6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 51

[EPA-HQ-OAR-2003-0079, FRL-XXXX-X]

RIN 2060-AJ99

Phase 2 of the Final Rule to Implement the 8-Hour Ozone National Ambient Air Quality Standard –Notice of Reconsideration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed Rule.

SUMMARY: On November 29, 2005, EPA published Phase 2 of the final rule to implement the 8-hour ozone national ambient air quality standard (NAAQS). Subsequently, EPA received a petition to reconsider specific aspects of this final rule. In this action, EPA is announcing its decision to reconsider and take additional comment on three provisions in the final Phase 2 8-hour ozone implementation rule: the determination that electric generating units (EGUs) that comply with rules implementing the Clean Air Interstate Rule (CAIR) and that are located in States where all required CAIR emissions reductions are achieved from EGUs meet the 8-hour ozone State implementation plan (SIP) requirement for application of reasonably available control technology (RACT) for nitrogen oxide (NO_x) emissions; a new source review (NSR) requirement allowing sources to use certain emission reductions as offsets under certain circumstances; and an NSR provision addressing when requirements for the lowest achievable emission rate (LAER) and emission offsets may be waived. In addition, EPA requests comment on postponing the submission date for the RACT SIP for RACT SIPs

for EGUs in the CAIR region. The EPA is seeking comment only on the three issues specifically identified in this notice and the submission date issue. We do not intend to respond to comments addressing other provisions of the final 8-hour ozone implementation rule that we are not reconsidering.

DATES: Comments. Comments must be received on or before [INSERT 30 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER].

If anyone contacts us requesting a public hearing by [INSERT 10 DAYS FROM DATE OF PUBLICATION IN THE FEDERAL REGISTER], the hearing will be held on **[INSERT DATE –],** in [INSERT LOCATION—likely EPA/RTP].]. If a public hearing is requested, the record for this action will remain open until [INSERT THE DATE 30 DAYS FOLLOWING THE PUBLIC HEARING] to accommodate submittal of information related to the public hearing. For additional information on the public hearing, see the SUPPLEMENTARY INFORMATION section of this notice of reconsideration.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-HQ-OAR-2003-0079, by one of the following methods:

- www.regulations.gov: Follow the on-line instructions for submitting comments.
- E-mail: a-and-r-docket@epa.gov.
- Mail: EPA Docket Center, EPA West (Air Docket), Attention Docket ID No. EPA-HQ-OAR-2003-0079, Environmental Protection Agency, Mail Code: 6102T, 1200 Pennsylvania Ave., NW, Washington, D.C. 20460. Please include two copies if possible.

- Hand Delivery: EPA Docket Center (Air Docket), Attention Docket ID No. EPA-HQ-OAR-2003-0079, Environmental Protection Agency, 1301 Constitution Avenue, N.W., Room 3334, Washington, D.C. Such deliveries are only accepted during the Docket Center's normal hours of operation, and special arrangements should be made for deliveries of boxed information.
- Instructions: Direct your comments to Docket ID No. EPA-HQ-OAR-2003-0079. The EPA's policy is that all comments received will be included in the public docket without change and may be made available on-line at www.regulations.gov, including any personal information provided, unless the comment includes information claimed to be confidential business information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through www.regulations.gov, or e-mail. The www.regulations.gov website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through www.regulations.gov, your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For

additional information about EPA's public docket, visit the EPA Docket Center homepage at http://www.epa.gov/epahome/dockets.htm. For additional instructions on submitting comments, go to the SUPPLEMENTARY INFORMATION section of this document.

Docket*:* All documents in the docket are listed in www.regulations.gov. Although listed in the index, some information is not publicly available, i.e., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically in www.regulations.gov or in hard copy at the EPA Docket Center (Air Docket), EPA/DC, EPA West, Room 3334, 1301 Constitution Ave., N.W., Washington, D.C. The Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Public Reading Room is (202) 566-1744. For information on accessing docket materials during the temporary closure of the EPA docket center see note above.

FOR FURTHER INFORMATION CONTACT: For further information on the issue relating to NO_x RACT for EGU sources in CAIR States, contact Mr. John Silvasi, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, (C539-01), Research Triangle Park, NC 27711, phone number (919) 54l-5666, fax number (919) 54l-0824 or by e-mail at silvasi.john@epa.gov or Ms. Denise Gerth, Office of Air Quality Planning and Standards, U.S. Environmental Protection Agency, (C539-01), Research Triangle Park, NC 27711, phone number (919) 54l-5550, fax number (919) 54l-0824 or by e-mail at gerth.denise@epa.gov. For further information on the NSR issues discussed

in this notice, contact Mr. David Painter, Office of Air Quality Planning and Standards, (C504-03), U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541-5515, fax number (919) 541-5509, e-mail: painter.david@epa.gov.

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

1. Issue on Determination of CAIR/RACT Equivalency for NO_x EGUs

Entities potentially affected by the subject rule for today's action include States (typically State air pollution control agencies), and, in some cases, local governments that develop air pollution control rules, in the region affected by the CAIR.[1] The EGUs are also potentially affected by virtue of State action in SIPs that implement provisions resulting from final rulemaking on today's action; these sources are in the following groups:

Industry group	SIC[a]	NAICS[b]
Electric Services	492	221111, 221112, 221113, 221119, 221121, 221122

[a] Standard Industrial Classification.
[b] North American Industry Classification System.

2. NSR Issues

Entities potentially affected by the subject rule for today's action include sources in all industry groups. The majority of sources potentially affected are expected to be in the following groups.

Industry group	SIC[a]	NAICS[b]
Electric Services	492	221111, 221112, 221113, 221119, 221121, 221122

[1] Federal Register of May 12, 2005 (70 FR 25162).

Petroleum Refining	291	324110
Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199
Miscellaneous Chemical Products	289	325520, 325920, 325910, 325182, 325510
Natural Gas Liquids	132	211112
Natural Gas Transport	492	486210, 221210
Pulp and Paper Mills	261	322110, 322121, 322122, 322130
Paper Mills	262	322121, 322122
Automobile Manufacturing	371	336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213
Pharmaceuticals	283	325411, 325412, 325413, 325414

[a] Standard Industrial Classification.
[b] North American Industry Classification System.

Entities potentially affected by the subject rule for today's action also include State, local, and Tribal governments that are delegated authority to implement these regulations.

B. What Should I Consider as I Prepare My Comments for EPA?

1. Submitting CBI. Do not submit this information to EPA through www.regulations.gov or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, mark the outside of the disk or CD ROM as CBI and then identify electronically within the disk or CD ROM the specific information that is claimed as CBI. In addition to one complete version of the comment that includes information claimed as CBI, a copy of the comment that does not contain the information claimed to be CBI must be submitted for inclusion in the public docket. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

2. Tips for Preparing Your Comments. When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, Federal Register date and page number).
- Follow directions - The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.
- Explain your views as clearly as possible, avoiding the use of profanity or personal threats.
- Make sure to submit your comments by the comment period deadline identified.

C. Where Can I Get a Copy of This Document and Other Related Information?

In addition to being available in the docket, an electronic copy of today's notice is also available on the World Wide Web. A copy of today's notice will be posted at http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/ .

D. What Information Should I Know About the Public Hearing?

If requested, EPA will hold a public hearing on today's notice. The EPA will hold a hearing only if a party notifies EPA by [INSERT THE DATE 10 DAYS FOLLOWING PUBLICATION OF THIS NOTICE IN THE FEDERAL REGISTER], expressing its

interest in presenting oral testimony on issues addressed in today's notice. Any person may request a hearing by calling Ms. Pamela S. Long at (919) 541–0641 before 5 p.m. by [INSERT THE DATE 10 DAYS FOLLOWING PUBLICATION OF THIS NOTICE IN THE FEDERAL REGISTER]. Any person who plans to attend the hearing should visit the EPA's Web site at http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/ and contact Ms. Pamela S. Long at (919) 541–0641 to learn if a hearing will be held.

If a public hearing is held on today's notice, it will be held on [INSERT DATE –], 2006 at the EPA, Building C, Room _____, 109 T.W. Alexander Drive, Research Triangle Park, NC 27709. Because the hearing will be held at a U.S. Government facility, everyone planning to attend should be prepared to show valid picture identification to the security staff in order to gain access to the meeting room. Please check our Web site at http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/ for information and updates concerning the public hearing.

If held, the public hearing will begin at 10 a.m. and end at 2 p.m. The hearing will be limited to the subject matter of this document. Oral testimony will be limited to 5 minutes. The EPA encourages commenters to provide written versions of their oral testimony either electronically (on computer disk or CD ROM) or in paper copy. The list of speakers will be posted on EPA's Web site at http://www.epa.gov/ttn/naaqs/ozone/o3imp8hr/ .Verbatim transcripts and written statements will be included in the rulemaking docket.

