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Shell Chukchi OCS Air Permit  
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Subject: OCS PSD Permit Number: R10OCS/PSD-AK-09-01 (Shell Gulf of Mexico Inc.)

ConocoPhillips Company (ConocoPhillips) submits these comments on the above-referenced proposed Prevention of Significant Deterioration (PSD) permit. ConocoPhillips acknowledges and supports several changes EPA has made in the current version of the permit to address practical implementation problems identified by Shell and other commenters on the August 20, 2009 draft of the permit. Nevertheless, the proposed permit still contravenes the Clean Air Act (CAA) in several respects. We support the expeditious issuance of this permit but believe that EPA must correct these flaws before doing so.

The exhibits posted on the Region 10 website in support of the proposed permit include a map of Shell's Chukchi Lease Sale 193 Lease Blocks. The posted map does not depict any of the lease blocks acquired by other companies in Lease Sale 193, but the fact is that in 2008 Shell, ConocoPhillips and four other oil and gas companies paid \$2.7 billion to the United States for the right to explore for and develop oil and gas resources on the outer OCS in the Chukchi Sea.<sup>1</sup> See Map of Chukchi leasehold interests, Attachment 1 to these comments.

Every operator proposing to conduct exploratory drilling in the Chukchi Sea must deploy not only a drill rig but also a fleet of support vessels charged with supporting drilling operations, protecting the environment and protecting the operation from floating ice. Shell's support vessels have a larger potential to emit than the Frontier Discoverer, and their operations require that they constantly reposition themselves over areas far larger than Shell's lease blocks. Icebreakers in particular can be located several miles away from the drillship<sup>2</sup> and their positions could vary with wind speed and direction.

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<sup>1</sup> The U.S. Department of the Interior Minerals Management Service website lists the successful bidders and the dollar value of the leaseholds awarded in Lease Sale 193.  
<http://www.mms.gov/alaska/cproject/Chukchi193/193Sale/day/Sale%20193%20Sum%20of%20Co%20Bids%20by%20Co%20Code.pdf>

<sup>2</sup> Statement of Basis at 44.

Emissions from Shell's exploratory operation were modeled to consume 84 percent of the PM<sub>2.5</sub> NAAQS and 76.3 percent of the PM<sub>10</sub> increment at the rail of the Frontier Discoverer, notwithstanding the incorporation into Shell's permit of "voluntary" operating limitations intended to prevent the models from showing NAAQS and increment violations.<sup>3</sup> Were the zone of impact limited to the rail of the Frontier Discoverer, EPA's demands might create operating problems for Shell, but they would not necessarily burden ConocoPhillips and other leaseholders. The mobility of the support fleet, however, coupled with the relative magnitude of Associated Fleet emissions, and the fact that Shell and ConocoPhillips hold many adjoining lease blocks,<sup>4</sup> means that Shell's operations – all by themselves -- will be modeled to consume substantial portions of the increments and to threaten compliance with the NAAQS at other locations in the Chukchi Sea, including locations within ConocoPhillips' Lease Sale 193 lease blocks.

In February 2010 ConocoPhillips submitted a Part 71 permit application for its own exploratory program to be conducted in ConocoPhillips' Chukchi lease blocks beginning in 2012. ConocoPhillips does not anticipate the need for a PSD permit for the exploration phase of its Chukchi operations. ConocoPhillips will, however, have to demonstrate that its operation will not cause a NAAQS violation. ConocoPhillips may not be able to meet that challenge if Shell's emissions consume large portions of the NAAQS at the location of ConocoPhillips' drilling rig.

To the best of our knowledge, the Shell permit will be the first PSD permit issued by EPA for a major stationary source located in the "outer OCS," i.e. more than 25 miles beyond the nearest state seaward boundary. In developing this permit, EPA made at least two erroneous decisions that threaten the viability of future oil and gas exploration projects in the outer OCS, including ConocoPhillips' proposed exploration program for which Region 10 will receive a permit application in February 2010. First, EPA required Shell to show compliance with PSD increments at the rail of the Frontier Discoverer, as opposed to the nearest onshore point in the State of Alaska. This error overstated the ambient impacts of Shell's project. Second, EPA imposed stationary source control strategies (e.g. PSD BACT) on vessels and nonroad engines that are not stationary sources, and that are not easily configured to meet stationary source emission standards.

It is instructive to contrast Region 10's permitting approach with that of the Minerals Management Service's (MMS) permitting approach in the Western and Central Gulf of Mexico (GOM) OCS areas where the MMS has jurisdiction i.e., west of 87.5° longitude. The MMS ably protects onshore air quality by prohibiting exceedances of the National Ambient Air Quality Standards (NAAQS) and by using an air quality regulatory approach that does not stifle exploration and production activities. To obtain authorization in the GOM, a company is required to present its realistic emissions in its Exploration Plan and then, using formulae developed by the MMS, determine whether the emissions are above levels that might cause onshore impacts above very stringent levels. If the impacts are below these levels, the company's air emissions are approved. If above the levels, the MMS requires the company to reduce their

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<sup>3</sup> Statement of Basis at 110 (Table 5-12).

<sup>4</sup> See Attachment 1.

emissions by using best available control technology. Of particular importance here is that the process is well-established, easily understood, and does not require an unreasonable amount of time. We acknowledge that the EPA is governed by the CAA but Section 328(b) of the CAA requires the EPA to consult with the Department of Interior to ensure coordination of the air pollution control regulations in the OCS.

In the following comments ConocoPhillips documents the proposed Shell permit conditions that deviate from CAA structure and precedent, and the threat they pose to the development by ConocoPhillips and others of the oil and gas resources in the Chukchi Sea.

**1. The proposed permit unlawfully limits project emissions to attain the PSD increments at the rail of the Frontier Discoverer.**

The proposed permit includes emission limits and operating restrictions to prevent exceedance of the PSD increments.<sup>5</sup> In modeling emissions increases against the increments, however, Region 10 erroneously required Shell to demonstrate attainment of the increments at the facility boundary (in this case the rail of the Frontier Discoverer). The Statement of Basis for the proposed permit announces that in an unpublished Region 10 internal memorandum EPA established the first ever Air Quality Control Region and PSD Baseline Area for the Chukchi Sea OCS.<sup>6</sup> EPA's justification for this invention is that while the legislative history of CAA Section 328 reflects only a concern for the onshore impacts of OCS activity, "Section 328 does not identify a particular area where the requirements to control air pollution from OCS sources located offshore must attain and maintain" NAAQS and increments.<sup>7</sup>

The limits on the geographic scope of the PSD program are found, not in Section 328, but in Title I of the Act. The PSD enabling language in CAA Title I, the history of CAA Section 328 and the rulemaking record supporting 40 CFR Part 55 leave no doubt that the point of compliance for an increment demonstration by a major stationary source operating in the OCS is on shore, not in the OCS.

**a. EPA's OCS air rules subject a major stationary source proposing to locate on the Outer OCS to the PSD program codified at 40 CFR 52.21.**

EPA's authority to regulate OCS sources derives exclusively from CAA Section 328.<sup>8</sup> A major objective of Section 328 was to "create a more equitable regulatory environment between

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<sup>5</sup> See Statement of Basis at 46, 49.

<sup>6</sup> Statement of Basis at 18, 91.

<sup>7</sup> Statement of Basis at 18.

<sup>8</sup> Prior to the enactment of Section 328 the Department of the Interior had the sole authority to regulate air quality on the OCS. In 1990 Congress transferred that authority to EPA, except for areas offshore of Alabama, Mississippi, Texas and Louisiana. 56 Fed.Reg. 63775-76 (December 5, 1991), Attachment 2 to these comments; *State of California v. Kleppe*, 604 F.2d 1187, 1194 (9th Cir. 1979).

onshore sources and OCS sources located within 25 miles of states' seaward boundaries."<sup>9</sup> Local air pollution control districts in California complained that emissions from offshore oil and gas production platforms impaired their ability to achieve the NAAQS. In response Congress established special requirements for OCS sources located within 25 miles of the seaward boundaries of each state. "[S]uch requirements shall be the same as would be applicable if the source were located in the corresponding onshore area, and shall include, but not be limited to, State and local requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing and reporting."<sup>10</sup>

Congress was less prescriptive about the standards that govern sources located beyond 25 miles of the states' seaward boundaries ("outer OCS sources").<sup>11</sup> Section 328 directed EPA to "establish requirements to control air pollution from Outer Continental Shelf sources . . . to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of Part C of Subchapter I of this chapter." Section 328 directed EPA to establish those requirements by rule.

In 1991 EPA proposed rules to implement Section 328.<sup>12</sup> Consistent with the legislative scheme, EPA proposed to subject sources within 25 miles of the seaward boundaries of each state to state and local emission control requirements.<sup>13</sup> For OCS sources more than 25 miles out, EPA proposed to apply PSD, NSPS and Section 112 requirements "if rationally related to the attainment and maintenance of federal or state ambient air quality standards," with the proviso that 40 CFR part 71 would apply to OCS sources upon promulgation.<sup>14</sup>

EPA's final OCS rules follow this approach. 40 CFR § 55.13 lists the requirements that apply to all OCS sources, including the PSD program found in 40 CFR 52.21.<sup>15</sup> EPA concludes that Shell's project requires a PSD permit under 40 CFR 52.21 because the project has the potential to emit more than 250 tons per year of three PSD pollutants.<sup>16</sup>

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<sup>9</sup> 56 Fed.Reg. 63775, Attachment 2 to these comments.

<sup>10</sup> CAA § 328(a)(1), 42 U.S.C. § 7627(a)(1).

<sup>11</sup> "Section 328 does not mandate the content of the OCS program for OCS sources located beyond 25 miles of states' seaward boundaries." 56 Fed.Reg. 63784 (December 5, 1991), Attachment 2 to these comments.

<sup>12</sup> 56 Fed.Reg. 63774.

<sup>13</sup> 56 Fed.Reg. 63785.

<sup>14</sup> 56 Fed.Reg. 63784, 63792.

<sup>15</sup> 40 CFR 55.13(d).

<sup>16</sup> Statement of Basis at 24.

**b. The point of compliance for an increment demonstration by a major stationary source proposing to locate in the OCS is on shore, not in the OCS.**

Congress established the PSD program as an element of each state's applicable implementation plan. CAA Section 163(a) specifies, "each applicable implementation plan shall contain measures assuring that [increments] shall not be exceeded."<sup>17</sup> CAA § 161 declares that "each applicable implementation plan" shall contain emission limitations and such other measures as may be necessary . . . to prevent significant deterioration of air quality in each region (or portion thereof) designated pursuant to section 7407 of this title as attainment or unclassifiable."<sup>18</sup>

"Section 7407" (CAA Section 107) directs EPA to designate air quality control regions in each state, in consultation with the state.<sup>19</sup> CAA Section 162 provides initial classifications of Class I areas, and assigns the balance of each State that has not been designated as nonattainment into Class II.<sup>20</sup> Section 107 does not contemplate the establishment of air quality control regions outside of State boundaries.

When Congress enacted Part C of Title I in 1977, EPA had no authority to regulate air quality on the OCS, and *Part C includes no mechanism to implement the PSD program on the OCS.*<sup>21</sup> Congress filled that gap in 1990 with the enactment of Section 328, but Congress did not direct EPA to regulate the increments in the OCS. To the contrary, Section 328 merely directs EPA to adopt rules "to comply with the provisions of Part C . . ."<sup>22</sup> This language accomplished the congressional objective of protecting onshore air quality from degradation by OCS sources.<sup>23</sup>

This legislative purpose was not lost on EPA when it adopted the Part 55 OCS permitting rules. EPA recognized that the goal of Congress was to protect the air quality of coastal regions:

The intent of Congress in adding section 328 was to protect ambient air quality standards onshore and ensure compliance with the PSD requirements. EPA is to accomplish this by controlling emissions of pollutants for which ambient standards have been set and their

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<sup>17</sup> 42 U.S.C. 7473(a).

<sup>18</sup> CAA § 161, 42 U.S.C. § 7471.

<sup>19</sup> 42 U.S.C. 7407(b)-(c).

<sup>20</sup> 42 U.S.C. 7472.

<sup>21</sup> EPA's list of Alaska air quality control regions does not include the OCS. See 40 CFR 81.302.

<sup>22</sup> CAA § 328(a)(1), 42 U.S.C. § 7627(a)(1).

<sup>23</sup> "Of primary concern is the fact that OCS air pollution is causing or contributing to the violation of Federal and State ambient air quality standards in coastal regions." . . . This section of the bill is intended to ensure that air pollution from OCS activities does not degrade the air quality in coastal regions of the United States." Report of the Senate Committee on Environment and Public Works on S. 1630, S.Rep. No. 228, 101st Cong., 1st Sess. at 77 (1989), *reprinted in* 1990 U.S. Code Cong. & Ad. News 3463, Attachment 3 to these comments.

precursors (criteria pollutants) from the OCS that can be transported onshore and affect ambient air quality.<sup>24</sup>

The preambles to the proposed and final Part 55 rules repeatedly emphasize that the goal of Part 55 PSD permitting is to protect increments on shore.<sup>25</sup> Neither the Part 55 rules nor 40 CFR 52.21 provide any authority to require increment attainment demonstrations within the OCS.

**c. The proposed permit unlawfully limits project emissions in order to demonstrate attainment of the increments at the rail of the Frontier Discoverer.**

EPA's increment consumption analysis for the Shell permit begins with the assertion that "the area covered by Shell's leases in Lease Sale 193 is a Class II area."<sup>26</sup> The Statement of Basis goes on to explain that "EPA considers the 'baseline area' for purposes of 40 CFR 52.21 to be the area bounded on the shoreward side by a parallel line 25 miles from the State's seaward boundary; on the seaward side by the boundary of U.S. territorial waters; and on the other two sides by the seaward extension of the onshore Air Quality Control Region boundaries."<sup>27</sup> These boundaries came from recommendations contained in a July 2, 2009 memo from EPA Senior Policy Advisor David C. Bray to Director Rick Albright, Region 10 Office of Air, Waste and Toxics. As Mr. Bray recognized, "The definition of 'baseline area' in the federal PSD rules relies on the existence of intrastate areas designated as attainment or unclassifiable under section 107(d) of the Act."<sup>28</sup> Despite this fact and contrary to the definition in the PSD rules, EPA Region 10 established a baseline area in an internal agency memorandum.

Each step in this analysis contradicts or ignores the plain language of the CAA and the PSD rules:

- The area covered by Shell's leases in the Lease Sale 193 area is *not* a Class II area. CAA Section 162(b), the section of the CAA that EPA cites as authority for this conclusion, defines as Class II areas only areas "in such State" that are not established elsewhere as Class

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<sup>24</sup> 56 Fed.Reg. 63775 (December 5, 1991), Attachment 2 to these comments.

<sup>25</sup> 56 Fed.Reg. 63778:

EPA is proposing that sources located more than 25 miles beyond state boundaries be subject to the requirements for PSD. NSPS and NESHAPS will apply to the extent they are rationally related to protection of ambient air quality standards. . . . The application of these requirements will allow EPA to protect onshore air quality from the impacts of emissions produced by OCS sources more than 25 miles beyond state seaward boundaries.

<sup>26</sup> Statement of Basis at 87.

<sup>27</sup> Statement of Basis at 91.

<sup>28</sup> Memorandum of July 2, 2009 from David C. Bray to Rick Albright at 3, Attachment 4 to these comments.

I areas. Section 162(b) provides no mechanism for designating portions of the OCS under the PSD class designation scheme.

- The PSD definition of “baseline area” applies, as Mr. Bray acknowledged, only to “any intrastate area . . .” Neither the PSD rules nor the CAA provide any mechanism to designate a baseline area in the OCS. The proposed permit establishes a baseline area in a location that cannot so be designated under the definition of that term.
- The Bray memo and the Statement of Basis overlook the fact that Congress established the PSD program to prevent significant deterioration in air quality control regions designated as attainment pursuant to CAA Section 107,<sup>29</sup> and that Section 107 plainly limits the establishment of air quality control regions to “any interstate area or major intrastate area” deemed appropriate for attainment of the NAAQS.<sup>30</sup>

EPA should revise its increment consumption analysis and delete all permit limits based on that analysis. The decision to apply the PSD increments at the rail of the Frontier Discoverer is prejudicial in ways that impact not only Shell but also ConocoPhillips. First, the emission limits in the proposed permit unlawfully restrict Shell’s operations to achieve the increments at locations where they do not apply.<sup>31</sup> Second, ConocoPhillips and other Chukchi Sea lessees likely will require PSD permits to develop and produce the oil and gas reserves in the Chukchi Sea. Historically, oil and gas production operations generate higher emissions than seasonal exploration projects. The decision to establish a PSD baseline area and to establish a point of compliance for the PSD increments on the OCS as opposed to on shore will preclude EPA from permitting the mix of exploration and production activities that must be performed to enable the holders of MMS leasehold interests to explore for, develop and produce mineral resources for which they acquired rights from the United States, at an aggregate cost of \$2.7 billion. EPA’s current actions may preclude the exercise of lease rights contrary to the terms of the leases and the statutes and regulations incorporated in the leases. As the holder of 98 Chukchi Sea leasehold interests acquired in Lease Sale 193, ConocoPhillips is profoundly concerned that EPA’s misapplication of the PSD increment consumption rules will prohibit the exploration and development of the oil and gas resources on its leases, while allowing Shell to explore and develop its leases.

**2. EPA erroneously applied stationary source controls to nonroad engines and vessels.**

The proposed permit imposes PSD BACT limits on the Frontier Discoverer generator engines (FD 1-6), the MLC compressor engines (FD 9-11), the HPU engines (FD 12-13), the

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<sup>29</sup> CAA § 161, 42 U.S.C. § 7471.

<sup>30</sup> CAA §107(c), 42. U.S.C. § 7407(c).

<sup>31</sup> Statement of Basis at 46.

deck cranes (FD 14-15) and the cementing unit and logging winch engines (FD 16-20).<sup>32</sup> These are all nonroad engines.

The proposed permit imposes capacity limits, operating limits, fuel consumption limits, fuel sulfur limits and control technology requirements on icebreakers, oil spill response vessels and other support vessels.

The Statement of Basis opines that New Source Performance Standards and NESHAPs apply to nonroad engines and other emission units located on vessels, although EPA defers the imposition of these requirements to a future Title V permit.<sup>33</sup>

The statutory definition of “stationary source” in CAA Section 302(z) excludes nonroad engines. The PSD definition of stationary source exempts vessels.<sup>34</sup> CAA Sections 111 and 112 plainly limit the application of NSPS and NESHAP requirements to stationary sources. None of these programs authorize EPA to apply stationary source controls to vessels or nonroad engines. Of particular relevance to the draft permit, the PSD program does not authorize EPA to establish BACT limits for nonroad engines or vessels.<sup>35</sup>

In the Statement of Basis for the Shell permit EPA acknowledges these limitations, but argues that they do not apply in the OCS, because Congress included nonroad engines and vessels in the Section 328 definition of “OCS Source:”

Drill ships and other vessels contain many emission sources that otherwise meet the definition of “nonroad engine” as defined in Section 216(10) of the Clean Air Act. However, based on the specific requirements of CAA Section 328, emissions from these otherwise nonroad engines on drillships and subject support vessels are considered as “potential emissions” from the OCS source, notwithstanding the fact that Section 302(z) of the CAA specifically excludes nonroad engines from the definition of “stationary source.” Similarly, nonroad engines that are part of the OCS source are subject to regulation as stationary sources. . . . *Simply put, the exclusion of nonroad engines from the general definition of “stationary source” in Section 302(z) of the CAA is overridden by the more specific provisions in Section 328 of the CAA and 40 C.F.R. §55.2.*<sup>36</sup>

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<sup>32</sup> Proposed Permit Conditions C.3, F.2, G.2-3, H.2-3 and I.2-3.

<sup>33</sup> Statement of Basis at 26.

<sup>34</sup> “Stationary source” is defined as a “building, structure, facility or installation,” which in turn is defined to exclude vessels. 40 CFR 52.21(b)(5) and (6). In *NRDC v. EPA*, 725 F.2d 761 (D.C.Cir. 1984) the Court of Appeals largely upheld the excusion of vessels from the PSD definition of a stationary source, with exceptions not relevant to Shell’s permit.

<sup>35</sup> *In re Cardinal FG Company*, PSD Appeal No. 04-04, EPA Environmental Appeals Board, 2005 WL 701329, \*14 (Mar. 22, 2005), Attachment 5 to these comments.

<sup>36</sup> Statement of Basis at 22-23 (emphasis added).

This interpretation misconstrues the language of Section 328, and ignores a recent decision of the EPA Environmental Appeals Board. ConocoPhillips agrees with EPA that nonroad engines are part of the OCS Source and emissions from vessels within 25 miles of the OCS Source count as direct emissions from the OCS Source for purposes of ambient impact assessment. The definition of OCS Source in Section 328(a)(4)(C) so provides. But there is a huge leap between classifying equipment as part of an “OCS Source” and concluding that any equipment within an OCS Source is subject to stationary source controls. In 2007 a coalition of environmental appellants invited the EAB to take that leap, arguing that “where an OCS source has the potential to emit more than 250 tons per year of any air pollutant, the PSD permitting requirements apply to that source notwithstanding any more restrictive applicability standard that might apply under the PSD regulation’s definition of “stationary source.”<sup>37</sup> The EAB, with support from Region 10, refused to “override” the jurisdictional boundaries of the PSD program just because the equipment was part of an “OCS Source.” The *Kulluk* decision squarely addresses this issue:

We find that the Region correctly concluded that, once it determines an emissions source located on the OCS is properly classified as an “OCS source,” then that emissions source becomes subject to the requirements of 40 C.F.R. part 55. Further, the permitting programs and other requirements to which the OCS source is subject through part 55, including the PSD permitting program, then apply to the OCS source based on the regulations that define the scope of those programs. Specifically, simply because EPA has identified an OCS source as regulated under the CAA, and subject to the requirements of part 55, does not mean it can avoid the next necessary step of determining the scope of the “stationary source” for PSD purposes.

This interpretation is further supported by applicable legislative history. One of Congress’ purposes in giving EPA authority to regulate air pollution sources on the OCS was to require similar treatment of onshore and offshore pollution emitting activities by “applying the same air quality protection requirements as would apply if the OCS sources were located within the corresponding onshore area.” The regulatory definition of “stationary source” establishes the basic unit of analysis – i.e., what emissions units must be included as part of a single source – for determining whether the PSD program’s minimum PTE thresholds are exceeded and a PSD permit is required. There is nothing in the plain language of the statute that indicates Congress intended to replace the unit of analysis used for determining onshore applicability of PSD permitting with the new concept of “OCS source” when determining PSD applicability offshore. To the contrary, the statute demonstrates that where Congress intended the “OCS source” to be the unit of analysis for determining applicability of a permitting program it did so expressly.

We thus specifically reject NSB’s and REDOIL’s argument that the reference to “any other source” in CAA section 169(1), 42 U.S.C. § 7479(1), requires the “OCS source” to be treated as the unit of analysis used to determine applicability of the PSD

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<sup>37</sup> *Shell Offshore Inc., Kulluk Drilling Unit and Frontier Discoverer Drilling Unit, Order Denying Review In Part and Remanding In Part*, 13 E.A.D. \_\_ (September 14, 2007), Slip Opinion at 31-32 (hereafter cited as “*Kulluk* decision”).

permitting program on the OCS. This interpretation, if adopted, would make inapplicable to the OCS the regulations EPA promulgated specifically defining “stationary source” as the unit of analysis for determining PSD applicability. This result would be contrary to Congress’s objective of “applying the same air quality protection requirements as would apply if the OCS sources were located within the corresponding onshore area.” In particular, neither the statutory text nor the legislative history indicates that Congress intended “OCS source,” used to identify the emissions units over which EPA has regulatory jurisdiction on the OCS, to replace or bar the analysis of which emissions units must be combined together and treated as a single “stationary source” for determining whether a PSD permit is required. Accordingly, we hold that the Region correctly concluded that it must determine the scope of the applicable “stationary source” in order to determine whether SOI must obtain a PSD permit before commencing construction of its OCS sources [references removed].<sup>38</sup>

PSD BACT, NSPS standards and MACT standards apply only to stationary sources, in the OCS as on land. EPA has no authority to impose BACT limits on nonroad engines or vessels. The Shell permit must be revised to delete the approval conditions that impose BACT limits on these categories of equipment.

**3. The draft permit misapplies the definition of OCS Source to include vessels that are not performing stationary source activities.**

Several conditions of the draft permit limit the operations of vessels to prevent them from being classified as part of the OCS source. For instance, Condition Q6 states: “At no time shall the Nanuq or the Kvichak work boats be attached to the Discoverer.” Conditions N.8 and O.10 prohibit attachment of the ice breakers to the Discoverer.

The Statement of Basis explains that these conditions are necessary in order to prevent support vessels from “becoming part of the OCS Source.”<sup>39</sup> These restrictions should be deleted, however, because they are based on a misreading of the 40 CFR Part 55 definition of OCS Source:

This definition [of OCS source] shall include vessels only when they are:

- (1) Permanently or temporarily attached to the seabed and erected thereon and used for the purpose of exploring, developing or producing resources therefrom, . . . or
- (2) Physically attached to an OCS facility, in which case only the stationary source aspects of the vessels will be regulated.<sup>40</sup>

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<sup>38</sup> *Id.* at 32-34

<sup>39</sup> Statement of Basis at 46.

<sup>40</sup> 40 CFR 55.2.

The draft permit overlooks the proviso that when vessels attach to the Frontier Discoverer “only the stationary source aspects of the vessels will be regulated.” This limitation derives directly from the D.C. Circuit holding in *NRDC v. EPA*.<sup>41</sup> But the vast majority, if not all, of emissions associated with the Shell support fleet that might attach to the Frontier Discoverer are not “stationary source activities” as the *NRDC* decision, and later, the published EPA position regarding the El Paso Energy Bridge,<sup>42</sup> explained that concept. Supply vessels and oil spill response vessels, for example, do not perform stationary source activities. There is no justification to prohibit or limit the attachment of these vessels to the Discoverer, and all conditions in the permit that impose prohibitions or restrictions on attachment of support vessels to the Discoverer should be deleted.

4. **EPA should adopt Option 2 of the two provisions proposed in Condition 5 of the draft permit for when the Discoverer becomes an OCS Source.**

On page 5 of the draft permit, EPA presents two options for defining when the Discoverer becomes an OCS source. We support option 2 as the only reasonable selection given the plain language of 40 CFR 55.2<sup>43</sup> and request that EPA incorporate this option into the final permit.

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<sup>41</sup> 57 Fed.Reg. at 40793-94 (September 4, 1992):

Only the vessel's stationary source activities may be regulated, since when vessels are in transit, they are specifically excluded from the definition of OCS source by statute. In addition, only the stationary source activities of the vessels at dockside will be regulated under title I of the Act (which contains NSR and PSD requirements), since EPA is prohibited from directly regulating mobile sources under that title. See *NRDC v. EPA*, 725 F.2d 761 (D.C. Cir. 1984). Part 55 thus will not regulate vessels en route to or from an OCS facility as “OCS sources,” nor will it regulate any of the non-stationary source activities of vessels at dockside.

<sup>42</sup> Charles Sheehan, Regional Counsel, EPA to Mr. Michael Cathey, El Paso Energy Bridge Gulf of Mexico, LLC and Diana Dutton, Akin, Gump, Strauss, Hauer, and Feld, LLP, October 28, 2003

In this letter, EPA argued that external combustion engines, as they relate to the Port's function, may be counted as a “stationary source activity.” Of note is that EPA expressly excluded nonroad (internal combustion) engines from the category of “stationary source activities” in presenting this case.

<sup>43</sup> OCS source is defined in 40 CFR 55 as any equipment, activity, or facility which:

- (1) Emits or has the potential to emit any air pollutant;
- (2) Is regulated or authorized under the Outer Continental Shelf Lands Act (“OCSLA”) (43 U.S.C. §1331 *et seq.*); and
- (3) Is located on the OCS or in or on waters above the OCS.

This definition shall include vessels only when they are:

- (1) **Permanently or temporarily attached to the seabed and erected thereon** and used for the purpose of exploring, developing or producing resources therefrom, within the meaning of section 4(a)(1) of OCSLA (43 U.S.C. §1331 *et seq.*); or
- (2) Physically attached to an OCS facility, in which case only the stationary sources aspects of the vessels will be regulated. [emphasis added]

Option 1 of the draft permit addresses only the "permanently or temporarily attached to the seabed" clause of the OCS Source definition:

*Option 1: For the purpose of this permit, the Discoverer is an "OCS Source" during all times between the placement of the first anchor on the seabed to removal of the last anchor from the seabed at a drill site.*

The definition in 40 CFR 55.2 requires that a vessel must be both attached to the seabed and erected thereon. It is not an OCS source if either one of these conditions is not satisfied.

In further support of Option 2, we offer some specific information as it relates to the type of OCS operation in which we plan to engage; using a temporary drilling rig, or jack-up rig. In this case, the "erected thereon" clause should clearly be interpreted to refer only to when the rig is in place, its three feet set on the seabed, and it is fully erected and ready to commence operation. The principal reason for this is that much activity occurs over a fairly lengthy period of time before an operator considers the rig "erected thereon" and ready for its intended activity.

Below are the general steps involved in deploying a jack-up rig and readying it for operation:

1. Off load the jack-up from the heavy lift vessel. This takes 8-12 hours since the lift vessel has to take on water and partially submerge to allow the rig to float off;
2. Using 3 vessels, tow the rig to the drilling location.
3. All three boats hold the rig in location for about 2 hours as the rig jacks up to the minimum air gap.
4. The rig then takes on water to load for the purpose of testing foundational stability (pre-loading). This takes 7 to 10 hours to fill the tanks and then the load is held for an additional hour;
5. During this pre-load period, one to three vessels remain attached to the rig
6. If all is deemed safe and successful, the rig is jacked to its drilling height (1 hour);
7. Then the cantilever, from which the drilling actually occurs, is extended (2 to 3 hours);
8. At this point, the rig is ready to take on fuel and supplies

12 to 16 hours may transpire between the time a leg hits the seabed and when the rig is "erected thereon." Except for the last 2 or 3 hours, there could be much vessel activity occurring immediately around the rig. But the principal point is that an OCS source does not exist, as we read the definition, until the cantilever is extended since the action of erecting the rig is not complete until then and the rig is not being used for the purpose of exploring, developing, or producing resources. This practical consideration supports the language proposed as option 2.

