

Federal Register

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ENVIRONMENTAL FEDERAL REGISTER

Electronic Sub-Set

**Note: Agencies currently participating in
this sub-set include: EPA**

Contents

Federal Register

Vol. 58, No. 221

Thursday, November 18, 1993

Environmental Protection Agency**PROPOSED RULES**

Clean Air Act:

Acid rain program allowance system; substitution and reduced utilization plans, 60950

Superfund:

National oil and hazardous substances contingency plan—
National priorities list update, 60825

Toxic substances:

Polychlorinated biphenyls (PCBs)—
Reclassification of PCB and PCB-contaminated transformers,
60970**NOTICES**

Drinking water:

Public water supply supervision program—
Connecticut, 60855
Rhode Island, 60855

Part V

Environmental Protection Agency, 60950

Part VIEnvironmental Protection Agency, 60970

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

40 CFR

Proposed Rules:

72.....	60950
73.....	60950
300.....	60825
761.....	60970

Proposed Rules

Federal Register

Vol. 58, No. 221

Thursday, November 18, 1993

This section of the FEDERAL REGISTER contains notices to the public of the proposed issuance of rules and regulations. The purpose of these notices is to give interested persons an opportunity to participate in the rule making prior to the adoption of the final rules.

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-4801-5]

National Oil and Hazardous Substances Pollution Contingency Plan; National Priorities List Update

AGENCY: Environmental Protection Agency.

ACTION: Notice of intent to delete the Witco Chemical Corporation site from the National Priorities List; Request for comments.

SUMMARY: The Environmental Protection Agency (EPA) Region II announces its intent to delete the Witco Chemical Corporation (Witco) site from the National Priorities List (NPL) and requests public comment on this action. The NPL constitutes appendix B to the National Oil and Hazardous Substances Pollution Contingency Plan (NCP), which EPA promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended. EPA and the State of New Jersey Department of Environmental Protection and Energy (NJDEPE) have determined that no further cleanup by responsible parties is appropriate under CERCLA. Moreover, EPA and NJDEPE have determined that remedial activities conducted at the site to date have been protective of public health, welfare, and the environment.

DATES: Comments concerning the deletion of the Witco site from the NPL may be submitted on or before December 17, 1993.

ADDRESSES: Comments may be mailed to: John Osolin, Remedial Project Manager, U.S. Environmental Protection Agency, Region II, 26 Federal Plaza, room 747, New York, New York 10278.

Comprehensive information on the Witco site is contained in the EPA Region II public docket, which is located at EPA's Region II office, and is available for viewing, by appointment only, from 9 a.m. to 5 p.m., Monday through Friday, excluding holidays. For further information, or to request an appointment to review the public docket, please contact Mr. Osolin at (212) 264-9301.

Background information from the Regional public docket is also available for viewing at

the Witco site's Administrative Record repository located at: Oakland Public Library, Municipal Plaza, Oakland, New Jersey 07436, (201) 337-3742. Hrs. M-TH 10 a.m.-9 p.m. F&SA 10 a.m.-5 p.m.

FOR FURTHER INFORMATION CONTACT: John Osolin at 212-264-9301.

SUPPLEMENTARY INFORMATION:

Table of Contents:

- I. Introduction
- II. NPL Deletion Criteria
- III. Deletion Procedures
- IV. Basis for Intended Site Deletion

I. Introduction

EPA Region II announces its intent to delete the Witco site, Oakland, New Jersey, from the NPL and requests public comment on this deletion. The NPL is appendix B to the NCP, which EPA promulgated pursuant to section 105 of CERCLA, as amended. EPA identifies sites that appear to present a significant risk to public health, welfare, or the environment and maintains the NPL as the list of those sites. Sites on the NPL may be the subject of remedial actions financed by the Hazardous Substances Superfund Response Trust Fund (the Fund). Pursuant to § 300.425(e)(3) of the NCP, any site deleted from the NPL remains eligible for Fund-financed remedial actions, if conditions at such site warrant action.

EPA will accept comments concerning the Witco site for thirty (30) days after publication of this notice in the **Federal Register** until December 17, 1993.

Section II of this notice explains the criteria for deleting sites from the NPL. Section III discusses procedures that EPA is using for this action. Section IV discusses how the Witco site meets the deletion criteria.

II. NPL Deletion Criteria

The NCP establishes the criteria that the Agency uses to delete sites from the NPL. In accordance with 40 CFR 300.425(e)(1)(i)-(iii), sites may be deleted from the NPL where no further response is appropriate. In making this determination, EPA, in consultation with NJDEPE, will consider whether any of the following criteria has been met:

1. Responsible or other parties have implemented all appropriate response actions required; or

2. All appropriate Fund-financed response under CERCLA has been implemented, and no further response action by responsible parties is appropriate; or

3. The remedial investigation has shown that the release poses no significant threat to public health or to the environment and,

therefore, taking remedial measures is not appropriate.

Deletion of a site from the NPL does not preclude eligibility for subsequent Fund-financed actions if future conditions warrant such actions. Section 105(e) of CERCLA states: "Whenever there has been, after January 1, 1985, a significant release of hazardous substances or pollutants or contaminants from a site which is listed by the President as a "Site Cleaned Up to Date" on the National Priorities List, the site shall be restored to the National Priorities List without application of the hazard ranking system."

III. Deletion Procedures

The NCP provides that EPA shall not delete a site from the NPL until the State in which the release was located has concurred, and the public has been afforded an opportunity to comment on the proposed deletion. Deletion of a site from the NPL does not affect responsible party liability or impede agency efforts to recover costs associated with response efforts. The NPL is designed primarily for informational purposes and to assist Agency management.

EPA Region II will accept and evaluate public comments before making a final decision to delete. The Agency believes that deletion procedures should focus on notice and comment at the local level. Comments from the local community may be most pertinent to deletion decisions. The following procedures were used for the intended deletion of the Witco site:

1. EPA Region II has recommended deletion and has prepared the relevant documents.

2. NJDEPE has concurred with the deletion decision.

3. Concurrent with this Notice of Intent to Delete, a notice has been published in local newspapers and has been distributed to appropriate federal, state and local officials, and other interested parties. This notice announces a thirty (30) day public comment period on the deletion package starting on November 18, 1993, and concluding on December 17, 1993.

4. The Region has made all relevant documents available in the Regional Office and the local site information repositories.

The comments received during the comment period will be evaluated before the final decision is made. EPA Region II will prepare a Responsiveness Summary which will address the comments received during the public comment period.

If after consideration of these comments, EPA decides to proceed with deletion, the EPA Regional Administrator will place a

Notice of Deletion in the **Federal Register**. The NPL will reflect any deletions in the next final update. Public notices and copies of the Responsiveness Summary will be made available to local residents by EPA.

IV. Basis for Intended Site Deletion

The following summary provides the Agency's rationale for recommending deletion of the Witco Site, Oakland, New Jersey from the NPL.

Witco has owned and operated a technical research facility for the development of specialty chemicals at this 9-acre site on Bauer Drive in Oakland, New Jersey from 1966 through the present. From 1966 through 1984, the company neutralized laboratory wastewater in a 2,000 gallon underground acid neutralizing tank, and then discharged it to a series of underground seepage pits.

On March 10, 1982, representatives of NJDEPE's Division of Water Resources performed an inspection at the facility to review operations and wastewater management practices for compliance with the New Jersey Water Pollution Control Act.

On April 2, 1982, NJDEPE issued a directive requiring that Witco take measures to cease the unpermitted discharge of industrial wastewaters to ground water at the site. On July 16, 1982, NJDEPE further directed Witco to submit a plan for the elimination of the discharge of industrial wastewaters into ground water and to implement a hydrogeological study to investigate possible soil and ground-water contamination.

On April 14, 1982 and November 18, 1982, NJDEPE collected seepage pit, soil and ground-water samples at the facility. Compounds detected include petroleum hydrocarbons, chloroform, toluene, carbon tetrachloride, chlorobenzene, benzene, xylene and ethylbenzene.

In response to NJDEPE's directive, Witco initiated a hydrogeological investigation in November 1982 which included the installation and sampling of four ground-water monitoring wells. In addition, three soil borings and two sludge samples from the seepage pit system were collected and analyzed. The analyses revealed that the ground water, soil and sludge were contaminated with petroleum hydrocarbons and various organic compounds including toluene, carbon tetrachloride, chloroform, xylene, benzene and chlorobenzene.

In February 1984, Witco replaced its underground seepage pit system with a 6,000

gallon capacity fiberglass tank with associated line connections, pumps and level gauges. This tank is used for the accumulation of laboratory wastewaters prior to off-site disposal. The system has been in operation at the facility from February 1984 through the present.

On August 28, 1985, EPA performed a Site Investigation at the facility to evaluate potential contamination due to the previous operation of the underground seepage pit system. Ground water, soil and surface water were sampled and analyzed. Compounds detected during the Site Investigation include 2-butanone, dieldrin, 4,4'-DDE, 4,4'-DDT and benzo(a)pyrene.

On November 30, 1987, Witco initiated activities at the site including excavation and stockpiling of soils, removal of sludge from the six seepage tanks, and removal and disposal of the seepage tanks. These activities were completed in January 1988. Soils that were shown by Witco's analyses to contain greater than 100 parts per million of petroleum hydrocarbons were removed and disposed of off site. Witco reported that approximately 720 cubic yards of soil and other debris, and fourteen 55-gallon drums of sludge were disposed of off site. Ground-water samples from monitoring wells at the facility were collected and analyzed by Witco on five occasions from February 1987 to June 1988 as part of a voluntary monitoring program. The removal and disposal of materials from the site and the collection and analyses of samples were conducted voluntarily by Witco and were not subject to EPA or NJDEPE oversight or verification.

The site was proposed for inclusion on the Superfund National Priorities List (NPL) by a notice published in the **Federal Register** (53 FR 23988), on June 24, 1988. On October 4, 1989, the site was formally placed on the NPL by a notice published in the **Federal Register** (54 FR 41000-41015).

In June 1989, EPA notified Witco of its potential Superfund liability with respect to the site. EPA offered Witco the opportunity to conduct or finance the Remedial Investigation and Feasibility Study (RI/FS) for the site and Witco agreed. Witco and EPA entered into an Administrative Order on Consent (Order) which provided for Witco's performance of the RI/FS with oversight by EPA. The Order became effective on August 29, 1989.

Witco contracted with Roy F. Weston, Inc. (Weston) to conduct an investigation to characterize the geology, ground-water

hydrology and the chemical quality of the soil and ground water at the site. The investigation included the installation of additional monitoring wells and piezometers, drilling of soil borings, collection of soil samples, and four rounds of ground-water samples. All samples were analyzed for volatile organic compounds, inorganic compounds, base-neutral and acid extractable organic compounds (BNAs), pesticides and polychlorinated biphenyls (PCBs). The analytical results indicated no significant levels of contaminants in site soils or surface water, and although there were sporadic detections of contaminants in site ground water, no discernible contaminant plume was found.

Based on the results of the RI, it appears that the removal of the seepage pits and surrounding soil, undertaken by Witco in 1987, effectively remediated the contamination at the Witco Site. Therefore, on September 28, 1992, EPA signed a Record of Decision (ROD) for this site, selecting "No Further Action" to address the site. The ROD also calls for the implementation of a limited ground-water monitoring program. EPA will monitor the residential well located at 18 Bailey Avenue, once a year for a period not less than five years. This well was selected because it is the only residential well downgradient of the Site which is located between the site and Oakland Public Supply Well #5. In the unlikely event that site-related contamination has migrated off the site, the monitoring program will not only ensure that this residential well has not been impacted, but will provide an early warning for the public water supply, should any such contamination migrate toward Oakland Public Supply Well #5.

Because the "No Further Action" remedy does not result in hazardous substances, pollutants, or contaminants (attributable to on-site activities) remaining on-site above health-based levels, the five-year review does not apply.

Having met the deletion criteria, EPA proposes to delete this site from the NPL. EPA and NJDEPE have determined that the response actions are protective of human health and the environment.

Dated: September 8, 1993.

William J. Muszynski,

Acting Regional Administrator.

[FR Doc. 93-27987 Filed 11-17-93; 8:45 am]

BILLING CODE 6560-50-P

Notices

Federal Register

Vol. 58, No. 221

Thursday, November 18, 1993

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ENVIRONMENTAL PROTECTION AGENCY

[FRL-4802-9]

Public Water Supervision Program: Program Revision for the State of Connecticut

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Notice is hereby given that the State of Connecticut is revising its approved State Public Water Supervision Primacy Program. Connecticut has adopted drinking water regulations for total coliforms (including fecal coliforms and E. Coli) that correspond to the National Primary Drinking Water Regulations for total coliforms (including fecal coliforms and E. Coli) promulgated by EPA on June 29, 1989 (54 FR 27544). EPA has determined that the State program revisions are no less stringent than the corresponding Federal regulations. Therefore, EPA has tentatively decided to approve these State program revisions. All interested parties are invited to request a public hearing. A request for a public hearing must be submitted by December 17, 1993, to the Regional Administrator at the address shown below. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by December 17, 1993, a public hearing will be held. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, this determination shall become effective December 17, 1993.

Any request for a public hearing shall include the following:

(1) The name, address, and telephone number of the individual, organization or other entity requesting a hearing.

(2) A brief statement of the requesting person's interest in the Regional Administrator's determination and of information that the requesting person intended to submit at such hearing.

(3) The signature of the individual making the request; or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

ADDRESSES: All documents relating to this determination are available for inspection between the hours of 8 a.m. and 4:30 p.m. Monday through Friday, at the following offices:
Connecticut Department of Public Health and Addiction Services (formerly Connecticut Department of Health Services), Water Supplies Section, 21 Grand Street, Hartford, CT 06106.

and

U.S. Environmental Protection Agency, Region I, Ground Water Management and Water Supply Branch, One Congress Street, 11th Floor, Boston, MA 02203.

FOR FURTHER INFORMATION CONTACT: Mark Sceery, U.S. Environmental Protection Agency, Region I, Ground Water Management and Water Supply Branch, JFK Federal Building, Boston, MA 02203, Telephone: (617) 565-3604.

Authority: Section 1413 of the Safe Drinking Water Act, as amended (1986); and 40 CFR 142.10 of the National Primary Drinking Water Regulations.

Dated: October 27, 1993.

Patricia L. Meaney,

Acting Regional Administrator.

[FR Doc. 93-28391 Filed 11-17-93; 8:45 am]

BILLING CODE 6560-50-F

[FRL-4802-8]

Notice of Public Water Supervision Program: Program Revision for the State of Rhode Island

AGENCY: Environmental Protection Agency.