A public hearing would provide interested parties the opportunity to present data, views, or arguments concerning issues addressed in today's notice. The EPA may ask clarifying questions during the oral presentations, but would not respond to the

presentations or comments at that time. Written statements and supporting information submitted during the comment period will be considered with the same weight as any oral comments and supporting information presented at a public hearing.

If a public hearing is held, the record for this action will remain open until [INSERT THE DATE 30 DAYS FOLLOWING THE PUBLIC HEARING] to accommodate submittal of information related to the public hearing. Otherwise, if a hearing is not held, the record for this action will remain open until [INSERT THE DATE 30 DAYS FOLLOWING PUBLICATION OF THIS NOTICE IN THE FEDERAL REGISTER].

E. How Is This Notice Organized?

The information presented in this notice is organized as follows:

II. Background

On November 29, 2005, EPA published the final Phase 2 rulemaking to implement the 8-hour ozone NAAQS (the Phase 2 Rule). That rule established requirements relating to several specific elements of the SIPs for nonattainment areas for the 8-hour ozone standard including: the attainment demonstration; the RACT requirement; the reasonable further progress (RFP) requirement; and new source review.

The Natural Resources Defense Council (NRDC) filed a petition for reconsideration dated January 30, 2006 under section 307(d) of the Clean Air Act (CAA) concerning three provisions of the Phase 2 rule. The EPA has granted the petition and, in

this notice, EPA announces its decision to reconsider the three provisions discussed below and requests public comment on these issues.

A. NO_x RACT for EGUs in CAIR States

- 1. Proposed and Final Rules and Guidance. In the Phase 2 rulemaking to implement the 8-hour ozone NAAQS, EPA determined that EGU sources complying with rules implementing the CAIR requirements meet ozone NO_x RACT requirements in States where all required CAIR emissions reductions are achieved from EGUs only.[2] We noted that the CAIR final rulemaking established a region-wide NO_x emissions cap, effective in 2009, at a level that, assuming the reductions are achieved from EGUs, would result in EGUs installing emission controls on the maximum total capacity on which it is feasible to install emission controls by that date. In addition, the CAIR's 2015 NO_x cap will eliminate all NO_x emissions from EGUs that are highly cost effective to control, and the 2009 cap represents an interim step toward that end. We also noted additional arguments in the phase 2 rule, which we are summarizing below under Section III. A. 1. below.

2. Petition for Reconsideration

The EPA received a petition for reconsideration of the final Phase 2 rule from the NRDC. This petition raised several objections to EPA's determination that, in certain circumstances, EGUs in CAIR States may satisfy the NO_x RACT requirement for ozone if they comply with rules implementing the CAIR. Specifically, they argued that:

[2] However, as noted below, a State that elects to bring its NOx SIP Call non-EGU sources into the CAIR ozone season trading program may continue to rely on EPA's determination that RACT is met for EGU sources covered by the CAIR trading program. It may rely on this determination if and only if the State retains a summer season EGU budget under the CAIR that is at least as restrictive as the EGU budget that was set in the State's NO_x SIP call SIP.

- The EPA unlawfully and arbitrarily failed to seek public comment on the final rule's determination that the CAIR satisfies NO_x RACT requirements.
- The EPA's CAIR-RACT determinations are unlawful and arbitrary because EPA's action illegally abrogates the Act's RACT requirements.

The EPA granted NRDC's petition by letter of June 21, 2006. In this action, EPA is announcing the initiation of the reconsideration process and requesting additional public comment on this issue. Also, EPA is supplementing the record with additional technical analyses that addresses the determination that the CAIR satisfies the NO_x RACT requirement for covered EGUs.

B. NSR Issues

1. Our previous proposed and final rules

The major NSR provisions in the November 29, 2005 Phase 2 rulemaking were proposed as part of two different regulatory packages. On July 23, 1996 (61 FR 38250), we proposed changes to the major NSR program, including codification of the requirements of part D of title I of the 1990 CAA Amendments for major stationary sources of volatile organic compounds (VOC), NO_x, particulate matter having a nominal aerodynamic diameter less than or equal to 10 microns (PM_{10}), and CO. On June 2, 2003 (68 FR 32802), we proposed a rule to implement the 8-hour ozone NAAQS. In the 2003 action, we proposed a rule to identify the statutory requirements that apply for purposes of developing SIPs under the CAA to implement the 8-hour ozone NAAQS (68 FR 32802). We did not propose specific regulatory language for implementation of NSR under the 8-hour NAAQS. However, we indicated that we intended to revise the nonattainment NSR regulations to be consistent with the rule for implementing the 8-hour

ozone NAAQS (68 FR 32844). On April 30, 2004 (69 FR 23951), we published a final rule that addressed classifications for the 8-hour NAAQS. The April 2004 rule also included the NSR permitting requirements for the 8-hour ozone standard, which necessarily follow from the classification scheme chosen under the terms of subpart 1 and subpart 2.

In 1996, we proposed to revise the regulations limiting offsets from emissions reductions due to shutting down an existing source or curtailing production or operating hours below baseline levels ("shutdowns/curtailments"). We proposed substantive revisions in two alternatives that would ease, under certain circumstances, the existing restrictions on the use of emission reduction credits from source shutdowns and curtailments as offsets.

On July 23, 1996, we proposed to revise 40 CFR 52.24 to incorporate changes made by the 1990 CAA Amendments related to the applicability of construction bans (61 FR 38305). To clarify our intent, our proposed 8-hour ozone NAAQS implementation rule in June 2003 explained that section 52.24(k) remained in effect and would be retained. In that action, we also proposed that we would revise section 52.24(k) to reflect the changes in the 1990 CAA Amendments (68 FR 32846). On June 2, 2003 (68 FR 32802), we explained implementation of the major NSR program under the 8-hour ozone NAAQS during the SIP development period, and proposed flexible NSR requirements for areas that expected to attain the 8-hour NAAQS within 3 years after designation.

In the final regulations, we included several revisions to the regulations governing the nonattainment NSR programs mandated by section 110(a)(2)(C) and part D of title I of the CAA. First, we codified requirements added to part D of title I of the CAA in the

1990 Amendments related to permitting of major stationary sources in areas that are nonattainment for the 8-hour ozone, particulate matter (PM), and carbon monoxide (CO) NAAQS. Second, we revised the criteria for crediting emissions reductions credits from shutdowns and curtailments as offsets. Third, we revised the regulations for permitting of major stationary sources in nonattainment areas in interim periods between designation of new nonattainment areas and EPA's approval of a revised SIP. Also, we changed the regulations that impose a moratorium (ban) prohibiting construction of new or modified major stationary sources in nonattainment areas where the State fails to have an implementation plan meeting all of the requirements of part D.

2. Petition for reconsideration

The NRDC petition for reconsideration raised two objections to the major NSR aspects of the Phase 2 rulemaking:

- Allowing sources to use emission reductions as offsets if they occur after the last day of the base year for the SIP planning process; and
- Changes to Section VI of Appendix S allowing for waiver of nonattainment major NSR requirements for some source categories.

The EPA granted the petition by letter of June 21, 2006 and in this action EPA announces its decision to reconsider and to request additional public comment on these issues.

III. This Action

A. NO_x RACT for EGUs in CAIR States

1. Reconsideration and request for comment on NO_x RACT for EGUs in CAIR States

In this notice, EPA announces its decision to reconsider and request additional comment on the determination that EGU sources complying with rules implementing CAIR requirements meet ozone NO_x RACT requirements in States where all required CAIR reductions are achieved from EGUs only.[3] This determination provided the basis for our determination that, for purposes of meeting the NO_x RACT requirement, States need not perform (or submit) NO_x RACT analyses for sources subject to a NO_x trading program meeting the CAIR NO_x requirements (in a State achieving all CAIR reductions from EGUs only). According to this provision, States relying on this conclusion for the affected EGU sources need to document their reliance on EPA's determination in their RACT SIPs. A full discussion of EPA's rationale and the conditions under which the above determination is valid appears in the Phase 2 Rule preamble at FR 71656-71658 (November 29, 2005). However, we are summarizing that rationale here:

In the Phase 2 rulemaking to implement the 8-hour ozone NAAQS, EPA determined that EGU sources complying with rules implementing the CAIR requirements meet ozone NO_x RACT requirements in States where all required CAIR emissions reductions are achieved from EGUs only.[4] We noted that the CAIR final rulemaking established a region-wide NO_x emissions cap, effective in 2009, at a level that, assuming the reductions are achieved from EGUs, would result in EGUs installing emission controls on the maximum total capacity on which it is feasible to install emission controls by that date.