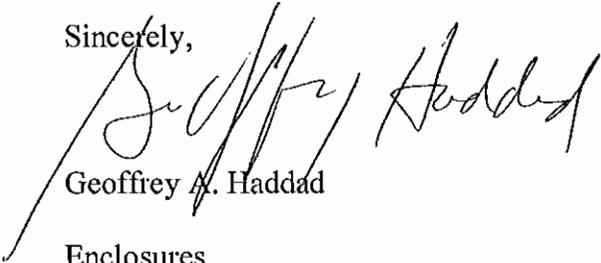
A jack-up rig may need to be moved if sea ice encroaches in the drilling area. In this case, the rig legs would be lifted and the rig towed to a pre-approved location away from the ice, perhaps even away from the Devil's Paw prospect, to await better (i.e., ice-free) conditions over the drilling area. While it waits, the legs will be lowered and the deck lifted. Some emissions will occur since the rig engines will run for raising and lowering the legs and to sustain a hotel load, and the tending vessels' activity could be substantial – particularly when positioning and stabilizing the rig at a location. The rig should not be defined as an OCS Source during these

safety-driven relocations, when no exploration activity is performed. But the language in Option 1 could be construed to define a rig in storage mode as an OCS source. Defining the OCS source as one in existence when the first anchor attaches to the seabed or, in our case, when the first leg touches, creates scenarios where equipment not being “used for the purpose of exploring, developing, or producing resources” is subject to 40 CFR Part 55. We do not believe this was the intent of that rule for vessels like the Frontier Discoverer, a jack-up rig, or any other mobile and temporary OCS exploration-related equipment.

## 5. Conclusion

In evaluating the concerns raised in these comments, EPA should look a short distance into the future, when (1) EPA promulgates PM 2.5 increments (expected in the spring of 2010), (2) MMS leaseholders other than Shell apply to permit exploration projects in other lease blocks in the Lease Sale 193 area that they will share with Shell’s support fleet and (3) MMS leaseholders propose to explore for, produce and develop mineral resources in the Chukchi Sea. The errors outlined in these comments will hinder the permitting of not only exploration activities in lease blocks adjoining Shell’s, but also production activities throughout the Chukchi Sea and the rest of the OCS. We ask EPA to re-examine its approach to OCS air permitting and to apply the relevant rules properly and equitably to all leaseholders to ensure that none are prevented from exercising their lease rights by this permit.

Sincerely,



Geoffrey A. Haddad

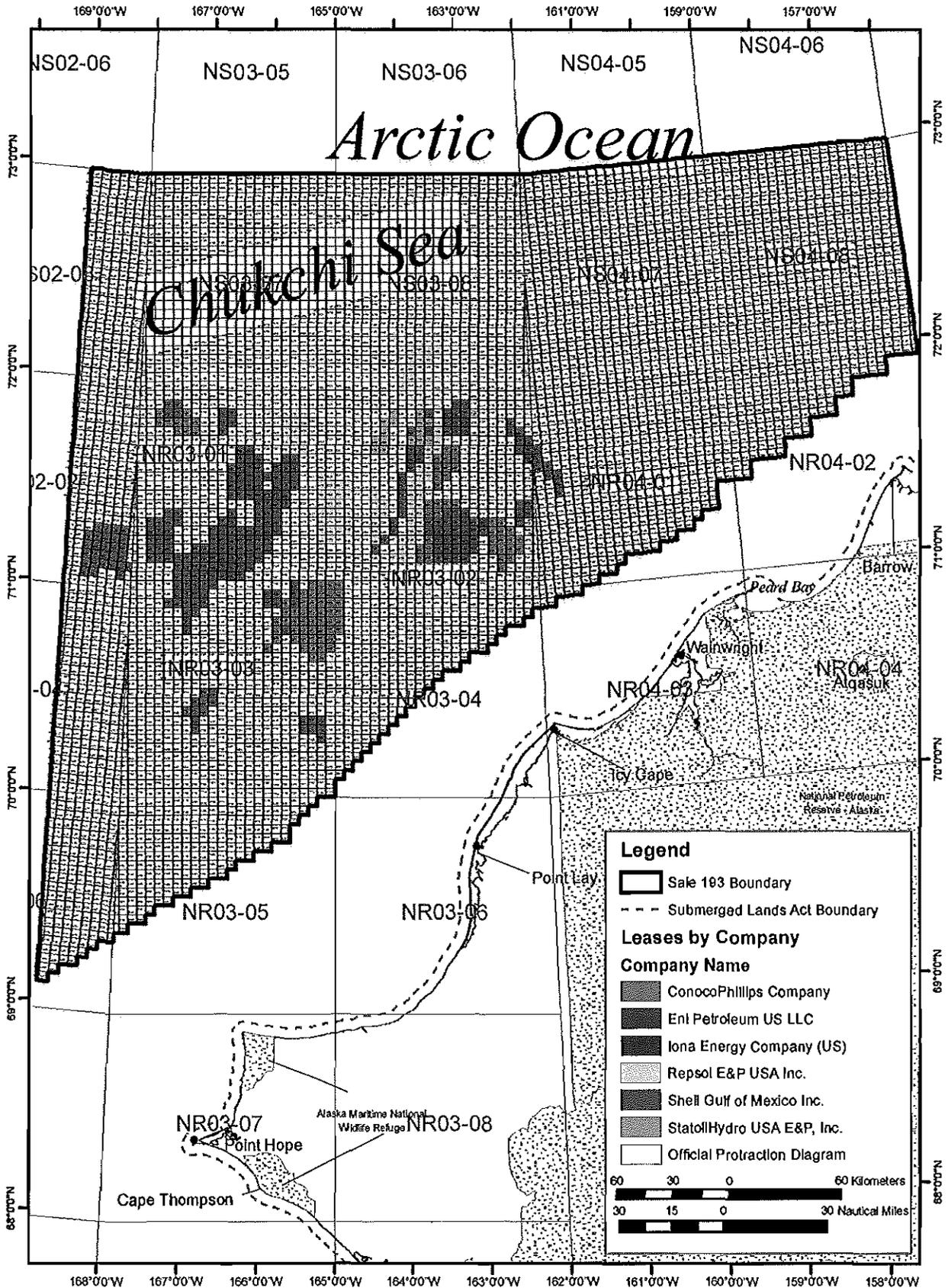
Enclosures

cc: Rick Albright, EPA Region 10  
Doug Hardesty, EPA Region 10  
Susan Childs, Shell  
John Goll, MMS, Alaska Region  
Edward S. Itta, Mayor, NSB

**Attachment 1**  
MMS Map of Chukchi Leasehold Interests



U.S. Department of the Interior  
Minerals Management Service  
Alaska OCS Region



## **Attachment 2**

December 5, 1991 Proposed 40 CFR 55 OCS Regulations

# Federal Register

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Thursday  
December 5, 1991

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Part IV

## Environmental Protection Agency

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40 CFR Part 55  
Outer Continental Shelf Air Regulations;  
Proposed Rule

**ENVIRONMENTAL PROTECTION  
AGENCY**

**40 CFR Part 55**

(FRL-4036-9)

**Outer Continental Shelf Air  
Regulations**

**AGENCY:** Environmental Protection  
Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA is proposing a new part 55 of chapter I of title 40 of the Code of Federal Regulations. This Part would establish requirements to control air pollution from outer continental shelf ("OCS") sources.

Section 328 of the Clean Air Act ("the Act") (42 U.S.C. 7401, *et seq.*), as amended by Public Law 101-549, the Clean Air Act Amendments of 1990 ("CAA-90"), enacted on November 15, 1990, requires EPA to promulgate a rule establishing air pollution control requirements for OCS sources. The purpose of the requirements is to attain and maintain federal and state ambient air quality standards, to comply with part C of title I, and to provide for equity between onshore sources and OCS sources located within 25 miles of state seaward boundaries.

The proposed requirements apply to all OCS sources except those located in the Gulf of Mexico west of 87.5 degrees longitude (near the border of Florida and Alabama). New sources must comply with the requirements on the day of their promulgation, and existing sources must comply within 24 months of promulgation. For sources located within 25 miles of a state boundary, the requirements will be the same as the requirements that would be applicable if the source were located in the corresponding onshore area ("COA"). In states affected by this rule, state boundaries extend three miles from the coastline except on the gulf coast of Florida, where the State's boundary extends three leagues (approximately 0 miles) from the coastline. Sources located beyond 25 miles of state boundaries will be subject to federal requirements for Prevention of Significant Deterioration ("PSD") (40 CFR 52.21), New Source Performance Standards ("NSPS") (40 CFR part 60), and National Emissions Standards for Hazardous Air Pollutants ("NESHAPS") (40 CFR part 61) apply to the extent they are rationally related to protection of ambient air quality standards. EPA is proposing that, when promulgated, the following federal requirements will also apply: The federal operating permit program (40 CFR part 71) and enhanced

compliance and monitoring regulations promulgated pursuant to section 114(a)(3) of the Act. Beyond 25 miles of state boundaries of OCS program requirements will be implemented and enforced solely by EPA. Part 55 also establishes procedures to allow the Administrator to exempt any OCS source from a specific onshore control requirement if it is technically infeasible or poses an unreasonable threat to health or safety.

**DATE:** Comments on the proposed regulations must be received by February 3, 1992. The EPA will hold public hearings in January 1992 at the addresses listed below. Requests to present oral testimony must be received on or before December 10, 1991.

**ADDRESSES:** Comments must be mailed (in duplicate if possible) to either of the addresses below:

EPA Air Docket (A-1), Attn: Docket No. A-91-45, Environmental Protection Agency, Region 9, 75 Hawthorne St., San Francisco, CA 94105.

EPA Air Docket (LJ-131), Attn: Air Docket No. A-91-45, Environmental Protection Agency, 401 M Street SW., Washington, DC 20460.

The hearings will be held at the following places:

January 0, 1992, 0 a.m.-5 p.m., EPA, Region 9, 75 Hawthorne Street, San Francisco, CA.

January 7, 1992, 9 a.m.-5 p.m., Los Angeles Hyatt Regency, 711 Hope Street, Los Angeles, CA.

January 13, 1992, 9 a.m.-5 p.m., EPA Headquarters, Waterside Mall, 401 M Street, SW., Washington, DC.

January 21, 1992, 9 a.m.-5 p.m., Clorton Hotel, 4600 Spennard Road, Anchorage, Alaska.

Persons interested in attending any of the hearings or wishing to present oral testimony should contact Ms. Linda Barajas in writing at EPA, Region 9, Air and Toxics Division (A-3-1), 75 Hawthorne St., San Francisco, CA 94105.

**Docket:** This rulemaking is determined to be subject to the requirements of section 307(d) of the Clean Air Act. Supporting information used in developing the proposed rule is contained Docket No. A-91-78. This docket is available for public inspection and copying at the Docket addresses listed above. In Washington, the docket will be available to the public in room M-1600 from 8:30 a.m. to 12 p.m. and 1:30 p.m. to 3:30 p.m., Monday through Friday, excluding legal holidays. In San Francisco the docket will be available to the public in the EPA library, 13th floor, from 9 a.m. to 3 p.m., Monday through

Friday. A reasonable fee may be charged for copying.

**FOR FURTHER INFORMATION CONTACT:** Allison Dhd, Air and Toxics Division (A-2), U.S. EPA, Region 9, 75 Hawthorne Street, San Francisco, CA 94105.

**SUPPLEMENTARY INFORMATION:** This preamble is organized according to the following outline:

- I. Background and Purpose
- II. Discussion of the Proposed Regulations
  - A. Section 55.1—Authority and Scope
  - B. Section 55.2—Definitions
  - C. Section 55.3—Applicability
  - D. Section 55.4—Requirements to Submit a Notice of Intent
  - E. Section 55.5—Designation of the Corresponding Onshore Area (COA)
  - F. Section 55.6—Permit Requirements
  - G. Section 55.7—Exemptions
  - H. Section 55.8—Monitoring, Reporting, Inspections, and Compliance
  - I. Section 55.9—Enforcement
  - J. Section 55.10—Fees
  - K. Section 55.11—Delegation
  - L. Section 55.12—Consistency Updates
  - M. Section 55.13—Applicable Federal Requirements
  - N. Section 55.14—Applicable Requirements of the COA
- III. Additional Topics for Discussion
  - A. Relationship Between the OCS Regulations and State Implementation Plans
  - B. The Applicability to OCS Sources of Regulations Controlling Air Pollutants that are not Significantly Related to a State or Federal Ambient Standard
- IV. Administrative Requirements
  - A. Executive Order 12201 (Regulatory Impact Assessment)
  - B. Regulatory Flexibility Act
  - C. Paperwork Reduction Act

**List of Subjects in 40 CFR Part 55**

Section I provides the background on the purpose and expected benefits of adding section 328 to the Act.

Section II contains a discussion of the rule and provides background information on the concepts behind the rule. This section also provides a comprehensive background on any issues or controversial aspects considered with respect to the rule.

Section III presents additional topics important to the OCS regulatory program. These areas are not related to specific regulatory requirements and so they are addressed in a separate section of the preamble.

Section IV contains the administrative requirements that accompany federal regulatory actions. These include the topics listed in the preamble outline.

Section V contains the list of subjects included in the proposed 40 CFR part 55.

Many citations (e.g., "(see § 55.10)") are made in this preamble. These citation sections will not be followed by

a notation of their origin such as "of this preamble" or "of section 320." Rather, the reader can recognize the origins of the sections by their nature:

- Sections of the preamble begin with a roman numeral.

- Sections of the OCS regulations appear as 55.xx.

- Sections of the Act are numbered in the hundreds.

- Sections of non-OCS EPA regulations are preceded by 40 CFR.

This preamble makes frequent use of the term "state," usually meaning the state air pollution control agency that would be the permitting authority. The reader should assume that use of "state" may also reference a local air pollution permitting agency, or certain Indian Tribes which can be the permitting authority for areas within their jurisdiction. In some cases, the term "delegated agency" is used and can refer to the state agency, the local agency, or the Indian Tribe, depending on the delegation status of the program.

## 1. Background and Purpose

### A. Purpose and Intent

The passage of the CAAA-90 was a major accomplishment for protection of public health and the environment in the United States. This proposed rulemaking is one of the first actions that EPA will undertake to fulfill its rule development responsibilities under the Act. The intent of Congress in adding section 320 was to protect ambient air quality standards onshore and ensure compliance with the PSD requirements. EPA is to accomplish this by controlling emissions of pollutants for which ambient standards have been set and their precursors (criteria pollutants) from the OCS that can be transported onshore and affect ambient air quality. It is also the clear intent of Congress to create a more equitable regulatory environment between onshore sources and OCS sources located within 25 miles of states' seaward boundaries. To accomplish this objective, Congress required EPA to promulgate regulations that require OCS sources within 25 miles of states' seaward boundaries to comply with the same requirements that would be applicable if the OCS source were located in the COA.

In section 328, Congress transferred authority to regulate sources on part of the OCS from the Department of Interior ("DOI") to EPA. This was an attempt to consolidate the authority to regulate air pollution within EPA, the agency with primary federal authority for regulating air pollution. Congress further specified that EPA's initial rulemaking must establish requirements for sources

within 25 miles of state boundaries that are the same as would be applicable if the source were located in the COA. In this way, the responsibility for protecting the environment will be shared proportionately and equitably by onshore and offshore sources. DOI retains authority on the OCS adjacent to Texas, Louisiana, Mississippi, and Alabama (in the Gulf of Mexico, west of 87.8 degrees longitude). However, Congress requires DOI to complete a study on the effects of OCS emissions on areas that remain under DOI's jurisdiction and are classified as nonattainment for nitrogen dioxide or ozone. DOI must report the results to Congress by November 15, 1993.

Historically in California, the onshore community felt that OCS emission sources were not bearing a fair share of the burden of air pollution control. Onshore sources were subject to increasingly stringent controls while virtually identical sources operated on the OCS with very few controls and little mitigation. The onshore community generally disagreed with the DOI argument and the distance of OCS sources from shore reduced their effects on onshore air quality and therefore reduced the need for controls and offsets. The result was a confrontational atmosphere in which the onshore community felt that OCS activity was encouraged at the expense of air quality or economic growth onshore. Start-up of OCS sources was often delayed by years due to extended litigation and negotiations on air quality issues. As a result, a trend developed for new OCS platforms constructed adjacent to California to apply controls to reduce emissions and obtain offsets to mitigate the impacts of remaining emissions.

This pattern of delay and confrontation in California could well have developed in other coastal areas as they began to experience OCS activity. EPA intends that the proposed OCS rule will result in a more orderly, less burdensome system of air quality, permitting for OCS sources. This certainty may speed up the permitting process, which may reduce costs in some instances, particularly offsetting the additional costs associated with the rule's more stringent requirements for controls and offsets. The proposed rule thus should result in a more stable regulatory atmosphere, allowing companies to plan with greater certainty the amount of time needed to obtain necessary permits to begin construction and operation of a proposed OCS source. This regulatory certainty is particularly important in light of the President's national energy strategy,

which includes the environmentally sound development of OCS reserves.

EPA would like to consolidate the review of a source's air quality impacts with reviews of the source's impact on other environmental media (e.g. water and land). EPA is soliciting specific comments and suggestions as to how this might be promoted by this rulemaking, keeping in mind the limitations of section 320.

In carrying out the non-discretionary provisions of Section 320, the inherent cost effectiveness number (\$/per ton pollutant reduced) do not necessarily, in the Agency's opinion, establish a precedent for cost-effectiveness benchmarks. Had Congress granted the Agency flexibility for this provision, the Agency may have established *de minimis* levels which would have exempted some of these sources in certain areas from nitrogen oxides ("NO<sub>x</sub>") and volatile organic compounds ("VOC") controls.

### B. Regulatory History

The 1978 amendments to the Outer Continental Shelf Lands Act ("OCSLA") (43 U.S.C. 1331 *et seq.*), as interpreted by the Ninth Circuit in *State of California v. Kloppe*, 604 F. 2d 1107 (1979), clarified that DOI (rather than EPA) had sole authority to regulate air emissions from activities authorized under the OCSLA. The amendments to the OCSLA required DOI to promulgate rules to protect the national ambient air quality standards ("NAAQS") by regulating air emissions from activities authorized under the OCSLA. In 1979, DOI published its first rulemaking effort in regard to air quality in an Advance Notice of Proposed Rulemaking ("ANPRM").

EPA comments in response to the 1979 ANPRM (D. Hawkins, "EPA Comments in Response to DOI ANPRM of 12/28/79," 1979), included suggestions to "assure that onshore and offshore facilities are treated the same." At that time EPA also pointed out the possibility of negative impacts on onshore economic growth, stating " . . . the construction of OCS sources will have an adverse impact on both air quality and the ability of sources to be built onshore . . . . The development of the OCS could impact growth of onshore areas in this fashion because emissions sources must be added to the baseline . . . ." Finally, EPA suggested that for sources that may significantly affect onshore air quality, DOI requires that " . . . the controls imposed be whatever controls are imposed by the adjacent state on like sources within its territorial jurisdiction . . . ."

EPA argued that its comments reflected Congressional intent, a position that EPA documented through numerous references contained in the comments, as submitted to DOI. In 1980 DOI promulgated final rules to regulate air emissions from OCS activities, and simultaneously proposed a more stringent rule that would apply only to OCS sources located on the OCS adjacent to California.

In 1982, DOI withdrew the proposed rule for the California OCS and applied the national OCS rules to the OCS adjacent to California. The decision not to adopt more stringent requirements for these areas resulted in a lawsuit, *State of California v. Watt*, No. 81-3234-CBM (MX) (C.D. Cal). The position taken by the complainants was that the DOI rules failed to adequately protect onshore air quality and the NAAQS, and that emissions from OCS activities had a significant impact on onshore air quality. The complainants held that DOI's action created an iniquitable situation whereby emissions from onshore sources were controlled more stringently than would have been necessary if OCS sources were regulated in a manner consistent with onshore requirements. This lawsuit eventually led to an attempted negotiated rulemaking.

Meanwhile, in 1983 EPA decided to require air pollution control districts (APCDs) in California to include OCS emissions in the emission inventory of their state implementation plans (SIPs). EPA's decision was based on the fact that since no natural barriers exist to prevent onshore migration of emissions from the OCS, a realistic emissions inventory must include OCS emissions. In an area designated as a nonattainment area ("NAA") under section 107(d) of the Act, the emissions inventory is used as input to a model that is used to determine the amount that emissions must be reduced in order to attain the NAAQS. It was EPA's position that any attainment demonstration would be unworkable and unacceptable if based on an emission inventory that did not include emissions from an entire category of major sources located in the air basin. Impacts due to increases in offshore emissions had to be mitigated by decreases in onshore emissions to prevent deterioration of onshore air quality. Actual improvement in air quality had to be achieved by reducing onshore emissions even further, thus slowing onshore growth in favor of offshore development.

In 1985, still involved in litigation of the *State of California v. Watt*, DOI published an ANPRM (60 FR 836), in

which DOI solicited information that could be used to develop emissions control requirements for OCS activities that adversely affect the onshore air quality in California. In response to comment on the 1985 ANPRM, DOI retained an independent mediator to assess the feasibility of a negotiated rulemaking. A decision was made to pursue a negotiated rulemaking with the assistance of an independent mediator. Participants in the lawsuit and other interested parties were organized into five coalitions: Federal, State, Local, Industry, and Environmental.

In 1989, DOI initiated the negotiated rulemaking process with the purpose of reaching consensus within one year on the requirements for oil and gas operations on the OCS adjacent to California. If consensus were reached, the Secretary of the Interior was prepared to publish the agreement as a Notice of Proposed Rulemaking ("NPRM"). During the course of the negotiated rulemaking, a substantial amount of valuable information was gathered and consensus was reached on many issues. However, after two and one-half years of negotiation, the coalitions were unable to produce a consensus rule, and the negotiated rulemaking was abandoned in 1990.

In 1989, DOI published an NPRM to regulate OCS activities adjacent to California. As a result of comments received on this NPRM, DOI began discussions with EPA in order to develop a more acceptable rule. Those discussions continued until Congress passed the CAAA-90. Also in 1989, a Presidential Task Force was formed to investigate issues associated with the leasing and development of three specific oil and gas leases. The Task Force presented its report to the President in January of 1990. In regard to air quality, the Task Force recommended that OCS sources comply with requirements equivalent to those imposed in the adjacent onshore area.

Congress addressed these concerns in the CAAA-90. Under section 320, Congress transferred to EPA the authority to regulate OCS sources except for sources located on the OCS adjacent to the States of Texas, Louisiana, Mississippi, and Alabama, where DOI retains authority. Section 320 requires DOI to complete a study within three years to determine the impact of emissions in nonattainment areas from OCS sources under DOI jurisdiction.

#### *C. Description of OCS Sources and Activities*

Currently, OCS activity is primarily related to the exploration and recovery of oil and gas. This activity can be

divided into three phases: exploration, construction, and development and production. The last two phases occur only if oil and gas can be economically extracted. The main pollutants of concern for all of these phases are NO<sub>x</sub> and VOC.

The exploration phase consists primarily of drilling exploratory wells. The emission sources associated with this phase are drilling vessels and the crew and supply boats that support these operations. Each exploratory well drilling usually lasts 3 to 6 months.

On-site activities during the construction phase consist of the fabrication of the platform from individual, pre-fabricated pieces and installation of pipelines. It is the most equipment-intensive phase of activity. During this stage, sections of the platform are towed by barge to the site and the platform is assembled. Emission sources associated with this phase include barges, tugs, cranes, and crew and supply boats, and emissions tend to be high due to the large amount of equipment on-site. The construction phase lasts about one to three years. Much of this time is spent fabricating the jacket, deck, and platform modules on land. The time the marine construction equipment must be on the OCS location installing components is normally broken up into several relatively brief periods.

During the development and production phases, wells are drilled from the platform and oil and/or gas is produced and processed at the platform and transported onshore for further processing. These phases consist of a wide variety of emission sources: Diesel and natural gas-fired engines and turbines (for power production and compressors), stand-by generators, fugitive emissions from processing and storage, and crew and supply boat emissions. The development phase consists of drilling the production wells and lasts two to five years, during which emissions are much greater than in the production phase. The production phase may last 25 years or longer.

#### *D. Current and Future Activities on the OCS*

At the present time, most oil and gas production on the OCS occurs in the western and central Gulf of Mexico, where more than 3,000 platforms are located and which remains under the jurisdiction of the Minerals Management Service ("MMS") of DOI. There are 23 producing platforms on the OCS adjacent to California, with at least three more under construction or development. The only other activity

occurring within EPA jurisdiction is exploratory drilling on the OCS adjacent to Alaska. MMS has sold oil and gas leases on the OCS adjacent to other states, and exploration has occurred in the Atlantic and adjacent to Florida and Alaska. In Florida and North Carolina, exploratory drilling has been approved, but has not yet begun, due to either Congressional moratoria or lack of coastal consistency concurrence by the state.

The OCSLA authorizes MMS to hold lease sales to develop resources other than oil and gas. Mining of cobalt-rich manganese crusts adjacent to Hawaii is being investigated. Other possible activities being investigated for future consideration are heavy mineral mining on the OCS adjacent to Oregon and Georgia, phosphate mining adjacent to Georgia and North Carolina, gold mining adjacent to Alaska, sand and gravel mining adjacent to New England, and sand and shell mining in the Gulf of Mexico.

## II. Discussion of the Proposed Regulations

### A. Section 55.1—Statutory Authority and Scope

Section 328 of the Act makes EPA responsible for establishing requirements to regulate OCS sources of air pollution. These regulations are intended to establish the air pollution control requirements for OCS sources and the procedures for implementation and enforcement of the requirements.

### B. Section 55.2—Definitions

A large number of existing regulations, including definitions in those regulations, have been incorporated by reference into §§ 55.13 and 55.14. Definitions that are included in regulations incorporated by reference shall apply in the context of those particular regulations to allow the incorporated requirements and permitting programs to function in their intended manner. EPA has sought to keep the definitions given in § 55.2 to a minimum to avoid inconsistencies with the definitions given by the federal, state, and local requirements incorporated into part 55. For this reason, no new definitions of "new OCS source," "existing OCS source," or "modification" have been included. Because the federal, state, and local requirements incorporated into §§ 55.13 and 55.14 define new source, existing source, and modification, language is included in §§ 55.13 and 55.14 to link the definition of OCS source to the definitions existing in the incorporated requirements.

Consistent with section 328(a)(4)(A), part 55 references the definition of OCS in the OCSLA. A brief summary of that definition is that the OCS begins at a state's seaward boundary and extends outward to the limit of U.S. jurisdiction. For states under EPA jurisdiction, states' seaward boundaries are 3 miles from the coast, except in the Gulf of Mexico offshore of Florida, where the state's seaward boundary is 3 leagues (approximately 9 miles) from the coast.

"OCS source" is defined in the statute and is limited to activities that emit or have the potential to emit any air pollutant, that are regulated or authorized under the OCSLA, and that are located on the OCS or in or on waters above the OCS. Section 328(a)(4)(C). At the present time these activities are mostly related to the exploration and development of oil and gas reserves. OCS activities include, but are not limited to: Platform and drill ship exploration, construction, development, production, processing, and transportation.

EPA is proposing to interpret the definition of "OCS source" to exclude vessels (other than drill ships, as discussed above) because they are not "regulated or authorized" under the OCSLA. Under the OCSLA, DOI may regulate "all installations and other devices permanently or temporarily attached to the seabed, which may be erected thereon for the purpose of exploring, developing, or producing resources therefrom, or any such installation or other device (other than a ship or vessel) for the purpose of transporting such resources." 43 U.S.C. 1333(a)(1). This language does not include vessels other than drill ships because they are not attached to the seabed, and vessels used for the transport of OCS resources are specifically excluded. Therefore, EPA is proposing not to regulate vessels as "OCS sources," and any regulations adopted by state and local agencies to directly control vessel emissions will not be incorporated into part 55 because it would exceed EPA's authority under section 328. Drill ships are considered to be an "OCS source" because they are attached, at least temporarily, to the seabed, and so are authorized and regulated pursuant to the OCSLA; as such, they will be subject to regulation as stationary sources while attached to the seabed. Vessel emissions related to OCS activity are, however, accounted for by including vessel emissions in the "potential to emit" (defined below).

The definition of "potential to emit" of an OCS source encompasses emissions from any vessel servicing or associated

with an OCS source, including emissions while at the OCS source or en-route to or from the OCS source and within 25 miles of the OCS source. The inclusion of vessel emissions in the total emissions of the stationary source is a statutory requirement under section 328(a)(4)(C). In this manner vessel emissions of attainment pollutants will be accounted for when PSD impact analyses are performed and increment consumption if calculated. For nonattainment pollutants the OCS source will have to obtain offsets as required by the COA, and vessel emissions will be offset.

In addition, EPA has authority under Title II of the Act to regulate vessel emissions as mobile sources, in a manner analogous to the regulation of automobiles. Regulating vessels under Title II is more practical than regulating vessels associated with OCS sources under section 328, due to the nature of mobile sources. Regulating mobile sources on a broad scale eliminates the problems inherent in attempting to apply a patchwork of regulations. Vessels associated with OCS sources cross local, state, and international jurisdictional lines, and may even be international flag vessels. A study mandated by the Act is currently underway to determine the appropriate regulatory scheme for non-road engines, including vessels. It would be premature to develop another regulatory scheme for vessels prior to the completion of this congressionally mandated study, and would add another unnecessary layer of regulation.