ACTION: Notice.

SUMMARY: Notice is hereby given that the State of Rhode Island is revising its approved State Public Water Supervision Primacy Program. Rhode Island has adopted: (1) Drinking water regulations for total coliforms (including fecal coliforms and E. Coli) that correspond to the National Primary Drinking Water Regulations for total coliforms (including fecal coliforms and E. Coli) promulgated by EPA on June 29, 1989 (54 FR 27544); and (2) filtration, disinfection, turbidity, Giardia lamblia, viruses, Legionella, and heterotrophic bacteria that correspond to the National Primacy Drinking Water Regulations for filtration, disinfection, turbidity, Giardia lamblia, viruses, Legionella, and heterotrophic bacteria requirements

promulgated on June 29, 1989 (54 FR 27486). EPA has determined that the State program revisions are no less stringent than the corresponding Federal regulations. Therefore, EPA has tentatively decided to approve these State program revisions. All interested parties are invited to request a public hearing. A request for a public hearing must be submitted by December 17, 1993, to the Regional Administrator at the address shown below. Frivolous or insubstantial requests for a hearing may be denied by the Regional Administrator. However, if a substantial request for a public hearing is made by December 17, 1993, a public hearing will be held. If no timely and appropriate request for a hearing is received and the Regional Administrator does not elect to hold a hearing on his own motion, this determination shall become effective December 17, 1993.

Any request for a public hearing shall include the following:

(1) The name, address, and telephone number of the individual, organization or other entity requesting a hearing.

(2) A brief statement of the requesting person's interest in the Regional Administrator's determination and of information that the requesting person intended to submit at such hearing.

(3) The signature of the individual making the request; or, if the request is made on behalf of an organization or other entity, the signature of a responsible official of the organization or other entity.

ADDRESSES: All documents relating to this determination are available for inspection between the hours of 8 a.m. and 4:30 p.m. Monday through Friday, at the following offices:

Rhode Island Department of Health, Division of Water Quality, 3 Capitol Hill, Providence, RI 01908.

and

U.S. Environmental Protection Agency, Region I, Ground Water Management and Water Supply Branch, One Congress Street, 11th Floor, Boston, MA 02203.

FOR FURTHER INFORMATION CONTACT: Ellie Kwong, U.S. Environmental Protection Agency, Region I, Ground Water Management and Water Supply Branch, JFK Federal Building, Boston, MA 02203, Telephone: (617) 565-3620.

Authority: Section 1413 of the Safe Drinking Water Act, as amended (1986); and 40 CFR 142.10 of the National Primary Drinking Water Regulations.

Dated: October 19, 1993.

Paul Keough,

Acting Regional Administrator.

[FR Doc. 93-28390 Filed 11-17-93; 8:45 am]

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Federal Register

Thursday
November 18, 1993

Part V

**Environmental
Protection Agency**

40 CFR Parts 72 and 73
Acid Rain Program: Permits and
Allowance System; Proposed Regulations

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 72 and 73

[FRL-4800-4]

RIN 2060-AD40 and AD46

Acid Rain Program: Permits and Allowance System

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed regulations and notice of public hearing.

SUMMARY: Title IV of the Clean Air Act, as amended by Public Law 101-549, the Clean Air Act Amendments of 1990 (the Act), authorizes the Environmental Protection Agency (EPA or Agency) to establish the Acid Rain Program to reduce the adverse effects of acidic deposition. On January 11, 1993, the Agency promulgated final rules implementing the program. The instant notice includes proposed revisions of rules that implement sections 404 (b) and (c) (Phase I substitution plans) and 408(c)(1)(B) (reduced utilization plans) of the Act.

EPA has determined that the existing rules can be read to give utilities an ability to use substitution and reduced utilization plans to create excess, new allowances. These allowances—potentially 200,000 allowances per year in Phase I—will authorize emissions in excess of total emissions without the plans and will result from emission reductions made, or required by federal or State law adopted, before enactment of title IV of the Act. This creation of allowances can compromise the achievement of the sulfur dioxide emissions reductions intended under title IV and is contrary to the statutory purposes of sections 404 (b) and (c) and 408(c)(1)(B).

Consequently, EPA is proposing today to modify sections of part 72 of the January 11, 1993 regulations, implementing substitution and reduced utilization plans and allowance surrender related to reduced utilization, and to make minor changes to part 73. The intended effect of the proposed modifications is to prevent the use of substitution and reduced utilization plans to create excess, new allowances.

DATES: *Comments.* Comments on the regulations proposed by this action must be received on or before January 3, 1994, except as provided below in connection with the public hearing. The request for comments is strictly limited to the matters addressed in this proposal. The Agency will deem irrelevant, and will not respond to, any comments pertaining to other aspects of the Acid Rain Program.

Public Hearing. The Agency will hold a public hearing, strictly limited to the matters addressed in the proposal, on December 3, 1993. The hearing will begin at 12:30 p.m.,

with registration at 12:15 p.m. Requests to schedule oral testimony must be received by the Acid Rain Division at (202) 233-9077 on or before November 26, 1993. Persons must restrict oral presentations to 10 minutes and may submit written copies of their complete comments. The record of the public hearing will be kept open until January 3, 1994 to allow submission of written information that rebuts or supplements the information presented at the public hearing.

ADDRESSES: *Comments.* All written comments (including those submitted in connection with the hearing) must be identified with the appropriate docket number and must be submitted in duplicate to: EPA Air Docket Section (LE-131), Attention, Docket No. A-93-40, Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460.

Hearing. The Agency will hold the December 3, 1993 public hearing at the EPA Education Center, Waterside Mall, 401 M Street, SW., Washington DC 20460.

Docket. Docket No. A-93-40, containing supporting information used to develop the proposal and copies of all comments received, is available for public inspection and copying from 8:30 a.m. to 12 p.m. and 1 p.m. to 3:30 p.m., Monday through Friday, excluding legal holidays, at EPA's Air Docket Section in room 1500, first floor at 401 M Street, SW., Washington DC 20460.

FOR FURTHER INFORMATION CONTACT: Dwight C. Alpern, Attorney-advisor, at (202) 233-9151, Acid Rain Division (6204J), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, or the Acid Rain Hotline at (202) 233-9620.

SUPPLEMENTARY INFORMATION: The contents of the preamble to the proposed rule are as follows:

I. Statutory Purposes of Substitution and Reduced Utilization Provisions

II. January 11, 1993 Regulations

III. Need to Modify January 11, 1993 Regulations

- A. January 11, 1993 regulations can be read to give utilities ability to bring Phase II units into Phase I in order to create excess, new allowances
- B. Under January 11, 1993 regulations, entry of Phase II units into Phase I can compromise emissions reduction goals of title IV
- C. Other statutory provisions support limiting entry of Phase II units into Phase I and creation of new allowances

IV. Proposed Modifications of January 11, 1993 Regulations

- A. Substitution Plans
 1. Limiting allowances allocated to each substitution unit
 - a. Emissions rate used to allocate allowances
 - b. Utilization used to allocate allowances
 2. Limiting number of substitution units
 3. Requiring common owner or operator
 4. Other changes
- B. Reduced Utilization Plans
 1. Option 1: end-of-year review of need for compensating units
 - a. Requiring actual reduced utilization and provision of compensating generation

- b. Limiting number of compensating units
 - c. Reporting requirements and allowance surrender
 2. Option 2: limiting units that can qualify as compensating units
- V. Applicability of Rule Revisions to Existing Permit Applications
 - VI. Administrative Requirements
 - A. Executive Order 12291 and Regulatory Flexibility Act
 - B. Paperwork Reduction Act

I. Statutory Purposes of Substitution and Reduced Utilization Provisions

The provisions in sections 404 (b) and (c) and 408(c)(1)(B) of the Act concerning substitution and reduced utilization plans have specific statutory purposes related to the achievement of the sulfur dioxide emissions reduction goals of title IV. Upon reflection, the Agency believes that Congress did not intend that these provisions provide utilities an ability to create excess, new allowances by bringing Phase II units into Phase I. Because the January 11, 1993 regulations implementing these provisions can be read to allow the creation of potentially 200,000 excess, new allowances per year in Phase I, the Agency proposes to revise the regulations to ensure that this does not occur.

Congress established substitution plans as a compliance option to "expand the compliance flexibility" of the units specified in Table A of section 404 as required to reduce emissions in Phase I. Senate Rep. No. 101-228, 101st Cong., 1st Sess. at 327 (Dec. 20, 1989). The purpose of a substitution plan is to allow a Table A unit (i.e., a unit listed in Table A) to reassign all or part of such reduction obligation to a non-Table A unit under the owner's or operator's control. *Id.* at 307 and 327-8. With this reassignment or "emissions reduction trading," the non-Table A unit will make emissions reductions in lieu of the Table A unit. *Id.* at 328. The non-Table A unit's reduction will free up allowances for the Table A unit that is not making the reductions. The substitution will be requested presumably because the non-Table A unit can reduce emissions at a lower cost than the Table A unit. Thus, the purpose of substitution plans is to increase flexibility and reduce the overall costs of compliance in Phase I while still achieving the emissions reductions intended by Congress under title IV.

The requirement that the intended emissions reductions still be achieved is stated plainly in section 404(b)(5) of the Act. That section requires that, in approving a substitution plan, the Administrator ensure that the substitution results in total emissions reductions at least equal to the total reductions that otherwise "would have been achieved" by these Table A and non-Table A units "without such substitution." 42 U.S.C. 7651c(b)(5); see also Senate Rep. No. 101-228 at 328. In short, the substitution provision is intended to provide an alternative means of achieving Phase I reductions, not a

mechanism for creating excess, new allowances and avoiding emission reductions.

The provision for reduced utilization plans has a statutory purpose that is also aimed at ensuring realization of emission reductions. Congress recognized that the potential for circumvention of emission limitation requirements exists because in Phase I only a minority of all utility units are subject to such requirements. A utility could circumvent the required reductions "simply by utilizing an affected unit less and an [sic] unit with no tonnage limitations in its place." Senate Rep. No. 101-228 at 334. Such load-shifting "would not yield a true net reduction in emissions: whatever emissions were avoided from the first [Phase I] unit would only occur at the second [e.g., a Phase II unit]." *Id.* While the Phase II unit would not have to use up allowances for its increased emissions, the Phase I unit would use up fewer allowances. Since there would be more unused allowances available to authorize future emissions in Phase I or Phase II, this "practice, if unchecked [,] could [] frustrate the emissions reduction objectives of the program." *Id.*

In section 408(c)(1)(B), Congress adopted the solution of requiring owners and operators of any Phase I unit that, for compliance purposes, propose reducing utilization of the unit below 1985-87 utilization (i.e., its baseline) to submit a reduced utilization plan. 42 U.S.C. 7651g(c)(1)(B). In such a plan, the owners and operators must specify "the unit or units that will provide electrical generation to compensate for the reduced output" at the Phase I unit or demonstrate that the reduced utilization "will be accomplished through energy conservation or improved unit efficiency." *Id.* The Administrator approves or disapproves each plan after determining whether it meets the requirements of title IV. 42 U.S.C. 7651g(c)(2). These requirements include, of course, achievement of the full amount of sulfur dioxide emissions reductions intended under the Acid Rain Program.

Each compensating unit designated in an approved plan becomes subject to all requirements for Phase I units with regard to sulfur dioxide, including the emissions limitations, and is allocated allowances equal to that unit's baseline times the lesser of the 1985 actual or allowable emissions rate for the unit. Congress made compensating units subject to Phase I in order to:

Ensure that total emissions from the initially affected units and the units to which the production is shifted together equal no greater amount of emissions than would have occurred at the affected unit had it reduced emissions without load-shifting * * *

In enforcing this provision, the Administrator should consider any pattern or practice that is counter to the intent of section 404 and this title. Shifting load use, e.g., from a baseload to a peak load unit, without accounting for the emissions consequences of increasing use at another unit is not an acceptable compliance strategy * * *.

Senate Rep. No. 101-228 at 334. Thus, like the substitution provisions, the provisions for designating compensating units in a reduced utilization plan are intended to both allow flexibility in compliance and protect the emission reduction goals of title IV by requiring that such a plan not result in more emissions than would occur in the absence of the plan.

II. January 11, 1993 Regulations

On January 11, 1993, EPA promulgated regulations that implemented the major provisions of title IV, including the substitution and reduced utilization provisions. Under § 72.41 of the January 11, 1993 regulations, the designated representative for a unit on Table A (which covers the same units as Table 1 of § 73.10(a)) may include in the Phase I permit application a substitution plan designating, as substitution units, one or more existing units that are Phase II units not on Table A. 40 CFR 72.41(b). There is no express requirement that the substitution unit make reductions in addition to those that it would have made without the plan or actually provide allowances for the Table A unit. Moreover, there is no express limit on the number of substitution units that a Table A unit may designate. Thus, the regulations can be read to allow substitution plans that, with few limitations, bring Phase II units into Phase I in a manner that creates excess, new allowances. See 58 FR 3600.

Section 72.43 of the January 11, 1993 regulations requires that the designated representative for a Phase I unit submit a reduced utilization plan under certain circumstances. A plan must be submitted if the owners and operators of the unit plan to reduce utilization of the unit below its baseline for purposes of complying with Phase I emissions limitations and to accomplish this by shifting generation to a non-Phase I unit or to a sulfur-free generator or by using energy conservation or improved unit efficiency measures. 40 CFR 72.43(b). However, the regulation establishes broad exceptions to the requirement to submit a plan. For example, where underutilization is caused by system sales decline, forced outage, or economic dispatching, a plan is not required. 40 CFR 72.43(e). Instead, §§ 72.91 and 72.92 require allowances to be surrendered to the extent a Phase I unit is underutilized and shifts generation to a non-Phase I unit.

Once a reduced utilization plan is approved (or a conditionally approved plan is activated), § 72.43 does not expressly require termination of the plan for years during which the Phase I unit does not actually have any reduced utilization or the compensating unit does not actually provide any compensating generation to the Phase I unit. Moreover, there is no express limit on the number of compensating units that a Phase I unit may designate and no express bar on a

compensating unit itself designating a compensating unit. (However, the designation of a large number of compensating units or a compensating unit's designation of its own compensating unit or a sulfur-free generator might throw into question the validity of the Phase I unit's reduced utilization plan.) Thus, as with substitution plans, the regulations can be read to allow utilities to use reduced utilization plans that, with few limitations, bring Phase II units into Phase I and create excess, new allowances.

