the fixed capital cost of the new components exceeds 50 percent of the fixed capital cost that would be required to construct a comparable entirely new facility and it is technologically and economically feasible for the facility after the replacements to comply with the applicable standards of performance. The 50 percent replacement criteria is designed merely to key the notification to the Administrator; it is not an independent basis for the Administrator's determination. The term "fixed capital cost" is defined as the capital needed to provide all the depreciable components and is intended to include such things as the costs of engineering, purchase, and installation of major process equipment, contractors' fees, instrumentation, auxiliary facilities, buildings, and structures. Costs associated with the purchase and installation of air pollution control equipment (e.g., baghouses, electrostatic precipitators, scrubbers, etc.) are not considered in estimating the fixed capital cost of a comparable entirely new facility unless that control equipment is required as part of the process (e.g., product recovery).

The revised § 60.15 leaves the final determination with the Administrator as to when it is technologically and economically feasible to comply with the applicable standards of performance. Further clarification and definition is not possible because the spectrum of replacement projects that will take place in the future at existing facilities is so broad that it is not possible to be any more specific. Section 60.15 sets forth the criteria which the Administrator will use in making his determination. For example, if the estimated life of the facility after the replacements is significantly less than the estimated life of a new facility, the replacement may not be considered reconstruction. If the equipment being replaced does not emit or cause an emission of an air pollutant, it may be determined that controlling the components that do emit air pollutants is not reasonable considering cost, and standards of performance for new sources should not be applied. If there is insufficient space after the replacements at an existing facility to install the necessary air pollution control system to comply with the standards of performance, then reconstruction would not be determined to have occurred. Finally, the Administrator will consider all technical and economic limitations the facility may have in complying with the applicable standards of performance after the proposed replacements.

While § 60.15 expresses the basic Agency policy and interpretation regarding reconstruction, individual subparts may refine and delimit the concept as applied to individual categories of facilities.

Response to Requests for Determination

Section 60.5 has been revised to indicate that the Administrator will make a determination of whether an action by an owner or operator constitutes reconstruction within the meaning of § 60.15. Also, in response to a public comment, a new § 60.5(b) has been added to indicate the Administrator's intention to respond to requests for determinations within 30 days of receipt of the request.

Statistical Test

Appendix C of the regulation incorporates a statistical procedure for determining whether an emission increase has occurred. Several individuals commented on the procedure as proposed. After considering all these comments and conducting further study into the subject, the Administrator has determined that a statistical procedure is substantially superior to a method comparing average emissions, and that no other statistical procedure is clearly superior to the one adopted (Student's *t* test). A more detailed analysis of this issue can be found in EPA's responses to the comments mentioned previously.

Effective date. These regulations are effective on December 16, 1975. Since they represent a clarification of the Agency's existing enforcement policy, good cause is found for not delaying the effective date, as required by 5 U.S.C. 553(d)(3). However, the regulations will, in effect, apply retroactively to any enforcement activity now in progress since they do reflect present Agency policy.

(Sections 111, 114, and 301 of the Clean Air Act, as amended (42 U.S.C. 1857c-6, 1857c-9, and 1857g).)

Dated: December 8, 1975.

RUSSELL E. TRAIN,
Administrator.

Part 60 of Chapter I, Title 40 of the Code of Federal Regulations is amended as follows:

1. The table of sections is amended by adding §§ 60.14 and 60.15 and Appendix C as follows:

Subpart A—General Provisions

* * * * *

Sec.
60.14 Modification.
60.15 Reconstruction.

* * * * *

Appendix C—Determination of Emission Rate Change.

2. In § 60.2, paragraphs (g) and (h) are revised and paragraphs (aa) and (bb) are added as follows:

§ 60.2 Definitions.

* * * * *

(d) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant and which contains any one or combination of the following:

(1) Affected facilities.

(2) Existing facilities.

(3) Facilities of the type for which no standards have been promulgated in this part.

* * * * *

(h) "Modification" means any physical change in, or change in the method of operation of, an existing facility which increases the amount of any air pollutant (to which a standard applies) emitted into the atmosphere by that facility which results in the emission of an air pollutant (to which a standard applies) into the atmosphere not previously emitted.

* * * * *

(aa) "Existing facility" means, with reference to a stationary source, any apparatus of the type for which a standard is promulgated in this part, and the construction or modification of which was commenced before the date of proposal of that standard; or any apparatus which could be altered in such a way as to be of that type.