Some commenters have offered another possible interpretation of section 328 regarding the regulation of marine vessels. This interpretation is based on the theory that section 328 provides for the direct regulation of pollution on the OCS, rather than the regulation of OCS sources. Specifically, section 328(a)(1) states that EPA "shall establish requirements to control air pollution from Outer Continental Shelf sources" (emphasis added). Section 328(a)(4)(C) then states that emissions from vessels "servicing or associated with an OCS source, including emissions while at the OCS source or en route to or from the OCS source within 25 miles of the OCS source shall be considered direct emissions from the OCS source" (emphasis added). Hence, it can be argued that EPA has authority pursuant to section 328 to regulate vessels. If then would follow that if a corresponding onshore area adopts requirements to control vessel emissions, EPA must incorporate those requirements into

§ 55.14. This interpretation appears, however, to contravene the plain language of the statute, which does not explicitly include vessels in the definition of "OCS source" but does explicitly include vessels' emissions in offset calculations and impact analyses, indicating that such emissions were not intended to be regulated directly. This interpretation would also result in vessels associated with OCS sources being regulated under section 328 while other vessels would remain unregulated, and thus raising some concern with the equity of such regulation. EPA is soliciting comment on this interpretation.

#### C. Section 55.3--Applicability

OCS sources are, by definition, located between state seaward boundaries and the outer limits of United States jurisdiction. The proposed OCS rule establishes two separate regulatory regimes, as indicated by the statute. The first applies to OCS sources within 25 miles of state boundaries. Those nearshore OCS sources must comply with requirements that "shall be the same as would be applicable if the source were located in the corresponding onshore area." Section 320(a)(1). EPA is proposing to read this requirement to mean that nearshore OCS sources will be subject to those federal, state, and local requirements applicable in the corresponding onshore area as of November 15, 1990 (the date that the CAAA-90, including section 320, were enacted) which are rationally related to the attainment and maintenance of federal and state ambient air quality standards and to part C of title I of the Act. For a discussion on the control of toxic air pollutants and the general applicability of the Act refer to section III.D. These requirements are set forth in proposed §§ 55.13 and 55.14 of this part. EPA will update the OCS rules to "maintain consistency with onshore regulations," as provided by section 320(a)(1), in accordance with the consistency provisions of § 55.12, discussed in Section II.L, below.

The second regulatory regime will apply to OCS sources located more than 25 miles beyond states' seaward boundaries. Because these outer OCS sources are located a considerable distance from shore, the impact of their emissions is less than if they were located within 25 miles of state boundaries. In some cases, the emissions from these sources might not affect ambient concentrations onshore. In contrast to the statutory requirements applying to sources located within 25 miles of state boundaries, section 328

does not link the requirements for OCS sources located beyond 25 miles from states' seaward boundaries to onshore requirements. The statute does, however, mandate that requirements be established to control air pollution from OCS sources. Therefore, within these bounds, the Administrator has discretion in determining the requirements for OCS sources located more than 25 miles beyond state boundaries.

EPA is proposing that sources located more than 25 miles beyond state boundaries be subject to the requirements for PSD, NSPS and NSHAPS will apply to the extent they are rationally related to protection of ambient air quality standards. When promulgated, the following federal requirements will also apply: The federal operating permit program (40 CFR part 71) and enhanced compliance and monitoring regulations promulgated pursuant to section 114(a)(3) of the Act. The application of these requirements will allow EPA to protect onshore air quality from the impacts of emissions produced by OCS sources located more than 25 miles beyond state seaward boundaries. If, due to future development of the OCS, the Administrator determines that these requirements are insufficient to protect both federal and state ambient standards, more stringent requirements will be established in a later rulemaking.

All OCS sources operating adjacent to any state other than Texas, Louisiana, Mississippi, or Alabama will be subject to requirements under one of the above regimes. OCS sources adjacent to these four states currently remain under the jurisdiction of MMS, and are not subject to the requirements of part 55. For a more detailed discussion of the requirements applicable to activities located in the nearshore and outer OCS regimes the reader is referred to H.M and I.N.

Section 328 sets compliance dates for new and existing sources. New sources must comply with this part on the date of promulgation. Existing sources must comply with this part within 24 months of the date of promulgation. For purposes of compliance with this requirement, a "new source" means an OCS source that is a new source within the meaning of section 111(a). An "existing source" means any source that is not a new source within the meaning of section 111(a). In instances when "new source" is defined in an NSPS regulation the source will not be treated as a new source, unless it is a new source within the meaning of section 111(a) pursuant to this part. NSPS

regulations often define a new source as any source that was not existing at the time the NSPS was promulgated. This is to clarify that existing OCS sources will not be treated as new sources for the purpose of compliance with NSPS requirements.

#### D. Section 55.4--Requirements to Submit a Notice of Intent (NOI)

The owner or operator of a proposed new source within 25 miles of a state's seaward boundary must submit an NOI to the Administrator through the Regional EPA Office and to the air pollution control agency of the NOA and adjacent onshore areas. An NOI will include general and specific information about a proposed source, such as the proposed location and the expected emissions from the source, to determine the source's onshore impacts and the applicability of onshore requirements. The Administrator may always request additional information if necessary.

The NOI serves two purposes. First, the NOI will allow adequate time for onshore areas to determine if they will submit a request for designation as the COA. Because the NOA will automatically be designated as the COA for exploratory sources, these sources will not be required to submit any information to be used for the purpose of determining the COA (i.e. an impact's analysis). Second, the NOI will trigger an EPA review of the OCS rule to determine whether it is "consistent" with the onshore rules. If it is not, EPA will initiate a rule update for that specific COA, with the goal of making the proposed new source subject to the same requirements that would apply if it were proposing to locate in the COA. The purpose of this process is to meet EPA's obligation to maintain consistency between onshore and offshore requirements within 25 miles of state boundaries, as required by section 328(a)(1). The consistency update procedure and its statutory background are explained more completely in Section II.L.

Because the applicable regulations are likely to change, the owner or operator of the proposed source must not submit the NOI more than 10 months before submitting a permit application. This timeframe is consistent with onshore requirements related to permit applications.

#### E. Section 55.5--Designation of the Corresponding Onshore Area (COA)

Under section 320(a)(4)(D), the COA is assumed to be the NOA, but the Act gives the Administrator the authority to designate another area as the COA

under certain circumstances. The following is a description of the procedures and criteria that EPA is proposing to use for making the COA designations. Also included in this section is a proposal to designate COAs for some existing and proposed sources adjacent to California.

### 1. New Development and Production Sources

EPA is proposing the following procedure for the designation of the COA for new sources. The NOA will be assumed to be the COA. An area other than the NOA may submit a request to EPA to be designated as the COA for a specific OCS source within 90 days of the submission of the NOI. If no request is received by the Administrator within 90 days, the NOA will become the COA without any further action.

If an area does submit a request for designation as the COA, that request must be followed within 90 days from the submission of the NOI by a demonstration which shows:

- The requesting area has more stringent requirements than the NOA for the control of emissions from the proposed source;
- The emissions from the proposed source can reasonably be expected to be transported to the requesting area; and
- The emissions from the proposed source can reasonably be expected to hinder the efforts of the area to attain or maintain federal or state ambient air quality standards, or to comply with the requirements for PSD, taking into account the effect of air pollution control requirements that would be imposed by the NOA.

See section 320(a)(4)(B). If no demonstration is submitted within the allotted time period, the NOA will become the COA without further action. The EPA requests comment on the content of the demonstration and what criteria should be used in making the determination of "reasonably expected."

If a demonstration is submitted, the Administrator will issue a preliminary determination of the COA within 150 days from the original submission of the NOI. The preliminary determination will be followed by a public review and comment period of 30 days. This will allow the NOA, the affected OCS source, and other interested parties adequate time to review the request and the supporting information, and provide EPA with any additional information that might have a bearing on the Administrator's decision.

The final designation will be issued within 240 days of the submission of the NOI. The Administrator will designate the COA based on all the available

information. When the Administrator makes a COA designation, consideration will be given to the impact that the designation will have on the NOA. Although emissions from a source may be transported to an area with more stringent requirements, usually the emissions will reach the nearest area in greater concentration and more frequently (naturally there will be exceptions to the preceding statement, depending on the location and distance from the source to the areas in question). The Administrator's decision to designate the COA for a proposed source will be based on the relative benefits to the NOA and the requesting area. The EPA requests comment on the content and determination of what constitutes "relative benefits."

When a more stringent area is designated as the COA, EPA will issue and administer the permit. This will allow EPA to better evaluate the permit requirements that would be imposed and the possible exemptions allowed. Another advantage is that the Administrator will be able to expedite the permit process by eliminating some of the cross-jurisdictional questions which will inevitably arise with regard to the qualification of offsets and the granting of exemptions.

OCS sources that must obtain offsets will obtain them at the base rate required in the COA if the offsets are obtained landward from the site of the proposed OCS source, with no discounting of offsets or distance penalties imposed. Since the purpose of this rule is to protect onshore ambient air quality, offsets obtained closer to shore will have a greater positive impact on onshore air quality. If, however, the OCS source obtains offsets seaward from the proposed site all discounting and distance penalties required by the COA shall apply in the same manner as if the source were located in the COA. Offsets may be obtained from sources in the NOA or the COA or from OCS sources. For the purpose of providing a source of offsets, reductions from an OCS source shall be considered to be reductions from within the NOA or the COA associated with the source providing the emissions reductions.

It has been suggested that EPA make area-wide determinations of COAs. EPA does not currently have the resources or adequate data to make area-wide COA determinations. This type designation would require a comparative analysis of all the onshore coastal regulations and an evaluation of probable impact of OCS sources. All onshore regulations will be in a state of flux over the next several years due to changes mandated by the CAA/100, so the relative

stringency of onshore programs can be expected to change. The anticipated changes in onshore programs, combined with the uncertainty of the location of future OCS development, make it infeasible for EPA to make area-wide designations.

EPA is soliciting suggestions on methods that, without depriving any interested party of adequate time to provide input, streamline the procedure for designating the COA.

### 2. New Exploratory Sources

EPA is proposing that for new exploratory sources the NOA will be designated as the COA. It is unnecessarily burdensome to require a temporary activity such as exploration drilling, typically lasting 3 to 4 months, to an administrative process that lasts up to eight months. Moreover, it is unlikely that an activity of such limited duration would hinder the efforts of the area in question to attain or maintain ambient air quality standards, as required by both the statute and the proposed regulations in order for the Administrator to designate an area other than the COA as the NOA. Thus, EPA is proposing at this time to make a presumptive determination that the COA will be the NOA for all exploratory sources. If the exploratory operation results in production development and production at that site, then that proposed development and production source would be subject to the full COA designation process.

In addition to the excessive burden the COA designation process would impose on an exploratory source, there are technical reasons to simplify the process for these temporary operations. The determination of impact is onshore from an exploratory operation could be dependent on the time of year drilling was projected to occur because meteorological conditions are a key factor in determining the area of impact. Since many factors could delay drilling, including the COA designation process, the showing of onshore impacts would be time dependent, and the COA could vary possibly change depending on the time of year drilling was to occur.

This is not a problem for development and production activity where the preponderance of effects on a particular onshore area could be projected over the lifetime of the platform.

### 3. Existing and Currently Proposed Sources

EPA is also proposing to designate COAs for some sources offshore of California. All existing development and production platforms that will be subject

to this rule are located on the OCS adjacent to California. Existing sources have only 24 months from the date of promulgation to comply with the requirements contained in these regulations. New sources must comply immediately upon promulgation. By designating COAs for these sources on the date of promulgation, the existing sources will have adequate time to determine the applicable requirements, install necessary controls, and receive the required permits, and the proposed sources will be given early notice of the requirements with which they must comply. EPA is proposing that the NOAs for these sources become the designated COAs to facilitate timely compliance with part 55. No COA designations for OCS sources located adjacent to states other than California are being proposed at this time due to uncertainty regarding the exact location of future development.

At this time, EPA is proposing the South Coast Air Quality Management District as the COA for the following existing or proposed OCS facilities:

Edith, Ellen, Ely, and Eureka.

At this time, EPA is proposing the Ventura County Air Pollution Control District as the COA for the following existing or proposed OCS facilities:

Graco, Gilda, Gail, and Gina.

At this time, EPA is proposing the Santa Barbara County Air Pollution Control District as the COA for the following existing or proposed OCS facilities:

Habitat, Hacienda, Harmony, Harvest, Heather, Henry, Heritage, Hermosa, Hidalgo, Hillhouse, Hogan, Houchin, Honda and Irene, Iris, the OS & T, and Union A, B, and C.

In proposing the COAs for the above sources, EPA is not making or implying any decision as to whether the facility is a new source or an existing source pursuant to section 111(a) for the purposes of compliance with the requirements of this part.

If no adverse comment is received on the proposed COA for each of the above OCS sources, the COA designation will become final upon promulgation of this rule. If adverse comment is received, it must be accompanied by a request to consider another area as the COA and sufficient documentation to support the request.

#### **P. Section 55.6—Permit Requirements.**

Section 55.0 of this proposal contains requirements to enable EPA or a delegated agency to issue preconstruction and operating permits in accordance with onshore federal, state,

and local regulations for sources within 25 miles of states' seaward boundaries. Section 55.0 also establishes federal permitting requirements for sources beyond 25 miles of a state boundary. As discussed in Section II.K, the Administrator will retain authority for the implementation and enforcement of the OCS regulations beyond 25 miles of state seaward boundaries.

This regulation proposes that approval to construct or permit to operate applications, submitted by a new or existing OCS source, must include a description of how the source will comply with all the applicable requirements. This is an established requirement of most preconstruction and operating permit programs; it ensures that the permitting agency and the applicant have identified all the requirements to which the source is subject and allows the applicant to identify any control technology requirements that the applicant believes are technically infeasible or will cause an unreasonable threat to health and safety.

A request for any exemptions from compliance with pollution control technology requirements must be submitted with the permit application to ensure that the air quality impacts and control technology requirements are properly evaluated. The Administrator, or delegated agency, will act on the request for exemption following the procedures discussed in the following Section II.G, including consultation with the MMS and the U.S. Coast Guard.

EPA is proposing that all OCS sources meet the applicable federal permitting requirements referenced in § 55.13. Under current federal law, new major stationary sources of air pollution are required to obtain air pollution permits before commencing construction, both in NAAs (areas where the NAAQS are exceeded or that contribute to NAAQS violations in nearby areas) and in areas where air quality is acceptable (attainment or unclassifiable areas). Because attainment status is evaluated separately for each criteria pollutant, an area can be both attainment and non-attainment. Therefore, a source may have to obtain both PSD and NAA permits.

In areas that meet the NAAQS a PSD program applies. Most states implement their own PSD programs that have been approved by EPA under 40 CFR 61.100 as part of the SIP. In the remaining states, the federal PSD program, which is set forth in 40 CFR 62.21 applies.

The federal non-attainment permit regulations are set forth in 40 CFR part 51 and accompanying appendix B. However, appendix B regulations only

apply to areas that are newly designated NAAs and in certain other special circumstances. Most states implement their own NAA permit programs, which have been approved by EPA under 40 CFR 61.105 as part of the SIP.<sup>1</sup>

There is not, at this time, a federal operating permit program. 40 CFR Part 70, proposed May 10, 1991 (56 FR 21712), will contain regulations requiring states to develop and submit to EPA within 3 years of enactment, programs for issuing operating permits. If the COA does not have an approvable operating permit program, or does not adequately implement an approved program as required by part 70, the applicable requirements of part 71, the federal operating permit program, will apply to new and existing OCS sources on and after the date that part 71 becomes a requirement in the COA. As onshore, the applicable requirements of part 71 will be implemented and enforced by the Administrator. OCS sources located beyond 25 miles of a state's seaward boundary will also be subject to the requirements of part 71.

A basic requirement of section 320 is that sources located within 25 miles of a state seaward boundary meet the requirements, including permitting, that would be applicable if the source were located in the COA. As discussed in Section II.N, states and local air pollution control districts that are adjacent to OCS sources may have their own permit requirements that are not identical to federal law. Hence, these OCS sources must meet all the applicable COA permitting requirements in addition to the federal permitting requirements. The applicable state and local permitting requirements are set forth in § 55.14. The applicable federal permitting requirements are set forth in § 55.13.

Any existing source subject to the requirements of a COA with an operating permit program is subject to that program. Existing sources must be in compliance with this part within 24 months from the date of promulgation, which may include obtaining a permit to operate by that date.

EPA realizes that there may be some duplication in the federal and state permitting requirements of the OCS regulation. For example, an OCS source may be required to apply best available control technology (BACT) for a pollutant for which the COA is in

<sup>1</sup> Where a construction ban has been imposed by EPA under section 173(a)(4) because the SIP is not adequately implemented, EPA administers the ban under 40 CFR 62.21, 40 CFR 62.24 and appendix B would only apply on the OCS if they are required in the COA.

attainment by federal standards and may also be subject to a state or local requirement to apply lowest achievable emission rate (LAER) for the same pollutant for which the COA is in non-attainment by state air quality standards. In such a case, the source should apply the more stringent requirement, thereby meeting both requirements. This regulatory overlap currently exists onshore, where sources are required to meet all federal, state, and local permitting requirements.

EPA believes that the applicable federal, state, and local new source review requirements can be incorporated into a single preconstruction permit. There may be cases, however, in which an OCS source may need more than one preconstruction permit. This may occur when a delegated agency routinely issues a separate permit for each emissions unit at a facility, when it is necessary to issue separate PSD and NAA permits, or when the state has received partial delegation under this part, and permits are required from both EPA and the state.

Because the statute states that "requirements shall be the same as would be applicable if the source were located in the COA," EPA did not attempt to correct deficiencies in onshore permitting regulations. The Act provides other mechanisms to correct deficiencies in onshore regulations. Once a rule is changed onshore, it will become applicable to OCS sources when EPA promulgates new rules under the consistency update procedure set forth in § 55.12 and discussed in II.L.

Section 328 requires that existing sources comply with the OCS requirements within 24 months of promulgation. In order to comply, existing sources may need to modify their facilities or methods of operation. Therefore, EPA is proposing that the preconstruction requirements of § 55.6 not apply to a particular modification of an OCS source if the modification is necessary to comply with the OCS regulation. If it is made within 24 months of promulgation of the OCS regulation, and it will not result in an increase in emissions of a pollutant regulated under the Act. EPA intends that debottlenecking<sup>2</sup> or expansion projects performed in conjunction with modifications necessary to meet OCS requirements shall be subject to the preconstruction requirements of the OCS regulation. Sources intending to perform modifications that will be

exempt from preconstruction requirements must submit a compliance plan to the Administrator or delegated agency prior to performing the modification. This will insure that the intended modification will indeed meet the onshore requirements.

For the purposes of §§ 55.4, 55.5, and 55.6, the definition of modification will be that corresponding to the applicable requirements of §§ 55.13 and 55.14. For applicability to part 55 in general, however, the definition of modification given in the Act, section 111(a), shall apply. In brief, a physical change, or change in method of operation, commenced after the publication of the proposed regulation, will make an existing OCS source a new OCS source.

Under the provisions of section 328 of the Act, the Administrator retains the authority to enforce any OCS requirement. EPA is therefore proposing that the applicant send a copy of any permit application required by this Section to the Administrator through the Regional Office at the same time the application is submitted to the delegated agency. To ensure that the delegated agency is adequately administering and enforcing the OCS requirements, EPA is also proposing that the delegated agency send a copy of any public notice, preliminary determination, and final permit action to the EPA Regional Office. These requirements are also consistent with EPA's goal of facilitating information transfer.

When issuing preconstruction or operating permits, EPA will use the applicable administrative and public notice and comment procedures of § 55.6 and 40 CFR part 124, which contain regulations on the issuance of EPA permits. Part 124 will be amended to reference the issuance of federal OCS permits. Where the Administrator delegates the OCS permitting requirements to a state or local agency, that agency must comply with the requirements of § 55.6 except for the administrative and public participation procedures of the federal rule, for which the agency may substitute its own procedures.

As with all permits issued under federal regulations or with federal authorization, an authority to construct or permit to operate does not relieve any owner or operator of the responsibilities to comply fully with applicable provisions of any other requirements under federal law, such as the National Environmental Policy Act (NEPA) or the Endangered Species Act. OCS air quality permits obtained pursuant to part 55 are not, however, subject to the environmental impact statement

provisions of section 102(2)(c) of NEPA, 42 U.S.C. 4321.

#### C. Section 55.7—Exemptions.

Section 320(a)(2) allows the Administrator to grant an OCS source an exemption from a specific control technology requirement if the Administrator finds that the requirement is technically infeasible or will cause an unreasonable threat to health and safety. The Administrator must make a written finding explaining the basis of any exemption granted and impose another requirement as close in stringency to the original requirement as possible. Any increase in emissions due to the granting of the exemption must be offset by emissions reductions not otherwise required by the Act.

Items that could be considered as a basis for finding a requirement technically infeasible or an unreasonable threat to health and safety include the following:

- The equipment is used for emergency service and compliance would negatively impact the equipment's effective emergency response;
- Compliance could significantly increase the risk of ship collisions;
- Compliance would entail modifications that would compromise the structural integrity of the facility;
- Compliance would create adverse cross-media impacts that would result in health risks outweighing the benefit of the air emission reductions; or
- Compliance would result in an actual increase of emissions of non-attainment pollutants, due to the location of the OCS source.

The following example is provided to explain what might be considered a valid basis for granting an exemption based on health grounds. The application of a NO<sub>x</sub> control could require large quantities of a chemical that must be transported to the platform by boat. The boat would emit NO<sub>x</sub> as it cruises back and forth between port and platform. The farther the platform is from shore, the more NO<sub>x</sub> the boat would emit. However, the NO<sub>x</sub> reduction at the platform is the same no matter how far the boat must travel. At a certain distance from shore, the NO<sub>x</sub> emitted by the boat would exceed the NO<sub>x</sub> reduction achieved at the platform, and the result of applying the control would be a net increase in NO<sub>x</sub> emissions. Thus, the imposition of the control measure is counterproductive and the resultant increased emissions of a precursor to ozone are an unreasonable threat to public health.

<sup>2</sup> Debottlenecking is an engineering term used to describe the removal of an impediment that limits the throughput of a process.

EPA is proposing that the procedures for granting exemptions be incorporated into the permitting process. When a source submits a permit application to the permitting agency, the application should contain a request for exemption from any requirement that the applicant believes is unsafe or technically infeasible. The request must include information that demonstrates that compliance with a requirement would be technically infeasible or cause an unreasonable threat to health and safety. The request should be accompanied by suggestions for substitute controls, an estimate of the residual emissions due to the substitutions, and preliminary information regarding the acquisition of any offset that will be required if the exemption is granted.

These offsets are required to prevent any deterioration of air quality due to the granting of the exemption. This is slightly different from the purpose of offsets required in an NAA, which must provide a "net air quality benefit" to assist the area to attain the ambient standards. For this reason, EPA has proposed two offset ratios for sources that receive exemptions pursuant to § 55.7.

EPA is proposing that a new source or a modification that qualifies as a new source must comply with the offset ratio imposed in the COA. A new source or a modification that qualifies as a new source must comply with an offset ratio of 1:1 if offsets are not required in the COA or if the source is located beyond 25 miles from a state's seaward boundary. The purpose of these offsets is to prevent any deterioration in air quality. Existing sources must comply with an offset ratio of 1:1.

It is possible that a source may want to request an exemption in a situation where no permit application or permit amendment would be required, such as when a new regulation becomes applicable. If this situation occurs, a source may simply submit a request for exemption that includes all the information required by the Administrator or the delegated agency. The request must be submitted within 90 days from the date the requirement is promulgated by EPA. All other requirements and procedures applicable to exemption requests under this section shall apply.

When issuing exemptions in conjunction with preconstruction or operating permits, EPA will use the applicable administrative and public notice and comment procedures of § 55.7 and 40 CFR part 124, which contain regulations on the issuance of EPA permits. Part 124 will be amended to

reference the issuance of federal OCS permits. If no permit is required, EPA will use the administrative procedures of § 55.7.

The authority to grant technical and safety exemptions may be delegated to qualifying state and local agencies along with adequate regulations. EPA or the delegated agency must consult with the MMS and the U.S. Coast Guard when reviewing exemption requests. If the delegated agency, the MMS and the U.S. Coast Guard cannot reach a consensus decision on the exemption request within 90 days the request will automatically be appealed to the Administrator. The 90 day period may be extended by mutual agreement between all the involved agencies. The purpose of this consultation process is to ensure that OCS operations will proceed in a safe manner. If the involved agencies do reach a consensus decision, the delegated agency will use its own procedures to meet the obligation to allow for public notice and comment when the exemption is part of a permit application. If the exemption is requested but no permit or permit change is required, the delegated agency must comply with the requirements of § 55.7.

#### **11. Section 55.0 Monitoring, Reporting, Inspections, and Compliance.**

The Environment Protection Agency is authorized to require OCS sources to monitor and report emissions and certify compliance status pursuant to section 114. Section 114 states, in part, that in order to determine if any person is in violation of any standard under the Act, the "Administrator may require any person who owns or operates any emission source . . . to (A) establish and maintain such records; (B) make such reports; (C) install, use and maintain such monitoring equipment, and use such audit procedures, or methods; (D) sample such emissions . . . ; (E) keep records on control equipment parameters, production variables or other indirect data when direct monitoring of emissions is impractical; (F) submit compliance certifications in accordance with section 114(a)(3); . . ."

Any monitoring or reporting requirement that appears in a rule adopted pursuant to section 114, or incorporated into this rulemaking, shall also apply to OCS sources. For example, NSPS requires certain monitoring requirements that may apply to OCS sources.

Section 114(a)(3) was added by the CAAA-90 and authorizes EPA to require any person who owns or operates a major stationary source to perform

enhanced monitoring and submit compliance certifications. These compliance certifications shall include "(A) identification of the applicable requirement that is the basis of the certification, (B) the method used for determining the compliance status of the source, (C) the compliance status, (D) whether compliance is continuous or intermittent, (E) such other facts as the Administrator may require." EPA is required to promulgate regulations providing guidance and implementing section 114(a)(3) by November 1992; those rules will apply to OCS sources when promulgated.

Any OCS source that is not required to obtain a permit to operate within 24 months, pursuant to the requirements of the part, must submit a compliance report to the Administrator or the delegated agency. Section 55.8 requires that a compliance report specify all the applicable requirements under this part and a description of how the source has complied with these requirements. This compliance report must be submitted within 25 months of the date of promulgation of this part. The purpose of this compliance report is to verify that the OCS source has met the statutory requirements in the absence of a permit.

When the OCS program is delegated, the delegated agency will have whatever monitoring, reporting, inspection and compliance certification authority over the OCS sources that the agency has over onshore sources. It will be the responsibility of an agency that requests delegation of the OCS program to have amended its rules to allow for authority over sources located in the OCS region within 25 miles of its state seaward boundary.

When EPA is administering the OCS program, inspections will be performed by EPA or an authorized agent and coordinated with the MMS and the U.S. Coast Guard for safety reasons. Where the program is delegated, the delegated agency shall perform the inspections, also in coordination with the MMS and the U.S. Coast Guard. Coordination with these agencies shall not be allowed to hinder the ability of the EPA or the delegated agency to conduct surprise inspections.

#### **1. Section 55.0 Enforcement.**

Section 111(a) states that it shall be unlawful for any owner or operator of any new source to operate such source in violation of any performance standard of the NSPS program. Since section 320(a)(1) provides that the OCS requirements are to be considered as standards of performance under section 111, and since section 320(a)(1) also

provides that violations of the OCS requirements shall be considered violations of section 111(a). It shall also be unlawful for any owner or operator of an OCS source to operate such source in violation of the OCS regulations.

EPA has a variety of enforcement tools under the Act that apply to OCS sources. Section 113 authorizes the Administrator to bring administrative and civil actions to prohibit sources from violating the requirements of the Act and to collect penalties for non-compliance. Section 113 also provides for criminal penalties for knowing violations of the Act. As discussed in II.H., section 114 provides authority to obtain information to determine the compliance status of sources. Section 120 provides authority to assess non-compliance penalties. Section 303 provides for emergency powers when a pollution source is presenting an imminent and substantial endangerment to public health or welfare or the environment. All of these sections apply to OCS sources.

Under a delegated program, the state or local agency shall have the enforcement authority that it possesses under state or local laws. The state or local agency shall be responsible for amending its laws to provide for authority to enforce the OCS regulations within 25 miles of the state's seaward boundaries.

If a facility is ever ordered to cease operation of any piece of equipment due to an enforcement action taken pursuant to this part by EPA or a delegated agency, the actual shut-down will be coordinated by the enforcing agency with the MMS and the U.S. Const. Court. In no case shall the consultation process delay the initiation of the shut down by more than 24 hours.

#### J. Section 55.10 Fees.

If EPA implements the requirements of the COA, EPA will charge fees under the operating permits fee schedule established pursuant to 40 CFR part 71 when promulgated, for all OCS sources subject to the requirements of part 71. For those OCS sources not subject to the requirements of part 71, and for all OCS sources before such time as the permit fee regulations in part 71 are promulgated, EPA will charge fees in accordance with the fee schedule imposed in the COA, with the following proviso: To the extent the fees in the COA are based on regulatory objectives, such as discouraging emissions, EPA will collect fees in accordance with the fee schedule imposed in the COA; to the extent the fees in the COA are based on cost recovery, EPA will cap such fees at an amount equal to EPA's cost to issue

and administer the permit. Upon delegation of authority to implement and enforce any portion of this part, EPA will cease to collect the fees associated with that portion of this part, and the delegated agency will calculate and collect fees in accordance with the fee schedules imposed in the COA.

#### K. Section 55.11 Delegation.

Section 320(a)(3) provides that each state whose seaward boundary is adjacent to a nearshore OCS source subject to the requirements of section 320(a) may, if that state so chooses, promulgate and submit to EPA state regulations for implementing and enforcing the nearshore OCS requirements of section 320(a). Pursuant to section 320(a)(3), EPA will carefully review any state enforcement regulations and authorities and if EPA determines that such plan is adequate to insure implementation and enforcement of the standards of section 3.0.(4) and is consistent with such standards, EPA shall defer to the state for implementation and enforcement.