Under the current regulations, early entry of Phase II units through substitution or reduced utilization plans can create excess, new allowances: i.e., allowances that would not otherwise be available and that reflect reductions that would occur in the absence of the plans. For each year that a plan remains in effect, each substitution or compensating unit under the plan becomes a Phase I unit allocated a number of allowances equal to the unit's baseline times the lesser of the 1985 actual or allowable emissions rate for the unit. See 40 CFR 72.41(c)(3) and (d) and 72.43(c)(4)(ii) and (d). Since there is no cap on total allowances in Phase I, the allocations to substitution and compensating units do not reduce the allowances already allocated to Phase I units. Moreover, a substitution or compensating unit that reduces its emissions rate after 1985 for reasons other than the reduction requirements and allowance trading under title IV may receive a Phase I allowance allocation significantly in excess of what its emissions would have been in Phase I in the absence of the plan. For example, before the enactment of title IV, some units had reduced emissions rates for economic reasons and some States had already enacted laws requiring their utilities to reduce emissions rates prior to Phase II; all such reductions have taken, or will take, place for reasons independent of the substitution and reduced utilization provisions of title IV.

To provide allowances—potentially 200,000 allowances per year in Phase I—for emissions reductions that would occur in the absence of these compliance options under title IV will create excess authorizations to emit sulfur dioxide. As discussed below, this can compromise achievement of the emissions reductions that Congress intended to result from title IV.

III. Need to Modify January 11, 1993 Regulations

Beginning in February 1993, EPA received Phase I permit applications covering all 263 Table A units. These applications included many substitution and reduced utilization plans proposing to designate a total of 250 Phase II units as substitution and compensating units. Further, on March 12, 1993, petitions for judicial review of the January 11, 1993 regulations were filed with the U.S. Court of Appeals for the District of Columbia Circuit. Three of the petitioners raised issues concerning, inter alia,

substitution and reduced utilization plans. On May 21, 1993, some of the petitioners also submitted to EPA a petition for reconsideration of the reduced utilization provisions of the regulations. Based in large part on its review of the permit applications, the reconsideration motion, and issues raised by the petitioners in litigation, the Agency is proposing to modify the January 11, 1993 regulations implementing substitution and reduced utilization plans.¹

A. January 11, 1993 Regulations Can Be Read To Give Utilities Ability To Bring Phase II Units Into Phase I in Order To Create Excess, New Allowances

The Agency is concerned that the current regulations can be read to give utilities an ability to use substitution and reduced utilization plans to bring selected Phase II units into Phase I and create excess, new allowances. Moreover, the number of new allowances created may greatly exceed the number needed by those Phase II units to cover their emissions in the absence of the plans. This result does not appear to be consistent with the statutory purposes of the substitution and reduced utilization provisions. The potential number of excess, new allowances can be sufficient to compromise achievement of the emissions reductions intended by Congress under title IV. This prospect is highlighted by the large number of substitution and compensating unit designations that have already been submitted in permit applications. EPA's review of these submissions indicates that approval of such designations for the full five years of Phase I would result in the creation of excess, new allowances. The Agency is therefore proposing to modify the regulations in order to ensure that these compliance options are used in a manner consistent with Congressional intent.

Several factors give rise to this problem. First, the current regulations can be read to give utilities a largely unlimited ability to bring selected Phase II units into Phase I. A utility arguably can elect to designate Phase II units as substitution or compensating units whether or not the Phase I unit for which they are designated actually reassigns any

emissions reduction obligation or reduces its utilization below baseline. To submit a reduced utilization plan, the utility must merely plan to have reduced utilization at the original Phase I unit while, for substitution plans, there are no prerequisites.

Moreover, a Phase I unit can arguably designate an unlimited number of Phase II units as substitution or compensating units. The regulations do not expressly establish any minimum amount of substitution or compensation that an individual substitution or compensating unit must provide in order to be designated in a plan. The only express limits on the number of substitution or compensating units are that the designated representatives of the units must agree to the designation of the units and, with regard to substitution plans, the Table A unit and its substitution unit must have a common owner or operator. Each designated substitution or compensating unit approved by EPA is then allocated allowances equal to its baseline times the lesser of its 1985 actual or allowable emissions rate.

Second, a utility's decision on whether to bring a given Phase II unit into Phase I as a substitution or compensating unit is largely discretionary. In the case of substitution plans, there is no requirement to designate a particular Phase II unit as a substitution unit except under very limited circumstances involving units with a common stack. See, e.g., 58 FR 3599 and 40 CFR 75.15(a)(2)(ii). In the case of reduced utilization plans, there are broad exemptions from the requirement to submit a plan. 58 FR 3605-3606.

Further, the regulations give utilities flexibility to decide, near the end of the year, whether or not a particular Phase II unit will be brought in as a substitution or compensating unit in that year. Utilities may submit substitution and reduced utilization plans for approval or conditional approval. An approved plan goes into effect for the years selected in the plan but may be terminated for a given year so long as the utility informs the Agency by 60 days (i.e., generally December 1) before the allowance transfer deadline for the year. 40 CFR 72.41(e)(3)(ii) and 72.43(e)(4)(ii). A conditionally approved plan may be activated for a given year so long as the utility informs the Agency by that same date. Thus, a utility with approved or conditionally approved plans can decide whether a Phase II unit will be a substitution or compensating unit in a given year after the utility reviews actual operating results for most of that year.

Consequently, Phase II units will likely enter Phase I only if they will benefit from early entry, e.g., where they will create new allowances because they have actual emissions in Phase I that are lower than the allowances (i.e., baseline times 1985 actual or allowable emissions rate) they will receive as

substitution or compensating units.² Some of the Phase II units entering Phase I may create allowances in excess of emissions because of emissions rate reductions that would not otherwise have been made in the absence of such early entry. However, entry into Phase I will also enable other Phase II units that would have reduced their emissions rate after 1985 even in the absence of such early entry (e.g., for economic reasons or due to State law) to convert these reductions into additional allowances in excess of their Phase I emissions. Phase II units with actual emissions in Phase I that exceed their allowance allocation as substitution or compensating units are less likely to voluntarily enter Phase I because they would have to obtain more allowances or reduce emissions. By remaining outside Phase I, they are free to increase their emissions until Phase II. Thus, voluntary entry into Phase I is likely to be selective: Phase II units that can create new allowances in excess of emissions are more likely to become and remain substitution or compensating units.

B. Under the January 11, 1993 Regulations, Entry of Phase II Units Into Phase I Can Compromise Emissions Reduction Goals of Title IV

The Agency estimates that if all Phase II units that reduced emissions rates between 1985 and 1991 for economic reasons or that are required to reduce emissions rates between 1985 and 1995 due to federal law (other than title IV) or State law—thus putting emissions below each unit's allowances as a substitution or compensating unit under the current rule—were to enter Phase I, about 200,000 allowances in excess of emissions without such entry would be created per year in Phase I.³ See Calculation of Potential Impacts of Phase I Substitution Units, ICF Inc. (July 7, 1993). Additional allowances could be created by early entry of other Phase II units projected to reduce their emissions rate between 1990 and 2000 for economic reasons. However, today's proposal focuses on the allowances created by early entry of the former group of Phase II units because their new allowances result from emissions rate changes that are most reasonably viewed as reductions that would

¹ Although the Agency is addressing in this proposal the concerns raised in the petition for reconsideration, it is doing so because of the significant of the issues raised and not due to any obligation under section 307(d)(7)(B) of the Act. That section would apply with regard to an objection that "was impracticable to raise" during the public comment period on the January 11, 1993 regulations or if the grounds for the objection "arose after the period for public comment (but within the time specified for judicial review)." 42 U.S.C. 7607(d)(7)(B). On July 2 and 6, 1993, the Utility Air Regulatory Group (UARG) and Ohio Edison Company (Edison) submitted comments on the petition for reconsideration. Contrary to those comments, the Agency maintains (as discussed in this proposal) that it has the authority under title IV to limit the designation of compensation units. UARG and Ohio Edison will have the opportunity, during the comment period, to present their positions and address the specific proposal presented here. The Agency will address, in the course of the rulemaking, all relevant comments.

² Phase II units may also benefit from early entry because, by becoming Phase I units, they may be subject to Phase I NO_x emissions limitations and may be grandfathered under any future action by EPA to promulgate more stringent NO_x limitations for Phase II. See 15 U.S.C. 7651(f)(b)(2).

³ The Agency also estimated the number of allowances that would be allocated, under the current rule and the proposal, to all the substitution and compensating units under the active and conditional plans already submitted to the Agency. For purposes of making that estimate, the Agency calculated allowances for compensating units by using the same allocation formulas as for substitution units. EPA estimates that, assuming all the plans would be active for each year in Phase I, approval of the plans under the current rule would result in about 385,000 more allowances being allocated than would approval of the plans under the proposal.

have taken place in the absence of the substitution and reduced utilization provisions of title IV.

These estimates are based on the following data for Phase II units: Baseline and 1985 actual and allowable emissions rates from the National Allowance Data Base, version 2.11 (58 FR 15720 (March 23, 1993)); 1990 actual emissions rates derived from data submitted by utilities to the Department of Energy on EIA form 767;⁴ and 1995 projected emissions rates and utilization in the data base relied on by Congress in developing and passing the Act (see Senate Rep. No. 101-228 at 302). The study addressed only the excess, new allowances that could result from designating Phase II units as substitution units. However, the same Phase II units could instead be designated as compensating units and, under the January 11, 1993 rules, would be allocated allowances under the same formula. Further, because the study relied on the same 1995 projected utilization figures as were relied on by Congress in passing the Act, the study does not reflect the impact of future utility dispatch decisions that may be aimed at maximizing the creation of new allowances under the current regulations. The analysis still provides a reasonable, but conservative, estimate of the potential aggregate impact of the early entry of Phase II units that may be allowed under the current regulations.

Thus, as a result of early entry of Phase II units, 200,000 excess, new allowances may become available to affected units in Phase I and/or in Phase II and may enable such units to avoid making emissions reductions that title IV would otherwise require them to make. The excess allowances will result from emissions rate reductions that would occur at Phase II units in the absence of the substitution and reduced utilization provisions of title IV and will therefore diminish the emissions reductions that Congress intended to be achieved by virtue of title IV. In sum, under a possible reading of the regulations, the statutory substitution and reduced utilization provisions are inadvertently turned on their heads and transformed from provisions for facilitating and protecting anticipated emissions reductions under title IV into potential means of creating new allowances that can be used to avoid such reductions.

The potential magnitude of the number of excess, new allowances that may be created through substitution and reduced utilization plans is sufficient to compromise achievement of the emissions reductions that Congress expected under title IV. Congress

expected the emission limitations in title IV to result in annual emissions reductions of 2.8 to 4.4 million tons in Phase I. Senate Rep. No. 101-228 at 327; Cong. Rec. S16980 (Oct. 27, 1990). The range in the annual expected reductions in Phase I was due, in large part, to uncertainty over what reductions or increases in emissions would occur at Phase II units during Phase I. With regard to Phase I units alone, the expected reductions during Phase I are more precisely known: About 2.4 million tons in 1995 and 1996; and about 3.5 million tons in 1997, 1998, and 1999. Under the current regulations, Phase I units could avoid some of these reductions by offsetting their emissions in Phase I with excess, new allowances resulting from the plans. The use of 200,000 excess, new allowances per year in Phase I would negate a significant portion (i.e., 6 to 8 percent) of the expected reductions for Phase I units.

Alternatively, banking these new allowances for use in Phase II would diminish the intended emissions reduction impact of the 8.95 million ton cap established by Congress for Phase II. The cap—which was regarded as the “centerpiece” of title IV—was adopted because, without it, Congress expected that there would be an additional 1.2 to 3 million tons of emissions per year in 2000 and up to 5 million additional tons by 2010. House Rep. No. 101-490 at 364 (May 17, 1990). Congress therefore required (with limited exceptions) that, if the total allowances allocated in Phase II exceeded the cap, EPA was to “make pro rata adjustments to reduce the total to 8.9 million” in order to guarantee that “neither extra allowances for clean utilities nor other provisions granting allowances in this title violate the cap.” *Id.* at 368. Congress recognized that the precise amount of reductions resulting from the imposition of the cap may vary depending on the extent to which units make greater than required reductions in Phase I and carry forward a corresponding number of allowances. Senate Rep. No. 101-228 at 315. However, the carryover and use of the excess, new allowances created by early entry of Phase II units into Phase I (e.g., the use of 200,000 allowances per year for the first five years of Phase II) could result in emissions exceeding the cap for each of those years by 200,000 tons.

The Agency concludes that Congress did not intend to provide Phase II units, through sections 404(b) and (c) and 408(c)(1)(B), the ability to create excess, new allowances for pre-Phase II emissions reductions that would have been achieved in the absence of substitution and reduced utilization plans under title IV.

C. Other Statutory Provisions Support Limiting Entry of Phase II Units Into Phase I and Creation of New Allowances

The Agency’s conclusion that Congress did not intend to allow creation of excess, new allowances through entry of Phase II units

into Phase I is supported not only by the emission reduction goals of title IV and the purposes of the substitution and reduced utilization provisions, but also by Congress’ approach in other sections of title IV.

In section 405 of the Act, Congress set forth the procedures for allocating allowances to Phase II units for each year in Phase II. Beginning in 2000, each Phase II unit that would otherwise have emissions exceeding its allowances must reduce emissions or acquire more allowances. With the limited exception in section 404(e), a Phase II unit that reduces emissions before 2000 is not allocated any additional allowances for making reductions early.

Under section 404(e), Congress permitted the allocation of additional allowances for early emissions reductions by Phase II units but only under very limited circumstances. In order for a Phase II unit to qualify for such allowances, the unit must meet stringent criteria, including the following:

1. The Governor of the State in which the unit is located authorized the unit to reduce emissions prior to 1995.
2. The total coal-fired electric generation of the unit’s utility system as a percentage of total system generation decreased by more than 20% between January 1, 1980 and December 31, 1985.
3. The weighted capacity factor for all coal-fired units within the utility system, averaged from January 1, 1985 to December 31, 1987, was less than 50%.
4. The emission reductions are achieved by physical changes or changes in methods of operation made after November 15, 1990, including changes in the type or quality of fuel being burned.
5. The emission reductions are made during 1995 through 1999.

See 42 U.S.C. 7651d(e); 40 CFR 73.16(a) and (b) and 73.20(a) and (b); and 57 FR 29942-29943 (July 7, 1992).

Further, in section 410 of the Act, Congress directly addressed the matter of units voluntarily entering the Acid Rain Program. In this section, Congress established a procedure under which owners and operators of units can elect to enter the Acid Rain Program, receive allowances, and become subject to the emissions limitations and other requirements of the program. Congress was careful to limit such voluntary entry to “any unit that is not, nor will become, an affected unit under section 403(e), 404, or 405 [of the Act].” 42 U.S.C. 7651i(a). Congress thereby excluded Phase II units from electing into Phase I under section 410.