[3] However, see footnote 1 above and exception described below.

[4] However, as noted below, a State that elects to bring its NOx SIP Call non-EGU sources into the CAIR ozone season trading program may continue to rely on EPA's determination that RACT is met for EGU sources covered by the CAIR trading program. It may rely on this determination if and only if the State retains a summer season EGU budget under the CAIR that is at least as restrictive as the EGU budget that was set in the State's NO_x SIP call SIP.

In addition, the CAIR's 2015 NO_x cap will eliminate all NO_x emissions from EGUs that are highly cost effective to control, and the 2009 cap represents an interim step toward that end. We also noted the following in the Phase 2 rulemaking:

- The EPA's prior views on the details of the NO_x RACT program were set forth in the "NO_x Supplement to the General Preamble," November 25, 1992 (57 FR 55620). In that document, EPA determined that in the majority of cases, RACT will result in an overall level of control equivalent to specified maximum allowable emission rates (in pounds of NO_x per million Btu) for certain specified electric utility boilers. Section 4.6 of this document (57 FR 55625) noted in part, "In general, EPA considers RACT for utilities to be the most effective level of combustion modification reasonably available to an individual unit. This implies low NO_x burners, in some cases with overfire air and in other instances without overfire air; flue gas recirculation; and conceivably some situations with no control at all." The NO_x Supplement also provided, ". . . the State may allow individual owners/operators in the nonattainment area (or, alternatively, Statewide within an ozone transport region) to have emission limits which result in greater or lesser emission reductions so long as the areawide average emission rates described above are met on a Btu-weighted average." (57 FR at 55625). The NO_x Supplement also set forth (in section 4.7) guidance on RACT for utility boilers other than those specified in section 4.6 and also for other source categories. This section noted in part, "In general, EPA expects that NO_x RACT for these other sources will be set at levels that are comparable to the RACT guidance specified above [in section 4.6] . . ."

- "The [CAIR] budgets are based on the level of emissions that can be achieved through highly cost-effective controls that EPA determined are available from EGUs; however, States have flexibility to choose the measures they will use to achieve the necessary emissions reductions. Due to feasibility constraints, EPA is requiring the CAIR budgets to be achieved in two phases. For summertime NO_x, the first phase starts in 2009 (covering 2009-2014);[5] the second phase of NO_x reductions begins in 2015 (covering 2015 and thereafter)." (70 FR 71621). We also noted in the June 2, 2003, proposal that we considered highly-cost effective controls for NO_x for EGUs and non-EGUs that were used to establish the Statewide NO_x emission caps in the NO_x SIP call to constitute a greater level of control than RACT. (68 FR 32839.)
- In general, we expect that the largest-emitting EGU sources will be the first to install NO_x control technology and that such control technology will gradually be installed on progressively smaller-emitting EGU sources until the ultimate cap is reached.
- We do not believe that requiring source-specific RACT controls on EGUs in nonattainment areas will reduce total NO_x emissions from EGU sources covered by the CAIR below the levels that would be achieved under the CAIR alone.
- We believe that EGU source-specific RACT would result in more costly emission reductions on a per ton basis. We noted the following: "As discussed more fully in the CAIR final rulemaking, EPA has set the 2009 CAIR NO_x cap at a level that, assuming the reductions are achieved from EGUs, would result in EGUs installing emission controls on the maximum total capacity on which it is feasible to install

[5]The CAIR first phase also provides an annual NO_x budget, which also starts in 2009.

emission controls by those dates. The 2015 NO_x cap is specifically designed to eliminate all NO_x emissions from EGUs that are highly cost effective to control (the first cap represents an interim step toward that end) . . . In general, we expect that the largest-emitting sources will be the first to install NO_x control technology and that such control technology will gradually be installed on progressively smaller-emitting sources until the ultimate cap is reached." (70 FR 71657, col. 3).

- The combination of EGU source specific RACT and the CAIR emissions cap would not reduce the collective total emissions from EGUs covered by the CAIR, but would likely achieve the same total emissions reductions as the CAIR alone, in a more costly way.
- As a result, we believe that EGUs subject to the CAIR NO_x emissions cap meet the RACT requirement for NO_x (in States that require all CAIR NO_x reductions from EGUs).

The EPA made the finding for all areas in the CAIR region, such that States meeting the CAIR emissions reduction requirements with reductions from EGUs only, need not submit RACT analyses for covered EGU sources subject to and in compliance with rules implementing CAIR requirements. At this time, EPA is not proposing to make any changes to this provision. The petition for reconsideration did not provide information sufficient to convince EPA that any aspect of the determination in the final Phase 2 8-hour ozone rule was in error, and EPA's supplemental technical analysis lends support to this determination. However, EPA acknowledges that the agency did not provide sufficient opportunity for public comment on this determination. We recognize

the significant public interest in this issue and request additional comment on this determination.

As explained in the preamble to the final Phase 2 Rule, EPA does not believe that requiring source-specific RACT controls on EGUs in nonattainment areas will reduce total NO_x emissions from sources covered by the CAIR below the levels that would be achieved under the CAIR alone. As discussed more fully in the CAIR final rulemaking, EPA has set the 2009 CAIR NO_x cap at a level that, assuming the reductions are achieved from EGUs, would result in EGUs installing emission controls on the maximum total capacity on which it is feasible to install emission controls by that date. Under cap-and-trade programs such as the CAIR program, there is a direct relationship between the total number of allowances held by participating sources and the collective emissions from those sources. EGU source-specific control requirements (such as EGU source-by-source RACT) layered on top of the overall allowance-based emissions cap may affect the temporal distribution of emissions (by reducing banking and thus delaying early reductions) or the spatial distribution of emissions (by moving them around from one place to another), but such requirements do not affect total allowed emissions in the CAIR region.

Furthermore, we believe that EGU source-specific RACT could result in more costly emission reductions on a per ton basis. The 2015 NO_x cap is specifically designed to eliminate all NO_x emissions from EGUs that are highly cost effective to control (the 2009 cap represents an interim step toward that end). In general, we expect that the largest-emitting EGU sources will be the first to install NO_x control technology and that such control technology will gradually be installed on progressively smaller-emitting

EGU sources until the ultimate cap is reached. If States choose to require smaller-emitting EGU sources in nonattainment areas to meet source-specific RACT requirements by 2009 (the required compliance date for RACT), they would likely use labor and other resources that would otherwise be used for emission controls on larger EGU sources. Because of economies of scale, more boiler-makers (skilled workers needed to install control equipment on EGUs) and other resources may be required per megawatt of power generation for smaller units than for larger units. Thus, the cost of achieving such reductions would be greater on a per ton basis. If it were possible to strategically target source-specific requirements at the EGUs that can be controlled most cost effectively, then the imposition of source-specific controls would achieve the same temporal and spatial distribution of controls as the projected CAIR cap-and-trade program. But this would require accurate forehand knowledge of each EGU's control costs, which would be practically difficult for regulators to obtain. Without this accurate source-specific control cost information, the imposition of EGU source-specific requirements would make any given level of emission reduction more costly than it would be under the cap-and-trade program alone. Thus, in States that achieve all CAIR reductions from EGUs, requiring both source-specific RACT on EGUs and compliance with rules implementing the CAIR would not achieve greater collective total emissions reductions from EGUs covered by the CAIR, and the collective reductions would likely be achieved at higher overall cost.

The CAIR is implemented on an annual and (for ozone) a seasonal basis. We believe that these averaging periods on which RACT is being implemented under the Phase 2 Rule are not in conflict with existing EPA policy. In general, the RACT

requirement is applied on a short-term basis up to 24 hours.[6] However, EPA guidance permits averaging times longer than 24 hours under certain conditions.[7] Although these earlier EPA guidance documents were directed at VOC, the NO_x Supplement to the General Preamble[8] provides, "While this guidance has been largely directed at application within the VOC program, much of the guidance is also applicable to RACT for stationary sources of NO_x." Section 4.6 ("RACT for Certain Electric Utility Boilers") of the NO_x Supplement provides generally applicable NO_x RACT emission rates for certain utility boilers on a pounds of NO_x per million Btu basis and indicates, "Compliance with these limits may be determined on a continuous basis through the use of a 30 day rolling average emission rate, calculated each operating day as the average of all hourly data for the pr[e]ceeding 30 operating days."