Section 320(a)(3) states that EPA shall "delegate" its enforcement authority to the state if EPA finds that the state's enforcement plan is "adequate." At the same time, however, section 320(a)(3) expressly preserves EPA's full authority to enforce the requirements of section 320. There is therefore an ambiguity in the statute: EPA cannot both delegate and retain its enforcement authority. Because the enforcement of federal law by state officials who are not officers of the United States raises constitutional concerns, EPA proposes to define "adequate" to include the requirement that a state enforcement plan be promulgated pursuant to a state law that expressly references or incorporates the standards and requirements adopted by EPA under section 320(a). In determining whether a state enforcement plan is promulgated pursuant to state law—a prerequisite to its adequacy—EPA will find it sufficient if the state submits a legal opinion of the attorney general of the state that the laws of the state provide adequate authority to carry out the plan of enforcement and that the standards of section 320(a)(1) have been adopted as state law.

The mere fact that a state will be enforcing state law does not, however, give the state the authority to change the OCS rule independent of EPA. The statute allows delegation of implementation and enforcement authority, but not rulemaking authority. If a state wants to change the OCS requirements, the state must first change the relevant onshore law. EPA will then update the OCS rule to "maintain

consistency with onshore regulations," as provided by section 320(a)(1) and § 65.12, and as discussed further in II.L. This process can be less time-consuming than may first appear if, when the state adopts a change to an onshore regulation, the state conditions its application to OCS sources on EPA's adoption of the measure into federal law. Then, when the measure is adopted into federal law, the rule will immediately be enforceable under state law.

One complication in the process to delegate the OCS program is that section 320(a)(3) states that a state "adjacent to an OCS source" may promulgate and submit to the Administrator regulations in order to receive delegation of the OCS program. This implies that a state must have at least one source on the OCS adjacent to the state before adopting the regulations. As a practical matter, EPA will not delegate the program to a state that does not have an OCS source adjacent to it.

To receive delegation, the governor of a state, or the governor's designee, must request delegation of the OCS program from EPA and demonstrate that the state has:

- An adjacent OCS source.
- Adopted the OCS regulations.
- Adequate authority to implement and enforce the regulations.
- Adequate resources to implement and enforce the OCS regulations.

As discussed above, the second and third requirements may be satisfied by a legal opinion of the state attorney general.

EPA will maintain authority to enforce all air pollution control requirements applicable to any nearshore OCS source under section 320(a), and may promulgate regulations governing such enforcement. EPA will closely monitor all enforcement efforts undertaken by state agencies pursuant to section 320(a)(3). If EPA determines that such efforts fail or are likely to fail to adequately implement the standards of section 320(a) with respect to any OCS source or that such efforts are inconsistent with the standards of section 320(a), EPA will assume the enforcement and implementation of section 320(a) through part 55. Similarly, EPA will assure its enforcement authority if at any time EPA determines that the state agency lacks sufficient authority to undertake such efforts.

EPA may delegate part of the OCS program to a state while still retaining other parts of the program. This partial delegation may be necessary, for example, in cases that do not have

delegation of certain onshore federal programs such as PSD.

The authority to implement and enforce §§ 55.5, 55.11, and 55.12, will not be delegated. Section 55.5 contains the procedures and requirements for designation of the corresponding onshore area. § 55.11 contains the procedures and requirements for the delegation of authority to the States, and § 55.12 contains the procedures under which EPA will perform the consistency updates required by the statute. These sections specifically address the duties of EPA and the Administrator under section 320 and are not considered part of the authority to implement and enforce the OCS program.

EPA will rescind delegation of the OCS program or any part of the OCS program which has been delegated if the delegated agency does not adequately implement and enforce the OCS program. This includes administering the program in such a way as to prevent OCS sources from operating, unless the OCS source has been found to be in violation of part 55.

EPA is proposing to retain the authority to implement and enforce the program beyond 25 miles from states' seaward boundaries for several reasons. First, state and local agencies would have to adopt and implement two programs: The onshore program which would apply to OCS sources within 25 miles of state boundaries, and a second program applicable to OCS sources located beyond 25 miles from the state boundaries. Secondly, as the distance from shore increases, it is increasingly difficult to make a COA designation which is technically defensible. EPA does not believe that Congress intended EPA to delegate to states the authority to regulate areas up to 200 miles or more outside their boundaries.

#### L. Section 55.12 Consistency Updates.

Because onshore requirements may change, section 320(a)(1) requires that EPA update the OCS requirements "as necessary to maintain consistency with onshore regulations." The statute uses the phrase "the same as" to describe the OCS requirements initially adopted (Section II.C) and uses the phrase "maintain consistency" in directing EPA to perform updates. This reflects a difference in the way rules in effect as of the date of enactment, and rules adopted after enactment, are to be treated.

The words "the same as" require that EPA include in the OCS regulations those onshore requirements determined to be applicable, and that were in effect, as of the date the CAA-90 were enacted. The fact that the statute directs

EPA to update the OCS requirements, rather than automatically incorporating new onshore requirements, and the use of the phrase "maintain consistency" rather than the phrase "the same as," implies that EPA's action in adopting "post-enactment" requirements must be more than rubber stamping a state or local rule into federal law. EPA proposes to interpret "maintain consistency" to mean that EPA will incorporate into part 55 those onshore rules which comply with the statutory requirements of section 320, are equitable and are rationally related to the attainment and maintenance of ambient air quality standards and the prevention of significant deterioration of air quality. These criteria are mandated by the general prohibition against arbitrary and capricious rulemaking with which the Administrator must comply in any rulemaking proceeding, under either section 307(d) of the Act or under the Administrative Procedures Act. They also comport with the general intent of the legislation to ensure equity between onshore and OCS sources. In determining whether an onshore rule is inequitable, even if no onshore sources would be controlled by a regulation adopted by a state such that only OCS sources would be affected, EPA will not consider the rule to be inequitable or arbitrary and capricious if the rule is consistent with the state's general approach to onshore regulation.

Updates also will address the requirements for areas that have not had previous OCS development. MMS publishes an inclusive five-year leasing plan that describes every proposed lease sale and an Environmental Impact Statement (EIS) must be prepared for each lease sale. EPA and interested parties will therefore have considerable notice if a new area is to become subject to exploration and/or development. EPA is proposing to promulgate OCS requirements for new areas as needed and will assure that regulations are in place in a timely manner so as not to impede the commencement of any OCS activity.

EPA is proposing to periodically update part 55 to reflect onshore rule changes that may affect OCS sources. This update will be done in accordance with notice and comment rulemaking procedures. EPA is soliciting comments on the appropriate time period to update the rule. One option is to link the consistency updates solely to the submittal of NOI. Section II.D. of the preamble proposes that the submission of an NOI will trigger a review of the onshore rules to determine if an update is necessary. Upon submission of an NOI, EPA will compare onshore rules

with the requirements of part 55. If the requirements of part 55 are found to be inconsistent with the current onshore requirements, EPA will expeditiously initiate a consistency update. A second option is to update part 55 annually. Under this option, part 55 would be evaluated on a yearly basis, with NOIs triggering early review.

Consistency updates will be performed using standard procedures for notice and comment rulemaking. Consistency updates may result in the inclusion of State or local rules or regulations into part 55 that will ultimately be disapproved as part of the SIP. Inclusion in the OCS rule does not imply that a regulation meets the requirements of the Act for SIP approval, nor does it imply the regulation will be approved by EPA for inclusion in the SIP. For additional discussion of this topic, see Section III.A.2.

#### M. Section 55.13 Applicable Federal Requirements.

Section 320 directs EPA to establish air pollution requirements for OCS sources. The statute specifies that for sources located within 25 miles of states' seaward boundaries, those requirements shall be the same as the requirements in the COA (see section II.A.). Section 320 does not mandate the content of the OCS program for OCS sources located beyond 25 miles of states' seaward boundaries. Therefore, within the framework of establishing requirements to "attain and maintain federal and state ambient standards and to comply with the provisions of part C of title 1," EPA has some latitude in establishing the requirements under Section 320 that apply to sources located beyond 25 miles from states' seaward boundaries.

In this rulemaking, EPA is proposing to apply PSD, and to the extent they are rationally related to protection of ambient air quality standards NSPS and MSHAPS. When promulgated the requirements of the federal operating permits program to outer OCS sources. These regulations will be implemented in accordance with EPA guidance. The requirements of § 55.13 apply to both nearshore and outer OCS sources. Nearshore sources must also meet the requirements of the COA, as set forth in § 55.14.

At present, there are few (if any) outer OCS sources within EPA jurisdiction and none are permanent. In the future, OCS sources may be established at distances of 25 miles to more than 200 miles offshore. Because of the uncertainty of where new sources will

be located, EPA cannot predict the impact these sources will have on onshore air quality. If the Administrator determines that additional requirements for outer OCS sources are necessary to protect onshore air quality, such requirements will be promulgated in a future rulemaking. This might occur for instance, if the density of OCS sources in a specific area cumulatively causes negative impacts to onshore air quality.

#### *N. Section 55.14, Applicable Requirements of the COA.*

The requirements of this Section apply only to those sources located within 25 miles of states' seaward boundaries. Section 328 mandates that sources located within 25 miles of states' seaward boundaries be subject to requirements that are the same as would be applicable if the source were located in the COA. Section 328(a)(1) provides that within 25 miles of state boundaries, requirements "shall include, but not be limited to, State and local requirements for emission controls, emission limitations, offsets, permitting, monitoring, testing, and reporting."

States have independent authority to establish air pollution regulations that apply within their jurisdiction. In many states, air pollution control regulations are established by a state agency responsible for air pollution control. In other states, particularly California, primary responsibility for regulation of air quality lies with local air pollution control districts. State law authorizes these air pollution control districts to adopt, implement, and enforce air quality regulations. In order to be considered by EPA for inclusion in the OCS rule, state and local requirements must have been formally adopted by the appropriate regulatory agency.

Because requirements applying to OCS sources located within 25 miles of states' seaward boundaries must be "the same as" or "consistent with" onshore requirements, EPA has little flexibility in establishing requirements that apply to these OCS sources.

A large number of onshore rules, such as those regulating agricultural burning or automobile refueling do not apply on the OCS. To reduce paperwork and the expense of promulgating rules, EPA is proposing to limit the scope of this promulgation to those rules that control sources that exist or could reasonably be expected to exist on the OCS and be regulated or authorized under the CGLA. EPA has examined federal, state and local law to determine which onshore requirements could be applied offshore. Where possible, EPA has limited the state and local rules incorporated into part 55 to those that

contain requirements that apply to OCS sources.

State and local administrative and procedural rules, such as those establishing hearing board procedures, have generally been excluded.<sup>3</sup> In some instances, however, individual rules contain administrative procedures along with the substantive requirements that section 328 directs EPA to promulgate. Where it was not feasible to separate the extraneous provisions from the necessary requirements, EPA has included both. In order to insure that EPA will not be required to adhere to state or local administrative or procedural requirements when implementing the OCS rule, § 55.14 explicitly states that EPA will not be bound by state or local administrative procedures. Instead, EPA will use the administrative procedures set forth in part 55 (excluding § 55.14), in 40 CFR part 124, and in rules promulgated pursuant to title V of the CAAA-90, as such rules apply in the COA.

If an onshore rule that would be applicable to a proposed OCS source is not currently incorporated into part 55, EPA will initiate a consistency update, as triggered by the submission of an NOI. This procedure is discussed in Section II.D.

Before a rule or regulation may be applied to OCS sources, it must be incorporated into part 55 by formal rulemaking. EPA proposes to include in this rule a few rules that were adopted by states or locals after November 15, 1990. Rules and rule revisions adopted by states subsequent to the date of enactment are subject to EPA consistency update requirements (see Section II.E.). In this rulemaking, therefore, EPA is doing both an initial rule adoption and a consistency update to incorporate state rules adopted after November 15, 1990.

Promulgation of OCS regulations entails the incorporation of requirements from up to three layers of law—Federal, State, and local—into one layer—40 CFR part 55. Because of this structure, it is inevitable that some overlap will exist. Onshore, sources must meet applicable federal requirements as well as State and local requirements. The difference is that the overlap does not exist within one body of law. In cases where OCS requirements overlap, the source must comply with all requirements, just as onshore sources must.

It is conceivable that a situation could arise where it is impossible for a source

<sup>3</sup> Upon delegation, states may use their administrative rules to implement and enforce OCS requirements, as appropriate.

to comply with different versions of the same requirement. A conflict within the OCS regulation would complicate enforcement on the OCS because, unlike onshore, the conflict would exist within a single body of law. EPA has not discovered any such conflicts in the rules it has reviewed. However, if EPA identifies a conflict between a federal, state, or local requirement, EPA will analyze the rules and incorporate the version that will result in the greatest emission reductions. Strictly speaking, this could create a regulatory environment for the OCS that is not "the same as" the onshore environment. This is an artifact of the process of combining three layers of law into a single layer. As noted above, EPA has not found any conflicts between Federal, State and local requirements.

EPA is proposing to incorporate the rules listed in the regulation that follows this preamble. The text of the rules is in the technical support document, which is part of the docket and is available at the addresses listed at the beginning of this notice.

### III. Additional Topics for Discussion

#### *A. Relationship Between the OCS Regulations and the State Implementation Plans*

##### *1. Emission Inventories/Attainment Demonstrations*

OCS emissions will be treated in a manner consistent with EPA emission inventory guidance and are to be included in the SIP baseline emission inventory of the COA. Upon promulgation by EPA, to the extent a rule meets EPA's criteria for creditability under SIP policy, emission reductions realized by implementation of OCS rules may be used for attainment demonstrations or to meet emission reduction targets.

##### *2. Deficiencies Incorporated Into the OCS Rule*

Section 328(n) requires that EPA establish requirements to control OCS sources located within 25 miles of states' seaward boundaries that are the same as onshore requirements. Because the statute mandates that requirements for these sources must be the same as the COA's onshore requirements, EPA must adopt a COA's rules into OCS law as they exist onshore. This limits EPA's flexibility in deciding which rules will be incorporated into part 55, and prevents EPA from making substantive changes to the rules it incorporates. As a result, EPA is proposing to incorporate into part 55 several rules that do not

conform to all of EPA's SIP guidance or certain requirements of the Act.

The following are examples of how rules may deviate from EPA SIP guidance or requirements of the Act:

- Section 172(c)(1) requires that NAAs adopt rules that require the application of reasonably available control technology (RACT). In some cases the rules proposed for inclusion in this promulgation are less stringent than RACT requirements.

- EPA has issued extensive guidance relating to SIP rules. Much of that guidance was summarized in appendix D of EPA's proposed post-1987 policy (52 FR 46044, November 23, 1987), and in a "bluebook" which elaborated on that guidance. Section 102(a)(2)(A) essentially requires most nonattainment areas to meet the pre-enactment VOC-RACT requirements as set forth in this guidance. Some rules that are proposed for inclusion in this promulgation do not meet all of EPA's guidance. For example, some rules do not specify EPA approved test methods or do not have adequate recordkeeping requirements.

The promulgation of OCS rules superficially resembles the SIP process. Rules that are presently in the SIP or rules that may eventually be included in the SIP are proposed for inclusion into part 55. However, SIP rules and OCS rules are subject to different standards. The net result is that rules promulgated as OCS law may contain deficiencies that would result in less than full approval for inclusion in the SIP. EPA is currently working with states to correct deficient rules. As corrections are adopted onshore, EPA will incorporate them into the OCS rule through the consistency update process.

It must be emphasized that promulgation of a state or local rule as OCS law does not constitute or imply approval of that rule as part of the SIP. Nor does it preclude any action EPA may take in regard to deficient onshore SIP's.

#### **D. The Applicability to OCS Sources of Regulations Controlling Air Pollutants that are not Significantly Related to a State or Federal Ambient Standard**

Section 320(a) requires the Administrator to promulgate requirements for OCS sources "to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of part C of title I of the Act." EPA reads this provision as a restriction on EPA's authority to regulate OCS sources. Specifically, in today's rule, making EPA is proposing to regulate only federal and state criteria

pollutants and precursors to those pollutants.<sup>4</sup>

Although it may be argued that this approach will result in inconsistencies between the regulation of onshore and offshore sources, which section 320 was intended to remove, EPA believes that this interpretation of the statute is the better reading of the plain language of the statute. Moreover, in providing for equity between onshore and offshore sources, the statute states that "such requirements shall be the same as would be applicable if the source were located in the corresponding onshore area," where "such" refers back to "requirements . . . to attain and maintain Federal and State ambient air quality standards," thus similarly restricting the application of onshore requirements.

EPA recognizes, however, that this interpretation results in a gap in the regulatory scheme. Although non-criteria pollutants are not a significant concern with respect to current OCS activities, they could become so in the future. For example, possible gold dredging on the OCS could emit cyanide and mercury that can be regulated under section 112 of the Act but are not criteria pollutants or precursors and so would not be regulated on the OCS under section 320(a).<sup>5</sup> With respect to air pollutants other than those specifically addressed under section 320(a), EPA may have authority to apply the Act generally to the OCS, since the OCS is an area of federal jurisdiction and the Act in general applies to "the Nation's air resources." Section 101(b). In addition, the OCSLA itself provides that all federal laws shall apply on the OCS "to the same extent as if the OCS were an area of exclusive federal jurisdiction located within a state." Section 4(a)(1), 43 U.S.C. 1333(a)(1). EPA is requesting comment on this interpretation.

#### **IV. Administrative Requirements**

##### **A. Executive Order 12201**

Executive Order 12201 requires that all federal agencies prepare a regulatory impact analysis for major rules. Major rules are those that may likely result in any of the following:

(1) An annual effect on the economy of \$100 million or more;

<sup>4</sup> The pollutants for which federal ambient air quality standards exist are ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, lead, and particulate matter (as PM-10). See 40 CFR part 60. Some states have adopted additional ambient air quality standards.

<sup>5</sup> Section 312 requires EPA to develop regulations for approximately 200 hazardous air pollutants for which there are no Federal ambient air quality standards.

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions;

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

EPA performed a Regulatory Impact Analysis Screening that is available in the docket, that indicates that the proposed rule results in an impact of less than \$3 million per year and therefore, EPA believes this rule is not a major rule. This result is dependent on the analysis methodology used and on assumptions having a high degree of uncertainty. EPA invites comment on the Screening Analysis, its assumptions and methodology. This rulemaking is not anticipated to meet the last two criteria listed above due to the small number of entities to be affected.

##### **B. Regulatory Flexibility Act**

The Regulatory Flexibility Act of 1980 requires each federal agency to perform a Regulatory Flexibility Analysis for all rules that are likely to have a "significant impact on a substantial number of small entities."

The EPA certifies that the proposed rule will not have a significant impact on a substantial number of small entities. A census of companies directly affected by the proposed regulations reveals that none meet the criteria of small according to the Small Business Administration (SBA).

##### **C. Paperwork Reduction Act**

The information collection requirements in this proposed rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An Information Collection Request (ICR) document has been prepared by EPA (ICR No. 1981-01) and a copy may be obtained from Sandy Farmer, Information Policy Branch (PM-223Y), U.S. Environmental Protection Agency, 401 M Street, NW, Washington, DC 20460 or by calling (202) 200-2740.

Public Reporting Burden for this collection of information is estimated to be an average of 300 hours per response for new sources and 310 hours per response for existing sources. This burden includes time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing the

collection of information and compliance testing.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to Chief, Information Policy Branch, EPA, 401 M Street, SW, (PM-223Y), Washington, DC 20460, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for the EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

**List of Subjects in 40 CFR Part 55**

Air pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Particulate matter, Hydrocarbons, Nitrogen oxides, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: November 22, 1991.  
William K. Reilly,  
Administrator.

For the reasons set out in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended by adding a new part 55 as follows.

**PART 55—OUTER CONTINENTAL SHELF AIR REGULATIONS**

- Sec.
  - 55.1 Statutory authority and scope.
  - 55.2 Definitions.
  - 55.3 Applicability.
  - 55.4 Requirements to submit a notice of intent.
  - 55.5 Corresponding onshore area designation.
  - 55.6 Permit requirements.
  - 55.7 Exemptions.
  - 55.8 Monitoring, reporting, inspections, and compliance.
  - 55.9 Enforcement.
  - 55.10 Fees.
  - 55.11 Delegation.
  - 55.12 Consistency updates.
  - 55.13 Listing of Federal requirements that apply to OCS sources.
  - 55.14 Listing of Federal, State, and Local requirements that apply to OCS sources located within 25 miles of states' seaward boundaries, by State.
- Authority: 42 U.S.C. 7401, *et seq.*

**§ 55.1 Statutory authority and scope.**  
Section 328 of the Clean Air Act (the Act) (42 U.S.C. 7401, *et seq.*), as amended by Public Law 101-540, the Clean Air Act Amendments of 1990, authorizes EPA to establish requirements to regulate outer continental shelf ("OCS") sources of air pollution, in order to attain and maintain ambient air quality standards and comply with the provisions of part C of

title I of the Act. This part establishes the air pollution control requirements for OCS sources and the procedures for implementation and enforcement of the requirements, consistent with the requirements of section 328.

**§ 55.2 Definitions.**  
**Administrator** means the Administrator of the U.S. Environmental Protection Agency.

**Corresponding Onshore Area ("COA")** means, with respect to any OCS source located within 25 miles of states' seaward boundaries, the onshore area that is geographically closest to the source or another onshore area that the Administrator designates as the COA, pursuant to § 55.5 of this part.

**Delegated Agency** means any agency that has been delegated authority to implement or enforce the requirements of this part by the Administrator, pursuant to § 55.11 of this part.

**Exploratory Source** means any temporary operation conducted for the sole purpose of gathering information.

**Nearest Onshore Area ("NOA")** means, with respect to any OCS source, the onshore area is geographically closest to that source.

**OCS Source** means any equipment, activity, or facility which:

- (a) Exists or has the potential to emit any air pollutant;
- (b) Is regulated or authorized under the Outer Continental Shelf Lands Act (43 U.S.C. 1331 *et seq.*); and
- (c) Is located on the OCS or in or on waters above the OCS.

**Outer Continental Shelf** shall have the meaning provided, as of the date of promulgation of this part, by section 2 of the OCS Lands Act.

**Onshore Area** means a coastal area designated as an attainment, nonattainment, or unclassifiable area by EPA in accordance with section 102 of the Act.

**Potential Emissions** means the maximum emissions of a pollutant from an OCS source operating at its design capacity. Any physical or operational limitation on the capacity of a source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as a limit on the design capacity of the source if the limitation is federally enforceable. Pursuant to section 320, emissions from vessels servicing or associated with an OCS source shall be considered direct emissions from such a source while at the source, and while en-route to or from the source when within 25 miles of the source, and shall be included in the "potential to emit" for an OCS source.

This definition does not alter or affect the use of this term for any other purposes under §§ 55.13 or 55.14 of this part, except that vessel emissions must be included in the "potential to emit" as used in §§ 55.13 and 55.14 of this part.

**Residual Emissions** means the difference in emissions from an OCS source if it applies the control requirement(s) imposed pursuant to § 55.13 and/or 55.14 of this part and emissions from that source if it applies a substitute control requirement pursuant to an exemption granted under § 55.7 of this part.

**§ 55.3 Applicability.**

(a) This part applies to all OCS sources except those located in the Gulf of Mexico west of 07.5 degrees longitude.

(b) OCS sources located within 25 miles of a state boundary shall be subject to all the requirements of this part which include, but are not limited to, the federal requirements set forth in § 55.13 of this part, and the state and local requirements of the COA (designated pursuant to § 55.5 of this part), as set forth in § 55.14 of this part.

(c) OCS sources located beyond 25 miles of a state seaward boundary shall be subject to all the applicable requirements of this part, except the requirements of § 55.14 of this part.

(d) New OCS sources shall comply with the requirements of this part on the date of promulgation of this part, as mandated by section 3.2, where a "new OCS source" means an OCS source that is a new source within the meaning of section 111(a).

(e) Existing sources shall comply with the requirements of this part within 24 months after the date of promulgation of this part, as mandated by section 3.3 of the Act, where an "existing OCS source" means any source that is not a new source within the meaning of section 111(a).

**§ 55.4 Requirements to submit a notice of intent.**

(a) Not more than 18 months prior to submitting an application for a preconstruction permit, the applicant shall submit a Notice of Intent ("NOI") to the Administrator through the Regional Office, and to the air pollution control agencies of the NOA and onshore areas adjacent to the NOA. This requirement applies only to new sources located within 25 miles of states' seaward boundaries.

(b) The NOI shall include the following:

- (1) General company information, including company name and address,

owner's name and agent, and facility site contact.

(2) Facility description in terms of the proposed process and products, including identification by Standard Industrial Classification Code.

(3) Estimate of the proposed project's potential emissions of any air pollutant, expressed in total tons per year and in such other terms as may be necessary to determine the applicability of requirements of this part. Potential emissions for the project must include all vessel emissions associated with the proposed project in accordance with the definition of potential emissions in § 55.2 of this part.

(4) Description of all emissions points including associated vessels.

(5) Estimate of quantity and type of fuels and raw materials to be used.

(6) Description of proposed air pollution control equipment.

(7) Proposed limitations on source operations or any work practice standards affecting emissions.

(8) Other information affecting emissions, including where applicable, information related to stack parameters (including height, diameter, and plume temperature), flow rates, and equipment and facility dimensions.

(9) Such other information as may be necessary to determine the applicability of onshore requirements.

(10) Such other information as may be necessary to determine the source's impact in onshore areas. Exploratory sources shall be exempt from this requirement.

**§ 55.6 Corresponding onshore area designation.**

(a) *Proposed Exploratory Source.* The NOA shall be the COA for exploratory sources as defined in § 55.2 of this part.

(b) *Requests for Designation.* (1) The chief executive officer of the air pollution control agency of an area that believes it has more stringent air pollution control requirements than the NOA for the proposed OCS source may submit to the Administrator a request to be designated as the COA. The request must be received by the Administrator within 60 days of the submission of the NOI. If no requests are submitted, the NOA will become the designated COA without further action, 61 days after the submission of the NOI.

(2) No later than 60 days after the submission of the NOI, a demonstration shall be submitted to the Administrator showing that:

(i) The area has more stringent requirements with respect to the control and abatement of air pollution than the NOA;

(ii) The emissions from the source are or would be transported to the requesting area; and

(iii) The transported emissions would affect the requesting area's efforts to attain or maintain a federal or state ambient air quality standard or to comply with the requirements of part C of title I, taking into account the effect of air pollution control requirements that would be imposed if the NOA were designated as the COA.

(c) *Determination by the Administrator.* (1) If no demonstrations are submitted to the Administrator within 60 days of the submission of the NOI, the NOA will become the COA 61 days after the submission of the NOI without further action.

(2) If one or more demonstrations are submitted, the Administrator will issue a preliminary designation of the COA within 150 days of the submission of the NOI, which shall be followed by a 30 day public comment period, in accordance with § 55.5(a) of this part.

(3) The Administrator will designate the COA for a specific source within 240 days of the submission of the NOI.

(4) When the Administrator designates a more stringent area as the COA with respect to a specific OCS source, EPA will issue the permit and enforce the requirements of 40 CFR part 55.

(d) *Offset Requirements.* Offsets shall be acquired in accordance with the requirements imposed in the COA, but no discounting or penalties associated with distance between the proposed source and the source of emissions reductions shall apply to offsets obtained on the coastal side of a line drawn through the proposed source parallel to the coastline. Offsets obtained on the seaward side of this line will be subject to all the requirements of the COA, including any discounting and distance penalties. Offsets may be obtained in the COA or the NOA, and/or from OCS sources with the same COA or NOA as the proposed source, notwithstanding any geographic restrictions contained in the offset requirements of the COA.

(e) *Authority to Designate the COA.* The authority to designate the COA for any OCS source shall not be delegated, but shall be retained by the Administrator.

(f) *Administrative Procedures and Public Participation.* The Administrator will use the following public notice and comment procedures for processing a request for COA designation under this section:

(1) Within 60 days from receipt of a demonstration, the Administrator shall:

(i) Make available in at least one location in the NOA and in the area requesting COA designation, a copy of all materials submitted by the requester, a copy of the Administrator's preliminary determination, and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

(ii) Notify the public, by prominent advertisement in a newspaper of general circulation in the NOA and the area requesting COA designation, of the opportunity for written public comment on the information submitted by the requester and the Administrator's preliminary COA designation.

(2) A copy of the notice required pursuant to § 55.4(e) of this part shall be sent to the requester and to officials and agencies having jurisdiction over the area nearest to the OCS source as follows: State and local air pollution control agencies, and the chief executive of the city and county; the Federal Land Manager of any adjacent Class I areas; and the Indian governing body whose lands may be affected by emissions from the OCS source.

(3) Public comments submitted in writing within 30 days after the data the public notice is made available shall be considered by the Administrator in making his final decision on the request. All comments shall be made available for public inspection. At the time that a final decision is issued, the Administrator shall issue a response to comments.

(4) The Administrator shall make a final COA designation within 60 days after the close of the public comment period. The Administrator shall notify, in writing, the requester and each person who has requested notice of the final action and shall set forth his reasons for the determination. Such notification shall be made available for public inspection.

**§ 55.6 Permit requirements.**

(a) *General Provisions.* (1) *Source information.* (i) The owner or operator of an OCS source shall submit to the Administrator or delegated agency all information necessary to perform any analysis or make any determination required under this section.

(ii) Any application submitted pursuant to this part by an OCS source shall include a description of all the requirements of this part that the applicant believes, after diligent research and inquiry, apply to the source and a description of how the source will comply with the applicable requirements.

(2) *Exemptions.* When an applicant submits any approval to construct or permit to operate application to the Administrator or delegated agency it shall include a request for any exemptions from compliance with a pollution control technology requirement that the applicant believes is technically infeasible or will cause an unreasonable threat to health and safety. The Administrator or delegated agency will act on the request for exemption under the procedures established in § 55.7 of this part.

(3) *Administrative Procedures and Public Participation.* The Administrator will follow the applicable procedures of 40 CFR part 124 in processing applications under this section.

(4) *Source Obligations.* (i) Any owner or operator who constructs or operates an OCS source not in accordance with the application submitted pursuant to part 55, or with the terms of any approval to construct or permit to operate, or any owner or operator of a source subject to the requirements of this part who commences construction after the effective date of this part without applying for and receiving approval hereunder, shall be in violation of this part.