The fact that Congress was so careful in sections 404(e), 405, and 410 to limit the ability of Phase II units to obtain allowances for emissions reductions made before Phase II strongly suggests that other sections of the Act should not be interpreted to allow allowance allocations for all such reductions.

⁴There information for 1990 was missing from the EIA forms, data were substituted from the EPA AIRS inventory if possible. If the information was still unavailable and the boiler was not reported as off-line or retired, a value was substituted by scaling data for the unit from the closest calendar year with data (1985, 1988, or 1989). The scaling was done using the ratio of the estimated national totals for 1990 and the closest calendar year.

IV. Proposed Modifications of the January 11, 1993 Regulations

A. Substitution Plans

The Agency proposes to modify the January 11, 1993 regulations concerning substitution plans by limiting the allowances allocated to the substitution unit to the baseline times the lesser of 1985 actual or allowable emissions rate, 1990 actual emissions rate, or the most stringent federal or State allowable rate for sulfur dioxide for Phase I as of November 15, 1990, the date of enactment of title IV of the Act. In addition, it is proposed that the regulations provide that having a common designated representative does not meet the common owner or operator requirement for substitution plans.

1. Limiting Allowances Allocated to Each Substitution Unit

a. Emissions rate used in allocating allowances. Under today's proposal, as in the January 11, 1993 regulations, each unit designated as a substitution unit in an approved plan becomes a Phase I unit and is allocated allowances. However, consistent with the purposes of section 404, the proposal limits the number of allowances allocated to each substitution unit by calculating the allocation based on an emissions rate that is more representative of what would have been achieved without the substitution plan. A substitution unit will be allocated allowances equal to baseline times the lesser of the unit's 1985 actual or allowable emissions rate, the unit's 1990 actual emissions rate, or the most stringent federal or State allowable emissions rate as of November 15, 1990 that applies to the unit in 1995-99. In contrast, the January 11, 1993 regulations consider only the unit's 1985 actual or allowable emissions rate.

As discussed above, section 404(c) requires that the substitution plan include a demonstration "to the satisfaction of the Administrator" that the plan will "achieve the same or greater emissions reduction than would have been achieved by the original affected unit and the substitute unit or units without such substitution." 42 U.S.C. 7651c(b)(5). Upon reflection, the Agency interprets this provision to require that the plan achieve total reductions equal to or greater than both; (i) The Table A unit's reduction obligation in Phase I, and (ii) the reductions that the substitution unit would have made if it had not entered Phase I, including reductions made for economic reasons prior to passage of title IV and reductions mandated by federal or State emissions limitations adopted prior to title IV. The preamble to the January 11, 1993 regulations set forth a different interpretation that the Agency now concludes is erroneous.

In the January 11, 1993 preamble, the Agency stated that any reductions in emissions rate that have been, or will be, made at the substitution unit after 1985

without the substitution plan (e.g., reductions for economic reasons or required by federal or State law) "will not have resulted from title IV" and so should "not be counted as reductions that would have occurred without the plan." 58 FR 3601 (emphasis added). The difficulty with this interpretation is that it appears to read out of section 404(b)(5) the requirement to ensure that a substitution plan does not negate reductions "that would have been achieved by * * * the substitute unit * * * without such substitution." 42 U.S.C. 7651c(b)(5). In the absence of the plan, the substitution unit would not be subject to title IV until Phase II. If only reductions required by title IV were considered under section 404(b)(5), the amount of reductions that would have been achieved by the substitution unit without the plan (i.e., the reductions in Phase I) would always be zero. See Comments of Utility Air Regulatory Group (UARG) at 85 n. 90 (filed February 12, 1992); and 56 FR 63015 (December 3, 1991). The reference to such reductions would therefore be meaningless. In interpreting the Act, it should not be presumed that Congress adopted meaningless language. See *U.S. v. Menache*, 348 U.S. 528, 538-9 (1955); *Motor & Equipment Manufacturers Assn. v. E.P.A.*, 627 F.2d 1095, 1107-8 (D.C. Cir. 1979), *cert. den.*, 446 U.S. 952 (1980).

The Agency concludes that the better interpretation of section 404(b)(5) is to take into account, and avoid allocating allowances to the substitution unit for, all reductions that would otherwise have been made at the substitution unit since 1985.⁵ Moreover, the Agency maintains that all emissions rate reductions by a substitution unit between 1985 and 2000 that were mandated by federal or State law as of the enactment of title IV are, by definition, reductions that would otherwise have been made in the absence of the substitution plan. Substitution units therefore will not be allocated allowances based on an emissions rate that is greater than the most stringent emissions limitation imposed in Phase I by federal or State law, as of November 15, 1990.

The Agency notes that some units may have multiple emissions rate limitations whose applicability depends on certain conditions (e.g., the operations of other units at the same plant). In such cases, the Agency proposes to use the most stringent of those limitations for the unit.

The Agency also notes that some mandated emissions limitations are not unit specific. For

example, under some State laws (e.g., the acid rain laws for Massachusetts and Wisconsin), a utility has a maximum, average emissions rate for all its units in the State. Under other State laws (e.g., for Minnesota), a utility has a total tonnage emissions cap for all its units in the State. In order to account for this variation in way that emissions limitations are expressed, the Agency proposes to reserve the authority to determine on a case-by-case basis the federally enforceable or State enforceable emissions limitations that will be used in establishing the allowance allocation for substitution units. Where a utility is required to submit upfront to the State a plan for complying in 1995 with a State maximum, average emissions rate or total tonnage emissions cap, the Agency may exercise this authority and require use of the individual-unit emissions rates set forth in or underlying such a plan as the applicable State limits in Phase I for purposes of determining allowance allocations for substitution units.

Comment is requested on how to establish the State limitation when no State plan is submitted upfront for 1995. Further, comment is requested on the Agency's general approach to establishing the most stringent emissions limitation and on whether the discussion here concerning how the Agency will determine the federal or State emissions limitation in particular circumstances should be incorporated in the regulations. After reviewing the comments, the Agency may incorporate in the final rule detailed provisions explaining how to determine the emissions limitation. The Agency also requests comment on alternative approaches, for example, where if a State law imposes a maximum utility-wide average emissions rate, that average rate would be used as the applicable State limit for each unit.

Comment is also requested concerning whether the Agency should provide for an end-of-year review in Phase I with regard to substitution units subject to a State utility-wide average emissions rate or tonnage cap. In the end-of-year review, each utility subject to such a State limit would have to demonstrate whether, if the allowances allocated to substitution units covered by that State limit were treated for purposes of the review as emissions by those units, the utility would be in compliance for that year with the State limit. In this demonstration, the State methodology for determining compliance would be applied, but using the allocated allowances, rather than actual annual emissions, for each substitution unit whose allocation exceeded its emissions. To the extent that the utility would not be in compliance, allowances allocated to the substitution units for that year would be surrendered. To the extent that the utility would overcomply with the State limit, additional allowances would be allocated to the substitution units for the year but the total allowances allocated to any substitution unit could still not exceed the amount based on

⁵EPA may have some authority to implement the proper interpretation of section 404(b)(5) without revising the current regulations, e.g., by announcing its rejection of the preamble discussion noted above and disapproving substitution plans that would result in allowance allocations for emissions reductions since 1985 that are not the result of substitution plans under title IV. See 40 CFR 72.41(b)(1)(ii) (repeating the requirement in section 404(b)(5)). However, the Agency believes that a more straightforward solution is to amend the allowance allocation formula for substitution units to reflect clearly the proper interpretation of the statute.

the lesser of 1985 actual or allowable emissions rate or the 1990 actual emissions rate. The allowance surrender or the allocation of additional allowances would be distributed among the substitution units involved in proportion to the number of allowances that they were originally allocated. Comment is requested on this approach and on whether any limits should be imposed on the trading of allowances allocated to such substitution units prior to this end-of-year review. (To the extent such limits are appropriate, § 73.52, in addition to § 72.41, would be revised to incorporate such limits.)

In addition to federal or State mandated emissions rate reductions, some substitution units' emissions rates have been, or will be, reduced after 1985 for economic reasons. To the extent a unit's emissions rate reductions are caused by economic factors that would have existed even if the unit did not become a substitution unit, such reductions should also be taken into account under section 404(b)(5). For example, some units may have found it economical to switch to lower sulfur fuel even in the absence of any obligation to hold allowances to cover emissions. Allowances should not be allocated for such reductions. EPA believes that this approach is reasonable because prior to enactment of the Clean Air Act Amendments of 1990, utilities had no reason to believe that such reductions would generate nationally tradable allowances under the Act.

For the implementation of section 404(b)(5) to be administratively feasible, the Agency believes that there must be a bright line drawn to determine whether a unit's voluntary reductions (i.e., those that are not mandated by law) in emissions rate between 1985 and 2000 would have occurred even if the unit were not a substitution unit. The Agency is concerned about the time- and resource-consuming process of case-by-case determination. In order to avoid the need to resolve issues such as whether a particular unit took actions to reduce its emissions rate in anticipation of becoming a substitution unit, the Agency proposes to treat all voluntary emissions rate reductions after 1985 and through 1990, the year in which title IV of the Act was passed, as reductions that would have occurred in the absence of a substitution plan. Even though reductions after 1990 perhaps would have occurred in the absence of the substitution plan, this is difficult to determine for periods after the substitution provision was enacted. December 31, 1990 is used as the cut-off point since emissions rate data is available on a calendar year basis. A unit's 1990 emissions rate (which is the most recent, actual rate prior to the enactment of title IV) will therefore be treated as representative of its emissions rate in Phase I in the absence of a substitution plan. All voluntary emissions rate reductions after 1990 will be treated as reductions that would not otherwise have occurred.

Consequently, substitution units should not be allocated allowances at a rate greater than either the 1990 actual emissions rate or the emissions limitation required by federal or State law for Phase I as of November 15, 1990.

Consistent with the approach proposed with regard to voluntary reductions, the Agency proposes to use 1990 as the cut-off point with regard to federal or State mandated emissions rate reductions. The Agency believes that the best approach is to establish a bright line as to whether a federal or State law mandating an emissions rate reduction would have been adopted in the absence of substitution plans under title IV. Consequently, only those emissions rate reductions that were mandated by federal or State law adopted on or before November 15, 1990, the enactment date of title IV, will be treated as reductions that would otherwise have occurred. Since dates of adoption of mandated emissions limitations can be precisely determined, there is no need to use December 31, 1990 as the cut-off point.

In sum, the Agency proposes that substitution units be allocated allowances based on the lesser of four emissions rates: 1985 actual emissions rate, 1985 allowable emissions rate, 1990 actual emissions rate, or the most stringent federal or State allowable emissions rate applicable in 1995-99 as of November 15, 1990. The first two emissions rates are set forth in section 404(b)(2) of the Act. The latter two are added in order to ensure, in accordance with section 404(b)(5), that a substitution plan will result in at least the same amount of reductions that would have occurred without the plan. Consistent with the position adopted in the January 11, 1993 regulations concerning the use of current allowable emissions rate with regard to Phase I extensions (58 FR 3604), the most stringent allowable rate for purposes of substitution plans will be the most stringent rate (as of November 15, 1990) after conversion to pounds per mmmBtu but without any annualization.

The Agency recognizes that the proposal relies on information (i.e., the 1990 actual emissions rate and the most stringent federal or State allowable emissions rate for the substitution unit) that is not specifically listed in section 404(b) as information required in a proposed substitution plan. However, the Agency concludes that section 404(b) provides adequate authority to require submission of the additional data and to use the data to calculate the allowance allocation under the plan. Section 404(b)(6) requires designated representatives to submit "such other information as the Administrator may require." 42 U.S.C. 7651c(b)(6). Moreover, using the 1990 emissions rate and the most stringent allowable rate to allocate allowances is a reasonable exercise of the Administrator's broad discretion, in approving substitution plans under section 404(c), to impose "modifications or

conditions * * * which will ensure the emissions reductions contemplated by [] title [IV]." 42 U.S.C. 7651c(c).⁶ Finally, since reliance on substitution plans is optional and the use of the most stringent allowable rate (in conjunction with the 1985 actual or allowable rate and the 1990 actual rate) to allocate allowances under such plans is necessary to meet statutory emissions reduction goals, it is difficult to see how such use of the most stringent allowable rate could be viewed as unfair to utilities located in States that mandated reductions. This approach simply prevents the creation of excess, new allowances and thereby ensures that reductions mandated by such States are not used to increase emissions elsewhere above the levels that title IV was intended to achieve.

Comment is requested on whether it would be appropriate for the Agency to consider only emissions rate reductions mandated by federal or State law in determining, under section 404(b)(5) of the Act, what emissions reductions would have been achieved without the substitution plan and therefore how many allowances should be allocated to substitution units (either upfront or in an end-of-year review). In this regard, the Agency also asks for comment on the need for, and policy and practical implications of, including or not including voluntary reductions in determining the emissions reductions without the plan. Comment is also requested on whether it is appropriate for the Agency to consider voluntary reductions by using the 1990 emissions rate as one of the criteria for determining how many allowances should be allocated. Comment on alternatives to the 1990 emissions rate and the policy and practical implications of such alternatives is requested.

b. Utilization used in allocating allowances. Under today's proposal, a substitution unit's allowance allocation is calculated by multiplying the lower of the above-discussed four emissions rates by the baseline, which reflects 1985-87 utilization. In the public comments that preceded the January 11, 1993 regulations, some commenters suggested that the allowance allocation be based on current utilization at the time the permit application is submitted. Allegedly, current utilization would be a more reasonable projection, than baseline, of the substitution unit's utilization in Phase I in the absence of a substitution plan. 58 FR 3600-

⁶The proposal is also a reasonable exercise of the Administrator's authority under section 404(c) to ensure that substitution plans are approved to the extent that they are "consistent with the orderly functioning of the allowance system." 42 U.S.C. 7651c(c). The creation of excess, new allowances interferes with the allowance system in two ways. First, introducing allowances into the system that were not intended by Congress and that are in excess of the substitution unit's emissions in the absence of the plan will tend to skew the market price of an allowance. Second, allowing such allowances into the system undermines its integrity and may encourage further attempts at gaming.

3601; Comments of National Rural Electric Cooperative Association (NRECA) at 6-7 (filed February 12, 1992). In developing today's proposal, the Agency reconsidered the option of requiring utilities to project what future utilization of the substitution units would be in Phase I without the substitution plan. The Agency concludes that, particularly since utilization can vary greatly from year to year, there is no basis for assuming that such future utilization would equal current utilization, which occurs before Phase I, and that it would be very difficult for the utilities to make accurate utilization projections. Similarly, it would be difficult for the Agency to evaluate such projections to ensure that they would not result in the creation of excess, new allowances. See Comments of UARG at 58 and n. 57 and 92.