Other EPA guidance and policy allow for longer averaging times in certain circumstances. The EPA's "Economic Incentive Policy"[9] (EIP) provides guidance on use of long-term averages for RACT and generally provides for averaging times of no greater than 30 days. However, that guidance also states, "For NO_x sources that are required to comply with the [Ozone Transport Region] NO_x MOU regulation or the NO_x SIP call, the averaging time of an emission limit must not exceed a compliance period of

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[6] See, e.g., 52 FR at 45108 col. 2, "Compliance Periods" (November 24, 1987). "VOC rules should describe explicitly the compliance timeframe associated with each emission limit (e.g., instantaneous or daily). However, where the rules are silent on compliance time, EPA will interpret it as instantaneous.

[7] Memorandum from John O'Connor, Acting Director of the Office of Air Quality Planning and Standards, January 20, 1984, "Averaging Times for Compliance with VOC Emission Limits—SIP Revision Policy."

[8] 57 FR at 55625, col. 1 sec. 4.5 "Relation to VOC RACT Policies" (November 25, 1992).

[9] Improving Air Quality with Economic Incentive Programs, January 2001, available at http://www.epa.gov/region07/programs/artd/air/policy/search.htm.

an area's ozone season. Sources involved with EIP trades must meet all requirements applicable to the program." The EPA interprets this policy as applying to all trading programs and providing that the averaging time may not exceed the period for determining compliance with the trading program (e.g., one year for the CAIR annual trading programs –and the ozone season for the CAIR ozone season trading program).

In addition, the RACT emission reductions need to be permanent, i.e., once implemented, they also need to be continuously implemented. The EPA believes that emissions reductions from the CAIR will continue to be applied on a permanent basis. The EPA believes that EGUs covered by the CAIR that make the economic decision to install permanent controls will generally reduce their emissions for an extended period of time and not fluctuate in their level of control significantly over short periods, since it will generally be in their economic interest to control in order to generate emission allowances for sale to EGUs that opt not to install controls. Sources that comply with the CAIR comply with the overall NO_x emission caps on an annual and (for ozone) a seasonal basis. We note that sources covered by the CAIR are expected to reduce emissions to either comply with State emission limits (or to "overcontrol" beyond mere compliance and create surplus emission reduction credits that would be used to provide allowances to under-controlling sources) through permanent installation of emission controls such as selective catalytic reduction or selective non-catalytic reduction or combustion modification. As we noted in the Phase 2 Rule preamble in relation to the NO_x SIP call, "In addition to operating advanced controls at least in the ozone season, many sources have installed combustion controls that function all the time; emissions reductions from these controls will occur year round." (70 FR 71656). Therefore,

because of the expected general level of permanence of the controls on individual sources, EPA believes that sources that install controls will generally continue to provide the level of control for an extended period of time.

For these reasons, we continue to believe that EGUs subject to rules implementing the CAIR NO_x emission reduction requirements satisfy the RACT requirements for NO_x (in States that require all CAIR NO_x reductions from EGUs). Thus, at this time, EPA is not proposing to make any changes to the determination concerning NO_x RACT for EGUs in CAIR States in the Phase 2 Rule. The EPA continues to support its determination that States achieving all CAIR reductions from EGUs need not submit RACT analyses for EGU sources that are subject to and in compliance with rules implementing the CAIR requirements.

The determination that EGU sources complying with rules implementing CAIR requirements thereby also meet ozone NO_x RACT requirements applies only to EGUs in States achieving all required CAIR reductions from EGUs, except as noted below. As explained in the preamble to the final Phase 2 Rule, under the CAIR, a State may elect to meet its State budget for NO_x emissions solely through requiring reductions from EGUs or through requiring reductions from a combination of sources, including non-EGUs. If the State requires reductions from sources other than EGUs, it is not eligible to participate in the EPA-administered CAIR trading programs. Additionally, separate provisions of the CAIR rule allow States to choose to allow large NO_x sources that are not EGUs to opt-in to the trading programs. States that elect to allow such opt-ins, and States that require reductions from sources other than EGUs in implementing CAIR, may not rely on EPA's determination that EGUs complying with rules implementing the

CAIR satisfy NO_x RACT. If only part of the CAIR reductions are required from EGUs, and the balance of the reductions obtained from non-EGU sources, then the stringency of the CAIR EGU control would be diminished to some extent (an amount that cannot be determined until a State submits a SIP indicating which sources are participating in the program). Therefore, in these cases, the rationale for our determination that these sources satisfy the RACT requirement would not necessarily apply.

Nonetheless, a State that elects to bring its NO_x SIP Call non-EGU sources into the CAIR ozone season trading program may continue to rely on EPA's determination that RACT is met for EGU sources covered by the CAIR trading program. It may rely on this determination if and only if the State retains a summer season EGU budget under the CAIR that is at least as restrictive as the EGU budget that was set in the State's NO_x SIP call SIP. The rationale for this determination is that the sources covered by the NO_x SIP call were shown to meet a level of NO_x control that exceeds EPA's presumption of control under NO_x RACT. Note that EPA is not reconsidering or requesting additional comment on its determination that the NOx SIP Call constitutes RACT for sources covered by the NOx SIP Call. Therefore, as explained in the final Phase 2 Rule, if the summer season EGU budget under CAIR is at least as restrictive as set out in the NO_x SIP call SIP, and if non-EGU sources after 2008 continue to be subject to a SIP that regulates those non-EGU sources equally or more stringently than the State's current rules meeting the NO_x SIP call, then those EGUs are meeting a level of control at least as stringent as RACT. (See 68 FR 32839, col. 1 "Proposed Approach for NOx RACT Determinations in Areas Affected by the NO_x SIP Call;" and 70 FR 71656, col. 2, "Response," and col. 3, "NO_x SIP Call.") If the State does not meet these conditions, the

State would need to conduct RACT analyses for those EGUs (either on an individual basis, or using the averaging approach within the nonattainment area). The published CAIR summer season NO_x budgets for each State are at least as stringent as the NO_x budgets for the NO_x SIP call. Also, the CAIR rule permits a State to bring its NO_x SIP Call non-EGU sources into the CAIR ozone season trading program only if they continue to be regulated at the same level of stringency as under the NO_x SIP call. 40 CFR 96.340 (published at 70 FR 25392, May 12, 2005)).

In addition, as we noted in the Phase 2 Rule, a State has discretion to require beyond-RACT NO_x reductions from any source (including sources covered by the CAIR or NO_x SIP Call programs), and has an obligation to demonstrate attainment of the 8-hour ozone standard as expeditiously as practicable. In certain areas, States may require NO_x controls based on more advanced control technologies as necessary to provide for attainment of the ozone standards.

2. Supplemental Technical Analysis

To provide further support for the determination regarding CAIR and ozone NO_x RACT, EPA conducted an additional technical analysis. For each geographic area within the CAIR region where 8-hour ozone RACT determinations are required, EPA examined whether the emissions reductions projected from the CAIR equal or exceed the emissions reductions projected to occur from application of source-by-source RACT.[10] Specifically, this analysis was conducted for operating coal-, oil-, and gas-fired EGUs for each ozone transport region (OTR) State within the CAIR region and for each

[10] Since RACT is a technology requirement prescribing year-round controls, it is appropriate to consider how participation in both CAIR trading programs (annual and seasonal) will affect annual emissions of NO_x and to compare that to how RACT will affect annual emissions of NO_x.

nonattainment area in the CAIR region for which a RACT SIP, separate from an attainment demonstration SIP, is expected to be required.[11] The analysis was conducted on the basis of annual emissions and also summer season emissions. This analysis illustrates that the CAIR achieves greater overall emissions reductions across the CAIR region and across the OTR than would be achieved through the application of EGU source-by-source RACT controls. The docket contains a Technical Support Document[12] describing the analysis.

This emissions analysis, though not quantitatively definitive, is suggestive of the appropriateness of the determination that areas meet the 8-hour ozone SIP requirement for application of RACT for NO_x emissions where all EGUs comply with rules implementing the CAIR and those areas are located in States where all required CAIR emissions reductions are achieved exclusively from EGUs. There is uncertainty in the assumptions made in the analysis, although, as noted in the Technical Support Document, the assumptions tended to be conservative, i.e., erring on the side of projecting more emission reductions under the RACT scenario. The analysis does not project that CAIR emission reductions are equivalent to or exceed the reductions from source-by-source

[11] 40 CFR 51.912 (c)(1) (promulgated in the Phase 2 Rule) provides that for a subpart 1 area ". . . that submits an attainment demonstration that requests an attainment date 5 or less years after designation for the 8-hour NAAQS, the State shall meet the RACT requirement by submitting an attainment demonstration SIP demonstrating that the area has adopted all control measures necessary to demonstrate attainment as expeditiously as practicable." Thus, these areas are not required to submit RACT SIPs separate from their attainment demonstrations. However, a State must submit a RACT SIP separate from an attainment demonstration SIP for the following areas: under 40 CFR 51.912 (a), subpart 2 moderate and above areas; and under 40 CFR 51.912 (c)(2), subpart 1 areas with attainment dates beyond 5 years after designation.