(ii) Receipt of an approval to construct or a permit to operate from the Administrator or delegated agency shall not relieve any owner or operator of the responsibility to comply fully with applicable provisions of any other requirements under federal law.

(5) *Delegation of Authority.* If the Administrator delegates any of the responsibility for implementing and enforcing the requirements of this section to any state or local agency, the following provisions shall apply:

(i) The applicant shall send a copy of any permit application required by this section to the Administrator through the Regional Office at the same time as the application is submitted to the delegated agency.

(ii) The delegated agency shall send a copy of any public comment notice required under this Section to the Administrator through the Regional Office.

(iii) The delegated agency shall send a copy of any preliminary determination and final permit action required under this Section to the Administrator through the Regional Office on the date of the determination and shall make available to the Administrator any materials used in making the determination.

(b) *Preconstruction Requirements for OCS Sources Located Within 25 Miles of a State Seaward Boundary.*

(1) No OCS source to which the requirements of §§ 55.13 through 55.14 of this part apply shall begin actual construction without a permit that requires the OCS source to meet those requirements.

(2) The applicant may be required to obtain more than one approval to construct permit, if necessitated by partial delegation of this part or by the requirements of this section and §§ 55.13 and 55.14 of this part.

(3) An approval to construct shall become invalid if construction is not commenced within 18 months after receipt of such approval. If construction is discontinued for a period of 18 months or more, or if construction is not completed within a reasonable time. The 18 month period may be extended upon a showing satisfactory to the Administrator or the delegated agency that an extension is justified. The requirement shall not supersede a more stringent requirement under §§ 55.13 or 55.14 of this part.

(4) Any preconstruction permit issued to a new OCS source or modification shall remain in effect, unless and until it expires under paragraph (b)(3) of this section or is rescinded under the applicable requirements listed in §§ 55.13 and 55.14 of this part.

(5) Whenever any proposed OCS source or modification to an existing OCS source is subject to action by a federal Agency that might necessitate preparation of an environmental impact statement pursuant to the National Environmental Policy Act (42 U.S.C. 4321), review by the Administrator conducted pursuant to this section shall be coordinated with the environmental reviews under that Act to the extent feasible and reasonable.

(6) The Administrator or delegated agency and the applicant shall provide written notice of any permit application from a source, the omissions from which may affect a Class I area, to the Federal Land Manager charged with direct responsibility for management of any lands within the Class I area. Such notification shall include a copy of all information contained in the permit application and shall be given within 30 days of receipt of the application and at least 60 days prior to any public hearing on the preconstruction permit.

(7) The preconstruction requirements above shall not apply to a particular modification, as defined in § 55.13 or 55.14 of this part, of an existing OCS source if:

(i) The modification is necessary to comply with this part, and no other physical change or change in the method of operation is made in conjunction with the modification;

(ii) The modification is made within 30 months of promulgation of this part; and

(iii) The modification does not result in an increase in potential emissions or actual hourly emissions of a pollutant regulated under the Act.

(8) Sources intending to perform modifications that meet all of the criteria of § 55.6(b)(7) of this part shall submit a compliance plan to the Administrator or delegated agency prior to performing the modification. The compliance plan shall describe the schedule and method the source will use to comply with the applicable OCS requirements within 24 months.

(c) *Operating Permit Requirements for Sources Located Within 25 Miles of a State Seaward Boundary.*

(1) All applicable operating permit requirements listed in this section and §§ 55.13 and 55.14 of this part shall apply to OCS sources.

(2) The Administrator or delegated agency shall not issue a permit to operate to an existing OCS source that has not demonstrated compliance with all the applicable requirements of this part.

(3) If the COA does not have an approvable operating permit program or does not adequately implement an approved program as required by 40 CFR part 70,<sup>1</sup> the applicable requirements of 40 CFR part 71,<sup>2</sup> the federal permitting program, shall apply to OCS sources on and after the date that 40 CFR part 71 becomes a requirement in the COA. The applicable requirements of 40 CFR part 71 will be implemented and enforced by the Administrator.

(d) *Permit Requirements for Sources Located Beyond 25 Miles of a State Seaward Boundary.* (1) OCS sources located beyond 25 miles of a state seaward boundary shall be subject to the permitting requirements set forth in § 55.13 of this part.

(2) The Administrator shall retain authority to implement and enforce all requirements of this part for OCS sources located beyond 25 miles from a state seaward boundary.

#### § 55.7 Exemptions.

(a) The Administrator or the delegated agency may exempt a source from a control technology requirement in effect under this part if the Administrator or the delegated agency finds that compliance with the control technology requirement is technically infeasible or

<sup>1</sup>40 CFR part 70 was published in the Federal Register issue of May 10, 1991 (56 FR 21712) as a proposed rule.

<sup>2</sup>EPA will propose 40 CFR part 71 in the future.

will cause an unreasonable threat to health and safety.

(b) An applicant shall submit a request for an exemption from a control technology requirement at the same time as the applicant submits a preconstruction or operating permit application to the Administrator or delegated agency. If no permit or permit modification is required, an exemption request must be submitted to the Administrator or delegated agency within 60 days from the date the requirement is promulgated by EPA.

(1) A request for exemption shall include information that demonstrates that compliance with a requirement of this part would be technically infeasible or would cause an unreasonable threat to health and safety.

(2) The request shall include a proposed substitute requirement(s) as close in stringency to the original requirement as possible.

(3) The request shall include an estimate of emission reductions that would be achieved by compliance with the original requirement, an estimate of emission reductions that would be achieved by compliance with the proposed substitute requirement(s), and an estimate of residual emissions.

(4) The request shall identify emission reductions of a sufficient quantity to offset the estimated residual emissions.

(c) If the authority to grant exemptions has been delegated, the delegated agency shall consult with the Minerals Management Service and the U.S. Coast Guard to determine whether the exemption will be granted.

(1) The delegated agency shall provide to the Minerals Management Service, and the U.S. Coast Guard a copy of the application within 15 days of receiving such application.

(2) If the delegated agency, the Minerals Management Service, and the U.S. Coast Guard cannot reach consensus decision on an exemption request within 60 days from the date the delegated agency received the applications, the exemption request shall automatically be appealed to the Administrator.

(3) Automatic appeal to the Administrator can be delayed beyond the initial 60 days by the mutual consent of the delegated agency, the Minerals Management Service, and the U.S. Coast Guard.

(d) At the time the draft permit is issued for public comment or within 60 days of receipt of the exemption request if no permit is required, the Administrator or the delegated agency shall:

(1) Propose to grant the exemption request; and

(i) Shall propose a substitute requirement(s), equal to or as close in stringency to the original requirement as possible; and

(ii) Provide for adequate public notice and comment; or

(2) Shall deny the exemption request.

(a) *Grant of Exemption.* (1) The Administrator or delegated agency shall impose a substitute requirement(s), equal to or as close in stringency to the original requirement as possible.

(2) The Administrator or the delegated agency shall require the applicant to offset any residual emissions resulting from the exemption. In accordance with the requirements of the Act and the regulations thereunder.

(3) For new and existing OCS sources as defined in the applicable requirements of §§ 55.13 and 55.14 of this part, offsets shall be obtained at the following ratios, in accordance with the requirements of the Act and the regulations thereunder:

(i) New OCS sources shall comply with the offset ratio required in the COA if offsets are required in the COA;

(ii) New OCS sources shall comply with the offset ratio of 1:1 if offsets are required in the COA;

(iii) Existing OCS sources shall offset at a ratio of 1:1.

(f) *Administrative Procedures and Public Participation.* If a permit is not required, the Administrator will use the following procedures for processing an exemption request under this section:

(1) Within 30 days of receipt of an exemption request, the Administrator shall advise the applicant of any deficiency in the information submitted in support of the exemption. In the event of such a deficiency, the date of receipt of the request, for the purpose of this Section, shall be the date on which all required information is received by the Administrator.

(2) Within 60 days after receipt of a complete request, the Administrator shall:

(i) Make a preliminary determination whether the exemption request should be granted with conditions in accordance with paragraph (d) of this section, or denied. Denials of exemption requests are not subject to any further public notice, comment, or hearings. Denials by the Regional Administrator may be informally appealed to the Administrator within 30 days of the decision by a letter setting forth the relevant facts. The appeal shall be considered denied if the Administrator does not take action on the letter within 60 days after receiving it. Written notice of the denial shall be given to the requestor.

(ii) Make available, in a least one location in the COA and NOA, a copy of all materials submitted by the requester, a copy of the Administrator's preliminary determination, and a copy or summary of other materials, if any, considered by the Administrator in making his preliminary determination; and

(iii) Notify the public, by prominent advertisement in a newspaper of general circulation in the COA and NOA, of the opportunity for written public comment on the information submitted by the owner or operator and the Administrator's preliminary determination on the approvability of the exemption request.

(3) A copy of the notice required pursuant to this paragraph shall be sent to the applicant and to officials and agencies having jurisdiction in the COA and NOA as follows: State and local air pollution control agencies, and the chief executive of the city and county; the Federal Land Manager of any adjacent Class I areas; and the Indian governing body whose lands may be affected by emissions from the OCS source.

(4) Public comments submitted in writing within 30 days after the date the public notice is made available will be considered by the Administrator in making his final decision on the request. All comments will be made available for public inspection. At the time that any final decision is issued, the Administrator will issue a response to comments.

(5) The Administrator will take final action on the exemption request within 30 days after the close of the public comment period. The Administrator will notify, in writing, the applicant and each person who has submitted written comments, or requested notice of the final action, of the conditional approval, or denial of the request, and will set forth his reasons for conditional approval or denial. Such notification will be made available for public inspection.

(6) Within 30 days after final action has been taken, any person filed comments on the preliminary determination may petition the Administrator to review any aspect of the decision. Any person who failed to file comments on the preliminary decision may petition for administrative review only on the changes from the preliminary to the final decision.

(7) The Administrator may extend each of the time periods specified in § 55.7(e) of this part by no more than 30 days or such other period as agreed to by the applicant and the Administrator.

**§ 55.8 Monitoring, reporting, inspections, and compliance.**

(a) The Administrator may require monitoring or reporting and may authorize inspections pursuant to section 114 of the Act and the regulations thereunder. Sources shall also be subject to the requirements as set forth in §§ 55.13 and 55.14 of this part.

(b) The requirements for Enhanced Compliance and Monitoring (section 114(e)(3)) and the requirements for Certification of Compliance (40 CFR part 64) shall apply.

(c) An existing OCS source that is not required to obtain a permit to operate within 24 months of the date of promulgation of this part shall submit a compliance report to the Administrator or delegated agency within 25 months of promulgation of this part. The compliance report shall specify all the applicable OCS requirements and a description of how the source has complied with these requirements.

(d) The Administrator or the delegated agency shall consult with the Minerals Management Service and the U.S. Coast Guard prior to inspections. This shall in no way interfere with the ability of EPA or the delegated agency to conduct surprise inspections.

**§ 55.9 Enforcement.**

(a) OCS sources shall comply with all requirements of this part and all permits issued pursuant to this part. Failure to do so shall be considered a violation of section 111(e) of the Act.

(b) Pursuant to section 320 of the Act, the provisions of sections 113, 114, 120, and 303 of the Act shall apply to OCS sources.

(c) If a facility is ordered to cease operation of any piece of equipment due to enforcement action taken by EPA or a delegated agency pursuant to this part, the shut down will be coordinated by the enforcing agency, with the Minerals Management Service and the U.S. Coast Guard to assure that the shut down can proceed in a safe manner. No shut down action will occur until consultation with these agencies is completed, but in no case will initiation of the shut down be delayed by more than 24 hours.

**§ 55.10 Fees.**

(a) *OCS Sources Located Within 25 Miles from States' Seaward Boundaries.*

(1) Until promulgation of 40 CFR part 71 in the Federal Register as a final rule, EPA will collect operating fees from OCS sources calculated in accordance with the fee requirements imposed in the COA if the fees are based on regulatory objectives, such as discouraging emissions. If the fee requirements are

based on cost recovery objectives, however, EPA will adjust the fees to reflect the costs to EPA to issue and administer the permit program. Upon its promulgation in the Federal Register as a final rule, EPA will collect operating permit fees in accordance with the requirements 40 CFR part 71.

(2) EPA will collect all other fees from OCS sources calculated in accordance with the fee requirements imposed on the COA if the fees are based on regulatory objectives, such as discouraging emissions. If the fee requirements are based on cost recovery objectives, however, EPA will adjust the fees to reflect the costs to EPA to issue and administer the permit program.

(3) Upon delegation, the delegated agency will collect fees from OCS sources calculated in accordance with the fee requirements imposed in the COA. Upon delegation of authority to implement and enforce any portion of this part, EPA will cease to collect fees imposed in conjunction with that portion.

(b) *OCS Sources Located Beyond 25 Miles from States' Seaward Boundaries.* EPA will calculate and collect fees in accordance with the requirements of 40 CFR part 71 when promulgated as a final rule in the Federal Register.

**§ 55.11 Delegation.**

(a) The governor or the governor's designee of any state adjacent to an OCS source subject to the requirements of this part, may submit a request to the Administrator for authority to implement and enforce the requirements of this OCS program within 25 miles of the state seaward boundary, pursuant to section 320(c) of the Act. Authority to implement and enforce §§ 55.5, 55.11, and 55.12 of this part, will not be delegated.

(b) The Administrator will delegate implementation and enforcement authority to a state if the Administrator determines that the state's regulations are adequate including a demonstration by the state that:

- (1) It has an adjacent OCS source;
- (2) It has adopted the appropriate portions of this part into state law;
- (3) It has adequate authority under state law to implement and enforce the requirements of this part. A letter from the State Attorney General shall be required stating that the requesting agency has such authority; and
- (4) It has adequate resources to implement and enforce the requirements for this part.

(c) The Administrator will notify in writing the governor or the governor's designee of the Administrator's final

action on a request for delegation within 6 months of the receipt of the request.

(d) If the Administrator finds that the state regulations are adequate, the Administrator will authorize the state to implement and enforce the OCS requirements under state law. If the Administrator finds that only part of the state regulations are adequate, he will authorize the state to implement and enforce only that portion of this part.

(e) Upon delegation, a state may use any authority it possesses under state law to enforce any permit condition or any other requirement of this part for which the agency has delegated authority under this part. A state may use any authority it possesses under state law to require monitoring and reporting and to conduct inspections.

(f) Nothing in this part shall prohibit the Administrator from enforcing any requirement of this part.

(g) The Administrator will withdraw a delegation of any authority to implement and enforce any or all of this part if the Administrator determines that:

(1) The requirements of this part are not being adequately implemented or enforced by the delegated agency;

(2) The requirements of this part are being implemented or enforced in an inequitable, arbitrary, or capricious manner.

(h) *Sharing of information.* Any information obtained or used in the administration of a delegated program shall be made available to EPA upon request without restriction. If the information has been submitted to the delegated agency under a claim of confidentiality, the delegated agency must notify the source of this obligation and submit that claim to EPA. Any information obtained from a delegated agency accompanied by a claim of confidentiality will be treated in accordance with the requirements of 40 CFR part 2.

(i) *Grant of Exemptions.* A decision by a delegated agency to grant or deny an exemption request may be appealed to the Administrator in accordance with § 55.7(e)(ii) of this part.

**§ 55.12 Consistency updates.**

(a) The Administrator will update this part as necessary to maintain consistency with onshore requirements in order to attain and maintain federal and state ambient air quality standards and to comply with the provisions of part C of title 1.

(b) When an OCS source submits an NOI, the Administrator will evaluate the requirements of this part to determine whether they are consistent with the onshore requirements existing at that

time, in order to determine if a consistency update is necessary. If a consistency update is necessary, the Administrator will update this Part in an expeditious manner.

(c) No rule or regulation will be incorporated into this part if EPA determines that it is ineffectual, arbitrary, or capricious.

#### § 55.13 Listing of Federal requirements that apply to OCS sources.

(a) The requirements of this section shall apply to OCS sources as set forth below. In the event that a requirement of this section conflicts with an applicable requirement of § 55.14 of this part, and a source cannot comply with the requirements of both sections, the more stringent requirement shall apply.

(b) In applying the requirements of this section:

(1) *New Source* means new OCS source; and

(2) *Existing Source* means existing OCS source; and

(3) *Modification* means a modification to an OCS source.

(c) 40 CFR part 60 (NSPS) shall apply to all OCS sources in the same manner as in the NOA.

(d) 40 CFR 52.21 (PSD) shall apply to OCS source:

(1) Located within 25 miles of the states' seaward boundary if the requirements are in effect in the COA;

(2) Located beyond 25 miles of states' seaward boundaries.

(e) 40 CFR part 61, together with any other provisions promulgated pursuant to section 112 of the Act, shall apply if rationally related to the attainment and maintenance of federal or state ambient air quality standards.

(f) 40 CFR part 71 when promulgated, shall apply to OCS sources:

(1) Located within 25 miles of the states' seaward boundary if the requirements are in effect in the COA;

(2) Located beyond 25 miles of states' seaward boundaries.

(g) The provisions of 40 CFR 52.10, 40 CFR 52.24, and 40 CFR part 61 and accompanying appendix S shall apply to OCS sources located within 25 miles of states' seaward boundaries, if these requirements are in effect in the COA.

#### § 55.14 Listing of Federal, State, and Local Requirements that Apply to OCS Sources Located Within 25 Miles of States' Seaward Boundaries, by State.

(a) Definitions. (1) In applying the requirements of this section:

(i) *New Source* means new OCS source; and

(ii) *Existing Source* means existing OCS source; and

(iii) *Modification* means a modification to an existing OCS source.

(2) During periods of EPA implementation and enforcement of this section, the following shall apply:

(i) Any reference to a State or local air pollution control agency shall mean EPA.

(ii) Any submital to a State or local air pollution control agency shall be submitted to the Administrator through the EPA Regional Office.

(iii) Nothing in this section shall alter or limit EPA's authority to administer or enforce the requirements of this part under federal law.

(iv) EPA shall not be bound by any state or local administrative or procedural requirements including, but not limited to requirements pertaining to hearing boards, permit issuance, public notice procedures, and public hearings. EPA will follow the applicable procedures set forth elsewhere in this part, in 40 CFR part 124, and in Federal rules promulgated pursuant to Title V of the Act (as such rules apply in the COA), when administering this section.

(b) Alaska. (1) Federal Requirements.

(i) 40 CFR part 52, subpart C.

(ii) (reserved)

(2) State requirements.

(i) Alaska Administrative Code—

Department of Environmental Conservation. The following sections of title 16, chapter 60:

18 AAC 60.020 Ambient Air Quality Standards (Effective 7/21/01)

18 AAC 60.030 Open Burning (Effective 10/30/83)

18 AAC 60.040 Incinerators (Effective 10/30/83)

18 AAC 60.050 Industrial Processes and Fuel Burning Equipment (Effective 5/11/91)

18 AAC 60.060 Ice Fog Limitations (Effective 5/20/72)

18 AAC 60.100 Marine Vessels (Effective 7/21/01)

18 AAC 60.110 Air Pollution Prohibited (Effective 5/20/72)

18 AAC 60.300 Permit to Operate (Effective 7/21/01)

18 AAC 60.310 Revocation or Suspension of Permit (Effective 5/4/80)

18 AAC 60.400 Application Review and Issuance of Permit to Operate (Effective 7/21/01)

18 AAC 60.600 Source Testing (Effective 8/2/84)

18 AAC 60.610 Ambient Analysis Methods (Effective 7/21/01)

18 AAC 60.620 Emission and Ambient Monitoring (Effective 7/21/01)

18 AAC 60.630 Circumvention (Effective 8/7/87)

18 AAC 60.620 Air Quality Control Plans: Volume II, Section IV; Paragraph F.—

Facility Review Procedures; Paragraph G.—Application Review and Permit Development, only. (Effective 7/21/01)

18 AAC 60.600 Definitions (Effective 7/21/01)

(ii) (Reserved)

(3) Local requirements. (i) South Central Alaska Clean Air Authority.

15.30.030 Definitions

15.30.100 Registration and Notification, except E.

15.30.110 Permit to Operate

15.30.120 Source Reports

15.30.130 Source Tests

15.35.010 Stationary Source Emissions—General Definitions

15.35.050 Stationary Source Emissions—Visible Emission Standards

15.35.060 Stationary Source Emissions—Emission Standards

15.35.080 Stationary Source Emissions—Circumvention

15.35.090 Stationary Source Emissions—Fugitive Emissions

15.35.100 Stationary Source Emissions—Open Burning

(ii) (Reserved)

(c) California. (1) Federal Requirements.

(i) 40 CFR part 52, subpart I.

(ii) (Reserved)

(2) State requirements.

(reserved)

(3) Local requirements.

(i)-(iv) (reserved)

(v) San Luis Obispo County Air Pollution Control District.

Rule 103 Conflicts Between District, State and Federal Rules (Adopted 8/0/70)

Rule 104 Action in Areas of High Concentration (Adopted 7/5/77)

Rule 105 Definitions (Adopted 11/5/01)

Rule 100 Standard Conditions (Adopted 8/0/70)

Rule 108 Severability (Adopted 11/13/83)

Rule 113 Continuous Emissions Monitoring, except F. (Adopted 7/3/77)

Rule 201 Equipment not Requiring a Permit, except A.1.b. (Adopted 11/5/91)

Rule 202 Permits, except A.A. and A.B. (Adopted 11/5/91)

Rule 203 Applications, except 2. (Adopted 11/5/91)

Rule 204 Requirements, except B.2. and C. (Adopted 11/5/91)

Rule 209 Provision for Sampling and Testing Facilities (Adopted 11/5/91)

Rule 210 Periodic Inspection and Renewal of Permits to Operate (Adopted 11/5/91)

Rule 213 Calculations, except E.A. and F. (Adopted 11/5/91)

Rule 302 Schedule of Fees (Adopted 7/1/91)

Rule 305 Fees for Acid Deposition Research (Adopted 7/10/80)

Rule 401 Visible Emissions (Adopted 8/0/78)

Rule 403 Particulate Matter Emission Standards (Adopted 8/8/78)

Rule 401 Sulfur Compounds Emission Standards, Limitations and Prohibitions (Adopted 12/0/70)

Rule 405 Nitrogen Oxides Emission Standards, Limitations and Prohibitions (Adopted 11/13/84)

Rule 400 Carbon Monoxide Emission Standards, Limitations and Prohibitions (Adopted 11/14/84)

## **Attachment 3**

Report of the Senate Committee on Environment and Public  
Works on S. 1630, S. Rep. No. 228, 101<sup>st</sup> Cong, 1<sup>st</sup> Sess.  
(1989)

Report of the Senate Committee on Environment and Public Works on S. 1630  
S. REP. NO. 228, 101st Cong., 1st Sess. (1989)

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Mr. Durdick, from the Committee on Environment and Public Works, submitted the following

REPORT

together with

ADDITIONAL AND MINORITY VIEWS

(To accompany H. R. 980)

The Committee on Environment and Public Works, to which was referred the bill (S. 1630) to amend the Clean Air Act to provide for attainment and maintenance of health protective national ambient air quality standards, and for other purposes having considered the same, reports favorably thereon with an amendment and recommends that the bill as amended do pass.

GENERAL STATEMENT

The Clean Air Act is the first modern environmental law to be enacted. It was first signed into law by President Johnson in 1963, replacing previous Federal air pollution legislation. In 1965 hearings before the Special Subcommittee on Air and Water Pollution, the Assistant Secretary of the Department of Health, Education, and Welfare testified:

[S]erious air pollution problems arise from the ever-increasing use of motor vehicles, (and) our rising demands for the energy derived from burning of sulfur-bearing fuels . . . The national importance of resolving these problems is beyond dispute. They are among the most significant factors in the growing and worsening air pollution problems currently faced by thousands of American communities . . .

None of these problems is technologically insurmountable. Our current technical capacity for dealing with them admittedly varies from one problem to another, but even where our knowledge and skills are less refined than we would wish, there exist at least partial solutions which we would have a responsibility to evaluate as rapidly as possible and to apply where feasible. (Hearing of April 6, 1965, page 22.)

This statement is still true today. Although some areas of the country have improved their air quality since 1965, a majority of Americans are still breathing air that does not meet the Federal health-based air quality standards.

Our knowledge about the adverse effects of exposure to air pollution has increased since 1965. Researchers have demonstrated adverse effects at levels of exposure previously presumed to be safe. Illnesses of no traumatic origin are now linked to air pollution. In some areas, for example, residents who do not smoke may have lungs as damaged as the lungs of heavy smokers, due to exposure to air pollution.

Air pollution can silently damage our lungs and heart or act swiftly in the case of exposure to toxic air pollutants. Rigorous regulation of toxic air pollutants is needed to avoid risk of serious, irreversible damage to human health.

We are routinely exposed to thousands of different air pollutants emitted every day. Exposure to this mix of pollutants can produce more adverse health effects than exposure to each of the individual pollutants. These synergistic effects must be considered if we are to adequately protect public health. In addition, there are many pathways of exposure to hazardous pollutants and contaminants. Exposure to polluted outdoor and indoor air, contaminated water and soil can combine to produce greater risks than exposure through only one source.

In testimony before the Subcommittee on Environmental Protection, public health leaders acknowledged the continuing health threat posed by air pollution. The American Lung Association, the American Public Health Association and the American Academy of Pediatrics all testified that we are facing a public health crisis due to air pollution. Reductions in emissions of sulfur dioxide and oxides of nitrogen are warranted based on health considerations alone. This conclusion does not address the myriad of other pollutants of concern. With regard to a graph of ozone pollution in the Northeast States for 1987 and 1988, one researcher from the American Lung Association stated:

. . . Most States went up significantly between 1987 and 1988 and Massachusetts tripled its ozone violation days up

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air quality be implemented and enforced pending approval of a comprehensive plan that demonstrates attainment.

The bill includes measures to assure that progress toward attainment is made in the years before the attainment deadline. As has been noted above, one of the major problems with State implementation plans has been the lack of objective measures against which to determine progress prior to finding that an area will not be able to meet its attainment deadline. As in the provisions for ozone and carbon monoxide nonattainment areas, the bill requires that comprehensive implementation plans for PM-10 nonattainment areas include quantitative, three-year milestones against which air quality improvements can be measured. While emissions reductions are an obvious standard for a milestone, the bill permits the use of other measures so long as they can be quantified and clearly show, every three years, that air quality is improving so as to bring the area into attainment by the required deadline.

Another provision designed to check on an area's progress prior to the attainment deadline is the requirement that the Administrator conduct an audit of each area's implementation plan every three years. The timing of the audit, to the extent possible, should be the year after an updated inventory is submitted, which is also the year an area is scheduled to meet a milestone. The audit will determine whether the milestone has been met, the status of the area's inventory, and whether provisions in the plan, as submitted, are being implemented and enforced.

The bill requires that the comprehensive plan for each area include contingency measures that can be implemented promptly if an area fails to attain the standard by the deadline required. The contingency measures should be adopted as regulations by the

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State, so that the State does not have to go through a rulemaking process after the deadline has been missed, and should provide for a reduction in emissions of PM-10 or PM-10 precursors of not less than 10 percent from the most recent inventory prepared prior to submission of the comprehensive plan. Contingency measures are to be promptly implemented and not delayed by any one-year extension of the deadline that may be granted.

**Control measures and control technology.**—Controlling emissions of PM-10 often entails reducing "area" emissions, that is, emissions that do not come from smokestacks or other point sources. Area sources that contribute to concentrations of PM-10 include dust from paved and unpaved roads, storage piles, construction activities, wood burning, road salting and sanding, and surface mining. Measures to control these emissions differ from, and are often more difficult to implement than, controls applicable to point sources.

The bill requires the Administrator, within 18 months of enactment, to issue control technique guidelines applicable to PM-10 and PM-10 precursor emissions from major stationary sources and also to issue guidelines for control measures for emissions from area sources. The bill specifies that the Administrator, at a minimum, must publish guidelines for control of emissions from residential wood burning, prescribed burning for silviculture and agriculture, and urban fugitive dust. The bill further requires the Administrator to issue control technique guidelines for every class or category of sources, the difficulty of control of which States indicated in their comprehensive plan submissions would prevent attainment of the PM-10 standard within five years. The bill gives the Administrator four years from the date of enactment to provide this needed guidance to the States.

The bill requires the Administrator, within 12 months of enactment, to publish guidelines that establish that curtailment of residential wood burning is a reasonably available control measure. Each PM-10 nonattainment area for which residential wood burning contributes 20 percent or more of PM-10 levels must, within 24 months of enactment, submit a plan revision that implements the curtailment guidelines. States may exempt wood heaters that are certified under EPA's Wood Heater Certification Program from the curtailment.

Reducing emissions from residential wood burning is necessary for many areas to achieve the PM-10 standard. One way to reduce these emissions is to prohibit the use of woodstoves or other wood burning devices on days when PM-10 ambient concentrations are high. Another way is to replace older, uncontrolled wood burning devices with stoves that are certified and significantly reduce PM-10 emissions. The bill allows States to provide exemptions from wood burning prohibitions for stoves that have been certified as being low-polluting. There may be occasions when prohibiting the use of uncertified devices is not enough; a State that chooses to provide exemptions for certified stoves must also be able to prohibit even their use if PM-10 pollution is at a level approaching the health standard. Providing exemptions from "no-burn days" for cleaner devices could be an inducement for people to replace dirtier models with cleaner burning ones.

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Areas that seek an extension of the five-year deadline must impose the controls and measures contained in guidelines issued by

the Administrator, but they must also make case-by-case determinations of reasonably available control measures and technology that will be required for sources for which the Administrator has not issued guidelines. The Administrator may waive certain requirements applicable to areas that seek an extension in the case of an area where nonanthropogenic sources are the principal cause of exceeding the PM-10 standard, but the reasonably available control measures and technology that are applicable to anthropogenic sources may not be waived for such an area.