While projections are used to allocate allowances from the Phase I extension reserve, the use of projections under substitution plans is more problematic. The Phase I extension reserve is fixed and thus there is a limit on the total number of allowances that can be allocated based on projections. 42 U.S.C. 7651c(a)(2). Unduly high projections in that context will affect the distribution of Phase I extension allowances among applicants for the Phase I extension but will not increase the total number of allowances allocated under the Phase I extension.

In contrast, there is no express statutory limit on the total number of allowances that can be allocated to substitution units. Allocating allowances based on projected utilization would mean that the higher the projection, the greater the total number of excess, new allowances that would be created. Consequently, allocating allowances based on a higher utilization than the substitution unit would have had without the substitution plan would have the same result as allocating allowances based on a higher emissions rate than that which the unit would otherwise have had. In either case, new allowances would be created that could result in fewer total reductions than in the absence of the substitution plan. This is precisely the result that Congress required the Administrator to prevent. The Agency does not believe that it would have sufficient information or expertise to ensure that the utilization projections were sufficiently accurate to prevent this result.

Moreover, even if the Agency could ensure sufficiently accurate utilization projections, allocating allowances based on them could still compromise the statutory requirement of no fewer reductions than without the substitution plan. A substitution unit that was allocated allowances based on projected utilization could decrease its utilization below the projected level and shift the generation to another Phase II unit that was not subject to the requirement to hold allowances in Phase I. This is analogous to the problem that Congress recognized with regard to "initially

affected units" in Phase I (and other Phase I units) and resolved in section 408(c)(1)(B) by requiring reduced utilization plans. Senate Rep. No. 101-228 at 334. However, section 408(c)(1)(B) addresses only decreases of utilization below baseline, not decreases below a projected utilization.

Rather than attempting to craft a second "reduced utilization" requirement solely for substitution units, the Agency concludes that the better and more administratively feasible approach is to allocate allowances to substitution units using their baseline. The existing reduced utilization provisions in section 408(c)(1)(B) will then continue to apply to such substitution units and ensure that reductions that would have been achieved without the substitution plan will not be circumvented by the substitution unit shifting generation to other units not subject to allowance requirements in Phase I. The Agency requests comment on whether an updated or projected level of utilization should be used, rather than baseline, in allocating allowances to substitution units.

2. Limiting number of substitution units

The Agency considered modifying the January 11, 1993 regulations to make upfront approval of the designation of substitution units and allocation of allowances to such units contingent on an end-of-year review of the need for such units for each year that the plan was in effect. Under such an approach, the Agency would allow only those designations of substitution units that actually proved to be needed.

The Agency would determine at the end of each year whether the Table A unit actually had any reduction obligation to reassign to a substitution unit, i.e., whether the Table A unit had emissions in excess of its allowance allocation. The Agency would also determine each year the extent to which each substitution unit had an allowance allocation exceeding actual emissions and thus could provide extra allowances to the Table A unit.

The number of units treated as substitution units for the year would be limited to the minimum necessary to provide allowances needed to ensure that the Table A unit could cover its emissions. Any additional units that had been designated, and allocated allowances, as substitution units would be de-designated for the year and would be required to surrender their allocated allowances. In order to ensure that there would be sufficient allowances for the surrender, the substitution units could be barred from transferring their allocated allowances for a given year until completion of the year-end review for that year.

The Agency believes that requiring end-of-year review of the need for substitution units and thereby limiting the number of such units is probably unnecessary but only if allowance allocations for substitution units are limited as proposed above. If each substitution unit is allocated allowances based on no greater an emissions rate than its 1985 actual or

allowable, 1990 actual, or most stringent allowable emissions rate and is subject to reduced utilization requirements, the substitution unit will have to use up all or almost all of its allocated allowances—either to cover its emissions or to account for its reduced utilization—unless that unit voluntarily reduces its emissions rate to an even lower level. This significantly limits the ability of a substitution unit to create new allowances in excess of its Phase I emissions, which allowances could be banked or transferred to other units. Moreover, since any new allowances will result from reductions that would be unlikely to occur in the absence of a substitution plan, the allowances will not result in fewer total reductions than would have been achieved without the substitution plan.

The Agency requests comment on its determination that end-of-year review of the need for substitution units is not necessary. To the extent commenters believe that end-of-year review is needed, they are requested to address the above explanation of how the review would be conducted.

3. Requiring Common Owner or Operator

The January 11, 1993 regulations provide that the statutory requirement that the Table A unit and its substitution unit have a common owner or operator is satisfied where such units have a common designated representative. 40 CFR 72.41(b)(1)(i); see also 42 U.S.C. 7651c(b). The regulations also allow the selection of an alternate designated representative to act in lieu of the designated representative. 40 CFR 72.22(a). The regulations do not expressly address whether having a common alternate designated representative alone meets the common owner or operator requirement.

The Agency proposes to reverse its interpretation that having a common designated representative meets the statutory requirement of a common owner or operator. In the January 11, 1993 regulations, the Agency concluded that, "[i]n general, a designated representative is not considered to be an operator." 58 FR 3600. This is because the Act distinguishes between designated representatives and owners and operators. See 58 FR 3599. On one hand, the Act states that designated representatives represent owners and operators and, in that capacity, are responsible, along with owners and operators, for holding and transferring allowances and submitting and complying with permit applications and compliance plans. 15 U.S.C. 7651a(26), 7651b(b), 7651g(c)(1), (d)(2), and (h)(1). On the other hand, the Act makes only owners and operators responsible for meeting emissions limitations and monitoring requirements. 15 U.S.C. 7651(c)(a), 7651d(a), and 7651k.

However, the Agency determined, in the preamble of the January 11, 1993 regulations, that "[i]n some cases" the designated representative's "duties and level of

responsibility can be equivalent to that of an operator.” Id. One such case, identified by the Agency, was where a designated representative represents multiple sources participating in a substitution plan and lacking any other common owner or operator. In that case, the designated representative’s responsibilities are allegedly “broad enough to bring him or her within the definition of operator.” Id. The problem with that analysis, upon reflection, is that it is difficult to see how a designated representative’s responsibilities in a multi-source substitution plan are actually any broader or more complex than they are under other compliance options involving multiple owners and operators and multiple units and sources.

In order to use the substitution compliance option, a designated representative must submit a substitution plan that covers all the units involved and that is included in the permit applications of the sources at which such units are located. See 40 CFR 72.41(b)(2). A common designated representative must coordinate among owners and operators of the sources that he or she represents to the extent necessary to ensure that he or she is authorized by the owners and operators to submit such a plan. See 40 CFR 72.21(b)(1). Once the substitution plan is approved, the owners and operators of a unit under the plan are liable for violations of the plan at that unit or at any other unit that is its substitution unit or for which it is a substitution unit. 40 CFR 72.41(e)(2).

Designated representatives have similar responsibilities under other multi-unit compliance options. For example, Phase I extension plans can involve a control unit at one source and transfer units at other sources and the sources involved need not have common owners or operators. In that case, the designated representatives of the sources involved must coordinate among owners and operators of the sources, agree on a single Phase I extension plan, and sign and submit the plan as part of their respective permit applications. See 40 CFR 72.40(b)(1)(i) and 72.42(b)(2)(ii). Under an approved Phase I extension plan, owners and operators are potentially liable for violations of the plan by other units governed by the plan. See 40 CFR 72.42(f)(1) and (4).

The situation is similar for reduced utilization plans, which can involve a Phase I unit and compensating units located at multiple sources. All the designated representatives must agree on and submit a single plan. See 40 CFR 72.40(b)(1)(i) and 72.43(b)(4). Further, under § 72.91(a), the designated representatives of the Phase I unit and compensating units under a plan must use consistent figures in their annual compliance certification reports to calculate the adjusted utilization of the respective units. See 40 CFR 72.91(a)(3)(ii) and (4). Under Option 1 of today’s proposal, the designated representatives of units under an approved

plan will also have to cooperate in order to meet the special end-of-year reporting requirements for determining which compensating units are necessary. See section IV(B)(1) of this preamble. Again, owners and operators are potentially liable for violations of the plan by other units governed by the plan. 40 CFR 72.43(f)(3).

In short, the common designated representative’s responsibilities under a multi-source substitution plan are no broader or more complex than those of designated representatives under multi-source Phase I extension or reduced utilization plans. The Agency concludes that there is no basis for treating designated representatives in the context of substitution plans differently than in the context of other compliance options. Moreover, there is nothing unique to substitution plans (other than the declaration, in the January 11, 1993 regulations, that a common designated representative “is” an operator under a substitution plan) that would make the designated representative, rather than simply the owners and operators, responsible for meeting emissions limitations or monitoring requirements that are applicable to all Phase I units. Under all these multi-unit compliance plans, the designated representative actually has less extensive responsibilities than, and thus should not be considered to be, an owner or operator.

Finally, in the preamble of the January 11, 1993 regulations, the Agency suggested that treating a common designated representative as an operator would give small utilities flexibility to use substitution plans. However, the Agency notes that none of the permit applications submitted in February 1993 included substitution plans using a common designated representative as the common owner or operator. Subsequently, one such plan involving four permit applications was submitted but none of the applications involved small utilities. The Agency requests comment on the effect that the proposed interpretation of the requirement of a common owner or operator would have on the ability of utilities to bring in selected Phase II units into Phase I as substitution units and, as a result, on their ability to create new allowances.

While the Agency proposes to change its interpretation in the January 11, 1993 regulations that a common designated representative meets the statutory common-owner-or-operator requirement for substitution plans, the Agency notes that in the absence of such a change, it would still be necessary to clarify that having a common alternate designated representative would not meet the statutory requirement. Whatever determination is made concerning the responsibilities of designated representatives as compared to those of owners and operators, the Agency believes that an alternate designated representative clearly does not carry the same level of responsibilities as a designated representative.

While the alternate designated representative can act in lieu of the designated representative, the latter is expected to be the primary representative. For this reason, where the Administrator determines that the designated representative and the alternate designated representative have taken “concurrent and conflicting” actions, the action of the designated representative “shall take precedence.” 40 CFR 72.22(c). Moreover, the purpose of allowing a unit to have an alternate designated representative is to ensure that there will be someone to represent the unit in the event that the designated representative is unavailable. See 56 FR 63009. It is possible that the alternate designated representative will never actually have to take any actions. There is therefore no logical basis to treat a common alternate designated representative as equivalent to a common designated representative.

4. Other Changes

The Agency proposes to make other minor changes to clarify the current § 72.41. For example, under the current rule, substitution allowances may be distributed in the plan between the substitution unit and the Table A unit. However, there may be more than one Table A unit in a plan and each substitution unit may not be designated by all the Table A units. The language of the current regulation is not clear on how allowance distribution is to occur in such a case. The Agency proposes to modify the regulation to make it clear that substitution allowances may be distributed from a given substitution unit only to the respective Table A unit that designated that substitution unit.

B. Reduced Utilization Plans

The January 11, 1993 regulations concerning reduced utilization—and the rulemaking proposal and public comments that preceded those regulations—focused primarily on concerns that utilities might be unable to designate a compensating unit and therefore might engage in uneconomic dispatching in order to avoid reduced utilization that would require such designation. See 56 FR 63020; Comments of UARG at 35; Comments of NRECA at 23–4; and Comments of Environmental Defense Fund at 3 (filed February 12, 1992). To allay these concerns, § 72.43 of the January 11, 1993 regulations establishes broad safe harbors under which the requirement to submit a reduced utilization plan may be avoided. 40 CFR 72.43(e). Further, §§ 72.91 and 72.92 of the regulations set forth an allowance surrender procedure for accounting for the emission consequences of utilizing a Phase I unit below baseline. 40 CFR 72.91(a) and 72.92(a) and (c). The allowance surrender procedure gives utilities the flexibility to use economic dispatching without designating compensating units and still accounts for the

emissions consequences of load shifts from Phase I units to non-Phase I units.

While the January 11, 1993 regulations address when utilities can avoid submitting reduced utilization plans, the significant number of reduced utilization plans and compensating units proposed in the Phase I permit applications highlight the opposite problem: utilities actively seeking reduced utilization plans and designating compensating units in order to create excess, new allowances by bringing Phase II units into Phase I. The designation of compensating units under reduced utilization plans should be limited to cases where the designation will serve the statutory purpose of section 408(c)(1)(B), i.e., to account for emissions from generation that is provided by a Phase II unit and that is needed to compensate for the reduced utilization of a Phase I unit.

Although the current regulations implementing substitution and reduced utilization plans pose similar problems concerning the creation of allowances, the Agency is proposing different approaches in modifying the requirements for the two compliance options. In contrast with sections 404 (b) and (c), which give the Administrator discretion in determining how many allowances to allocate to substitution units, section 408(c)(1)(B) states the formula for allocating allowances for compensating units. In order to ensure that reduced utilization plans are used as a means of accounting for emissions from load shifting and not as a method of creating excess, new allowances through early entry of Phase II units into Phase I, the Agency must limit the circumstances under which Phase II units can become compensating units.⁷

Today, the Agency is proposing two basic options for limiting the designation of compensating units. The Agency requests comment on both options.

Under Option 1, units will be allowed to become compensating units and will be allocated allowances only where there is a demonstration that the compensating units are actually needed to account for reduced utilization. The Agency proposes in Option 1 to modify the reduced utilization provisions by granting upfront approval of a reduced utilization plan with compensating units but making approval contingent on an end-of-

year determination by the Administrator that each compensating unit is needed for the year. A unit designated as a compensating unit will become a Phase I unit and will be allocated allowances upon upfront approval of the reduced utilization plan and issuance of the Acid Rain permit containing the plan.

However, a compensating unit will not be allowed to transfer allowances allocated for any given year in Phase I unless and until an end-of-year determination of need is made for that unit for that year. A compensating unit will be deemed to be needed only if certain specified conditions are met. If those conditions are not met, the unit will be retroactively de-designated for the year and the allowances allocated for the year will be deducted. The limitation on transfer will ensure the availability of the allowances for such end-of-year deduction and will prevent the use of what are potentially excess allowances by other units in the meantime. Since section 408(c)(1)(B) of the Act does not specify when allowances are to be allocated to compensating units, the Agency could have delayed any allocation until completion of the end-of-year review. The Agency maintains that the approach proposed here is within its authority and is more consistent with the overall operation of the Acid Rain Program.