(bb) "Capital expenditure" means an expenditure for a physical or operational change to an existing facility which exceeds the product of the applicable "annual asset guideline repair allowance percentage" specified in the latest edition of Internal Revenue Service Publication 534 and the existing facility's basis, as defined by section 1012 of the Internal Revenue Code.

3. Section 60.5 is revised to read as follows:

§ 60.5 Determination of construction or modification.

(a) When requested to do so by an owner or operator, the Administrator will make a determination of whether action taken or intended to be taken by such owner or operator constitutes construction (including reconstruction) or modification or the commencement thereof within the meaning of this part.

(b) The Administrator will respond to any request for a determination under paragraph (a) of this section within 30 days of receipt of such request.

4. In § 60.7, paragraphs (a)(1) and (a)(2) are revised, and paragraphs (a)(3), (a)(4), and (c) are added as follows:

§ 60.7 Notification and recordkeeping.

(a) Any owner or operator subject to the provisions of this part shall furnish the Administrator written notification as follows:

(1) A notification of the date construction (or reconstruction as defined under § 60.15) of an affected facility is commenced postmarked no later than 30 days after such date. This requirement shall not apply in the case of mass-produced facilities which are purchased in completed form.

(2) A notification of the anticipated date of initial startup of an affected facility postmarked not more than 60 days nor less than 30 days prior to such date.

(3) A notification of the actual date of initial startup of an affected facility postmarked within 15 days after such date.

(4) A notification of any physical or operational change to an existing facility which may increase the emission rate of any air pollutant to which a standard applies, unless that change is spe-

cifically exempted under an applicable subpart or in § 60.14(e) and the exemption is not denied under § 60.14(d)(4). This notice shall be postmarked 60 days or as soon as practicable before the change is commenced and shall include information describing the precise nature of the change, present and proposed emission control systems, productive capacity of the facility before and after the change, and the expected completion date of the change. The Administrator may request additional relevant information subsequent to this notice.

(e) If notification substantially similar to that in paragraph (a) of this section is required by any other State or local agency, sending the Administrator a copy of that notification will satisfy the requirements of paragraph (a) of this section.

5. Subpart A is amended by adding §§ 60.14 and 60.15 as follows:

§ 60.14 Modification.

(a) Except as provided under paragraphs (d), (e) and (f) of this section, any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies shall be considered a modification within the meaning of section 111 of the Act. Upon modification, an existing facility shall become an affected facility for each pollutant to which a standard applies and for which there is an increase in the emission rate to the atmosphere.

(b) Emission rate shall be expressed as kg/hr of any pollutant discharged into the atmosphere for which a standard is applicable. The Administrator shall use the following to determine emission rate:

(1) Emission factors as specified in the latest issue of "Compilation of Air Pollutant Emission Factors," EPA Publication No. AP-42, or other emission factors determined by the Administrator to be superior to AP-42 emission factors, in cases where utilization of emission factors demonstrate that the emission level resulting from the physical or operational change will either clearly increase or clearly not increase.

(2) Material balances, continuous monitor data, or manual emission tests in cases where utilization of emission factors as referenced in paragraph (b)(1) of this section does not demonstrate to the Administrator's satisfaction whether the emission level resulting from the physical or operational change will either clearly increase or clearly not increase, or where an owner or operator demonstrates to the Administrator's satisfaction that there are reasonable grounds to dispute the result obtained by the Administrator utilizing emission factors as referenced in paragraph (b)(1) of this section. When the emission rate is based on results from manual emission tests or continuous monitoring systems, the procedures specified in Appendix C of this part shall be used to determine whether an increase in emission rate has occurred. Tests shall be conducted under such conditions as the Administrator shall specify to the owner or operator based on representative performance of the facility. At least three valid test runs must be conducted before and at least three after the physical or operational change. All operating parameters which may affect emissions must be held constant to the maximum feasible degree for all test runs.

(c) The addition of an affected facility to a stationary source as an expansion to that source or as a replacement for an existing facility shall not by itself bring within the applicability of this part any other facility within that source.

(d) A modification shall not be deemed to occur if an existing facility undergoes a physical or operational change where the owner or operator demonstrates to the Administrator's satisfaction (by any of the procedures prescribed under paragraph (b) of this section) that the total emission rate of any pollutant has not increased from all facilities within the stationary source to which appropriate reference, equivalent, or alternative methods, as defined in § 60.2 (s), (t) and (u), can be applied. An owner or operator may completely and permanently close any facility within a stationary source to prevent an increase in the total emission rate regardless of whether such reference, equivalent or alternative method can be applied, if the decrease in emission rate from such closure can be adequately determined by any of the procedures prescribed under paragraph (b) of this section. The owner or operator of the source shall have the burden of demonstrating compliance with this section.