[12] Technical Support Document For Phase 2 Of The Final Rule To Implement The 8-Hour Ozone National Ambient Air Quality Standard –Notice Of Reconsideration; NO_x RACT For EGUs In CAIR States--Supplemental Technical Analysis.

RACT for EGUs for every relevant nonattainment area and every State within the OTR. However, CAIR emission reductions are overall significantly greater regionwide than reductions obtained from source-by-source RACT for EGUs in both the CAIR region and the OTR. It is our belief that, due to the nature of regional emissions transport, local nonattainment area emissions reductions alone will not achieve the most effective or economically efficient impact on ozone air quality in nonattainment areas. We believe a combination of local and broader regional reductions, such as those driven by the CAIR requirements for EGUs, will achieve a more effective and economically efficient air quality improvement in nonattainment areas than application of source-by-source RACT.

Further, EPA believes that the term "reasonable" in RACT may be construed to allow consideration of the air quality impact of required emissions reductions from a region-wide cap and trade program such as the CAIR. As stated earlier, the region-wide CAIR NO_x emissions cap for 2009 was established based on the maximum total capacity on which it was possible to install controls by that date. So by design, the 2009 CAIR region-wide NO_x emissions cap for EGUs represents the most reductions that are reasonable to achieve. Because the CAIR achieves more NO_x emission reductions overall across the CAIR region and the OTR than EGU-by-EGU application of RACT, we believe this will result in more region-wide air quality improvements than application of RACT in the absence of the CAIR. The CAIR is projected to improve ozone air quality across much of the eastern half of the country, including many current and projected future nonattainment areas. A list of the counties projected to be in nonattainment in 2010 and 2015 (in the absence of the CAIR and 8-hour ozone SIPs), and the air quality improvement provided by the CAIR in each county, is provided in the

preamble to the final CAIR (70 FR 91, May 12, 2005, pp. 25254-25255, Tables VI-12 and VI -13) and in the final Air Quality Modeling Technical Support Document in the CAIR final rule docket (docket document EPA-OAR-2003-0053-2123). The CAIR improves air quality in all of the 40 projected 2010 nonattainment counties, and in all 22 of the projected 2015 nonattainment counties, that were identified in the CAIR rule modeling. The modeling also showed air quality improvement in numerous counties projected to be in attainment.

3. Request for Public Comment Period on Submission Date For RACT SIP for RACT SIPs for EGUs In CAIR Region

Because EPA is reconsidering the RACT determination discussed above, we believe it is appropriate to postpone the submission date for the portion of the 8-hour ozone SIP that addresses NO_x RACT for EGUs in the CAIR region. The EPA therefore proposes a new date of June 15, 2007 for States in the CAIR region to submit RACT SIPs for these sources.

Such a postponement would affect only moderate 8-hour ozone nonattainment areas in the CAIR region and only the portion of the RACT SIPs that covers EGUs. For moderate areas in the CAIR region, the States must still submit RACT SIPs for all other affected sources per 40 CFR 51.912 (a) by September 15, 2006.

B. Provisions of Final Rule Regarding the Criteria For Emission Reduction Credits From Shutdowns And Curtailments

1. Why We Changed Major Source NSR Criteria For Emission Reduction Credits (ERC) From Shutdowns And Curtailments

The final 8-hour ozone implementation rule removed the requirement that a State must have an approved attainment plan before a source may use pre-application credits from shutdowns or curtailments as offsets. It also revised the availability of creditable offsets, consistent with the requirements of section 173 of the CAA. We revised the provisions at 40 CFR 51.165(a)(3)(ii)(C) and appendix S concerning emission reduction credits generated from shutdowns and curtailments as proposed in Alternative 2 of the 1996 proposal, with one exception. Alternative 2 of the 1996 proposal provided that, in order to be creditable, the shutdown of an existing emission unit or curtailing of production or operating hours must have occurred after the "most recent emissions inventory." We agreed with the commenter who found the regulatory term "most recent emissions inventory" confusing. In particular, the commenter believed this language could be mistaken to mean that the base year for the purpose of determining emissions that may be used as creditable offsets would continue to shift. The commenter noted that it would be more accurate to state that the base year emissions inventory is the starting point, and all creditable emissions reductions must result from the shutdown or curtailment of emissions that have been reported in the base year inventory or a subsequent emissions inventory. (For the 8-hour ozone NAAQS, the base year is 2002.[13]) We agreed with the commenter that the terminology "most recent emissions inventory" could be confusing and revised 40 CFR 51.165(a)(3)(C)(1) and Appendix S paragraph IV.C.3. accordingly, specifying the cutoff date after which the shutdown or curtailment of emissions must occur as "the last day of the base year for the SIP planning process. For purposes of this paragraph, a reviewing authority may choose to consider a

[13] 68 FR 32833. See also "2002 Base Year Emission Inventory SIP Planning: 8-hr Ozone, PM2.5 and Regional Haze Programs," U.S. EPA, pg. 1 (November 18, 2002).

prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units." This provision is consistent with the previous regulation which also allowed the reviewing authority to treat prior shutdowns or curtailments as occurring after the date of the most recent emissions inventory, but we have modified the regulatory language to clarify the appropriate emissions inventory. Further, this regulatory language is consistent with our previous guidance on how emission reduction credits from shutdowns and curtailments are used in attainment planning.[14] The base year inventory includes actual emissions from existing sources and would not normally reflect emissions from units that were shutdown or curtailed before the base year, as these emissions are not "in the air." To the extent that these emission reduction credits are to be considered available for use as offsets and are thus "in the air" for purposes of demonstrating attainment, they must be specifically included in the projected emissions inventory used in the attainment demonstration along with other growth in emissions over the base year inventory. This step assures that emissions from shutdown and curtailed units are accounted for in attainment planning.[15] As with the prior rules, reviewing authorities thus retain the

[14] See 57 FR 13553. After the 1990 CAA Amendments were enacted, 1990 was the base year for 1-hour ozone NAAQS attainment planning purposes. See 57 FR 13502. The EPA encouraged States to allow sources to use pre-enactment banked emissions reductions credits for offsetting purposes. States have been allowed to do so if the restored credits meet all other offset creditability criteria, and States consider such credits as part of the attainment emissions inventory when developing their post-enactment attainment demonstration.

15 For a discussion of emission inventories for the 8-hour ozone standard, see our emission inventory guidance, "Emissions Inventory Guidance for Implementation of Ozone and Particulate Matter National Ambient Air Quality Standards (NAAQS) and Regional Haze Regulations - Final," at

ability to consider a prior shutdown or curtailment to have occurred after the last day of the base year if emissions that are eliminated by the shutdown or curtailment are emissions that were accounted for in the attainment demonstration. However, in no event may credit be given for shutdowns that occurred before August 7, 1977, a provision carried over from the previous regulation. See 40 CFR 51.165(a)(3)(C)(1)(ii) and 40 CFR Part 51 Appendix S Paragraph IV.C.3.

Other changes made to the provisions of the final Phase 2 Rule regarding emissions reduction credits from shutdowns and curtailments were nonsubstantive and merely clarified the restrictions on credits from shutdowns or curtailments. Specifically, the rule proposed on June 2, 2003 retained the requirement that a State have an approved attainment demonstration before a source may use preapplication credits from shutdowns or curtailments as offsets, but made that requirement inapplicable where the credits occurred after the last day of the base year for the SIP planning process or where they were included in the most recent emissions inventory. Our final rule recognized there is no requirement for an approved attainment demonstration in those circumstances, and thus deleted the reference to that former requirement since under the revised rule it would never apply.

2. Legal Basis For Changes To Criteria For Emission Reduction Credits From Shutdowns And Curtailments

The revisions made to the rules governing use of emissions reductions from shutdowns/curtailments as offsets were warranted by the more detailed attainment

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http://www.epa.gov/ttn/chief/eidocs/eiguid/index.html. For a discussion of emission projections used in attainment demonstrations, see Emission Inventory Improvement Program, Volume X, Emission Projections, December 1999, available at http://www.epa.gov/ttn/chief/eiip/techreport/.

planning and sanction provisions of the 1990 CAA Amendments. These provisions specifically address air quality concerns in nonattainment areas lacking EPA-approved attainment demonstrations. As a threshold matter, we noted (See 70 FR 71677, November 29, 2005) that CAA section 173 does not mandate the prior restrictions on shutdown credits, specifically, the requirement to have an approved attainment demonstration before shutdown credits may be allowed. (See 48 FR 38742, 38751; August 25, 1983). Rather, in promulgating these restrictions in 1989, EPA recognized that it had a large degree of discretion under the CAA to shape implementing regulations, as well as the need to exercise that discretion such that offsets are consistent with reasonable further progress (RFP) as required in CAA section 173. (See 54 FR 27286, 27292; June 28, 1989). Originally, EPA believed that areas without approved attainment demonstrations lacked adequate safeguards to ensure that shutdown/curtailment credits would be consistent with RFP. We thus subjected those areas to more restrictive requirements to ensure a link between the new source and the source being shutdown/curtailed (that is, shutdown/curtailment must occur after the application for a new or modified major source is filed).