Current § 73.52 will be revised both to reflect this transfer limitation and to make it clear the transfer limitation (and the one under § 72.44 (repowering)) apply to transfers of specific allowances and of allowances in perpetuity. (The latter revision to § 73.52 will also be made under Option 2 (discussed below) with regard to the § 72.44 transfer limitation.)

In the end-of-year review, a unit will be deemed to be needed as a compensating unit only for years in which: the Phase I unit actually had utilization below baseline; the Phase I units in the initial Phase I unit's dispatch system actually had total net utilization below the sum of their baselines after taking account of all sulfur-free generation acquired by the dispatch system; and the proposed compensating unit actually provided compensating generation to that dispatch system. Further, the number of compensating units allowed under a single reduced utilization plan will be limited to the number needed. As part of the end-of-year review, the Administrator will determine how much compensating generation all the original Phase I units in the dispatch system potentially needed and how much excess generation each compensating unit proposed for any such Phase I unit potentially could have provided. The only compensating-unit designations that will be allowed for any of the Phase I units in the dispatch system will be designations of compensating units whose potential excess generation was necessary to meet the potential need for compensating generation for the dispatch system as a whole.

Under Option 2, the category of units that may be designated as compensating units will be limited to those units whose designation cannot create excess, new allowances. A unit can be designated as a compensating unit only if: The unit's baseline times the lesser of its 1985 actual or allowable SO₂ emissions rate does not exceed the unit's baseline times the lesser of its 1990 actual SO₂ emissions rate or its most stringent federally enforceable or State enforceable emissions limitation for SO₂ for 1995-99 as of November 15, 1990.

Comment is requested on policy and practical implications of both Option 1 and Option 2, including whether they are workable and what impact they would have on the functioning and development of the allowance system and the allowance trading market. Comment is also requested concerning the consistency of Options 1 and 2 with section 408(c)(1)(B) and title IV in general.

1. Option 1: end-of-year review of need for compensating units

a. Requiring actual reduced utilization and provision of compensating generation. Under Option 1, the requirements for upfront approval of reduced utilization plans with compensating units remain essentially the same as under the current regulations. Compensating units designated under an approved plan will be allocated allowances under the statutory formula. However, during each year for which the plan is approved, certain conditions must be met in order for the plan to be effective for that year and for a unit to remain a compensating unit and retain the allowances that it is allocated under the plan for that year. The Administrator will determine after the end of the year whether these conditions have been met.

First, the Phase I unit's need for compensating generation from a compensating unit, i.e., the Phase I unit's "potential reduced generation," will be calculated. "Potential reduced generation" equals: (i) The Phase I unit's baseline, adjusted for any decline in total sales of electricity by the dispatch system, less (ii) the Phase I unit's actual utilization, (iii) estimated savings from conservation and unit efficiency measures, (iv) compensating generation received from designated sulfur-free generators, and (v) compensating generation provided by the Phase I unit if the unit itself is a compensating unit for other Phase I units. These factors are already defined and used in § 72.91 of the January 11, 1993 regulations to calculate "adjusted utilization" in order to determine whether a reduced utilization plan is required under § 72.43(e) and whether allowances must be surrendered under § 72.92.

The Phase I unit's "potential reduced generation" for the year must be greater than zero in order to be allowed to have a compensating unit for that year. This requirement is aimed at allowing only needed

⁷ EPA believes that it has authority under the current regulations to limit, at least to some extent, the ability of utilities to designate compensating units and create excess, new allowances. For example, where a reduced utilization plan designates compensating units that are not shown to provide compensating generation under the plan or the approval of a plan would result in fewer total emissions reductions than intended by Congress, the Administrator may rely on her authority under section 408(c)(2) of the Act to disapprove the plan or approve it with changes necessary to prevent the creation of excess, new allowances. Although the Agency is reviewing the reduced utilization plans already submitted and determining whether they are consistent with section 408(c)(1)(B) and title IV generally, the Agency also maintains that the current rule should be revised to establish detailed criteria for approval of such plans.

compensating units to enter into Phase I. If a Phase I unit's "potential reduced generation" is less than or equal to zero, then the Phase I unit is not actually underutilized compared to its baseline or the unit already has sufficient conservation or unit efficiency savings or sulfur-free generation to account for its underutilization. Consequently, there is no need for generation from a compensating unit. It should be noted that although year-end estimates of conservation and unit efficiency savings may be altered by subsequent verification procedures, the Agency proposes to evaluate the need for compensating units using estimated savings rather than waiting for verified savings figures, which may not be available until as long as six months after the end of the year. See 58 FR 3607; and § 72.91(b)(1) (requiring submission of verified savings figures by July 1 and providing for extension of the deadline for good cause).

The second requirement is that the "dispatch system potential reduced generation" (which is the sum of the "potential reduced generation" for all Phase I units in the Phase I unit's dispatch system less sulfur-free generation acquired by the dispatch system from any non-designated sulfur-free generators) must be greater than zero. If "dispatch system potential reduced generation" is less than or equal to zero, then either no Phase I unit needs compensating generation or the potential reduced generation of underutilized Phase I units in the dispatch system is fully offset by utilization above baseline of the other Phase I units in the same system or by sulfur-free generation.

Where there is a full offset (or to the extent there is any partial offset) by other Phase I units, there is no basis for concluding that Phase II units, rather than other Phase I units, provided to the dispatch system the generation that compensated for underutilized Phase I units. See Comments of UARG at 32. To prevent unnecessary designation of compensating units, underutilized Phase I units are assumed to first shift generation to other Phase I units. Phase II units may become compensating units only to the extent necessary to compensate for net potential reduced generation of the Phase I units. This approach is consistent with § 72.43(e)(1)(ii)(A) of the January 11, 1993 regulations, which removes the requirement to submit a reduced utilization plan to the extent that underutilization at a Phase I unit is offset by overutilization at other Phase I units in the dispatch system. See also 40 CFR 72.92(c)(2)(i); and 58 FR 3608 (explaining that allowance surrender is based on the net underutilization of all Phase I units in the dispatch system).

For similar reasons, in calculating "dispatch system potential reduced generation", the designated representative must subtract any sulfur-free generation acquired by the dispatch system from sulfur-free generators that were not designated under

a reduced utilization plan. This is because, to the extent that a dispatch system acquired increased sulfur-free generation since 1985–87 from generators that could have been designated, there is no basis for concluding that Phase II units, rather than sulfur-free generators, provided compensating generation for underutilized Phase I units.

The third requirement considered in the end-of-year review concerns the designated compensating unit, which must actually provide compensating generation to the Phase I unit's dispatch system during the year. The utility must show that the compensating unit—whether inside or outside the Phase I unit's dispatch system—provided to the dispatch system an amount of electricity at least equal to the amount of claimed compensating generation.

b. Limiting number of compensating units. In order to prevent the unnecessary creation of new allowances, the Agency proposes to limit the number of compensating units under a reduced utilization plan to those necessary to provide compensating generation. This will be done by determining how much compensating generation can potentially be provided by the compensating units designated by the utility and comparing that potential with the amount of compensating generation that is needed. A unit will be allowed to remain a compensating unit for a given year only if it is shown, in the year-end review, that the unit's potential for providing compensating generation is necessary to meet the potential need for such generation for that year.

As discussed above, the Agency proposes to determine the need for compensating generation on a dispatch system basis, i.e., by calculating the dispatch system potential reduced generation. Similarly, the number and identity of the allowed compensating units will be determined on a dispatch system basis, and the same list of compensating units must be used in all reduced utilization plans for Phase I units in a given dispatch system. The dispatch system potential reduced generation will be compared with the compensating generation potentially provided by all the compensating units designated by any Phase I units in the dispatch system. This is appropriate because, while individual Phase I units designate compensating units, the electricity resulting from all compensating generation is actually transmitted to the Phase I unit's dispatch system (not to the Phase I unit itself) for resale. A compensating unit designated to provide compensating generation for one Phase I unit in a dispatch system is equally capable of providing compensating generation for other Phase I units in that system until the compensating unit reaches its full potential for generation.

Under Option 1, the "potential compensating generation" for each designated compensating unit will equal the higher of: the unit's baseline (converted to Kw-hs) or the highest annual generation by the

unit since 1987 as of the date of submission of the plan. The highest actual generation is used, rather than the nameplate capacity of the generator served by the unit, in order to obtain a realistic figure for the full generation capability of the unit.

The designated compensating units will then be considered in the order that they are listed in the reduced utilization plans for the dispatch system. Only those units whose potential compensating generation is necessary to cover the dispatch system's need for compensating generation for the year will be allowed to remain as compensating units for that year for any Phase I unit in the dispatch system. This is accomplished by requiring that the sum of the "potential compensating generation" of all units that are listed ahead of the last allowed compensating unit not exceed the "dispatch system potential reduced utilization." Comment is requested as to whether designated representatives should be allowed to revise, after the end of the year, the order in which compensating units are listed in the plans.

The Agency anticipates that the above-described requirements for allowing compensating units will minimize the need for case-by-case review of reduced utilization plans to ensure that the reduced utilization provisions are used for their statutory purposes and not simply to create excess, new allowances. However, in accordance with section 408(c)(2) of the Act, the Agency will continue to review proposed plans with compensating units to determine whether the designated representative demonstrates that the units will provide compensating generation to Phase I units or whether the plan is otherwise consistent with the purposes and requirements of title IV. For example, the Administrator will scrutinize and may disapprove plans that create a daisy chain of compensating units, i.e., where a compensating unit is itself underutilized and designates its own compensating unit. The Administrator will consider, *inter alia*, whether there is a sufficient showing that the compensating generation will really be provided to the Phase I unit by its proposed compensating unit, rather than by a subsequent compensating unit in the daisy chain. As a further example, the Administrator may well disapprove plans where Phase I units in two dispatch systems designate different compensating units in a third dispatch system or designate the same compensating units in a third dispatch system but in a different order. Moreover, under section 408(c)(2), the Agency also reserves the right, after the end of each year, to review any compensating unit designation to determine whether it is consistent with the purposes and requirements of title IV (e.g., whether the designation unnecessarily creates excess, new allowances), even if the designation otherwise meets the requirements of proposed § 72.91(c). Where a plan is disapproved or a compensating unit

designation is not allowed to be in effect, the allowance surrender formula will, of course, apply.

c. Reporting requirements and allowance surrender. In order to implement the above-described limitations on designation of compensating units, the proposal augments the requirements for the annual compliance certification report submitted by Phase I units. In particular, the annual report submitted for any Phase I unit with a designated compensating unit must include demonstrations that the above-described conditions for compensating-unit designation and the limitations on the number of compensating units are met.

These proposed requirements are in addition to the requirements in the January 11, 1993 regulations concerning: calculation, in the annual compliance certification report, of a unit's "adjusted utilization" (40 CFR 72.91(a)); and submission of the confirmation report by Phase I units claiming to have realized kilowatt hour savings or reductions in heat input from conservation or improved unit efficiency measures (40 CFR 72.91(b)). These existing reporting provisions are not, for the most part, substantively altered. Several minor, nonsubstantive changes are proposed. For example, the terminology used in § 72.91(a) (such as the terms "shifts to designated sulfur-free generators" and "compensating generation provided to other units") is corrected to make it consistent throughout the section. Also, the definition of "compensating generation provided to other units" (40 CFR 72.91(a)(4)) is clarified by, *inter alia*, removing the superfluous but potentially confusing sentence at the end of the definition.

In addition to these minor changes, the proposal clarifies several other aspects of the provisions concerning reduced utilization plans and the calculation of adjusted utilization. For example, § 72.43 of the January 11, 1993 rule requires that energy conservation measures under a reduced utilization plan must be installed after the baseline period, i.e., after December 31, 1987. That section is amended to make it clear that unit efficiency measures, which are a category of energy conservation measures, must meet the same requirement.

As a further example, under § 72.91 of the January 11, 1993 regulations, where there are shifts to sulfur-free generators outside a unit's dispatch system, the designated representative must document that electricity of at least the amount claimed to have been shifted was actually "purchased" by the unit's dispatch system from the generator. Some sulfur-free generators have multiple owners and may be owned in part by the unit's dispatch system. In such cases, the unit's dispatch system may not "purchase" electricity from the generator but rather may acquire the electricity based on its ownership share. The proposal therefore requires that there be documentation that the dispatch system "acquired" the

electricity from the sulfur-free generator. An analogous change is proposed for § 72.43(c)(4)(iv). Further, in order to ensure that multiple owners of sulfur-free generators claim only their respective shares of the sulfur-free generation, the documentation requirement is proposed to apply whether the sulfur-free generator is in or outside the dispatch system. For similar reasons, the documentation requirement is also applied to compensating units in or outside the dispatch system, for purposes of calculating "adjusted utilization."

Further, under § 72.91 of the current regulations, two or more Phase I units may include savings or generation from the same conservation measure or sulfur-free generator, provided that the designated representatives submit a certification that apportions the savings or generation among the units. Section 72.91 is revised to require the same approach where savings and improvement in heat rate from the same supply-side measure are claimed by two or more Phase I units.

In addition, under current § 72.91, plan reductions (i.e., underutilization accounted for by conservation or improved unit efficiency measures, sulfur-free generation, or shifts to compensating units under a reduced utilization plan) are considered only to the extent that they account for underutilization of the Phase I unit for which the plan was approved. 40 CFR 72.91(a)(3) (defining "plan reductions"). This approach was taken in order to prevent the plan reductions of one Phase I unit from being used to offset the underutilization of another Phase I unit that has no reduced utilization plan. Today's proposal adds a provision at § 72.91(a)(7) to make this limitation clear.

2. Option 2: Limiting Units That Can Qualify as Compensating Units

The Agency also requests comment on Option 2, which is an alternative approach to restricting the designation of compensating units and thereby preventing the creation of excess, new allowances. Under Option 2, the Agency will adopt an upfront limitation on the category of units that can qualify for designation as compensating units. Once the Agency determines that a proposed compensating unit meets the upfront limitation, the Agency will approve the designation and allocate allowances for the unit and, as under the current regulations, will not conduct any end-of-year review of the need for the compensating unit.

Option 2 takes the approach that excess allowances will likely be created by the designation of any Phase II unit whose baseline, multiplied by what its annual emissions rate in Phase I would be in the absence of the designation, is less than the annual allowances allocated to the unit as a compensating unit. Without making any more emission rate reductions than it would have otherwise made, such a Phase II unit can increase its own generation (or purchase

generation from a third party) to provide compensating generation and use its own allowance allocation to cover its own emissions. In addition, the unit may still have extra allowances to transfer, sell, or bank for future use. In order to prevent the creation of excess, new allowances, such units will not be allowed to be designated as compensating units.