**PSD increments.**—The bill gives the Administrator authority to revise the basis for determining maximum allowable increases in the concentration of particulate matter in the prevention of significant deterioration (PSD) program. Currently, the Act specifies the allowable increases or "increments" in terms of total suspended particulates. When the Administrator revised the ambient air quality standard for particulate matter and adopted PM-10, rather than total suspended particulates, as the pollutant to be regulated, he had no authority to change the pollutant on which PSD increments are based. The authority given the Administrator is limited by the condition that any substituted maximum allowable increase, based on PM-10, must be at least as stringent in effect with respect to sources seeking PSD permits, as the total suspended particulate standard it replaces.

#### INTERSTATE POLLUTION (SECTION 110)

##### SUMMARY

The bill amends section 128 of the Act by adding a new subsection (d) which states that emission of an air pollutant which, by itself or in combination, reaction, or transformation, adversely affects public health or welfare in another State, is a violation of the section.

Section 128 is also amended by removing the reference to national ambient air quality standards in subsection (a) and by including groups of sources as actionable entities under subsection (b).

The bill amends section 302(h) of the Clean Air Act by inserting the phrases "precipitation," and "whether caused by transformation, conversion, or combination with other air pollutants."

##### DISCUSSION

The bill strikes "in excess of ambient standards" from section 128(a)(1)(B) of the Act. Under current law, interstate pollution must lead to a violation of the ambient standard to be actionable under section 128. It may not be possible to specify a source or group of sources that cause nonattainment. The amendment eliminates the need to establish a causal relationship between a polluter and violation of an ambient standard.

Current law allows section 128 to be used only for violations of section 110(a)(2)(E)(i), which relates to the preparation of SIP. Thus, a State being injured by another State's pollution can file a complaint about the offending State's SIP, but not the pollution itself.

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The amendment to section 128(b) adding "or this section", is essentially procedural in nature and would allow a State to complain about the pollution itself, not just a defect in the offending State's SIP.

Under current law the definition of "welfare" protected by the Act may not include the quality of the precipitation, itself. It also may not include damage that results from conversion of a pollutant from one chemical to another—which happens with both acid rain and smog. The amendment to section 302(h) explicitly includes precipitation as a protected value and clarifies that transported, converted, and combined pollutants are all covered.

The Act currently allows a State to file a petition with the Administrator complaining of interstate air pollution, but not to file a lawsuit for violation of section 128. The amendment to section 304 would allow a State, and citizens, to sue in Federal district court for violation of section 128.

#### OUTER CONTINENTAL SHELF ACTIVITIES (SECTION 111)

##### SUMMARY

The bill adds a new section 827 to the Act that requires the Administrator, within 12 months of enactment, to promulgate requirements applicable to air pollution from Outer Continental Shelf (OCS) sources. The requirements must be the same as would be applicable if the sources were located in the corresponding onshore area; they take effect with respect to new sources on the date of promulgation and for existing sources twelve months later; and they are enforced as if they were a standard promulgated under section 111. States may be delegated the authority to implement and enforce the requirements if they submit proposed procedures to the Administrator and the Administrator finds the procedures adequate. The bill defines the terms "corresponding onshore area" and "OCS source."

##### DISCUSSION

The construction and operation of OCS facilities emit a signifi-

cant amount of air pollution which adversely impacts coastal air quality in the United States. Operational emissions from an OCS platform and associated marine vessels can routinely exceed 500 tons of oxides of nitrogen (NO<sub>x</sub>) and one hundred tons of reactive hydrocarbons annually. Platform construction emissions can easily exceed 350 tons of NO<sub>x</sub> while drilling a single exploratory OCS well can cause emissions in excess of one hundred tons of NO<sub>x</sub>. A major uncontrolled offshore oil project can emit pollution in a year which exceeds pollutants emitted by one hundred thousand automobiles (meeting 1988 California emission standards), each traveling 10,000 miles. Yet under current Federal law, emissions from these major sources of air pollution are not required to be mitigated or controlled. Enormous discrepancies exist in the regulation of air pollution from virtually identical onshore and OCS sources. EPA requires stringent pollution controls onshore and within State waters to improve coastal air quality, while the Interior Depart-

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ment allows unmitigated OCS pollution under the provisions of the Outer Continental Shelf Lands Act.

Of primary concern is the fact that OCS air pollution is causing or contributing to the violation of Federal and State ambient air quality standards in coastal regions, with the potential that unmitigated OCS pollution will prevent certain coastal regions from attaining Federal clean air standards. OCS pollution in the Santa Barbara Channel and Santa Maria Basin for example, is expected to be equivalent to 87 percent of Santa Barbara County's onshore NO<sub>x</sub> inventory and 22 percent of its onshore reactive hydrocarbon inventory in the year 2000. In Santa Barbara and other coastal regions, unmitigated OCS emissions can entirely negate the effect of all offshore emission reductions relied upon to achieve Federal clean air standards. The adoption of more stringent regulations onshore to compensate for the effect of these unmitigated OCS emissions could only be done, if at all, with great cost to onshore industries and with substantial disruption to lifestyles of coastal residents. The magnitude of OCS pollution and the fact that the prevailing winds bring much of this pollution onshore has led the Environmental Protection Agency to express concern about the onshore air quality impacts from OCS development, along the coasts of both California and the Gulf States.

National energy production goals, both offshore and onshore, can only be achieved through the permitting and regulation of many low-polluting facilities. While keeping within allowable air quality levels, over ten times as much low-polluting oil production can be permitted, as compared to highly polluting oil production. Application of the same requirements to all offshore and onshore projects will preclude a few "dirty" projects from using up an air basin's remaining capacity to absorb pollutants and thereby impede future energy development.

This section of the bill is intended to ensure that air pollution from OCS activities does not degrade the air quality in coastal regions of the United States. This is to be achieved by applying the same air quality protection requirements as would apply if the OCS sources were located within the corresponding onshore area. These requirements are intended to include, but not be limited to, emission control requirements for new, modified, and existing facilities; offset requirements for new and modified facilities; and permitting, monitoring, reporting, enforcement, and fee requirements. The legislation will eliminate differences in air pollutant regulation which currently exist between OCS sources and sources located in the corresponding onshore area. OCS air pollution is to be regulated to protect both Federal and State established ambient air quality standards, consistent with the requirements for sources located onshore. It is the intent that OCS emissions be included in any State implementation plan for the corresponding onshore area required under this Act. Furthermore, all emissions from marine vessels (including engine emissions) which service or are associated with an OCS source, are subject to the same permitting, enforcement, monitoring, reporting, and offset requirements which would apply if these vessels were located in the corresponding onshore (State waters) area. This is intended to include emissions generated while vessels are traveling within the same air basin. These require-

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ments should apply to vessel emissions occurring while at the OCS source, or when enroute to or from the OCS source and to or from the corresponding onshore area.

This legislation provides EPA, the Federal agency experienced and knowledgeable in air quality regulation, up to twelve months to establish regulations to implement section 327. These regulations should address administrative procedures, including fees, necessary for EPA to implement section 327 in areas where delegation to a State or local agency has not occurred. For all substantive air quality requirements, EPA should not write a unique set of requirements for the OCS but should adopt by reference the same requirements for emission controls, offsets, permitting, monitoring, reporting, and enforcement, as would apply if the OCS source was located in the corresponding onshore area. The regulations should

also specify the procedures to be followed by the Administrator in determining under what circumstances the more stringent requirements of another onshore area should apply, rather than the requirements of the closest onshore area. Such procedures should consider those factors specified in subsection (b)(2), and should apply whether or not EPA has delegated authority to a State or local air regulatory agency.

This legislation transfers the responsibility for OCS air regulation from the Interior Department to the Environmental Protection Agency (EPA), in order to ensure consistent implementation of air quality laws and regulations for both onshore and offshore sources. It is also expected that EPA will delegate the authority to implement section 327 to the agency which has been delegated authority under the Act to regulate air pollution in the corresponding onshore area, whether that agency is a State or local air regulatory agency. EPA should delegate such authority expeditiously following receipt of a written petition requesting delegation from an onshore air regulatory agency. EPA should not withhold such delegation unless EPA finds that the onshore air regulatory agency's procedures are inadequate to meet the requirements of this Act.

This legislation is intended to supersede any inconsistent authorities, including, but not limited to, section 5(a)(8) of the Outer Continental Shelf Lands Act (OCSLTA) (43 U.S.C. 1334(a)(8)). It is intended that the requirements of section 5(a)(8) will remain in effect until the requirements of section 327 apply. This legislation eliminates the requirements under section 5(a)(8) which have been interpreted by the Department of the Interior to require air pollution regulation only when the agency has proven that an individual OCS facility will cause a significant adverse impact on onshore air quality.

## INDIAN TRIBES (SECTION 112)

## SUMMARY

The bill adds a new section 228 to the Act authorizing the Administrator to treat tribes as States under the Act. Within eighteen months of enactment the Administrator is to promulgate regulations specifying for which provisions of the Act it is appropriate to treat Indian tribes as States. Tribes may be treated as States only if the tribe is recognized by the Secretary of Interior and has a gov-

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erning body carrying out substantial government duties; the functions under the Act to be carried out by the tribe are within the tribal government's jurisdiction; and the tribe is, in the Administrator's judgment, capable of carrying out the functions it is authorized to exercise. Tribes shall not be treated as states for the purposes of being assured of receiving at least one half of one percent of grants awarded under section 105 of the Act. For provisions of the Act where treatment of tribes as States is not feasible, the Administrator is authorized to include other means for administering those provisions.

## DISCUSSION

The purpose of new section 228 of the Act is to improve the environmental quality of the air within Indian country in a manner consistent with the EPA Indian Policy and "the overall Federal position in support of Tribal self-government and the government-to-government relations between Federal and Tribal Governments," as stated in the document *EPA Policy for the Administration of Environmental Programs on Indian Reservations*, Nov. 8, 1984.

Congress amended the Act in 1977 to authorize Indian tribes to redesignate their reservations for prevention of significant deterioration purposes, but did not address air quality planning or enforcement authority for Indian tribes in those amendments. The amendments in the bill are necessary to ensure that tribes will be allowed to participate fully in programs established by the Act as they take affirmative measures to manage, regulate, and protect air quality.

These amendments are intended to provide Indian tribes the same opportunity to assume primary planning, implementation and enforcement responsibilities for programs under the Act as they are presently accorded under the Safe Drinking Water Act and Clean Water Act. Subsection 228(a) authorizes the Administrator to treat Indian tribes as States and to provide grant and contract assistance to tribes to carry out functions provided by the Act. Thus, new section 228(a) of the Act constitutes an express delegation of power to Indian tribes to administer and enforce the Clean Air Act in Indian lands, as Indian tribes were delegated the power to administer and enforce the Safe Drinking Water Act and Clean Water Act. See *Brendale v. Confederated Yakima Indian Nation*, U.S., 109 S.Ct. 2394, 3006-3007 (1989).

Subsection (b)(1) of section 228 requires the Administrator to promulgate final regulations within eighteen months of the enactment of the bill specifying the criteria that must be met for Indian tribes to be treated as States. Subsection (b)(1) establishes the following three criteria for treating Indian tribes as states:

...an exemption from the requirement that ... from the years 2000-2010. This would give ... grace period to operate and to adjust to the

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It is hoped that, by the year 2010, those units ... in the system and obtain any allowances that ... after that time. ... would not only address the serious problem of ... but it would also address two other matters of ... First, the net effect of the emissions offset ... stands is to drive some independent power ... utility generators, and low-emitting utility systems ... This is of particular concern in Virginia, since we ... coal that can be used to further the goal of re- ... oxide emissions. Decreasing the use of cleaner coal ... concern to all members of the Committee and the ... we are turning away from one of the few plen- ... energy we have right here in the United States. ... amendment would correct what I see as an anomalous ... requirement would create in Virginia and ... Old Dominion Electric Cooperative, which serves over ... in Virginia, Maryland and Delaware, has under ... proceeding to develop an 800 megawatt coal-fired ... station, that will supply much-needed power in

... plant will be built using Best Available Control ... in fact, of the total investment of \$688 million in the ... than \$178 million will be invested for pollution control ... that the plant will operate at an emission rate of .25 ... million BTUs. And yet, due to the uncertainties of the al- ... Old Dominion may not be able to obtain construc- ... for this clean project. In my view, the Congress ... encouraging the construction of such clean plants in Vir- ... other States, and I will seek to amend the acid rain por- ... the legislation on the floor to allow such construction to go

... concerns that my amendment was designed to address have ... expressed by 18 of my Senate colleagues in a November 11 ... letter to Senator Baucus. In that letter, those Senators stated ... hope that the Senate not adopt an acid rain bill that would ... primarily impede the economic growth of various States.

... pleased that 12 members of the Senate Energy and Natural ... Committee have also recognized the threat to reasonable ... presented by the offset provision. In a letter of November ... those Senators called upon Chairman Johnston to hold hearings ... the impact of the acid rain provisions, among others, on this ... energy policy.

... my colleagues pointed out, "these and other provisions under ... consideration have major economic and social implications for all ... Americans." I am confident that these hearings, which I now un- ... and Senator Johnston has agreed to hold promptly upon our ... in January, will contribute much to the debate in the ... Senate.

Air Toxics Provisions

Unfortunately, the Committee failed to consider an important provision contained in the air toxics section of S. 1490, clean air

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legislation proposed by President Bush, sponsored in the Senate by Senator Chafee, and cosponsored by myself and many other Senate colleagues. That provision would require the Environmental Protection Agency to undertake a three-year study of the emissions coming from fossil fired utility boilers. It is my impression, and apparently that of the President and his advisors at EPA, that in the combustion of any fossil fuel, extremely small amounts of six or eight toxic substances may be emitted from these boilers. I have been advised that they are merely trace amounts, but when aggregated they may at some times, but not at others, exceed the bill's aggregate tonnage prescription.

The utility industry has testified that the cost to control these minuscule emissions would be extremely expensive. In light of these facts, the full Senate should certainly adopt the President's three-year study proposal to determine the nature of utility boiler emissions and whether their control is warranted.

Ozone Nonattainment Provisions

I am seriously concerned about the requirement in the nonattainment title that all States from Maine to Virginia be part of an Ozone Transport Region. Although portions of Virginia are out of attainment with ozone standards, many rural areas are not, and do not contribute to problems in other States.

It is my view that those areas in Virginia that are in attainment and do not contribute to the problems of other States should not be subjected to the same requirements as serious nonattainment

area, I intend to consider changes in the legislation to ensure that these areas will not be unfairly penalized.

Other Provisions

There are many other provisions in this legislation that deserve another look. In particular, it is my view that the Committee did not give the sections on permits and enforcement sufficient consideration before approving them in full Committee mark-up. No hearings were held on these sections, and only the shortest amount of discussion occurred among members of the Committee. These provisions deserve more thorough consideration on the Senate floor.

In addition, I feel that the Committee did not give sufficient consideration to the costs of the legislation. I applaud the Minority Leader's November 16 letter to the Majority Leader requesting that, before debate on this bill begins, "detailed cost estimates of all titles of the bill be made (for) all Senators on a State-by-State basis." In the last Congress, over 30 Senators joined in requesting that a similar study be done on S. 1894 by CBO, CRS and OTA. It is imperative that this be done prior to our consideration of this bill on the floor in order that we can adequately assess for our constituents the cost which we are asking them to bear for cleaner air.

JOHN W. WARNER.

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that fuels with at least 3.1 percent oxygen content be sold in all areas classified as nonattainment for CO from October 1st to March 31st each year. In the absence of other avenues through which to encourage domestically produced ethanol to enter the fuel stream, this provision is necessary.

But its cost is significant, and its value to air quality limited. Since its effect would be to require the splash blending of ethanol, and because splash-blended ethanol is currently given a 60 cents per gallon exemption from fuel use taxes, the provision would result in significant loss of revenue to the Highway Trust Fund, the fund out of which we pay for the maintenance and upkeep of the Nation's infrastructure.

Furthermore, the value of splash-blended ethanol to attaining clean air goals is limited, especially since such fuels must necessarily be granted a variance allowing them to meet RVP standards

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one pound higher than other fuels. Many of the areas where splash-blended ethanol would be mandated will likely reach attainment merely through vehicle fleet turnover, thus eliminating the environmental value of the ethanol blend.

A much better method of utilizing ethanol in the nation's fuel supply is in the production of Ethyl Tertiary Butyl Ether (ETBE). ETBE is a clean burning ethanol- and isobutylene-derived compound, currently unavailable since it cannot compete with cheaper imported, methanol-derived MTBE and splash blends. However, should the U.S. Treasury follow through with their proposed rule to extend the "blenders tax credit" to ETBE<sup>47</sup>, the need for a 3.1 percent oxygenate mandate would be greatly lessened. The Committee bill's oxygenate requirement could then be lowered to 2.7 percent or some other level that assures continued clean air improvement and yet leaves highway funds intact.

#### 5. OUTER CONTINENTAL SHELF

The Department of the Interior is currently charged with regulating offshore air quality, including the air quality concerns associated with offshore oil and gas production. It carries out this charge through the office of the Mineral Management Service (MMS).

The MMS is charged with safety considerations as well as environmental review, which is an important duality of responsibility on offshore drilling rigs. Not every kind of control equipment used "onshore" can be safely used offshore. Because of its ongoing offshore inspections, the MMS maintains a regular presence that is of great value to enforcing and monitoring compliance with offshore air emission standards.

Nevertheless, there are some who have criticized the Department of the Interior for not having done an adequate job. The logical response of the Committee to such an accusation would be to redouble efforts to ensure that Interior does a better job. Unfortunately, the Committee bill does not take the "logical" course.

Rather, it merely places the regulation of offshore sources in the hands of the EPA. Forcing EPA's air quality office to assume authority over an area of the outer continental shelf poses some awkward problems, not least of all being the fact that States, who implement most EPA air quality measures, cannot be expected to regulate sources outside their own borders.

Offshore air emissions should be regulated by the agency that has the best authorities, funding, personnel and resources. Whether that agency is Interior or EPA depends on where the President chooses to place such resources. Because of this very fact, questions of executive reorganization have traditionally been a Presidential prerogative. There is no reason why the Committee should seek to usurp that prerogative now.

#### IV. ACID DEPOSITION

Title V of the Committee bill is directed at reducing sulfur dioxide (SO<sub>2</sub>) and oxides of nitrogen (NO<sub>x</sub>) emissions believed to be the

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precursors to acidic deposition. The title is projected to require a 10 million ton annual reduction of SO<sub>2</sub> emissions and an estimated 4 million ton annual reduction in NO<sub>x</sub> both from 1980 levels. Just as was the case with the bill reported from the Environment and Public Works Committee during the 100th Congress (S. 1894), the cost of these provisions are astronomical, their benefits at best are uncertain (and perhaps minimal), and the direct and indirect impacts of such controls on the Nation's economy and ability to compete internationally are great.<sup>48</sup> To adequately address the problems found in this title of the bill, it is necessary to focus on 1) the state of our scientific knowledge about the acid deposition phenomenon, 2) the nature of title V, including the emissions require-

ments for SO<sub>2</sub> and NO<sub>x</sub>, deadlines, innovative technologies, emission trading, and plants under construction and, 3) the economic cost of the title.

#### A. SCIENTIFIC RESEARCH AND ACID PRECIPITATION

As has been the case with acid rain proposals reported from the Committee in the past, there is a pressing need to point out that legislative action on this issue in advance of the completion of the National Acid Precipitation Assessment Program ("NAPAP") can be viewed as an admission that politics, not science, is the driving force behind this proposal.<sup>49</sup> An often expressed sentiment in hearings, by supporters of the proposal, was that Congress must of necessity rely upon "imperfect information" and that science "points in the direction" of controlling acid deposition.<sup>50</sup> NAPAP's final report is being prepared, however, even as the Committee acted.<sup>51</sup> If Congress now acts on the basis of the Committee's work—literally months before NAPAP hosts a major international conference on the state-of-science and the publication of the Final Integrated Assessment—the Nation could end up wasting the 10 years and one-half billion dollars that have gone into NAPAP.<sup>52</sup> What is perhaps worse is that preliminary research has produced no information that dictates immediate action to address an abrupt deterioration in our environment as the result of acid deposition.<sup>53</sup>

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#### 1. THE PARADOX OF NAPAP

Trial lawyers say that no experienced advocate should ask a question unless he already knows the answer a witness will give. In reviewing the history of the NAPAP effort, it is difficult not to reach the conclusion that it has become a paradox—those who in the beginning thought they knew the answers that NAPAP would produce now do not want to hear its unsettling findings; those who were once skeptical of NAPAP, and now want to hear more, are told that NAPAP's findings no longer matter—that the time for study is passed. The important policy question, however, is what do we know as the result of NAPAP research to date? Dr. James R. Mahoney, Director of NAPAP, provided testimony in October of this year to the Subcommittee on Environmental Protection.<sup>54</sup> From that testimony and that of other witnesses who appeared before the Subcommittee, we can draw a number of important facts and conclusions.

#### (a) Progress Made Under Current Clean Air Act

We know from NAPAP's estimates of annual emissions trends through 1987, with preliminary estimates for sulfur dioxides for 1988, that between 1978, the peak year of sulfur dioxide emissions in the United States, and 1988, sulfur dioxide emissions decreased by 28 percent from approximately 81 to 24 million short tons, despite a 45 percent increase in coal use. The decrease resulted from increased use of low sulfur coal and flue gas desulfurization ("scrubbers"), increased nuclear power production and decreased utilization of some higher emitting powerplants and industrial sources. We also know that emissions of nitrogen oxides peaked in 1978 at 23 million short tons and have since declined. Preliminary estimates of 1988 emissions are 20 million short tons, which is a decrease from 1978.<sup>55</sup>

Obviously, these reductions in emissions are no accident. They are the product of nearly 20 years of national effort and expense. The U.S. now spends over \$30 billion annually to control air pollution. In 1970, the Congress increased dramatically the role of the Federal Government in addressing the problem of air pollution. The Clean Air Act empowered it to establish primary and secondary National Ambient Air Quality Standards, which set the maximum allowable concentrations of various air pollutants for all regions of the country. Subsequent amendments to the Clean Air Act in 1977 set more stringent emission limits on existing sources of air pollution and placed stricter requirements on new sources of air pollution. In 1971, EPA set primary standards—designed to protect health—and secondary standards—designed to protect public welfare for each pollutant identified under section 108 of the Clean

<sup>47</sup> The National Acid Precipitation Assessment Program was created by Congress in 1980 (P.L. 96-284).

<sup>48</sup> See, Oral Testimony of Mr. William Roseberry, Assistant Administrator for Air and Radiation, U.S. Environmental Protection Agency, Hearing before the Subcommittee on Environmental Protection, "Hearing to Consider Results of the NAPAP Research Program into the Causes and Effects of Acid Precipitation," Thursday, October 5, 1989, as yet unpublished transcript, at p. 8.

<sup>49</sup> NAPAP will publish its assessment reports at various scheduled dates in the next eleven months, as described in the Plan and Schedule for NAPAP Assessment Reports, released in January 1989.

<sup>50</sup> The NAPAP International Conference on Acidic Deposition—February 11-16, 1990 will focus on critical review of NAPAP's 28 State-of-Science and State-of-Technology Reports which have been developed throughout 1989. Preliminary conference registration has already been received from more than 600 scientists and other representatives of government, non-governmental and private organizations from over 30 countries.

<sup>51</sup> See, e.g., Testimony of G.M. Hidy, Vice President, Environment Division, Electric Power Research Institute, before the Subcommittee on Environmental Protection Subcommittee, October 8, 1989.

<sup>52</sup> See, Testimony of James R. Mahoney, Director, National Acid Rain Precipitation Assessment Program, before the Subcommittee on Environmental Protection, October 5, 1989.

<sup>53</sup> For all of the foregoing, see, Mahoney testimony at pp. 3-6.

<sup>47</sup> As introduced on November 20, 1989 in a notice of proposed rulemaking (89-47-41).

<sup>48</sup> See, Clean Air Standards Attainment Act of 1987, Report of the Committee on Environment and Public Works, Report 100-53, 100th Cong., 1st Sess., Minority Views of Mr. Bryan and Mr. Warner, pp. 412-433.

## **Attachment 4**

EPA Region 10 Memorandum of July 2, 2009  
from David C. Bray to Rick Albright



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 10  
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July 2, 2009

Reply To: AWT-107

**MEMORANDUM**

**SUBJECT:** Implementing PSD Baseline Dates, Baseline Areas, and  
Baseline Concentrations on the Outer Continental Shelf in Alaska

**FROM:** David C. Bray  
Senior Policy Advisor

**TO:** Rick Albright, Director  
Office of Air, Waste, and Toxics

Janis Hastings, Associate Director  
Office of Air, Waste, and Toxics

**Introduction**

The purpose of this memorandum is to clarify how EPA Region 10 intends to implement the PSD increments on the OCS in Alaska the absence of formal area designations under section 107(d).

**Background**

Pursuant to Section 328 of the Clean Air Act (Act) EPA has promulgated regulations to control air pollution from Outer Continental Shelf (OCS) sources to attain and maintain Federal and State ambient air quality standards and to comply with the provisions of Part C of title I (prevention of significant deterioration of air quality or PSD). See 40 CFR Part 55.

In Part C of Title I of the Act, Congress sets forth a program for preventing significant deterioration of air quality in areas that have air quality better than the National Ambient Air Quality Standards (NAAQS). Specifically, Congress established an approach for defining "significant deterioration" that relies upon changes in air quality concentrations from a baseline. The "baseline concentration" is defined in section 169(4) of the Act and the acceptable changes in concentration, called "increments," are defined in sections 163 (for Congressionally-established increments) and 166 (for EPA-established increments) of the Act.

Under Section 169(4) of the Act, 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 concentrations 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." (emphasis added). EPA has promulgated regulatory definitions for the phrases "the time of the first application for a permit" (known as the "minor source baseline date") and "in an area subject to this part" (known as the "baseline area"). These definitions are found in 40 CFR 52.21(b) of EPA's regulations and incorporated into the OCS regulations at 40 CFR 55.13.

The requirements to which OCS sources are subject depend on the distance of the source from shore. From the State's seaward boundary (typically 3 miles from shore) and extending out 25 miles, the requirements for the Corresponding Onshore Area (COA), as well as federal requirements, apply to OCS sources; beyond 25 miles from the State's seaward boundary, only federal requirements apply. See 40 CFR 55.3(b) and (c). Because of these different regulatory requirements, the implementation of PSD increments is different in these two portions of the OCS.

#### Sources located less than 25 miles from the State's seaward boundary

In accordance with section 328 of the Act and EPA's implementing regulations at 40 CFR Part 55, an OCS source located less than 25 miles from the State's seaward boundary is subject to the same requirements as would be applicable if the source were located within the COA. Section 328(a) of the Act; 40 CFR 55.3(b). As a result, EPA incorporates by reference the air quality regulations, including the major source permitting programs, that are in effect in the COA and applies them to OCS sources inside this 25 miles limit. See 40 CFR 55.12. The OCS rules define the term "onshore area" in terms of the section 107(d) area designations. 40 CFR 55.2. Hence the COA is generally synonymous with a section 107(d) area and, if designated attainment or unclassifiable, with a PSD baseline area.

Since the COA PSD rules look to the designation of the COA for determining baseline dates, applying the COA PSD rule to an OCS source includes using the COA minor source baseline dates. Importantly, the minor source baseline dates for a section 107(d) area are not established in regulation, but rather they are determined through the implementation of the PSD regulations. See 40 CFR 52.21(b) (definition of "minor source baseline date"). Where the COA PSD rules apply on the OCS, the baseline date that has already been determined under the COA rule is the baseline date that applies for the permitting of the OCS source. This baseline date is then used to determine the baseline concentration in the area of the OCS source in accordance with the COA PSD rules.

When using the onshore minor source baseline date for OCS sources located less than 25 miles from the State's seaward boundary, there is no need to define separate baseline areas (and hence section 107 area designations) for the OCS source. In fact, establishing this portion of the OCS as a separate baseline area, or extending the onshore baseline area onto the OCS, would be contrary to the current Part 55 rules which require a case-by-case determination of the COA for the purpose of determining the applicable onshore rules. See 40 CFR 55.5. Since the COA may be different than the nearest onshore area (NOA), and can actually differ from permit to permit,

the applicable permitting rules, and hence the baseline date, could be different than that of the NOA. As such, a fixed baseline area for the OCS within 25 miles of the State's seaward boundary could potentially prevent the utilization of the COA minor source baseline date, contrary to the intent of Congress that such sources be subject to the same requirements as would be applicable if the sources were located within the COA.

**Sources located more than 25 miles beyond the State's seaward boundary**

For sources locating on the OCS more than 25 miles from the State's seaward boundary, the EPA PSD rules at 40 CFR 52.21 apply. The definition of "baseline area" in the federal PSD rules relies on the existence of intrastate areas designated as attainment or unclassifiable under section 107(d) of the Act. See 40 CFR 52.21(b). Until EPA either designates section 107(d) areas on the OCS and/or promulgates revisions to the definition of "baseline area" in 40 CFR Part 55, it is appropriate to implement the term "baseline area" in 40 CFR 52.21(b), for OCS areas more than 25 miles from the State's seaward boundary by using the boundaries of the coastal Air Quality Control Regions on shore as a guide. Accordingly, the following areas will be considered as separate "baseline areas" for purposes of 40 CFR 52.21:

Each area bounded on the shoreward side by a parallel line 25 miles from the State's seaward boundary; on the seaward side by the boundary of U.S. territorial waters; and on the other two sides by the seaward extensions of the onshore Air Quality Control Region boundaries.

This approach is consistent with the approach of the Clean Air Act and EPA's implementing regulations for defining baseline areas on shore. Section 107 of the Act sets forth the criteria and processes for defining Air Quality Control Regions (AQCR's) and attainment/nonattainment designations. AQCR's for all States have been promulgated by EPA in 40 CFR Part 81, Subpart B. States are required, under section 107(d) to submit to the Administrator recommendations for attainment/nonattainment designations for (air quality control) regions or portions thereof. The final attainment/nonattainment designations for each State have been promulgated by EPA in 40 CFR Part 81, Subpart C. Under this statutory scheme, the largest possible onshore PSD baseline area is an AQCR. See Section 107(d) of the Act and 40 CFR 52.21(b) (definition of "baseline area"). The approach set forth in this memo essentially mirrors the onshore AQCR's for purposes of establishing separate offshore baseline areas in order to implement the PSD increments on the OCS for the areas more than 25 miles from the State's seaward boundary.