(1) Such demonstration shall be in writing and shall include: (i) The name and address of the owner or operator.

(ii) The location of the stationary source.

(iii) A complete description of the existing facility undergoing the physical or operational change resulting in an increase in emission rate, any applicable control system, and the physical or operational change to such facility.

(iv) The emission rates into the atmosphere from the existing facility of each pollutant to which a standard applies determined before and after the physical or operational change takes place, to the extent such information is known or can be predicted.

(v) A complete description of each facility and the control systems, if any, for those facilities within the stationary source where the emission rate of each pollutant in question will be decreased to compensate for the increase in emission rate from the existing facility undergoing the physical or operational change.

(vi) The emission rates into the atmosphere of the pollutants in question from each facility described under paragraph (d)(1)(v) of this section both before and after the improvement or installation of any applicable control system or any physical or operational changes to such facilities to reduce emission rate.

(vii) A complete description of the procedures and methods used to determine the emission rates.

(2) Compliance with paragraph (d) of this section may be demonstrated by the methods listed in paragraph (b) of this section where appropriate. Decreases in emissions resulting from requirements of a State implementation plan approved or promulgated under Part 52 of this chapter will not be acceptable. The required reduction in emission rate may be accomplished through the installation or improvement of a control system or through physical or operational changes to facilities including reducing the production of a facility or closing a facility.

(3) Emission rates established for the existing facility which is undergoing a physical or operational change resulting in an increase in the emission rate, and established for the facilities described under paragraph (d)(1)(v) of this section shall become the baseline for determining whether such facilities undergo a modification or are in compliance with standards.

(4) Any emission rate in excess of that rate established under paragraph (d)(3) of this section shall be a violation of these regulations except as otherwise provided in paragraph (e) of this section. However, any owner or operator electing to demonstrate compliance under this paragraph (d) must apply to the Administrator to obtain the use of any exemptions under paragraphs (e)(2), (e)(3), and (e)(4) of this section. The Administrator will grant such exemption only if, in his judgment, the compliance originally demonstrated under this paragraph will not be circumvented or nullified by the utilization of the exemption.

(5) The Administrator may require the use of continuous monitoring devices and compliance with necessary reporting procedures for each facility described in paragraph (d)(1)(iii) and (d)(1)(v) of this section.

(e) The following shall not, by themselves, be considered modifications under this part:

(1) Maintenance, repair, and replacement which the Administrator determines to be routine for a source category, subject to the provisions of paragraph (c) of this section and § 60.15.

(2) An increase in production rate of an existing facility, if that increase can be accomplished without a capital expenditure on the stationary source containing that facility.

(3) An increase in the hours of operation.

(4) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to that source type, as provided by § 60.1, the existing facility was designed to accommodate that alternative use. A facility shall be considered to be designed to accommodate an alternative fuel or raw material if that use could be accomplished under the facility's construction

interests. Where no State or Indian Governing Body protests the redesignation of another State or Indian Reservation, the Administrator will only review the redesignation to determine whether it is arbitrary and capricious. However, where a State or Indian Governing Body protests a redesignation to the State proposing the redesignation and to the Administrator, the Administrator will take an expanded role of review in which he will balance the competing interests involved.

10. *Specification of emission limitation.* In order to ensure that the requirement for applying BACT is properly implemented, the provisions of paragraph (d)(2)(ii) have been modified to require that an emission limitation be established as a condition to approval. This places the emphasis on emissions rather than the presence of any particular control equipment. This change also makes the BACT requirement for sources not covered by NSPS more consistent with the NSPS requirements. However, if the Administrator determines that technological or economic limitations on the application of measurement methodology to a particular class of sources would make the imposition of an emission standard infeasible, he may instead prescribe a design or equipment standard requiring the application of best available control technology. Such standard shall to the degree possible set forth the emission reductions achievable by implementation of such design or equipment, and shall provide for compliance by means which achieve equivalent results.