Consistent with the reasoning underlying the approach proposed above with regard to substitution units, the lesser of a prospective compensating unit's 1990 actual emissions rate or most stringent federally enforceable or State enforceable emission rate in Phase I as of November 15, 1993 will be treated as the unit's likely emissions rate in the absence of the reduced utilization plan. That emissions rate times baseline will be compared with, and must equal or exceed, the unit's potential allowance allocation (i.e., baseline times the lesser of 1985 actual or allowable emissions rate). Only compensating-unit designations that meet this requirement can be approved. Because of the inherent unreliability of projected utilization figures (discussed above in section IV(A)(1)(b) of this preamble), baseline, rather than projected utilization, will be used to determine whether a unit qualifies as a compensating unit. If a utilization projection less than baseline were used to determine that a unit qualified as a compensating unit but subsequently the unit had a higher actual utilization in Phase I that would have otherwise disqualified the unit, the unit could create excess, new allowances. In order to be approved, the designation of a compensating unit, of course, must meet the requirements in the current regulations for reduced utilization plans as well as the additional requirement proposed in Option 2.

Comment is requested on whether only emission rate reductions mandated by federal or State law should be considered in determining which units qualify to be designated as compensating units. In this regard, the Agency also asks for comment on the need for, and policy and practical implications of, including or not including voluntary reductions in this determination. Comment is also requested on whether the Agency should consider voluntary reductions by using the 1990 emissions rate as one of the criteria for determining which units qualify. Comment on alternatives to the 1990 emissions rate and the policy and practical implications of such alternatives is requested. The Agency also requests comment on whether an up-dated or projected level of utilization should be used, rather than baseline, in determining which units qualify.

If a designated representative of a Phase I unit has no Phase II unit that will provide compensating generation and that will qualify under Option 2, the designated representative will not be required to submit a reduced utilization plan designating a compensating unit. Instead, the allowance surrender provisions in §§ 72.91 and 72.92 will apply.

The Agency proposes to adopt, under Option 2, the same clarifications and other revisions, as proposed under Option 1, to the portions of § 72.91 concerning calculation of adjusted utilization and confirmation reports. See section IV(B)(1)(c) of this preamble.

V. Applicability of Rule Revisions to Existing Permit Applications

As discussed above, the Agency has determined that rule revisions are necessary to ensure that the rule, and compliance plans approved under the rule, are consistent with the purposes of title IV of the Act. However, owners and operators of some affected sources have already submitted to EPA substitution or reduced utilization plans based on their reading of the January 11, 1993 regulations. In order to provide these owners and operators an opportunity to adjust their compliance strategies in the event of revision of the regulations, EPA has recently proposed, in draft permits, to approve for 1995 those substitution plans, and those reduced utilization plans (and parts of plans) with compensating units, that EPA determined to be in compliance with the existing regulations. In the draft permits, EPA also proposed to defer action on those compliance options for 1996–99 pending completion of the instant rulemaking. 58 FR 38371 (July 16, 1993); 58 FR 39542 (July 23, 1993); 58 FR 40812 (July 30, 1993); 58 FR 42065 (Aug. 6, 1993); and 58 FR 43107 (Aug. 13, 1993).

In the July 16, 1993 **Federal Register** notice of the issuance of draft permits, the Agency also first gave notice of its concern that the January 11, 1993 regulations can be read to allow the creation of excess, new allowances contrary to title IV and announced its intention to propose revisions of the regulations. 58 FR 38371. In that notice, the Agency further indicated that it intended to adopt a consistent approach with regard to all substitution plans, and reduced utilization plans with compensating units, that were submitted to EPA before the date of the notice and that are consistent with the January 11, 1993 regulations: the Agency stated that it intends, in issuing five-year Phase I permits, to approve such plans for 1995 and defer action on them for 1996–99. *Id.* This approach will be taken even where such plans are revised after their submittal so long as the revisions do not add units to the plans.

As stated in the July 16, 1993 notice, however, the Agency does not intend to give one-year approval for substitution plans or reduced utilization plans with compensating units that are submitted, or revised to add units, on or after July 16, 1993. The Agency notes that where such new or revised plans are submitted before issuance of Phase I permits for the units involved, the revisions must undergo a completeness review under § 72.61. The Agency's six-month period for acting on a permit addressing the revisions will run from the date that they are received

by EPA, provided that the revisions are determined, or deemed, to be complete under § 72.61(a). In those cases where the Agency issues such permit before completion of the instant rulemaking, the Agency intends to defer action for 1995–99 on the substitution plans and reduced utilization plans with compensating units. *Id.* Similarly, where substitution plans or reduced utilization plans with compensating units are submitted or revised on or after July 16, 1993 and after issuance of Phase I permits for the Phase I units involved, EPA intends to defer action on those plans for 1995–99. To the extent that action on a plan is deferred, the plan will be reviewed and acted on in accordance with the regulations resulting from the instant rulemaking. *Id.*; see also 58 FR 39542–39543.

This seems appropriate because in such cases the owners and operators of the Phase I units involved will have originally developed compliance strategies and submitted compliance plans (as part of their Phase I permit applications) that did not include the newly submitted substitution or compensating units. Consequently, with regard to the newly proposed substitution or compensating units, these owners and operators will not have relied, prior to July 16, 1993, on the current regulations revised in today's proposal. Similarly, the owners and operators of the newly proposed substitution or compensating units will not have previously submitted plans based on the current regulations and, in any event, such units are not otherwise required to comply with title IV emissions limitations until 2000. Any submissions of new or revised plans on or after July 16, 1993 are made after the Agency gave notice of its intent to amend the current regulations to make them consistent with the purposes and requirements of title IV and to prevent the creation of excess, new allowances.

However, the Agency is considering a modification of this general approach in response to comment on the draft permits. Some commenters on the draft permits have suggested that the Agency approve for 1995–99 those plans that clearly would not result in the creation of excess, new allowances and thus would not be affected by the revised regulations proposed today. The Agency is considering these comments in connection with the draft permits. If the Agency were to approve plans for 1995–99 for the reasons noted, any such approval would make it clear that the Agency retained the right to reopen the permits under 40 CFR 72.85 and revise the plans for 1996–99, where necessary, if the final regulations resulting from the instant rulemaking differ from today's proposal in a way that would be inconsistent with the five-year approval of such plans.

The Agency requests comment on its approach to addressing any reliance by owners and operators on the January 11, 1993 regulations, including the one-year period for which plans submitted before July 16, 1993

will be approved. This includes comment on whether the one-year approval period is too generous or too short. For example, comment is requested on whether it is appropriate to limit the application of the revised regulations proposed here to amendments of existing substitution and reduced utilization plans, and to new plans, submitted in the future. Under such a limitation, substitution and reduced utilization plans that have already been submitted to EPA and that are in compliance with the current regulations would be approved for 1995–99.

Finally, the Agency maintains that it has the authority under section 408 of the Act and the current § 72.62(a) to defer ruling on substitution or reduced utilization plans or parts of such plans. Under section 408(c)(2), the Administrator must “review each proposed compliance plan to determine whether it satisfies the requirements of * * * title [IV]” and must “approve or disapprove such plan within six months of receipt of a complete submission.” 15 U.S.C. 7651g(c)(2). In carrying out its statutory responsibility to resolve issues concerning the consistency of a compliance plan with title IV, EPA has the administrative discretion to organize its consideration of the issues and decide some issues ahead of others. Consistent with its rulings on the initially decided issues, the Agency can approve or disapprove a compliance plan (which includes at a minimum the agreement that the designated representative will hold sufficient allowances) while reserving decision on all or a portion of particular proposed compliance options. The Agency maintains that, once the Agency has approved or disapproved a compliance plan, its consideration of the deferred issues on a compliance option is not subject to the six-month deadline.

The current § 72.62(a) allows for this type of flexibility in structuring and resolving issues concerning a proposed compliance plan. The regulation provides that the Administrator may issue a draft permit that “incorporates in whole or in part, or with changes or conditions, as appropriate, the permit application.” 40 CFR 72.62(a). The Agency has exercised such authority in issuing the draft permits that, by including approved compliance plans and deferring action on some proposed compliance options for certain years, incorporate in part the permit applications. See, e.g., 58 FR 38370. As discussed above, the Agency maintains that the current regulations governing substitution and reduced utilization plans can be read to allow excess, new allowances to be created contrary to the purposes and requirements of title IV. In order to ensure that only compliance options for 1996–99 that are consistent with title IV will be approved, the Agency has issued draft permits that, *inter alia*, defer action on those compliance options for 1996–99 until completion of the instant rulemaking and the issuance of final rules

addressing those compliance options in a manner consistent with title IV.

While deferral of action on compliance options is authorized under the current § 72.62(a), the Agency wishes to remove any possible doubt concerning such authority under the regulations. Therefore, the Agency proposes to add language making this authority more explicit, both with regard to the issuance of permits and the revision (whether through permit modification or fast-track modification) of previously issued permits.

VI. Administrative Requirements

A. Executive Order 12291 and Regulatory Flexibility Act

Under Executive Order 12291, the Administrator must judge whether a regulation is "major" and therefore subject to the requirements to conduct a Regulatory Impact Analysis. In the preamble of the January 11, 1993 regulations, the Agency determined that the regulations were "major" because their annual effect on the economy would be greater than \$100 million. 58 FR 3648. A Regulatory Impact Analysis was therefore submitted, along with the regulations, to the Office of Management and Budget (OMB) for review. 58 FR 3649.

The Regulatory Flexibility Act of 1980 requires each federal agency to perform a Regulatory Flexibility Analysis for all rules that are likely to have a "significant impact on a substantial number of small entities." In the preamble of the January 11, 1993 regulations, the Administrator certified that the regulations would not have such impact. *Id.*

This document proposes to modify a few sections of the January 11, 1993 regulations. These proposed modifications are not significant enough to change the regulatory or economic impacts addressed in the preamble of the January 11, 1993 regulations. Today's proposal was submitted to OMB for review prior to publication as required by E.O. 12291.

B. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.* An Information Collection Request document has been prepared by EPA (ICR No. 1584), and a copy may be obtained from Sandy Farmer, Information Policy Branch, Environmental Protection Agency, 401 M Street, SW., (Mail Code 2136), Washington, DC 20460 or by calling (202) 260-2740.

This collection of information has an estimated reporting and recordkeeping burden averaging 16 hours per response. These estimates include time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

An Information Collection Request document and estimates of the public reporting burden were prepared in connection with the January 11, 1993 regulations. 56 FR 63098; 58 FR 3650. The regulation modifications contained in today's proposal will not significantly change the reporting burden that was previously estimated.

Send comments regarding this burden analysis or any other aspect of this collection of information, including suggestions for reducing the burden, to Chief, Information Policy Branch of EPA at the above address; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, 726 Jackson Place, NW., Washington, DC 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

List of Subjects in 40 CFR Parts 72 and 73

Environmental protection, Air pollution control, Compliance plans, Electric utilities, Permits, Reporting and recordkeeping requirements, and Sulfur dioxide.

Dated: November 4, 1993.

Carol M. Browner,

Administrator, U.S. Environmental Protection Agency.

For the reasons set forth in the preamble, chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 72—[AMENDED]

1. The authority citation for part 72 is revised to read as follows:

Authority: 42 U.S.C. 7601 and 7651 *et seq.*

2. Section 72.41 is amended by revising paragraphs (b)(1)(i), (c)(3)(i)(B), (c)(3)(i)(C), (c)(3)(ii), (c)(4)(ii), (d)(2), and (e)(3)(iv) to read as follows:

§ 72.41 Phase I substitution plans.

* * * * *

(b)(1) * * *

(i) Any unit under paragraph (a)(2) of this section has a common owner or operator with the unit under paragraph (a)(1) of this section; and

* * * * *

(c) * * *

(3) * * *

(i) * * *

(B) The lesser of the unit's 1985 actual SO₂ emissions rate, 1985 allowable SO₂ emissions rate, 1990 actual SO₂ emissions rate, or, as of November 15, 1990, the most stringent federally enforceable or State enforceable emissions limitation for sulfur dioxide applicable to the unit for 1995-99.

For purposes of determining the most stringent emissions limitation, applicable emissions limitations shall be converted to lb/mmBtu in accordance with appendix B of this

part. Where the most stringent emissions limitation is not the same for every year during 1995-99, the lesser of the emissions rates shall be determined, as provided in paragraph (c)(3)(i)(B) of this section, separately for each year during 1995-99 using the most stringent emissions limitation for that year. Where the federally enforceable or State enforceable emissions limitation governing the unit is not a unit-specific limitation, the Administrator will determine on a case-by-case basis the unit-specific, most stringent federally enforceable or State enforceable emissions limitation to be used in determining the lesser of the emissions rates under paragraph (c)(3)(i)(B) of this section.

(C) The product of the baseline in paragraph (c)(3)(i)(A) of this section and the emissions rate in paragraph (c)(3)(i)(B) of this section, divided by 2000 lbs/ton. Where the most stringent emissions limitation is not the same for every year during 1995-99, the product shall be calculated, as provided in the prior sentence, separately for each year during 1995-99 using the emissions rate determined for that year in paragraph (c)(3)(i)(B) of this section.

(ii)(A) The sum of the amounts in paragraph (c)(3)(i)(C) of this section for all substitution units to be governed by the plan. Except as provided in paragraph (c)(3)(ii)(B) of this section, this sum is the total number of allowances available each year under the substitution plan.

(B) Where the most stringent emission limitation is not the same for every year during 1995-99, the sum shall be calculated, as provided under paragraph (c)(3)(ii)(A) of this section, separately for each year during 1995-99 using the amounts calculated for that year in paragraph (c)(3)(i)(C) of this section. Each separate sum is the total number of allowances available for the respective year under the substitution plan.

(4) * * *

(ii) A list showing any annual distribution of the allowances in paragraph (c)(3)(ii) of this section from a substitution unit to the respective unit under paragraph (a)(1) of this section to be governed by the plan. The total number of such allowances allocated among such units each year may not exceed the sum calculated and applicable to that year under paragraph (c)(3)(ii) of this section.

* * * * *

(d) * * *

(2) In no event shall allowances be allocated, under paragraph (d)(1) of this section, for any year in excess of the sum calculated and applicable to that year under paragraph (c)(3)(ii) of this section, as adjusted by the Administrator in approving the plan.

* * * * *

(e) * * *

(3) * * *

(iv) *Change of owner or operator.* If there is a change in the owners or operators of any unit governed by an approved substitution

plan and the requirement under paragraph (b)(1)(i) of this section is no longer met, then the designated representatives of the units governed by the plan shall terminate the plan as of January 1 of the calendar year during which the change was made. If the designated representatives fail to terminate the plan, the Administrator, on his own motion, shall terminate the plan and deduct the allowances required to be surrendered under paragraph (e)(3)(ii) of this section.