Once the "baseline area" is determined according to the above approach, the "minor source baseline date" and the "baseline concentration" are determined in accordance with the rules at 40 CFR 52.21.

cc: Herman Wong, OBA  
Pat Nair, OAWT,  
Doug Hardesty, OAWT  
Natasha Greaves, OAWT

## **Attachment 5**

In re Cardinal FG Company, PSD Appeal No. 04-04

**IN RE CARDINAL FG COMPANY**

PSD Appeal No. 04-04

***ORDER DENYING REVIEW***

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Decided March 22, 2005

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**Syllabus**

Olympia and Vicinity Building and Construction Trades Council ("OBCT") filed a petition ("Petition") seeking review of certain conditions of a Clean Air Act prevention of significant deterioration ("PSD") permit decision, No. PSD-03-03 (the "Permit"), issued by the State of Washington Department of Ecology ("WDOE"). The Permit would authorize Cardinal FG Company ("Cardinal") to construct a 650 ton per day flat glass production plant near Chehalis, Washington. Cardinal proposes to use a process known as the float process to produce flat glass.

In making its permitting decision, WDOE concluded that the best available control technology, or "BACT," for controlling nitrogen dioxide ("NO<sub>x</sub>") and carbon monoxide ("CO") emissions from the facility's gas furnace is the "3R Process." WDOE rejected "oxy-fuel technology" as BACT, concluding that it is technically infeasible. Based on the 3R Process as BACT, the Permit set the NO<sub>x</sub> emissions limit at 7 pounds NO<sub>x</sub> per ton glass draw (lb NO<sub>x</sub>/T<sub>G</sub>, 24-hour average basis), and the CO emissions limit at 6.5 pounds CO per ton glass draw (lb CO/T<sub>G</sub>). WDOE also concluded that a "trackmobile" that will be used to move train cars around the grounds of the facility is not subject to review and permitting under the PSD program.

OBCT's Petition objects to the Permit's limits for NO<sub>x</sub> and CO from the natural gas-fired furnace, arguing that WDOE improperly concluded that the 3R Process is BACT for this type of facility. Instead, OBCT argues that WDOE should have concluded that oxy-fuel technology is BACT. OBCT argues that oxy-fuel technology is technically feasible because it has been demonstrated by years of operating experience and also that this technology, which has been used on other types of glass production plants, can be transferred to the float process Cardinal will use. OBCT also contends that WDOE should have conducted a cost effectiveness analysis of oxy-fuel. In addition, OBCT argues that, even with the 3R Process selected as BACT, WDOE should have set lower emissions limits for NO<sub>x</sub> and CO. With respect to the trackmobile, OBCT argues that WDOE should have conducted a review of the emissions from the trackmobile and required application of BACT. OBCT argues that since the trackmobile is permanently situated at a given location (the track circle) on the Cardinal grounds, it does not qualify as a mobile nonroad engine and is subject to BACT analysis.

Held: Review is denied. OBCT has failed to demonstrate in its Petition that WDOE's permitting decision is clearly erroneous or otherwise warrants review.

(1) OBCT has not shown clear error in WDOE's determination to eliminate oxy-fuel due to concerns regarding its technical feasibility. WDOE explained in its response to comments that the problem of furnace refractory deterioration from oxy-fuel precludes WDOE from finding that oxy-fuel has been operated successfully in a facility producing high-quality flat glass through the float process. WDOE also explained in its response to comments that the problem of refractory deterioration precludes considering oxy-fuel as a technology transfer. This analysis is consistent with an Agency guidance document, which states that "a showing of unresolved technical difficulty with applying the control would constitute a showing of technical infeasibility" and that technology transfer is not appropriate where "significant differences between source types exist that are pertinent to the successful operation of the control device." WDOE's analysis set forth in its response to comments shows careful consideration of both OBCT's comments and the information in the record, and OBCT has failed to demonstrate in its Petition why the information upon which it seeks to rely clearly outweighs the information relied upon by WDOE.

(2) The Board holds that WDOE's determination regarding the issue of technical feasibility was sufficient to eliminate oxy-fuel as BACT without conducting a full cost effectiveness analysis. Because OBCT has not shown any clear error in WDOE's determination that oxy-fuel is not BACT due to questions regarding the technical feasibility of oxy-fuel for WDOE's facility, WDOE was not required to perform a cost effectiveness analysis of oxy-fuel and WDOE did not need to provide such an analysis in response to OBCT's comments on this issue.

(3) The Board concludes that OBCT has not shown clear error in WDOE's decision to set the emissions limits for application of the 3R Process at 7 lb NO<sub>x</sub>/T<sub>0</sub> and 6.5 lb CO/T<sub>0</sub>, rather than the lower limits suggested by OBCT. WDOE explained in its response to comments that no flat glass plant in the U.S. using 3R Process has a lower permit limit than that specified in Cardinal's draft permit. WDOE also explained that there may be a relationship between early furnace failure due to refractory damage from operating the furnace using the 3R Process to obtain NO<sub>x</sub> reductions below 7 lb NO<sub>x</sub>/T<sub>0</sub>. In other decisions, the Board has recognized that PSD permit limits are not necessarily a direct translation of the lowest emissions rate that has been achieved by a particular technology at another facility, but that those limits must also reflect consideration of any practical difficulties associated with using the control technology. OBCT's arguments in the present case pointing out that lower NO<sub>x</sub> and CO emissions rates have been achieved at other facilities, therefore, cannot show clear error in WDOE's permitting decision without addressing the practical considerations WDOE identified in its analysis. OBCT has not demonstrated in its Petition any error, much less clear error, in WDOE's rationale for its permitting decision based on the potential for early furnace failure if operated at lower permit limits.

(4) The Board concludes that WDOE correctly determined that the trackmobile is not subject to PSD review because the trackmobile does not fall within the statutory definition of "stationary source" under CAA § 302(z), 42 U.S.C. § 7602(z). The trackmobile does not fall within the statutory definition of "stationary source" because that definition expressly states that emissions directly from a "nonroad vehicle" are not from a stationary source, and WDOE correctly concluded that the trackmobile is a "nonroad vehicle" under CAA § 216(1), 42 U.S.C. § 7550(1). A nonroad vehicle is a vehicle powered by a "nonroad engine." The Board rejects OBCT's contention that an exception to the regulatory definition of "nonroad engine" set forth in paragraph (2)(iii) of the nonroad engine definition in 40 C.F.R. § 89.2, which applies to "portable or transportable" engines that remain in one location for more than a year, requires that the trackmobile be treated as outside the scope of the definition of nonroad engine. OBCT's own description of the trackmobile recognizes that it "will move train cars around the grounds of the Cardinal facility." The

very notion of "moving" around the grounds of the facility is patently inconsistent with the regulation's description of "location" as a "single site" at a building, structure, facility, or installation." 40 C.F.R. § 89.2 ("nonroad engine" paragraph (2)(iii)) (emphasis added). Simply stated, OBCT's efforts in this case to construe something that moves around the grounds of the facility as being a "single site" at the facility requires an excessively unnatural and distorted reading of the regulation's plain language.

Moreover, the trackmobile's most important feature — and, indeed, its sole function — is its ability to propel itself and the train cars around the grounds of the Cardinal facility. As previously noted, the exception set forth in section 89.2 ("nonroad engine" paragraph (2)(iii)) can apply only to "portable or transportable" engines. Applying this exception to the trackmobile would eviscerate the regulation's distinction between "self-propelled" engines described in section 89.2 ("nonroad engine" paragraph (1)(i)) and "portable or transportable" engines described in section 89.2 ("nonroad engine" paragraph (1)(iii)). The trackmobile is a self-propelled engine and therefore is a "nonroad engine," which means that it is excluded from the statutory definition of stationary source and is not subject to BACT review.

*Before Environmental Appeals Judges Edward E. Reich and Kathie A. Steh.*

*Opinion of the Board by Judge Steh:*

Before the Board is a petition seeking review of certain conditions of a prevention of significant deterioration ("PSD") permit decision, No. PSD-03-03 (the "Permit"), issued by the State of Washington Department of Ecology ("WDOE").<sup>1</sup> See Final Approval of PSD Application (Oct. 6, 2004) (hereinafter the "Permit"). The Permit would authorize Cardinal FG Company ("Cardinal") to construct a flat glass production plant. Olympia and Vicinity Building and Construction Trades Council ("OBCT") filed the petition for review ("Petition").

For the reasons explained below, we deny review.

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<sup>1</sup> WDOE administers the PSD program in the State of Washington pursuant to a delegation of authority from U.S. Environmental Protection Agency, Region 10 (the "Region"). Because WDOE acts as EPA's delegate in implementing the federal PSD program within the State of Washington, the Permit is considered an EPA-issued permit for purposes of federal law, and is subject to review by the Board pursuant to 40 C.F.R. § 124.19. See *Sierra Pac. Indus.*, 11 E.A.D. 1, 2 n.1 (BAB 2003); *In re Hillman Power Co.*, 10 E.A.D. 673, 675 (BAB 2002); *In re Kawaihae Cogeneration Project*, 7 E.A.D. 107, 109 n.1 (BAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 765 n.1 (BAB 1997); *In re W. Suburban Recycling & Energy Ctr., L.P.*, 6 E.A.D. 692, 695 n.4 (BAB 1996).

## I. BACKGROUND

### A. Statutory and Regulatory Background

Congress enacted the Clean Air Act ("CAA") to "enhance the quality of the Nation's air resources to promote the public health and welfare and productive capacity of its populace." CAA § 101(b)(1), 42 U.S.C. § 7401(b)(1). Among other things, the CAA directs EPA to create a list of those pollutants that pose a danger to public health and welfare and result from numerous or diverse mobile or stationary sources, CAA § 108(a)(1), 42 U.S.C. § 7408(a)(1). The CAA also directs EPA to issue air quality criteria for each pollutant on the list,<sup>2</sup> and to promulgate regulations establishing national ambient air quality standards ("NAAQS") for all criteria pollutants. See CAA §§ 108(a)(1), 109(a)(2), 42 U.S.C. §§ 7408(a)(1), 7409(a)(2). The NAAQS are "maximum concentration 'ceilings'" for particular pollutants, "measured in terms of the total concentration of a pollutant in the atmosphere," U.S. EPA Office of Air Quality Planning & Standards, *Draft New Source Review Workshop Manual* at C.3 (Oct. 1990) ("NSR Manual").<sup>3</sup> The Agency has set NAAQS for six criteria pollutants: sulfur oxides,<sup>4</sup> particulate matter,<sup>5</sup> nitrogen dioxide ("NO<sub>2</sub>"),<sup>6</sup> carbon monoxide ("CO"), ozone ("O<sub>3</sub>"),<sup>7</sup> and lead. See *In re Kendall New Century Dev.*, 11 E.A.D. 40, 43 (EAB 2003).

Congress established the PSD permitting program to regulate air pollution in areas, known as "attainment" areas, where air quality meets or is cleaner than the NAAQS, as well as areas that cannot be classified as "attainment" or "non-attainment" ("unclassifiable" areas). *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 59 (EAB 1997); *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 766-67

<sup>2</sup> Pollutants for which EPA has established air quality criteria are commonly referred to as "criteria pollutants." 42 U.S.C. § 7408(a)(2).

<sup>3</sup> The Agency has used the NSR Manual as a guidance document in conjunction with new source review workshops and training, and as a guide for permitting officials with respect to PSD requirements and policy. Although it is not accorded the same weight as a binding Agency regulation, the Board has looked to the NSR Manual as a statement of the Agency's thinking on certain PSD issues. See, e.g., *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 72 n.7 (EAB 1998); *In re EcoEléctrica, L.P.*, 7 E.A.D. 56, 59 n.3 (EAB 1997); *In re Masonite Corp.*, 5 E.A.D. 551, 558 n.8 (EAB 1994).

<sup>4</sup> Sulfur oxides are measured in the air as sulfur dioxide ("SO<sub>2</sub>"). 40 C.F.R. § 50.4(c) (2004).

<sup>5</sup> For purposes of determining attainment of the NAAQS, particulate matter is measured in the ambient air as particulate matter with an aerodynamic diameter less than or equal to a nominal 10 micrometers, referred to as PM<sub>10</sub>. 40 C.F.R. § 50.6(e) (2004).

<sup>6</sup> A facility's compliance with respect to nitrogen dioxide is measured in terms of emissions of any nitrogen oxides ("NO<sub>x</sub>"). 40 C.F.R. § 52.21(b)(23) (2004); *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 69 n.4 (EAB 1998).

<sup>7</sup> A facility's compliance with respect to ozone is measured in terms of emissions of volatile organic compounds ("VOCs"). 40 C.F.R. § 52.21(b)(23)(2004).

(EAB 1997). Among other things, the PSD provisions of the Act require any person planning the construction or modification of any major emitting facility in an attainment area, or in an unclassifiable area, to apply for and receive a PSD permit before beginning construction.<sup>8</sup>

The PSD permitting requirements are pollutant-specific, which means that a facility may emit many air pollutants, but only one or a few may be subject to PSD review. Whether a facility must undergo PSD review depends on a number of factors including the amount of emissions of each pollutant by the facility. NSR Manual at 4. In order to prevent violations of the NAAQS and, generally, to prevent significant deterioration of air quality, the PSD regulations require that new major stationary sources be carefully reviewed prior to construction to ensure that emissions from such facilities will not cause or contribute to an exceedance of either the NAAQS or the applicable PSD ambient air quality "increments." 40 C.F.R. § 52.21(k). A PSD "increment" refers to "the maximum allowable increase in concentration that is allowed to occur above a baseline concentration for a pollutant." NSR Manual at C.3; *see also* 40 C.F.R. § 52.21(c) (establishing increments for regulated pollutants). A central means for preconstruction determination of whether the NAAQS or PSD increment will be exceeded is performing an ambient air quality and source impact analysis, pursuant to the regulatory requirements of 40 C.F.R. § 52.21(k), (l) and (m), as part of the PSD permit review process. *In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 73 (EAB 1998).

Another key component of the PSD regulations is the requirement that new major stationary sources, or major modifications of existing major sources, employ the "best available control technology," or BACT, to control emissions of any PSD-regulated pollutants that the new or modified facility will emit in significant amounts.<sup>9</sup> 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j). As discussed below, one of the principal contentions OBCT sets forth in its Petition is that WDOE's BACT determination for NO<sub>x</sub> and CO emissions from the natural gas-fired furnace at Cardinal's proposed facility is clearly erroneous.

#### B. *Factual and Procedural Background*

The Permit at issue in this case would authorize Cardinal to build a 650 ton-per-day flat-glass production plant located approximately five miles south of Chehalis, Washington. Permit at 1. The proposed facility is located within a Class

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<sup>8</sup> A "major emitting facility" is any of certain listed stationary sources that emit or have the potential to emit 100 tons per year ("tpy") or more of any PSD pollutant, or any other stationary source with the potential to emit at least 250 tpy of any PSD pollutant. CAA § 169(1), 42 U.S.C. § 7479(1).

<sup>9</sup> BPA's PSD regulations identify applicable levels of significance for particular pollutants. 40 C.F.R. § 52.21(b)(23).

II area that is in attainment or unclassified for all pollutants regulated by the NAAQS. *Id.*

The proposed facility will use "float" technology. See Technical Supplement Document for Prevention of Significant Deterioration Permit No. PSD-03-03, Cardinal FG Company, Winlock, Washington (hereinafter "TSD"). In the flat-glass manufacturing process, the molten glass is poured onto the surface of a liquid zinc or tin bath in a natural gas-fired furnace and a floating flat-glass ribbon extends the length of the bath to the exit. *Id.* at 3. The formation of the continuous sheet of glass takes place within the furnace. *Id.* A hydrogen and nitrogen atmosphere is maintained inside the bath to prevent tin oxidation. *Id.* The glass ribbon exits the tin bath and enters a roller hearth oven, or lehr, designed to slowly cool the glass ribbon after it exits the float bath. *Id.* Cooling rates are controlled across both the width and length of the lehr. The glass ribbon is transported through the lehr on driven rolls. *Id.* Sulfur dioxide is injected on to the rollers and the top and bottom surfaces of the glass to prevent staining. *Id.* After exiting the lehr, the solidified glass sheet is inspected, cut and trimmed, and packaged. *Id.* Cardinal's proposed facility also includes a "trackmobile" that will be used to move train cars around the grounds of the facility.

Cardinal's proposed facility will produce air emissions from the melting furnace, waste glass return system, raw materials receiving, transport, and mixing operations, the annealing lehr, emergency generator, and glass cutting operations. TSD at 3. The facility will be a new major source, as defined by 40 C.F.R. § 52.21, because it will emit more than 250 tons per year of carbon monoxide (1,187 tpy) and nitrogen oxides (883 tpy). Permit at 2. The facility will emit the following pollutants in amounts greater than the applicable PSD significance levels: NO<sub>x</sub>, CO, SO<sub>2</sub>, VOCs, and PM<sub>10</sub>. *Id.*

Cardinal submitted its application for a PSD permit on October 27, 2003. Permit at 1. On January 12, 2004, Cardinal submitted supplementary material. *Id.* WDOE provided notice to the public of the proposed draft permit on or about July 23, 2004, and WDOE held a public hearing on September 2, 2004. Petition at 2. OBCT submitted comments during the public comment period and participated in the public hearing. *Id.* WDOE issued its permitting decision, along with responses to comments, on October 6, 2004. *Id.*; Admin. Rec. Doc. # 21 (Concise Explanatory Statement From the Washington Department of Ecology Air Program Responding to Written and Verbal Public Comments on the Proposed PSD Permit No. 03-03 for Cardinal-Winlock) (hereinafter "Response to Comments"). In making its permitting decision in this matter, WDOE concluded that the trackmobile to be used at the facility is not subject to review and permitting under the PSD program. See Response to Comments at 10-11.

The Permit's conditions contain limits for the facility's emissions of NO<sub>x</sub> and CO from the glass furnace; emissions of SO<sub>2</sub> from the glass furnace and the

annealing lehr; emissions of PM/PM<sub>10</sub> from the glass furnace and the material handling operations; and emissions of VOCs from the glass furnace and glass cutting operations. Permit at 3. The Permit's conditions for control of NO<sub>x</sub> and CO emissions from the furnace are central to the first issue OBCT raises in this proceeding. Among other things, the Permit provides that NO<sub>x</sub> emissions "shall not exceed 7 pounds NO<sub>x</sub> per ton glass draw (lb NO<sub>x</sub>/T<sub>0</sub>, 24-hour average basis), exclusive of operation during furnace burnout-maintenance." Permit at 6. The Permit also provides, among other things, that CO emissions "shall not exceed 6.5 pounds CO per ton glass draw (lb CO/T<sub>0</sub>) in any consecutive twelve month period." Permit at 9.

### C. Issues Raised In the Petition

OBCT's Petition raises issues concerning the Permit's emissions limits for NO<sub>x</sub> and CO from the glass furnace and issues concerning WDOE's conclusion that the trackmobile is not subject to review and permitting under the PSD program. Specifically, OBCT objects to the Permit's limits for NO<sub>x</sub> and CO from the natural gas-fired furnace, arguing that WDOE improperly concluded that the "3R Process" is BACT for this type of facility. Instead, OBCT argues that WDOE should have concluded that "oxy-fuel technology" is BACT. The 3R Process, or chemical reduction by fuel, is generally based on creating an oxygen-starved condition in critical stages of the combustion process by feeding excess fuel into the furnace. TSD at 13. Oxy-fuel technology, or melting, "involves the replacement of the combustion air with 90% pure oxygen." TSD at 9.

With respect to the trackmobile, OBCT argues that WDOE should have conducted a review of the emissions from the trackmobile and required application of BACT. OBCT argues that "since the trackmobile is permanently situated at a given location (the track circle) on the Cardinal grounds, it does not qualify as a mobile nonroad engine and is subject to BACT analysis." Petition ¶ 26. OBCT also argues that emissions from the trackmobile "could be substantial, depending on the hours of operation and engine size." *Id.* ¶ 30.

Both Cardinal<sup>10</sup> and WDOE have filed responses to OBCT's Petition. See State of Washington Department of Ecology Response Opposing Petition for Review (Jan. 7, 2005); Cardinal FG Company's Response to Merits of Petition (Jan. 6, 2005).

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<sup>10</sup> Cardinal filed a motion requesting that it be allowed an opportunity to respond to OBCT's Petition. Recognizing that the permit applicant has a unique interest in the outcome of a petition seeking review of the permitting authority's decision to issue a permit to the applicant, the Board granted Cardinal's request by order dated December 9, 2004.

## II. DISCUSSION

### A. Standard of Review

The Board's review of PSD permitting decisions is governed by 40 C.F.R. part 124, which "provides the yardstick against which the Board must measure" petitions for review of PSD and other permit decisions. *In re Commonwealth Chesapeake Corp.*, 6 E.A.D. 764, 769 (BAB 1997)(quoting *In re Envotech, L.P.*, 6 E.A.D. 260, 265 (BAB 1996)). Pursuant to those regulations, a decision to issue a PSD permit will ordinarily not be reviewed unless the decision is based on either a clearly erroneous finding of fact or conclusion of law, or involves an important matter of policy or exercise of discretion that warrants review. 40 C.F.R. § 124.19(n); accord, e.g., *In re Zion Energy, LLC*, 9 E.A.D. 701, 705 (BAB 2001); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 126-27 (EAB 1999); *Commonwealth Chesapeake*, 6 E.A.D. at 769. The preamble to section 124.19 states that the Board's power of review "should be only sparingly exercised," and that "most permit conditions should be finally determined at the [permitting authority] level." 45 Fed. Reg. 33,290, 33,412 (May 19, 1980); accord *Knauf*, 8 E.A.D. at 127; *In re Kawalhae Cogeneration Project*, 7 E.A.D. 107, 114 (BAB 1997).

We have explained that in order to establish that review of a permit is warranted, section 124.19(n) requires that a petitioner both state the objections to the permit that are being raised for review and explain why the permit decision maker's previous response to those objections (i.e., the decision maker's basis for the decision) is clearly erroneous or otherwise warrants review. See, e.g., *In re Steel Dynamics, Inc.*, 9 E.A.D. 740, 744 (BAB 2001); *In re Tondu Energy Co.*, 9 E.A.D. 710, 714 (BAB 2001); *In re Encogen Cogeneration Fac.*, 8 E.A.D. 244, 252 (BAB 1999); *Kawalhae*, 7 E.A.D. at 114; *In re P. R. Elec. Power Auth.*, 6 E.A.D. 253, 255 (BAB 1995); *In re Genesee Power Station L.P.*, 4 E.A.D. 832, 866-67 (BAB 1993). It is not enough simply to repeat objections made during the comment period. See, e.g., *Zion Energy*, 9 E.A.D. at 705; *Knauf*, 8 E.A.D. at 127.

In the present case, we conclude as explained below that OBCT has failed to sustain its burden of showing that WDOE's basis for its decision was clearly erroneous or involves an important matter of policy or exercise of discretion that warrants review.

### B. NO<sub>x</sub> and CO Emissions from the Natural Gas-Fired Furnace

OBCT objects to the Permit's limits for NO<sub>x</sub> and CO emissions from the natural gas-fired furnace. Specifically, OBCT argues that WDOE improperly concluded that the 3R Process is BACT and that WDOE should have concluded that oxy-fuel technology is BACT for this type of facility. OBCT submits two argu-

ments in support of its position. First, OBCT argues that WDOE improperly rejected oxy-fuel technology as technically infeasible and that, instead, oxy-fuel has "years of actual operating experience and is technically feasible and capable of limiting NO<sub>x</sub> emissions to as low as 3 lbs/ton of glass and CO emissions below 1 lb/ton of glass," Petition ¶¶ 16, 20-21. Second, OBCT argues that WDOE improperly failed to conduct a cost-effectiveness analysis of oxy-fuel for limiting NO<sub>x</sub> and CO emissions, Petition ¶¶ 11.C, 22-24. OBCT also argues that, even with 3R Process selected as BACT, WDOE should have set emissions limits for NO<sub>x</sub> at 5.5 lbs/ton of glass produced and CO at less than 6.5 lbs/ton of glass produced. Petition ¶¶ 11.B, 18-19.

As discussed below, we deny OBCT's request that we review the Permit's conditions specifying emissions limits based on the 3R Process as BACT for the control of NO<sub>x</sub> and CO from the natural gas-fired furnace because OBCT has not shown clear error in WDOE's determination to eliminate oxy-fuel due to concerns regarding its technical feasibility. We also hold that WDOE's determination regarding the issue of technical feasibility was sufficient to eliminate oxy-fuel as BACT without conducting a full cost-effectiveness analysis. We also conclude that OBCT has not shown clear error in WDOE's decision to set the emissions limits for application of the 3R Process at 7 lb NO<sub>x</sub>/T<sub>0</sub> and 6.5 lb CO/T<sub>0</sub>, rather than 5.5 lb NO<sub>x</sub>/T<sub>0</sub> and lower than 6.5 lb CO/T<sub>0</sub> as suggested by OBCT.

#### 1. *Background: Top-down BACT Analysis*

As noted above, the PSD regulations require that new major stationary sources and major modifications of such sources employ the "best available control technology," or BACT, to minimize emissions of regulated pollutants. 42 U.S.C. § 7475(a)(4); 40 C.F.R. § 52.21(j)(2). BACT is a site-specific determination resulting in the selection of an emission limitation that represents application of control technology appropriate for the particular facility. *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 47 (EAB 2001); *In re Knauf Fiber Glass, GmbH*, 8 E.A.D. 121, 128-29 (EAB 1999); see also *In re CertainTeed Corp.*, 1 E.A.D. 743, 747 (Adm'r 1982) ("It is readily apparent \* \* \* that \* \* \* BACT determinations are tailor-made for each pollutant emitting facility."). BACT is defined by the regulations in relevant part as follows:

*Best Available Control Technology* means an emissions limitation \* \* \* based on the maximum degree of reduction for each pollutant \* \* \* which would be emitted from any proposed major stationary source or major modification which the Administrator, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such source or modification through application of production processes or available methods, systems and

techniques, including fuel cleaning or treatment or innovative fuel combustion techniques for control of such pollutant.

40 C.F.R. § 52.21(b)(12) (2004).

In the present case, WDOE followed the NSR Manual's guidance for determining BACT using an approach known as the "top-down" method. TSD at 4-7. The NSR Manual is not a binding Agency regulation and, as such, strict application of the methodology described in the NSR Manual is not mandatory. *See, e.g., Three Mountain Power*, 10 E.A.D. at 42, 54. However, a careful and detailed analysis of the criteria identified in the regulatory definition of BACT is required, and the methodology described in the NSR Manual provides a framework that assures adequate consideration of the regulatory criteria and consistency within the PSD permitting program. *See, e.g., id.* at 54; *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 183 (EAB 2000) ("This top-down analysis is not a mandatory methodology, but it is frequently used by permitting authorities to ensure that a defensible BACT determination, involving consideration of all requisite statutory and regulatory criteria, is reached."); *Knauf*, 8 E.A.D. at 129 n.14, 134 n.25.

The NSR Manual summarizes the top-down method for determining BACT as follows:

The top-down process provides that all available control technologies be ranked in descending order of control effectiveness. The PSD applicant first examines the most stringent — or "top" — alternative. That alternative is established as BACT unless the applicant demonstrates, and the permitting authority in its informed judgment agrees, that technical considerations, or energy, environmental, or economic impacts justify a conclusion that the most stringent technology is not "achievable" in that case.

NSR Manual at B.2; *see also In re Haw. Elec. Light Co.*, 8 E.A.D. 66, 84-92 (EAB 1998).

The NSR Manual provides a five-step procedure for implementing the top-down analysis. The first step is to identify all "potentially" available control options. NSR Manual at B.5. The second step, which is discussed below as central to WDOE's decision in the present case, is to eliminate "technically infeasible" options. *Id.* at B.7. This second step involves first determining for each technology whether it is "demonstrated," which means that it has been installed and operated successfully elsewhere on a similar facility, and if not demonstrated, then whether it is both "available" and "applicable." Technologies identified in step one as "potentially" available, but that are neither demonstrated nor found

after careful review to be both available and applicable, are eliminated under step two from further analysis. *Id.*

In step three of the top-down analysis, the remaining control technologies are ranked and then listed in order of control effectiveness for the pollutant under review, with the most effective alternative at the top. *Id.* In the fourth step of the analysis, the energy, environmental, and economic impacts are considered and the top alternative is either confirmed as appropriate or is determined to be inappropriate. *Id.* at B.29. Issues regarding the cost effectiveness of the alternative technologies are considered under step four. *Id.* at B.31-.46. Finally, under step five, the most effective control alternative not eliminated in step four is selected as BACT. *Id.* at B.53.

The issues raised by OBCT in the present case regarding technical feasibility of oxy-fuel arise under the NSR Manual's guidelines for step two of the top-down BACT analysis, and the issues regarding cost effectiveness arise under step four. *See, e.g., Haw. Elec. Light*, 8 E.A.D. at 84-92; *In re Maui Elec. Co.*, 8 E.A.D. 1, 5-6 (EAB 1998).

## 2. Step Two: The Issue of Technical Feasibility

The NSR Manual describes the question of "technical feasibility" under step two of the BACT analysis as consisting of, first, a determination whether the technology in question has been "demonstrated," and, second, if not demonstrated, then a determination whether the technology is "available" and "applicable." NSR Manual at B.17. A technology is demonstrated "if the control technology has been installed and operated successfully on the type of source under review." *Id.* If a technology has not been demonstrated, then it must be both "available" and "applicable" to be considered technically feasible:

[A] technology is considered "available" if it can be obtained by the applicant through commercial channels or is otherwise available within the common sense meaning of the term. An available technology is "applicable" if it can reasonably be installed and operated on the source type under consideration.

*Id.* More specifically, "technologies in the pilot scale testing stages of development would not be considered available for BACT review" and "[t]echnical judgment on the part of the applicant and the review authority is to be exercised in determining whether a control alternative is applicable to the source type under consideration." *Id.* at 18.