The 1990 CAA Amendments changed the considerations involved. For areas subject to subpart 2 of CAA Part D, Congress emphasized the emission inventory requirement in section 172(c)(3) as a fundamental tool in air quality planning (See Section 182(a)(1). Congress also added new provisions keyed to the inventory requirement, including specific reduction strategies (e.g., section 182(b)(3) and (4) (regarding gasoline vapor recovery and motor vehicle inspection and maintenance programs)) and “milestones” that measure progress toward attainment from the base year

emissions inventory or subsequent revised inventories (See section 182(b)(1)). Where the emission reduction credits pre-date the base year, State and local agencies must include the credits from the shutdown/curtailment in the projected emissions inventory used to develop the attainment demonstration. Subpart 4 sets forth specific reduction strategies and milestones for attainment of the PM_{10} standards. Additionally, there are now several adverse consequences where States fail to meet the planning or emissions reductions requirements of the CAA. For example, the CAA contains mandatory increased new source offset sanctions at a 2:1 ratio where the Administrator finds that a State failed to submit a required attainment demonstration (See section 179). In areas that are subject to subpart 2 and subpart 4, failure to attain the air quality standard by the attainment deadline results in the area being bumped up to a higher classification (see sections 181(b)(2) and 188(b)(2)). Additional regulatory requirements are imposed as a result of the higher classification (see, e.g., section 182(c), (d), and (e), and section 189(b)). These statutory changes justify shifting the focus of the prior regulations from individual offset transactions between a specific new source and shutdown source and towards a systemic approach. Considering the changes to the 1990 CAA Amendments, we now believe that continuing the prohibition on the use of shutdown/curtailment credits generated in a nonattainment area that is without an approved attainment demonstration is not warranted. We believe that use of emission reduction credits from shutdowns/curtailments will be consistent with RFP towards attainment under CAA section 173, even in the absence of an approved attainment demonstration, if the shutdown or curtailment occurs after the last day of the base year for the SIP planning process or is included in the projected emissions inventory used to develop the attainment

demonstration. From an air quality planning perspective, emissions from the shutdown source actually impacted the measurements of air quality used in determining the nonattainment status of an area. Therefore, emissions reductions from such source shutdowns/curtailments are actual emissions reductions, and their use as emission offsets at a ratio of 1:1 or greater is consistent with RFP towards improved air quality as set forth in CAA section 173(a)(1)(A) provided they are included in the baseline emissions inventory.

3. Reconsideration of Emission Reduction Credits Final Rule Language and Request for Public Comments

In its January 30, 2006, petition for reconsideration, NRDC requested that EPA reconsider provisions in the final Phase 2 Rule that pertain to ERC. NRDC argued that EPA failed to present portions of the rule's "shutdown-curtailment offset provisions" and accompanying rationales to the public for comment. As noted above, the EPA is of the opinion that the basis for the ERC provisions of the final rule were fully explained in the November 29, 2005 rulemaking and in earlier actions leading to that rulemaking. The November 29, 2005 preamble included a lengthy description of preceding actions in which our rationale was developed. Furthermore, the November 29, 2005 preamble detailed our response to comments pertaining to the proposal. The particular comments that triggered the change in wording from usage of the term "most recent emissions inventory" to the term "projected emissions inventory used to develop the attainment demonstration" directly resulted from public comments we received in response to the July 23, 1996 proposal. The commenters voiced concerns that emission inventory updates would periodically eliminate emissions that could be used as emission reduction

credits even though those emissions had been included in the projected inventory to be used for establishing attainment progress. Such was not our intent and we changed the language specific to the inventory in question in the interest of making a clarification. Petitioners assert in their request for reconsideration that our clarifying amendments to the ERC provisions of the final rule were not a logical outgrowth of the ERC provisions we proposed. In contrast, we saw our language change in the final rule as a technical clarification and not as a change to the nature or scope of our proposal.

Nonetheless, we do see value in presenting the final rule language for public comment as requested by the petitioners. It was and is our position that the changes reflected in the final rule were made in a procedurally correct manner and that the public comments reflected in the final rule were factually and logically compelling. Nevertheless, we encourage and welcome additional input. At proposal, we presented two options, one of which was adopted following our consideration of the public comments. We thus propose for reconsideration and seek public comment on the ERC provisions in the final Phase 2 Rule set forth at 40 CFR 51.165(a)(3)(ii)(C)(1) and (2), and Appendix S paragraph IV.C.3.

C. Applicability of Appendix S, Section VI

1. Final Changes to Applicability of Appendix S, Section VI

Section VI allows new sources locating in an area designated as nonattainment to be exempt from the requirements of Section IV.A. of Appendix S if the date for attainment has not yet passed. Section VI provides a management tool to provide a limited degree of flexibility in situations where a new source would not interfere with an area's ability to meet an attainment deadline. The final Phase 2 Rule made a procedural

change to limit the applicability of appendix S, section VI to only those instances in which the Administrator has specifically approved doing so. Although we did not include the regulatory language to accomplish this goal in the June 2, 2003 proposal, we did clearly state our intention of doing so. As we noted at 68 FR 32848, section VI as worded without any amendment could apply in any nonattainment area where the dates for attainment have not passed even if the source meets all applicable SIP emission limitations and would not interfere with the area's ability to meet its attainment date. As codified prior to the amendment in the Final Phase 2 Rule, section VI contained no provision conditioning its applicability on approval by the Administrator. We noted at proposal, however, that States generally would not be able to show that a nonattainment area would continue to meet its attainment date if it does not apply LAER or offsets to major new sources and major modifications in the absence of safeguards (68 FR 32848).

Further, we stated in the preamble to the Phase 2 Rule that we continued to believe, as we stated in the proposal, that States should not interpret section VI as allowing a blanket exemption from LAER and offsets for all major new sources and major modifications in a given area before attainment dates have passed for that area. At proposal, we also offered for comment two broad programmatic proposals to modify the then-existing section VI for the purpose of providing greater flexibility. Overall, commenters considered the programmatic options to be impracticable. However most commenters did express support for the flexibility provided by section VI. For this reason, we retained the original eligibility conditions for determining when section VI applies, but added the procedural requirement that the Administrator determine that the two previously existing conditions of Section VI are satisfied, and that the Administrator

provide public notice of that determination. Thus, in the final rule we retained the previously existing requirements of Section VI, and added a further requirement that the Administrator independently determine and provide public notice that those requirements have been met. This requirement will achieve the proposal's purpose of assuring that States do not interpret section VI to provide a broad exemption to all major new sources and major modifications in any nonattainment area for which the attainment date has not passed.

2. Legal Basis for Changes to Applicability of Appendix S and the Transitional NSR Program

For the purposes of today's reconsideration, we will not expand our prior expressions of the legal basis for section VI of Appendix S. The legal basis for Appendix S, including section VI, was discussed in detail in section V.B.3.b. of the preamble to the final Phase 2 Rule. We have historically recognized that the SIP development period provided for in section 172(b) leaves a gap in part D major NSR permitting and have determined that this gap is to be filled with an interim major NSR program that is substantially similar to the requirements of part D, including the LAER and offset requirements from part D, subject to a limited exemption where the attainment deadline will be met (57 FR 18070, 18076). This interim NSR program has been implemented to date through Appendix S.

The section VI exemption, as limited by the final Phase 2 Rule, is consistent with the section 110(a)(2)(C) requirement that preconstruction permitting is implemented "as necessary to assure that the [NAAQS] are achieved." While the Phase 2 Rule did not adopt the eligibility criteria that were proposed to ensure satisfaction of the original

section VI conditions, we did add the proposed requirement that the Administrator determine that sources exempted from LAER and offsets under section VI will meet those conditions, in particular, noninterference with the attainment deadline. Section VI also is consistent with the exercise of our gap filling authority under section 301, as informed by the legislative history. That is, Appendix S reflects Congressional intent that standards equivalent to part D govern the issuance of NSR permits, subject to a limited degree of flexibility under conditions where attainment of the NAAQS by the attainment deadline is assured.