11 *Responsibility for performing air quality impact analysis.* A number of public comments suggested that the reviewing agency analyze the air quality impact of additional growth that has occurred in the vicinity of the proposed source since the reviewing agency is more likely to have the necessary data which is needed. The Administrator has concluded that it would be more appropriate for the reviewing agency to perform the air quality impact analysis based on information submitted by the applicant. This change will eliminate the uncertainty which was expressed concerning the requirement that the applicant analyze the air quality impact of general growth and development "in the area affected by the proposed source," since the reviewing agency will define this area and perform the calculations required. Also the provisions of paragraph (d)(3) do not require the applicant to submit growth data with each application. However, the reviewing agency may request such data from the applicant in cases where it does not have the necessary information and will specify the area over which such information is required.

12. *Procedures for public participation.* The procedures specified in paragraph (e) for public comment on an application to construct have been modified to be consistent with the procedures contained in EPA's regulations for indirect source review (39 FR 25292). The changes allow the reviewing agency to require additional information, where necessary, and permit the applicant to respond to public comments involving his application to construct.

13. *Sources subject to review.* As proposed on August 27, several of the 19 source categories subject to the preconstruction review appeared to be restricted to an individual process (e.g. Kraft pulp mill recovery furnaces) rather than all emission points on the premises. The wording has been changed to be consistent with the listing of the other source categories and to make clear that all emission points associated with a stationary source must be considered in determining whether the source will violate an applicable air quality increment. This change allows sintering plants to be dropped from the list, since sintering operations will be covered under the primary metals industries which are subject to review under these regulations.

A detailed explanation of the technical and policy considerations which form the basis for these regulations is being prepared. Upon completion, the Administrator will publish a notice in the FEDERAL REGISTER announcing the availability of this information for public inspection.

These regulations will be effective January 6, 1975 and will be applicable to sources commencing construction on or after June 1, 1975.

(Secs. 110(c) and 301(a) of the Clean Air Act as amended [42 U.S.C. 1857 c-5(c) and 1857 g(a)])

Dated: November 27, 1974.

RUSSELL E. TRAIN,
Administrator.

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

1. In § 52.01, paragraph (d) is revised and paragraph (f) is added. As amended § 52.01 reads as follows:

§ 52.01 Definitions.

* * * * *

(d) The phrases "modification" or "modified source" mean any physical change in, or change in the method of operation of, a stationary source which increases the emission rate of any pollutant for which a national standard has been promulgated under Part 50 of this chapter or which results in the emission of any such pollutant not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered a physical change, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the source;

(ii) An increase in the hours of operation;

(iii) Use of an alternative fuel or raw material, if prior to the effective date of a paragraph in this Part which imposes conditions on or limits modifications, the source is designed to accommodate such alternative use.

* * * * *

(f) The term "best available control technology," as applied to any affected facility subject to Part 60 of this chapter, means any emission control device or technique which is capable of limiting emissions to the levels proposed or promulgated pursuant to Part 60 of this chapter. Where no standard of performance has been proposed or promulgated for a source or portion thereof under Part 60, best available control technology shall be determined on a case-by-case basis considering the following:

(1) The process, fuels, and raw material available and to be employed in the facility involved,

(2) The engineering aspects of the application of various types of control techniques which have been adequately demonstrated,

(3) Process and fuel changes,

(4) The respective costs of the application of all such control techniques, process changes, alternative fuels, etc.,

(5) Any applicable State and local emission limitations, and

(6) Locational and siting considerations.

2. Section 52.21 is revised by designating the first paragraph (a) and adding paragraphs (b), (c), (d), (e), and (f) to read as follows:

§ 52.21 Significant deterioration of air quality.

(a) *Plan disapproval.* Subsequent to May 31, 1972, the Administrator reviewed State implementation plans to determine whether or not the plans permit or prevent significant deterioration of air quality in any portion of any State where the existing air quality is better than one or more of the secondary standards. The review indicates that State plans generally do not contain regulations or procedures specifically addressed to this problem. Accordingly, all State plans are disapproved to the extent that such plans lack procedures or regulations for preventing significant deterioration of air quality in portions of States where air quality is better than the secondary standards. The disapproval applies to all States listed in Subparts B through DDD of this part. Nothing in this section shall invalidate or otherwise affect the obligations of States, emission sources, or other persons with respect to all portions of plans approved or promulgated under this part.

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

(1) The phrase "baseline air quality concentration" refers to both sulfur dioxide and particulate matter and means the sum of ambient concentration levels existing during 1974 and those additional concentrations estimated to result from sources granted approval (pursuant to approved new source review procedures in the plan) for construction or modification but not yet operating prior to

demonstrated capability of control systems to meet the standards. These comments have been evaluated and investigated, and it is the Administrator's judgment that emission control systems capable of meeting the standards have been adequately demonstrated and that the standards promulgated herein are achievable at reasonable costs.