The NSR Manual also explains that "a presumption of technical feasibility may be made by the review authority based solely on technology transfer." *Id.* at B.19. The NSR Manual describes this approach as follows:

For example, in the case of add-on controls, decisions of this type would be made by comparing the physical and chemical characteristics of the exhaust gas stream from the unit under review to those of the unit from which the technology is to be transferred. Unless significant differences between source types exist that are pertinent to the successful operation of the control device, the control option is presumed to be technically feasible unless the source can present information to the contrary.

*Id.* The NSR Manual also notes that "a showing of unresolvable technical difficulty with applying the control would constitute a showing of technical infeasibility (e.g., size of the unit, location of the proposed site, and operating problems related to specific circumstances of the source)." *Id.*

OBCT argues in its Petition that (1) "oxy-fuel technology has years actual operating experience on flat glass plants," Petition ¶ 16; and (2) a technology, such as oxy-fuel, is considered technically feasible if it is "available within the common sense meaning of the term" and applicable, and that a technology is considered available "if it has reached the licensing and commercial sales stage of development," which OBCT contends is the case with oxy-fuel, *id.* ¶ 20 (citing NSR Manual at B.17-.18). OBCT also argues that WDOE "failed to consider oxy-fuel's lengthy experience on other types of glass plants, under the 'technology-transfer' doctrine of BACT analysis." Petition ¶ 21. OBCT's first argument appears to be directed at the question whether oxy-fuel has been "demonstrated." OBCT's second argument speaks directly to the alternative analysis, namely whether oxy-fuel is "available" and "applicable," particularly under the notion of technology transfer. These arguments, however, do not establish grounds sufficient for us to grant review of WDOE's permitting decision. WDOE specifically addressed these same arguments in its Response to Comments, and OBCT has failed to explain in its Petition "why the [permit decision maker's] previous response to those objections (i.e., the [decision maker's] basis for the decision) is clearly erroneous or otherwise warrants review." *Steel Dynamics*, 9 E.A.D. at 744; *In re Tondu Energy Co.*, 9 E.A.D. 710, 714 (EAB 2001); *In re Encogen Cogeneration Fac.*, 8 E.A.D. 244, 252 (EAB 1999); *In re Kawatha Cogeneration Project*, 7 E.A.D. 107, 114 (EAB 1997); see also *In re Puerto Rico Elec. Power Auth.*, 6 E.A.D. 253, 255 (EAB 1995); *In re Genesee Power Station L.P.*, 4 E.A.D. 832, 866-67 (EAB 1993).

In the TSD and in its Response to Comments, WDOE explained why it concluded that oxy-fuel has not been "demonstrated" in a facility similar to Cardi-

nal's producing high-quality flat glass through the float process and why WDOE concluded that the technology is not yet available and applicable to such a facility. TSD at 9-10; Response to Comments at 5-8. In the TSD, WDOE explained that oxy-fuel "has been widely adopted by the glass industry with the exception of the float glass sector." TSD at 9. WDOE explained why oxy-fuel has not been adopted in the float glass sector as follows:

Use of oxy-fuel firing in the float glass sector appears to be inhibited by a high capital investment requirement, concerns about furnace refractory deterioration and effects on product quality. \* \* \* Oxy-fuel burning leads to increased temperature and gas-phase alkali concentration in the furnace. This is the main pathway for vapor attack on the glass furnace refractory. Research is on-going to counteract the generally-acknowledged problem of refractory deterioration.

*Id.* at 9-10. WDOE's reasons for concluding that oxy-fuel is not "demonstrated" fall squarely within the NSR Manual's guidance concerning whether "the control technology has been installed and operated successfully on the type of source under review." NSR Manual at B.17. In short, WDOE explained that the problem of furnace refractory deterioration precludes WDOE from finding that oxy-fuel has been operated successfully in a facility producing high-quality flat glass through the float process.

In addition, in its Response to Comments, WDOE specifically discussed the four plants that OBCT had identified in its comments as allegedly showing that oxy-fuel has been demonstrated to be successfully installed and operated. WDOE explained that the four plants identified by OBCT have features or characteristics that distinguish them from the facility at issue in this permitting proceeding. Response to Comments at 5. For example, WDOE stated that a plant identified by OBCT located in Keihin, Japan, is not the same type of facility as the one at issue here. Specifically, the Keihin, Japan facility is not designed to produce high-quality flat glass similar to Cardinal's proposed facility and the Keihin, Japan plant burns fuel oil, rather than a natural gas-fired furnace as proposed for Cardinal's facility. *Id.* Notably, WDOE's analysis in this regard is consistent with the guidance of the NSR Manual, which specifically states that a control technique should not even be considered "potentially applicable"<sup>11</sup> unless the determination is "based on demonstrations made on the basis of manufacturing identical or simi-

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<sup>11</sup> The determination of "potentially applicable" is made at step one of the top-down BACT method and, thus, control techniques that have not been found to be "potentially applicable" at step one are not analyzed for technical feasibility under step two, which includes the more detailed analysis of applicability.

lar products from identical or similar raw materials or fuels." NSR Manual at B.10.

WDOE also explained in its Response to Comments that the PPG Industries, Fresno plant and the PPG-Meadville furnace have higher permit limits than WDOE is setting for the Cardinal facility using the 3R Process. Response to Comments at 5-6. Finally, with respect to the Pilkington Rossford, Ohio facility, WDOE explained that "the related two to three year operating history is insufficient to satisfy the concept of demonstrated technology when the primary issue is furnace life." *Id.* at 6.

OBCT's Petition does not identify any error in these responses to comments. Indeed, beyond merely asserting that "Oxy-fuel technology has years of actual operating experience on flat glass plants," Petition ¶ 16, OBCT provided no argument or basis from which we could conclude that WDOE committed clear error in its Response to Comments, or more generally in WDOE's finding that oxy-fuel has not been demonstrated on facilities comparable to Cardinal's proposed facility. OBCT's allegation, unsupported by any analysis whatsoever discussing WDOE's Response to Comments, is insufficient to sustain OBCT's burden to "explain why the [permit decision maker's] previous response to those objections (i.e., the [decision maker's] basis for the decision) is clearly erroneous or otherwise warrants review." *Steel Dynamics*, 9 E.A.D. at 744; *Tondu Energy*, 9 E.A.D. at 714; *Encogen*, 8 E.A.D. at 252; *Kawatha*, 7 E.A.D. at 114. Accordingly, we conclude that OBCT has not shown clear error in WDOE's conclusion that oxy-fuel has not been demonstrated on a facility similar to the one at issue in this case.

Next, we turn to OBCT's argument that oxy-fuel should be found to be technically feasible because it is "available" and "applicable" to the type of facility Cardinal proposes to construct. Here, we note that OBCT's argument appears to be primarily directed to the question whether oxy-fuel is available, and OBCT does not speak directly to the applicability question, except by reference to the potential of technology transfer. Petition ¶¶ 20, 21. In contrast, WDOE's rationale for rejecting oxy-fuel is solidly grounded on questions regarding whether oxy-fuel is "applicable." For example, WDOE explained in its initial analysis made available before the public comment period that, while there is potential that oxy-fuel may result in extremely low NO<sub>x</sub> levels, "[h]owever, its use is intimately tied to the furnace and burner design and production formulation that are still in research and demonstration phases." TSD at 10. WDOE's rejection of oxy-fuel on this ground is consistent with the NSR Manual's guidance that technologies in the testing stage generally are not considered technically feasible. NSR Manual at B.18.

WDOE explained further in its Response to Comments that "oxy-fuel firing is likely to have unpredictable glass quality problems." Response to Comments

at 6. WDOE quoted a recent report as concluding that "[t]rials have been carried out \* \* \* resulting in good NO<sub>x</sub> reduction, but problems occurred with severe foaming \* \* \* the higher quality requirements make [solutions] more difficult to apply \* \* \* ." *Id.* (alterations made by WDOE) (quoting Reaction Engineering International and Energy & Environment Strategies, *Summary of Emissions Controls Available for Large Stationary Sources of NO<sub>x</sub> and PM*, (June 30, 2003)). WDOE also cited another report for the conclusion that the degree of refractory corrosion is not yet predictable in virtually identical furnaces. *Id.* at 7 (citing TNO Glass Group, Bldhofen, The Netherlands, *Glass Newsletter* (May 5, 2004)). WDOE also cited this report as identifying an example of 80% furnace refractory deterioration in an oxy-fired furnace after only two years. *Id.* These responses to comments express a rationale consistent with the NSR Manual's guidance that "a showing of unresolved technical difficulty with applying the control would constitute a showing of technical infeasibility" and that technology transfer is not appropriate where "significant differences between source types exist that are pertinent to the successful operation of the control device." NSR Manual at 19.

WDOE's analysis set forth in the TSD and in its Response to Comments shows a careful and detailed consideration of oxy-fuel as a potentially feasible emissions control method. We have explained that:

[I]t is important to distinguish between BACT decisions where the permit issuer failed to consider an "available" control option in the first instance and decisions where the option was considered but rejected. Where a more stringent alternative is not evaluated because the permitting authority erred in not identifying it as an "available" option, a remand is usually appropriate, because proper BACT analysis requires consideration of all potentially "available" control technologies. However, where an alternative control option has been evaluated and rejected, those favoring the option must show that the evidence "for" the control option *clearly outweighs* the evidence "against" its application.

*In re Inter-Power of N.Y., Inc.*, 5 E.A.D. 130, 144 (EAB 1994) (footnotes omitted); accord *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 50 (EAB 2001); *In re Maul Elec. Co.*, 8 E.A.D. 1, 15 (EAB 1998); *In re Masonite Corp.*, 5 E.A.D. 551, 569 n.26 (EAB 1994). Moreover, when the Board is presented with conflicting expert opinions or data, we look to see if the record demonstrates that the permitting agency duly considered the issues raised in the comments and if the approach ultimately selected is rational in light of all the information in the record, including the conflicting opinions and data. *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 180 n.16 (EAB 2000); *In re NE Hub Partners, L.P.*, 7 E.A.D. 561, 568 (EAB 1998). In the present case, WDOE's analysis set forth

In the Response to Comments shows careful consideration of both OBCT's comments and the information in the record, and OBCT has failed to demonstrate in its Petition why the information upon which it seeks to rely clearly outweighs the information relied upon by WDOE. Accordingly, we conclude that OBCT has failed to demonstrate that WDOE's analysis is clearly erroneous. OBCT also has not shown that WDOE's permitting decision involves an important policy or discretionary decision that warrants review. Therefore, we deny review of WDOE's decision to eliminate oxy-fuel from further consideration as BACT due to concerns regarding the technical feasibility of oxy-fuel for Cardinal's proposed facility.

### 3. Step Four: Cost Effectiveness

OBCT argues that WDOE improperly failed to conduct a cost-effectiveness analysis of oxy-fuel for limiting NO<sub>x</sub> and CO emissions. Petition ¶¶ 11.C, 22-24. We deny review of this issue because WDOE's determination regarding the issue of technical feasibility was sufficient to eliminate oxy-fuel as BACT without conducting a full cost-effectiveness analysis.

Under the NSR Manual's guidance, issues regarding the cost effectiveness of alternative control technologies are considered under step four of the top-down BACT analysis. NSR Manual at B.31-B.46. A control technology that is eliminated under step two, however, does not need to be reviewed under step four. NSR Manual at B.7; *accord In re Haw. Elec. Light*, 8 E.A.D. 66, 84-92 (BAB 1998). *Compare In re Old Dominion Elec. Corp.*, 3 E.A.D. 779, 794-95 (Adm'r 1992) (control technology eliminated as not technically feasible under step two) with *In re Masonite Corp.*, 5 E.A.D. 551, 567 nn.21 & 24 (BAB 1994) (distinguishing cost effectiveness from the review of technical feasibility performed in *Old Dominion*).

Because we find, as discussed above, that OBCT has not shown any clear error in WDOE's determination under step two that oxy-fuel is not BACT due to questions regarding the technical feasibility of oxy-fuel for WDOE's facility, WDOE was not required to perform a cost-effectiveness analysis of oxy-fuel and WDOE did not need to provide such an analysis in response to OBCT's comments on this issue. For this reason, we reject OBCT's arguments that we should grant review of this issue.<sup>12</sup> *Haw. Elec. Light*, 8 E.A.D. at 84-92.

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<sup>12</sup> WDOE argues in response to OBCT's Petition that it did perform a cost-effectiveness analysis sufficient to determine that the cost of oxy-fuel for Cardinal's proposed facility is "obviously excessive" in relation to the removal efficiency and, consequently, that a more detailed analysis is not required under the reasoning of *In re Masonite Corp.*, 5 E.A.D. 551, 566 (BAB 1994), and *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 213 (BAB 2000). Because we have concluded that WDOE was not required to perform a cost-effectiveness analysis of oxy-fuel on the grounds that WDOE properly

Continued

#### 4. More Stringent Limits Under 3R Process

WDOE concluded that appropriate emissions limits for the natural gas-fired furnace at Cardinal's proposed facility applying the 3R process are 7 lb NO<sub>x</sub>/T<sub>0</sub> and 6.5 lb CO/T<sub>0</sub>. Permit at 6, 9. OBCT seeks review of these limits for NO<sub>x</sub> and CO emissions, arguing that, even with 3R Process selected as BACT, WDOE should have set emissions limits for NO<sub>x</sub> at 5.5 lbs/ton of glass produced and CO at less than 6.5 lbs/ton of glass produced. Petition ¶¶ 11.B, 18-19. We deny review of the Permit's NO<sub>x</sub> and CO limits because OBCT has not shown that WDOE's permitting decision is clearly erroneous.

WDOE explained in its Response to Comments that "[n]o flat glass plant in the U.S. using 3R Process has a lower permit limit than that specified in Cardinal's draft permit." Response to Comments at 8. In addition, WDOE stated:

[A]t least four of the known thirteen float glass furnaces designed to use the 3R process and operated for extended periods below 7 lb NO<sub>x</sub>/T<sub>0</sub> have experienced refractory failure substantially earlier than normal expectations, and are in the re-build process.

*Id.* WDOE also explained that Cardinal had presented evidence that "Cardinal's Mooresville glass furnace, which has operated below 7 lb NO<sub>x</sub>/T<sub>0</sub> for extended periods, is starting to show similar early refractory failure." *Id.* In addition, in the TSD, WDOE explained that there may be a relationship between early furnace failure due to refractory damage from operating the furnace using the 3R Process to obtain NO<sub>x</sub> reductions below 7 lb NO<sub>x</sub>/T<sub>0</sub>. TSD at 13-15. In particular, WDOE stated that "[t]here is significant evidence from the U.S. and Europe that float glass furnaces using the 3R Process are experiencing early refractory damage." *Id.* at 15. For this reason, WDOE concluded that emissions lower than 7 lb NO<sub>x</sub>/T<sub>0</sub> using the 3R Process are not currently technically feasible. *Id.*

With respect to the CO limit, WDOE explained that "there is a distinct inverse relationship between CO and NO<sub>x</sub> emissions when applying the 3R Process." *Id.* at 9. WDOE explained that "the CO emission limit prescribed in the draft Cardinal permit reflects the inverse NO<sub>x</sub> — CO relationship and a reasonable margin from the lowest demonstrated CO emission levels in consideration of the corresponding NO<sub>x</sub> emission limit. It is the lowest CO emission limit for a flat glass plant using 3R Process with an equivalent NO<sub>x</sub> emission limit." *Id.*

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(continued)

eliminated oxy-fuel from further consideration under step two of the top-down method, we do not reach WDOE's alternative argument that the cost-effectiveness analysis it did perform was sufficient under the circumstances of this case.

We have previously noted that a permit writer is not required to use the lowest emissions limit that has been demonstrated in a similar facility. *In re Kendall New Century Dev.*, 11 E.A.D. 40, 53 (BAB 2003). We explained as follows:

Although this emission limit [suggested by the petitioner as demonstrated at another facility] may be somewhat lower than the limit set by IEPA in the present case, it does not show clear error in IEPA's decision. We have held that permit writers retain discretion to set BACT levels that "do not necessarily reflect the highest possible control efficiencies but, rather, will allow permittees to achieve compliance on a consistent basis."

*Id.* (quoting *In re Steel Dynamics, Inc.*, 9 E.A.D. 165, 188 (BAB 2000)) (footnote omitted); accord *In re Three Mountain Power, LLC*, 10 E.A.D. 39, 53 (BAB 2001); *In re Masonite Corp.*, 5 E.A.D. 551, 560-61 (BAB 1994); see also *In re Knaut Fiber Glass, GmbH*, 9 E.A.D. 1, 15 (BAB 2000) ("There is nothing inherently wrong with setting an emissions limitation that takes into account a reasonable safety factor. \* \* \* The inclusion of a reasonable safety factor in the emission limitation calculation is a legitimate method of deriving a specific emission limitation that may not be exceeded.").

The underlying principle of all of these cases is that PSD permit limits are not necessarily a direct translation of the lowest emissions rate that has been achieved by a particular technology at another facility, but that those limits must also reflect consideration of any practical difficulties associated with using the control technology. OBCT's arguments in the present case pointing out that lower NO<sub>x</sub> and CO emissions rates have been achieved at other facilities, therefore, cannot show clear error in WDOE's permitting decision without addressing the practical considerations WDOE identified in its analysis. As noted above, WDOE explained that emissions limitations lower than 7 lb NO<sub>x</sub>/T<sub>0</sub> and 6.5 lb CO/T<sub>0</sub> would potentially result in excessive damage to Cardinal's furnace. TSD at 13-15. OBCT has not demonstrated in its Petition any error, much less clear error, in this rationale for WDOE's permitting decision. Accordingly, we deny review of the Permit's emissions limits for NO<sub>x</sub> and CO. *Kendall New Century Dev.*, 11 E.A.D. at 153 (petitioner failed to show clear error in the general reasons the permit issuer identified as the basis for permit limits that were not the lowest achieved at other facilities).

### C. The Trackmobile

OBCT argues that WDOE should have required application of BACT to control emissions from the trackmobile. OBCT argues that "since the trackmobile is permanently situated at a given location (the track circle) on the Cardinal

grounds, it does not qualify as a mobile non-road engine and is subject to BACT analysis," Petition ¶ 26. OBCT also argues that emissions from the trackmobile "could be substantial, depending on the hours of operation and engine size." *Id.* ¶ 30. For the following reasons, we deny review of this issue. OBCT describes the trackmobile as "a vehicle mounted on a circle of train tracks that will move train cars around the grounds of the Cardinal facility." *Id.* ¶ 25.

Upon consideration, we conclude that WDOE correctly determined that the trackmobile is not subject to PSD review because the trackmobile does not fall within the statutory definition of "stationary source" under CAA § 302(z), 42 U.S.C. § 7602(z). The trackmobile does not fall within the statutory definition of "stationary source" because that definition expressly states that emissions directly from a "nonroad vehicle" are not from a stationary source, and WDOE correctly concluded that the trackmobile is a "nonroad vehicle" under CAA § 216(1), 42 U.S.C. § 7550(11).

The statutory definition of "stationary source" governs this issue because the PSD permitting program applies to the construction of any new "major stationary source" or any project at an existing "major stationary source," 40 C.F.R. § 52.21(a)(2). A stationary source is determined to be "major" based on the amount of air pollutants it emits, *id.* § 52.21(b)(1), and the CAA defines the term "stationary source" to mean "any source of an air pollutant *except* those emissions resulting directly from \* \* \* a nonroad engine or nonroad vehicle." CAA § 302(z), 42 U.S.C. § 7602(z) (emphasis added). Thus, the statute expressly excludes from the PSD permitting requirements emissions resulting directly from a nonroad engine or a nonroad vehicle. Accordingly, emissions directly from the trackmobile are not subject to the PSD program's BACT requirements if the trackmobile is a "nonroad vehicle" within the meaning of the statute.

The CAA defines the term "nonroad vehicle" as "a vehicle powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition." CAA § 216(1), 42 U.S.C. § 7550(11).<sup>13</sup> The term "nonroad engine" is defined by the regulations in relevant part as follows:

*Nonroad engine* means:

(1) Except as discussed in paragraph (2) of this definition, a nonroad engine is any internal combustion engine;

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<sup>13</sup> The trackmobile will not be used for competition. Moreover, OBCT has not suggested that the trackmobile would fall within the meaning of "motor vehicle," which is defined by the statute to mean "any self-propelled vehicle designed for transporting persons or property on a street or highway." CAA § 216(2), 42 U.S.C. § 7550(2).

(i) In or on a piece of equipment that is *self-propelled or serves a dual purpose by both propelling itself and performing another function* (such as garden tractors, off-highway mobile cranes and bulldozers); or

(ii) In or on a piece of equipment that is intended to be propelled while performing its function (such as lawnmowers and string trimmers); or

(iii) That, by itself or in or on a piece of equipment, is *portable or transportable, meaning designed to be and capable of being carried or moved from one location to another*. Indicia of transportability include, but are not limited to, wheels, skids, carrying handles, dolly, trailer, or platform.

(2) An internal combustion engine is not a nonroad engine if:

\* \* \*

(iii) the engine *otherwise included in paragraph (1)(iii) of this definition remains or will remain at a location for more than 12 consecutive months or a shorter period of time for an engine located at a seasonal source. A location is any single site at a building, structure, facility, or installation.*

40 C.F.R. § 89.2 (definition of "nonroad engine") (emphasis added).

WDOE concluded that the trackmobile falls within the definition of "nonroad engine" because it is "self-propelled or serves a dual purpose by both propelling itself and performing another function" and therefore falls within paragraph (1)(i) of the "nonroad engine" definition in 40 C.F.R. § 89.2. Response to Comments at 10. WDOE also explained that the exception set forth in paragraph (2)(iii) of the "nonroad engine" definition in section 89.2 does not exclude the trackmobile because that exception applies by its terms only to paragraph (1)(iii) of the "nonroad engine" definition, which refers to "portable or transportable" engines, and does not apply to engines, such as the trackmobile, that are "self-propelled" and fall within paragraph (1)(i) of the "nonroad engine" definition in section 89.2. Response to Comments at 10. WDOE explained further that the trackmobile does not fall within the exception set forth in paragraph (2)(iii) because it will not remain at the same "location" for 12 consecutive months where the term "location" means "any single site at a building, structure, facility, or installation." Response to Comments at 10 (quoting 40 C.F.R. § 89.2("nonroad en-

gine" paragraph (2)(iii)). WDOE explained that this means the engine must be "parked" at a single site. Response to Comments at 10.

In its Petition, OBCT argues that WDOE's conclusion that the trackmobile is not a "nonroad engine" is erroneous because "the trackmobile is permanently situated at a given location (the track circle) on the Cardinal grounds," Petition ¶ 26. OBCT explains further that it "believes that the trackmobile emissions are directly associated with the Cardinal plant and are conducted as part of its operations, under the EPA advice letter in the El Paso Energy Bridge matter (October 28, 2003), and that the trackmobile's fixed location on its tracks constitute a single location under 40 C.F.R. [§ ] 89.2." Petition ¶ 27. OBCT's arguments, however, fail to show any error, much less clear error, in WDOE's analysis set forth in its Response to Comments.

First, we reject OBCT's contention that the railroad tracks upon which the trackmobile will operate must be treated as a "location" within the meaning of paragraph (2)(iii) of the "nonroad engine" definition in section 89.2. OBCT's own description of the trackmobile recognizes that it "will move train cars around the grounds of the Cardinal facility," Petition ¶ 25. The very notion of "moving" around the grounds of the facility is patently inconsistent with the regulation's description of "location" as a "*single site* at a building, structure, facility, or installation," 40 C.F.R. § 89.2 ("nonroad engine" paragraph (2)(iii)) (emphasis added). Simply stated, OBCT's efforts in this case to construe something that moves around the grounds of the facility as being a "single site" at the facility requires an excessively unnatural and distorted reading of the regulation's plain language.

Moreover, this same characteristic of moving train cars around the grounds of the facility underscores an additional reason why the exclusion set forth in paragraph (2)(iii) of the "nonroad engine" definition in section 89.2 does not apply to the trackmobile. As WDOE noted in its Response to Comments at page 10, by its terms paragraph (2)(iii) applies only to an "engine otherwise included in paragraph (1)(iii) of this definition." 40 C.F.R. § 89.2 ("nonroad engine" paragraph (2)(iii)). The trackmobile, however, must be viewed as a quintessential example of a "self-propelled" engine under paragraph (1)(i) of the "nonroad engine" definition and not as a "portable or transportable" engine described in paragraph (1)(iii). The trackmobile's most important feature — and, indeed, its sole function — is its ability to propel itself and the train cars around the grounds of the Cardinal facility. Under these circumstances,<sup>14</sup> applying the exception set forth in paragraph

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<sup>14</sup> We do not address the question of whether a permit-issuing authority has discretion to apply the exclusion in paragraph (2)(iii) of the "nonroad engine" definition in section 89.2 in circumstances where an engine's ability to propel itself is only a minor characteristic or where the area in which engine moves is only a very small part of the overall facility. Those are not the circumstances of this case where the trackmobile's self-propulsion is its central and defining feature and its sole purpose is to move train cars around the grounds of the facility.

(2)(iii) of the "nonroad engine" definition in to the trackmobile would eviscerate the regulation's distinction between "self-propelled" engines described in paragraph (1)(i) and "portable or transportable" engines described in paragraph (1)(iii). See Response to Comments at 10 (noting that extending the qualifier "portable and transportable" to include "anything that can move under its own power leads to contradiction of the preceding paragraphs (i) and (ii), and is a logical inconsistency"). The distinction apparent from the plain language of the regulatory text between "self-propelled" and "portable or transportable" engines is further supported by the preamble to the *Federal Register* notice promulgating these regulations, where the Agency explained: "the revised definition specifically states that portable and transportable engines remaining in a particular location for over 12 months are not nonroad engines (this excludes engines in self-propelled equipment and equipment intended to be propelled while performing its intended function), thus ensuring that engines that are actually used in a stationary manner are considered stationary engines." Control of Air Pollution; Determination of Significance for Nonroad Sources and Emission Standards for New Nonroad Compression-Ignition Engines At or Above 37 Kilowatts, 59 Fed. Reg. 31,306, 31,311 (June 17, 1994). We therefore reject OBCT's argument that the exception in paragraph (2)(iii) of the "nonroad engine" definition in section 89.2 applies in this case. See *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("courts should disfavor interpretations of statutes that render statutory language superfluous"); *United States v. Talley*, 16 F.3d 972, 976 n.7 (8th Cir. 1994) ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute."); see also *In re City of Moscow*, 10 E.A.D. 135, 143 (EAB 2001) (same rules of construction apply to administrative regulations as apply to statutes); accord *In re Mayes*, 12 E.A.D. 54, 91 (EAB 2005) ("It is very well settled that statutes and regulations must be read as a whole and single components may not be plucked out and applied wherever convenient").

Second, we also reject OBCT's contention that statements made by Regional Counsel Charles J. Sheehan in connection with another permitting matter, known as the El Paso Energy Bridge, have any bearing upon the issues in the present case. See Letter from Charles J. Sheehan, Regional Counsel, U.S. EPA Region 6, to Michael Cathey, Managing Director, El Paso Energy Bridge Gulf of Mexico, LLC (Oct. 28, 2003) (hereinafter "Sheehan Letter").<sup>15</sup> OBCT states that it "believes that the trackmobile emissions are directly associated with the Cardinal plant and are conducted as part of its operations, under the EPA advice letter in the El Paso Energy Bridge matter (October 28, 2003)." Petition ¶ 27. Beyond this brief statement, OBCT did not offer any explanation of why it views the Sheehan Letter to be relevant. Upon consideration, we conclude that the Sheehan Letter has no relevance to the present case because the emissions at issue in the El Paso

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<sup>15</sup> The Sheehan Letter may be found at: <http://www.epa.gov/Region7/programs/artd/air/usrf/strmemos/20031028.pdf> (last viewed Mar. 8, 2005).

Energy Matter were from a stationary source. Sheehan Letter at 8-10. In contrast, in the present case, the emissions from the trackmobile are, by statutory definition, expressly not from a stationary source. As we explain above, the trackmobile is a nonroad vehicle and CAA § 302(z) expressly excludes emissions from a nonroad vehicle from the definition of stationary source.<sup>16</sup> For these reasons, we conclude that the Sheehan Letter has no bearing on the present matter.

Finally, we note that WDOE's Response to Comments provided a further reason for excluding the trackmobile from PSD review that OBCT has not sought to challenge in its Petition. Specifically, WDOE explained that emissions from the trackmobile may not be considered as secondary emissions due to the regulatory exclusion of tailpipe emissions from mobile sources at a stationary source under 40 C.F.R. § 52.21(b)(18). Response to Comments at 11. OBCT's Petition did not argue that WDOE erred in reaching this conclusion.

For the foregoing reasons, we conclude that OBCT has not shown clear error in WDOE's analysis and we therefore reject OBCT's request that we grant review of WDOE's decision not to require application of BACT to control emissions from the trackmobile.

### III. CONCLUSION

For the reasons set forth above, we deny OBCT's petition seeking review of WDOE's decision to issue the Permit to Cardinal. In accordance with 40 C.F.R. § 124.19(f)(2), the Regional Administrator of EPA Region 10, or his delegate, shall promptly publish in the *Federal Register* a notice of this final agency action.

So ordered.

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<sup>16</sup> Section 302(z) defines "stationary source" to mean "generally any source of an air pollutant except those emissions resulting directly from an internal combustion engine for transportation purposes or from a nonroad engine or nonroad vehicle" as defined in section 216, CAA § 302(z); 42 U.S.C. § 7602(z). Significantly, Regional Counsel Sheehan stated that this exclusion did not apply to the emissions at issue in the El Paso Energy Matter. Sheehan Letter at 8-10 (noting, among other things, that the vessels at issue were powered by "external combustion engines" and therefore were *not* excluded "nonroad engines" or "nonroad vehicles," which are defined as "internal combustion engines" by 40 C.F.R. § 89.2 ("nonroad engines" paragraph (1)).