3. Reconsideration of Appendix S, Section VI Final Rule Language and Request for Public Comments

In its January 30, 2006, petition, NRDC requested that EPA reconsider provisions in the final Phase 2 Rule that pertain to Appendix S, section VI. NRDC argued that EPA failed to provide the public with an opportunity to comment on the language of Appendix S, Section VI that was included in the final rule. As is the case with respect to the ERC provisions, EPA believes that our rationale was fully explained in the November 29, 2005 rulemaking and in earlier actions leading to that rulemaking. The preamble to the final rule included a lengthy description of preceding actions in which our rationale was developed. Further, the preamble to the final rule detailed our response to comments pertaining to the proposal. In our June 2, 2003 notice we proposed two possible programs for the implementation of the provisions contained in Section VI. Commenters recommended against the proposed approaches and we responded by dropping both proposed programs at promulgation. As noted above, what we did in the final rule was add one provision to the already existing language of Appendix S, section VI to limit use

of Section VI to only those instances publicly approved of by the Administrator. Although we did not include in the June 2, 2003 proposal the regulatory language added to the final rule at Appendix S, Section VI.C., we did clearly state our intention as to the change to be made. From our perspective, we made the smallest change possible and achieved closure of a gap in section VI. Thus, we disagree with the petitioner's assertion that the final rule language is not a logical outgrowth of the proposal. As well, we disagree with the petitioner's assertion that the final rule constitutes an open-ended scheme to evade the strictures of Part D. If anything, the prior rule language could have been construed as open-ended. The sole intention of our language change was to close what we perceived to be a loophole allowing just the type of outcome to which the petitioners object. Congress required just such closure through the provisions of the original section 129 as included in the August 7, 1977 amendments to the Act. At that time, Congress made clear its opinion that it would be the role of the Administrator to determine whether waiver of the appendix S provisions in question might be appropriate.

The change made to Section VI in the final rule providing that the Administrator must determine whether the conditions of Section VI have been satisfied provides a positive safeguard to prevent just the kinds of unchecked application of its provisions as envisioned by the petitioners. We continue to see section VI as a gap-filler that goes away as of the attainment date. It was and is our position that the changes reflected in the final rule were made in a procedurally correct manner and that the public comments reflected in the final rule were factually and logically compelling. Nonetheless, we see value in presenting for public comment the changes made to Section VI of Appendix S in

the final Phase 2 Rule. Therefore, we seek comment on subsection C. of Section VI of Appendix S as added in the final Phase 2 rule as requested by the petitioners.

Following today's action, we anticipate two possible outcomes. First, should we not receive compelling arguments to the contrary, the provision promulgated on November 29, 2005, and proposed today in section VI.C. would remain as promulgated. That is, the language proposed herein is actually already codified in the Code of Federal Regulations and we would make no further changes. The second possible outcome of our reconsideration of this provision could be that commenters might make compelling arguments that it was inappropriate for us to add to the final Phase 2 Rule the requirement of Section VI.C. that the Administrator determine that requirements A and B of Section VI have been satisfied and to provide notice of such determination. Should that occur, our final rule would consist of amendatory language to revert the text of section VI to that which existed prior to November 29, 2005. That is, we would retract section VI.C. and remove the specification for the Administrator to be the determinant of when section VI might be applied. We invite comment on these two options. We currently believe that the correct approach is the approach we took in the final Phase 2 Rule. While section 129 has been amended to address matters largely unrelated to those addressed in 1977, Congress did previously legislate a course parallel to that which we have thus far chosen to pursue.

IV. STATUTORY AND EXECUTIVE ORDER REVIEWS

A. Executive Order 12866: Regulatory Planning and Review

A. Executive Order 12866: Regulatory Planning and Review

Under Executive Order (EO) 12866 (58 FR 51735, October 4, 1993), this action is a "significant regulatory action." This action is significant because it raises novel legal or policy issues. Accordingly, EPA submitted this action to the Office of Management and Budget (OMB) for review under EO 12866 and any changes made in response to OMB recommendations have been documented in the docket for this action.

Paperwork Reduction Act

The information collection requirements in this reconsideration notice are addressed along with those covering the Phase 1 Rule (April 30, 2004; 69 FR 23951) and the Phase 2 Rule (November 29, 2005; 70 FR 71612) which was submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. [EPA ICR # 2236.01.] The information collection requirements are not enforceable until OMB approves them other than to the extent required by statute.

This action announces EPA's decision to reconsider and take additional comment on several provisions of the Phase 2 Rule, namely the RACT provisions and selected NSR provisions. This action does not establish any new information collection burden on States beyond what was required in the Phase 2 Rule.

The EPA has projected cost and hour burden for the statutory SIP development obligation for the Phase 2 Rule, and prepared an Information Collection Request (ICR). Assessments of some of the administrative cost categories identified as a part of the SIP for an 8-hour standard are already conducted as a result of other provisions of the CAA and associated ICRs (e.g. emission inventory preparation, air quality monitoring program, conformity assessments, NSR, inspection and maintenance program).

The burden estimates in the ICR for the Phase 2 rule are incremental to what is required under other provisions of the CAA and what would be required under a 1-hour standard. Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations in 40 CFR are listed in 40 CFR part 9. When the ICR for the Phase 2 rule is approved by OMB, the Agency will publish a technical amendment to 40 CFR part 9 in the Federal Register to display the OMB control number for the approved information collection requirements contained in this final rule. However, the failure to have an approved ICR for this rule does not affect the statutory obligation for the States to submit SIPs as required under part D of the CAA.

The information collection requirements associated with NSR permitting for ozone are covered by EPA's request to renew the approval of the ICR for the NSR program, ICR 1230.17, which was approved by OMB on January 25, 2005. The information collection requirements associated with NSR permitting were previously

covered by ICR 1230.10 and 1230.11. The OMB previously approved the information collection requirements contained in the existing NSR regulations at 40 CFR parts 51 and 52 under the provisions of the Paperwork Reduction Act, and assigned OMB control number 2060-0003. A copy of the approved ICR may be obtained from Susan Auby, Collection Strategies Division; U.S. Environmental Protection Agency (2822T); 1200 Pennsylvania Ave., NW, Washington, DC 20460 or by calling (202) 566-1672.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act generally requires an Agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the Administrative Procedures Act or any other statute unless the Agency certifies the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of today's notice of reconsideration on small entities, small entity is defined as: (1) a small business as defined by the Small Business Administration's (SBA) regulations at 13 CFR 121.201; (2) a governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of the Phase 1 and Phase 2 Rules, we concluded that those actions did not have a significant economic impact on a substantial number of small entities. For those same reasons, I certify that this action will not have a

significant economic impact on a substantial number of small entities. This notice of reconsideration will not impose any requirements on small entities. We continue to be interested in the potential impacts of our proposed rules on small entities and welcome comments on issues related to such impacts.

Concerning the NSR portion of this notice of reconsideration, a Regulatory Flexibility Act Screening Analysis (RFASA) was developed as part of a 1994 draft Regulatory Impact Analysis (RIA) and incorporated into the September 1995 ICR renewal. This analysis showed that the changes to the NSR program due to the 1990 CAA Amendments would not have an adverse impact on small entities. This analysis encompassed the entire universe of applicable major sources that were likely to also be small businesses (approximately 50 "small business" major sources). Because the administrative burden of the NSR program is the primary source of the NSR program's regulatory costs, the analysis estimated a negligible "cost to sales" (regulatory cost divided by the business category mean revenue) ratio for this source group. The incorporation of the major source thresholds and offset ratios from the 1990 CAA Amendments in section 51.165 and appendix S for the purpose of implementing NSR for the 8-hour standard does not change this conclusion. Under section 110(a)(2)(C), all States must implement a preconstruction permitting program "as necessary to assure that the [NAAQS] are achieved," regardless of changes to today's regulations. Thus, small businesses continue to be subject to regulations for construction and modification of stationary sources, whether under State and local agency minor NSR programs, SIPs to implement section 51.165, or appendix S, to ensure that the 8-hour standard is achieved.

D. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with "Federal mandates" that may result in expenditures to State, local, and Tribal governments, in the aggregate, or to the private sector, of $100 million or more in any 1 year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires EPA to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows EPA to adopt an alternative other than the least costly, most cost-effective or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted. Before EPA establishes any regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments, it must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of EPA regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

The EPA has determined that this notice of reconsideration does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local,

and Tribal governments, in the aggregate, or the private sector in any 1 year. In promulgating the Phase 1 and Phase 2 Rules, we concluded that they were not subject to the requirements of sections 202 and 205 of the UMRA. For those same reasons, this notice of reconsideration and request for comment is not subject to the UMRA.