The regulations establishing standards of performance for steam generators, incinerators, cement plants, nitric acid plants, and sulfuric acid plants are hereby promulgated effective on publication and apply to sources the construction or modification of which was commenced after August 17, 1971.

Dated: December 16, 1971.

WILLIAM D. RUCKELSHAUS,
Administrator,
Environmental Protection Agency.

A new Part 60 is added to Chapter I, Title 40, Code of Federal Regulations, as follows:

Subpart A—General Provisions

AUTHORITY: The provisions of this Part 60 issued under sections 111, 114, Clean Air Act; Public Law 91-604, 84 Stat. 1713.

Subpart A—General Provisions

§ 60.1 Applicability.

The provisions of this part apply to the owner or operator of any stationary source, which contains an affected facility the construction or modification of which is commenced after the date of publication in this part of any proposed standard applicable to such facility.

§ 60.2 Definitions.

As used in this part, all terms not defined herein shall have the meaning given them in the Act:

(a) "Act" means the Clean Air Act (42 U.S.C. 1857 et seq., as amended by Public Law 91-604, 84 Stat. 1676).

(b) "Administrator" means the Administrator of the Environmental Protection Agency or his authorized representative.

(c) "Standard" means a standard of performance proposed or promulgated under this part.

(d) "Stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant.

(e) "Affected facility" means, with reference to a stationary source, any apparatus to which a standard is applicable.

(f) "Owner or operator" means any person who owns, leases, operates, controls, or supervises an affected facility or a stationary source of which an affected facility is a part.

(g) "Construction" means fabrication, erection, or installation of an affected facility.

(h) "Modification" means any physical change in, or change in the method of operation of, an affected facility which increases the amount of any air pollutant (to which a standard applies) emitted by such facility or which results in the emission of any air pollutant (to which a standard applies) not previously emitted, except that:

(1) Routine maintenance, repair, and replacement shall not be considered physical changes, and

(2) The following shall not be considered a change in the method of operation:

(i) An increase in the production rate, if such increase does not exceed the operating design capacity of the affected facility;

(ii) An increase in hours of operation;

(iii) Use of an alternative fuel or raw material if, prior to the date any standard under this part becomes applicable to such facility, as provided by § 60.1, the affected facility is designed to accommodate such alternative use.

(i) "Commenced" means that an owner or operator has undertaken a continuous program of construction or modification or that an owner or operator has entered into a binding agreement or contractual obligation to undertake and complete, within a reasonable time, a continuous program of construction or modification.

(j) "Opacity" means the degree to which emissions reduce the transmission of light and obscure the view of an object in the background.

(k) "Nitrogen oxides" means all oxides of nitrogen except nitrous oxide, as measured by test methods set forth in this part.

(l) "Standard of normal conditions" means 70° Fahrenheit (21.1° centigrade) and 29.92 in. Hg (760 mm. Hg).

(m) "Proportional sampling" means sampling at a rate that produces a constant ratio of sampling rate to stack gas flow rate.

(n) "Isokinetic sampling" means sampling in which the linear velocity of the gas entering the sampling nozzle is equal to that of the undisturbed gas stream at the sample point.

(o) "Startup" means the setting in operation of an affected facility for any purpose.

§ 60.3 Abbreviations.

The abbreviations used in this part have the following meanings in both capital and lower case:

B.t.u.—British thermal unit.
cal.—calorie(s).
c.f.m.—cubic feet per minute.
CO_2—carbon dioxide.
g.—gram(s).
gr.—grain(s).
mg.—milligram(s).
mm.—millimeter(s).
l.—liter(s).
nm.—nanometer(s), -10^{-9} meter.
µg.—microgram(s), 10^{-6} gram.
Hg.—mercury.
in.—inch(es).
K—1,000.
lb.—pound(s).
ml.—milliliter(s).
No.—number(s).
%—percent.
NO—nitric oxide.
NO_2—nitrogen dioxide.
NO_x—nitrogen oxides.
N.M.³—normal cubic meter.
s.c.f.—standard cubic feet.
SO_2—sulfur dioxide.
H_2SO_4—sulfuric acid.
SO_3—sulfur trioxide.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Proof Brief of Environmental Intervenor-Respondents** has been served by United States first-class mail (or, where an email address is set forth, electronically pursuant to written consent obtained under Fed. R. App. P.25(c)(1)(D)) this 30th day of August 2004, upon the following:

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