The EPA has determined that this notice of reconsideration contains no regulatory requirements that may significantly or uniquely affect small governments, including Tribal governments.

E. Executive Order 13132: Federalism

Executive Order 13132 (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government."

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This notice of reconsideration requests comment on three aspects of the Phase 2 Rule. For the same reasons stated in the Phase 1 and Phase 2 Rules, Executive Order 13132 does not apply to this action.

In the spirit of Executive Order 13132, and consistent with EPA policy to promote communications between EPA and State and local governments, EPA specifically solicits comment on this action from State and local officials.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

Executive Order 13175 (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure "meaningful and timely input by Tribal officials in the development of regulatory policies that have Tribal implications." This notice of reconsideration does not have "Tribal implications" as specified in Executive Order 13175.

The purpose of this notice of reconsideration is to announce our decision to reconsider and request comment on specific aspects of the Phase 2 Rule. The CAA provides for States and Tribes to develop plans to regulate emissions of air pollutants within their jurisdictions. The Tribal Authority Rule (TAR) gives Tribes the opportunity to develop and implement CAA programs such as the 8-hour ozone NAAQS, but it leaves to the discretion of the Tribes whether to develop these programs and which programs, or appropriate elements of a program, they will adopt.

For the same reasons stated in the Phase 1 and Phase 2 Rules, this action does not have Tribal implications as defined by Executive Order 13175. It does not have a substantial direct effect on one or more Indian Tribes, since no Tribe has implemented a CAA program to attain the 8-hour ozone NAAQS at this time. If a Tribe does implement such a plan, it would not impose substantial direct costs upon it. Furthermore, this action does not affect the relationship or distribution of power and responsibilities between the

Federal government and Indian Tribes. The CAA and the TAR establish the relationship of the Federal government and Tribes in developing plans to attain the NAAQS, and this action does nothing to modify that relationship. Because this action does not have Tribal implications, Executive Order 13175 does not apply.

G. Executive Order 13045: Protection of Children from Environmental Health and Safety Risks

Executive Order 13045 (62 FR 19885, April 23, 1997) applies to any rule that (1) is determined to be "economically significant" as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children, and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This notice of reconsideration addresses several provisions in the Phase 2 Rule that the Agency was requested to reconsider and requests comment on those provisions. The action is not subject to Executive Order 13045 because the Agency does not have reason to believe the environmental health risks or safety risks addressed by this action present a disproportionate risk to children. Nonetheless, we have evaluated the environmental health or safety effects of the 8-hour ozone NAAQS on children. The results of this evaluation are contained in 40 CFR part 50, National Ambient Air Quality Standards for Ozone, Final Rule (July 18, 1997; 62 FR 38855-38896, specifically, 62 FR 38860 and 62 FR 38865).

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This action is not a "significant energy action" as defined in Executive Order 13211, "Actions That Significantly Affect Energy Supply, Distribution, or Use," (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The notice of reconsideration announces our decision to reconsider and requests comment on several aspects of the Phase 2 Rule, for which EPA did perform an analysis of the energy impacts under Executive Order 13211.[16]

I. National Technology Transfer Advancement Act

Section 12(d) of the National Technology Transfer Advancement Act of 1995 (NTTAA), Public Law No. 104-113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards (VCS) in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by VCS bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

This action does not involve technical standards. Therefore, EPA is not considering the use of any VCS.

[16] Technical Appendix: Potential Impacts of Implementation of the 8-Hour Ozone NAAQS; Technical Support Document. July 21, 2005. Docket Document EPA-HQ-OAR-2003-0079-0860.

The EPA will encourage the States and Tribes to consider the use of such standards, where appropriate, in the development of the implementation plans.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionate high and adverse human health or environmental effects of its programs, policies, and activities on minorities and low-income populations.

The EPA concluded that the Phase 2 Rule does not raise any environmental justice issues (See 70 FR at 71695, col. 2; (November 29, 2005)); for the same reasons, since this action announces our decision to reconsider and requests comment on several aspects of the Phase 2 rule, this reconsideration notice does not raise any environmental justice issues. The health and environmental risks associated with ozone were considered in the establishment of the 8-hour, 0.08 ppm ozone NAAQS [62 FR 38856 (July 18, 1997)]. The level is designed to be protective with an adequate margin of safety. The Phase 2 Rule provides a framework for improving environmental quality and reducing health risks for areas that may be designated nonattainment.

List of Subjects

40 CFR Part 51

Environmental protection, Air pollution control, Carbon monoxide, Lead, Nitrogen dioxide, Ozone, Particulate matter, Sulfur oxides.

_____

Dated:

_____

Stephen L. Johnson,
Administrator.

For the reasons stated in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

Part 51–Requirements for Preparation, Adoption, and Submittal of Implementation Plans

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

Authority: 23 U.S.C. 101; 42 U.S.C. 7401-7671q.

Subpart I - [Amended]

2. Section 51.165 is amended by revising paragraph (a)(3)(ii)(C) to read as follows:.

§51.165 Permit requirements.

(a) * * *

(3) * * *

(ii) * * *

(C) Emission reduction credits from shutdowns and curtailments. (1) Emissions reductions achieved by shutting down an existing emission unit or curtailing production or operating hours may be generally credited for offsets if they meet the requirements in paragraphs (a)(3)(ii)(C)(1)(i) through (ii) of this section.

(i) Such reductions are surplus, permanent, quantifiable, and federally enforceable.

(ii) The shutdown or curtailment occurred after the last day of the base year for the SIP planning process. For purposes of this paragraph, a reviewing authority may choose to consider a prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment

demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units. However, in no event may credit be given for shutdowns that occurred before August 7, 1977.

(2) Emissions reductions achieved by shutting down an existing emissions unit or curtailing production or operating hours and that do not meet the requirements in paragraph (a)(3)(ii)(C)(1)(ii) of this section may be generally credited only if:

(i) The shutdown or curtailment occurred on or after the date the construction permit application is filed; or

(ii) The applicant can establish that the proposed new emissions unit is a replacement for the shutdown or curtailed emissions unit, and the emissions reductions achieved by the shutdown or curtailment met the requirements of paragraph (a)(3)(ii)(C)(1)(i)of this section.

* * * * *

Appendix S to part 51 - [Amended]

3. Appendix S to part 51 is amended by revising paragraphs IV.C.3 and VI to read as follows:

Appendix S to part 51–Emission Offset Interpretative Ruling

* * * * *

IV. * * *

C. * * *

3. Emission Reduction Credits from Shutdowns and Curtailments.

(i) Emissions reductions achieved by shutting down an existing source or curtailing production or operating hours may be generally credited for offsets if they meet the requirements in paragraphs IV.C.3.i.1. through 2 of this section.

(1) Such reductions are surplus, permanent, quantifiable, and federally enforceable.

(2) The shutdown or curtailment occurred after the last day of the base year for the SIP planning process. For purposes of this paragraph, a reviewing authority may choose to consider a prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions from such previously shutdown or curtailed emission units. However, in no event may credit be given for shutdowns that occurred before August 7, 1977.

(ii) Emissions reductions achieved by shutting down an existing source or curtailing production or operating hours and that do not meet the requirements in paragraphs IV.C.3.i.1. through 2 of this section may be generally credited only if:

(1) The shutdown or curtailment occurred on or after the date the new source permit application is filed; or

(2) The applicant can establish that the proposed new source is a replacement for the shutdown or curtailed source, and the emissions reductions achieved by the shutdown or curtailment met the requirements of paragraphs IV.C.3.i.1. through 2 of this section.

* * * * *

VI. POLICY WHERE ATTAINMENT DATES HAVE NOT PASSED

In some cases, the dates for attainment of primary standards specified in the SIP under section 110 have not yet passed due to a delay in the promulgation of a plan under this section of the Act. In addition the Act provides more flexibility with respect to the dates for attainment of secondary NAAQS than for primary standards. Rather than setting specific deadlines, section 110 requires secondary NAAQS to be achieved within a "reasonable time". Therefore, in some cases, the date for attainment of secondary standards specified in the SIP under section 110 may also not yet have passed. In such cases, a new source locating in an area designated in 40 CFR 81.300 *et seq.* as nonattainment (or, where section III of this Ruling is applicable, a new source that would cause or contribute to a NAAQS violation) may be exempt from the Conditions of section IV.A if the conditions in paragraphs VI.A through C are met.

A. The new source meets the applicable SIP emission limitations.

B. The new source will not interfere with the attainment date specified in the SIP under section 110 of the Act.

C. The Administrator has determined that conditions A and B of this section are satisfied and such determination is published in the Federal Register.