3. Section 72.43 is amended as follows:

§ 72.43 Phase I reduced utilization plans.

Option 1 for Paragraph (a)

[Unchanged]

Option 2 for Paragraphs (a) Introductory Text, (a)(1) Introductory Text [revised] and (a)(2) [Added]

(a) *Applicability.* This section shall apply to the designated representative of:

(1) Any Phase I unit, including:

* * * * *

(2) Any affected unit that:

- (i) Is not otherwise subject to any Acid Rain emissions limitation or emissions reduction requirements during Phase I; and
- (ii) Meets the requirement that the unit's baseline multiplied by the lesser of the unit's 1985 actual SO₂ emissions rate or 1985 allowable SO₂ emissions rate, divided by 2000 lbs/ton, does not exceed the unit's baseline multiplied by the lesser of the unit's 1990 actual SO₂ emissions rate or, as of November 15, 1990, the most stringent federally enforceable or State enforceable emissions limitation for sulfur dioxide for 1995-99, divided by 2000 lbs/ton.

Option 1 for Paragraph (b)(1)

[Unchanged]

Option 2 for Paragraphs (b)(1) Introductory Text, (b)(1)(ii)(A) and (b)(3)(i) [revised]

(b)(1) The designated representative of any unit under paragraph (a)(1) of this section shall include in the Acid Rain permit application for the unit a reduced utilization plan, meeting the requirements of this section, when the owners and operators of the unit plan to:

* * * * *

(ii) * * *

(A) Shifting generation of the unit to a unit under paragraph (a)(2) of this section or to a sulfur-free generator; or

* * * * *

(3)(i) Improved unit efficiency measures shall be implemented in the unit after December 31, 1987. Such measures include supply-side measures listed in appendix A, section 2.1 of part 73 of this chapter.

* * * * *

Option 1 for Paragraphs (c)(4)(i) and (iv), (d), (f)(1)(i), (f)(4)(i), (f)(4)(ii)(B) and (f)(4)(iii) [Revised] and (c)(4)(v) [Added]

(c) * * *

(4) * * *

(i) Identification of each compensating unit or sulfur-free generator. All units in the same dispatch system that submit a plan designating one or more compensating units shall identify the same list of compensating units.

* * * * *

(iv) For each compensating unit or sulfur-free generator not in the dispatch system of the unit reducing utilization under the plan, the system directives or power purchase agreements or other contractual agreements governing the acquisition, by the dispatch system, of the electrical energy that is generated by the compensating unit or sulfur-free generator and on which the plan relies to accomplish reduced utilization.

(v) For each compensating unit, the higher of the baseline or the highest actual annual utilization for any calendar year starting after 1987 and ending by the date that the plan is submitted.

* * * * *

(d) *Administrator's Action.* (1) In approving the reduced utilization plans (including conditional approval), the Administrator will provide that the plan will be in effect:

(i) With regard to any portion of the plan that relies on sulfur-free generation or energy conservation or improved unit efficiency measures, for the calendar years in Phase I that are specified in the plan or until the calendar year for which a termination of the plan takes effect; and

(ii) With regard to any portion of the plan that designates any compensating units, for those calendar years included under paragraph (d)(1)(i) of this section for which the Administrator determines that the requirements of §§ 72.91(c) (1)(ix) and (3)(v) are met and for compensating units for which the Administrator determines that the requirements of § 72.91(c)(5)(v) are met; except to the extent that the Administrator determines that designation of a compensating unit is inconsistent with the purposes of title IV of the Act.

(2) If the Administrator approves the reduced utilization plan, he or she will allocate allowances, as provided in the approved plan, to the Allowance Tracking System accounts for any designated compensating unit upon issuance of an Acid Rain permit containing the plan, except that, if the plan is conditionally approved, the allowances will be allocated upon revision of the permit to activate the plan. The designated representative of any compensating unit shall not transfer the allowances allocated for any year under paragraph (d)(2) of this section unless and until the Administrator determines

under paragraph (d)(3) of this section that the plan is in effect for that unit and for that year.

(3) After the end of each calendar year for which allowances are allocated under paragraph (d)(2) of this section, the Administrator will determine whether, and for which compensating units, the reduced utilization plan is in effect in accordance with paragraph (d)(1) of this section. For each compensating unit, if the Administrator determines that no plan designating such unit as a compensating unit for any Phase I unit is in effect for the year, he or she will deduct from the compensating unit's Allowance Tracking System account the allowances allocated to the compensating unit for the year under paragraph (d)(2) of this section.

* * * * *

(f) * * *

(1) * * *

(i) Any compensating unit designated under an approved reduced utilization plan shall become a Phase I unit for each calendar year for which the plan is in effect in accordance with paragraph (d)(1) of this section, except that such unit shall not become subject to the Acid Rain emissions limitations for nitrogen oxides in Phase I under section 407 of the Act and the regulations implementing section 407 of the Act.

* * * * *

(4) *Termination.* (i) No reduced utilization plan that designates a compensating unit that serves as a control unit under a Phase I extension plan shall be terminated, and no such unit shall be de-designated as a compensating unit, before the end of Phase I.

(ii) * * *

(B) In the notification to terminate, the designated representative of any compensating unit governed by the plan shall state that he or she surrenders for deduction from the unit's Allowance Tracking System account the allowances allocated under paragraph (d)(2) of this section to each compensating unit for the calendar years for which the plan is to be terminated.

(iii) If the requirements of paragraph (f)(3)(ii) are met and upon revision of the permit to terminate the reduced utilization plan, the Administrator will deduct the allowances specified in paragraph (f)(3)(ii)(B) of this section. No reduced utilization plan shall be terminated, and no unit shall be de-designated as a Phase I unit under paragraph (f)(4)(ii) of this section, unless such deduction is made.

Option 2 for Paragraphs (c) (4)(i), (ii) and (iv) [Revised]

(c) * * *

(4) * * *

(i) Identification of each compensating unit or sulfur-free generator.

(ii) For each compensating unit.

(A) The compensating unit's baseline multiplied by the lesser of the compensating

unit's 1985 actual SO₂ emissions rate or 1985 allowable SO₂ emissions rate, divided by 2000 lbs/ton.

(B) The compensating unit's baseline multiplied by the lesser of the compensating unit's 1990 actual SO₂ emissions rate or, as of November 15, 1990, the most stringent federally enforceable or State enforceable emissions limitation for sulfur dioxide for 1995-99, divided by 2000 lbs/ton.

(C) The allowance allocation calculated as the amount under paragraph (c)(4)(ii)(A) of this section. If the compensating unit is a new unit, it shall be deemed to have a baseline of zero and shall be allocated no allowances.

* * * * *

(iv) For each compensating unit or sulfur-free generator not in the dispatch system of the unit reducing utilization under the plan, the system directives or power purchase agreements or other contractual agreements governing the acquisition, by the dispatch system, of the electrical energy that is generated by the compensating unit or sulfur-free generator and on which the plan relies to accomplish reduced utilization.

* * * * *

4. Section 72.62 is amended by revising paragraph (a) to read as follows:

§ 72.62 Draft permit.

(a) After the Administrator receives a complete Acid Rain permit application and any supplemental information, the Administrator will issue a draft permit that incorporates in whole, in part, or with changes or conditions as appropriate, the permit application or deny the source a draft permit. In issuing such a draft permit, the Administrator may defer ruling on any compliance option for any year.

* * * * *

5. Section 72.82 is amended by revising paragraph (d) to read as follows:

§ 72.82 Fast-track modifications.

* * * * *

(d) Within 30 days of the close of the public comment period, the permitting authority shall consider the fast-track modification and the comment received and approve, in whole or in part or with changes or conditions as appropriate, or disapprove the modification. In addressing the fast-track modification, the permitting authority may defer ruling on any compliance option for any year. A fast-track modification shall be effective immediately upon issuance, in accordance with § 70.7(a)(1)(v) of this chapter as applied to significant permit modifications.

6. Section 72.91 is amended by revising the section heading and paragraphs (a)(3)(iii) introductory text (formula is unchanged), (a)(3)(iv), (a)(4), (a)(5), (a)(6), (b)(2), and adding paragraphs (a)(7) and (c) to read as follows:

Option 1 for Section Heading

§ 72.91 Phase I unit adjusted utilization and determination of compensating units.

Option 2 for Section Heading

§ 72.91 Phase I unit adjusted utilization. [Unchanged]

(a) * * *

(3) * * *

(iii) "Shifts to designated sulfur-free generators" is the reduction in utilization (in mmBtu), for the calendar year, that is accounted for by all sulfur-free generators designated under the reduced utilization plan. This term equals the sum, for all such generators, of the "shift to sulfur-free generator." "Shift to sulfur-free generator" shall equal the amount, to the extent documented under paragraph (a)(6) of this section, calculated for each generator using the following formula:

* * * * *

(iv) "Shifts to designated compensating units" is the reduction in utilization (in mmBtu) that is accounted for by increased generation at compensating units for which the reduced utilization plan is in effect for the calendar year. This term equals the heat rate, under paragraph (a)(3) of this section, of the unit reducing utilization multiplied by the sum, for all such compensating units, of the "shift to compensating unit" for each compensating unit. "Shift to compensating unit" shall equal the amount of compensating generation (in Kwh), to the extent documented under paragraph (a)(6) of this section, that the designated representatives of the unit reducing utilization and the compensating unit have certified (in their respective annual compliance certification reports) as the amount that will be converted to mmBtus and used, in accordance with paragraph (a)(4) of this section, in calculating the adjusted utilization for the compensating unit.

(4) "Compensating generation provided to other units" is the total amount of utilization (in mmBtu) necessary to provide the generation (if any) that was shifted to the unit as a designated compensating unit under any other reduced utilization plans that were in effect for the unit and for the calendar year. This term equals the heat rate, under paragraph (a)(3) of this section, of such unit multiplied by the sum of each "shift to compensating unit" that is attributed to the unit in the annual compliance certification reports submitted by the Phase I units under such other plans and that is certified under paragraph (a)(3)(iv) of this section.

(5) Notwithstanding paragraphs (a)(3) (i), (ii), and (iii) of this section, where two or more Phase I units include in "plan reductions", in their annual compliance certification reports for the calendar year, expected kilowatt hour savings or improvement in heat rate from the same specific conservation or improved unit

efficiency measures or increased utilization of the same sulfur-free generator:

(i) The designated representatives of all such units shall submit with their annual reports a certification signed by all such designated representatives. The certification shall apportion the total kilowatt hour savings, improvement in heat rate, or increased utilization among such units.

(ii) Each designated representative shall include in the annual report only the respective unit's share of the total savings, improvement in heat rate, or increased utilization, in accordance with the certification under paragraph (a)(5)(i) of this section.

(6)(i) Where a unit includes in "plan reductions" under paragraph (a)(3) of this section the increase in utilization of any sulfur-free generator, the designated representative of the unit shall submit, with the annual compliance certification report, documentation demonstrating that an amount of electrical energy at least equal to the "shift to sulfur-free generator" attributed to the sulfur-free generator in the annual report was actually acquired by the unit's dispatch system from the sulfur-free generator.

(ii) Where a unit includes in "plan reductions" under paragraph (a)(3) of this section utilization of any compensating unit, the designated representative of the unit shall submit with the annual compliance certification report, documentation demonstrating that an amount of electrical energy at least equal to the "shift to compensating unit" attributed to the compensating unit in the annual report was actually acquired by the unit's dispatch system from the compensating unit.

(7) Notwithstanding paragraphs (a)(3)(i), (ii), (iii), and (iv), (a)(4), and (a)(5) of this section, (plan reductions—compensating generation provided to other units) shall not exceed (baseline—actual utilization).

(b) * * *

(2) Notwithstanding paragraph (b)(1)(i) of this section, where two or more Phase I units include in the confirmation report the verified kilowatt hour savings or reduction in heat rate from the same specific conservation or improved unit efficiency measures:

(i) The designated representatives of all such units shall submit with their confirmation reports a certification signed by all such designated representatives. The certification shall apportion the total kilowatt hour savings or reduction in heat rate among such units.

(ii) Each designated representative shall include in the confirmation report only the respective unit's share of the total savings or reduction in heat rate in accordance with the certification under paragraph (b)(2)(i) of this section.

* * * * *

Option 1 for Paragraph (c)

(c) Annual Compliance Certification Report: compensating units. The designated representative for each Phase I unit that designates any compensating units for the calendar year under an approved reduced utilization plan shall include the following elements in the annual compliance certification report for the calendar year; provided that the reporting requirement in this paragraph (c) shall not apply to the annual compliance certification report submitted for 1995 by the designated representative of a Phase I unit whose plan, as approved, is not governed by § 72.43(d)(1)(ii) for 1995.

(1) Potential reduced generation of the unit, calculated as follows:

potential reduced generation = {(baseline × (1 + percentage change in dispatch system sales))—actual utilization} heat rate—reduction from energy conservation—(reduction from improved unit efficiency + heat rate)—shifts to designated sulfur-free generators + compensating generation provided to other units

where:

- (i) "Baseline" is as defined in § 72.2.
- (ii) "Percentage change in dispatch system sales" is as calculated under paragraph (a)(3)(iii)(C) of this section; provided that if the result of the formula is greater than or equal to zero, then the percentage change in dispatch system sales shall be treated as zero only for purposes of paragraph (c)(1) of this section.
- (iii) "Actual utilization" is the figure calculated under paragraph (a)(2) of this section.
- (iv) "Heat rate" is the actual annual average heat rate (Btu/Kwh × 10⁻⁶) of the unit (determined in accordance with part 75 of this chapter) before the employment of any improved unit efficiency measures under an approved plan.
- (v) "Reduction from energy conservation" is as calculated under paragraphs (a)(3)(i) and (5) of this section, without converting to mmBtus. This figure shall not be adjusted under paragraph (b) of this section.
- (vi) "Reduction from improved unit efficiency" is as calculated under paragraphs (a)(3)(ii) and (5) of this section. This figure shall not be adjusted under paragraph (b) of this section.
- (vii) "Shifts to designated sulfur-free generators" is as calculated under paragraphs (a)(3)(iii) and (5) of this section, without converting to mmBtus.
- (viii) "Compensating generation provided to other units" is as calculated under paragraph (a)(4) of this section, without converting to mmBtus.
- (ix) Where a reduced utilization plan designates any compensating units for a Phase I unit, the plan will be in effect for the calendar year only if the Phase I unit's

potential reduced generation is greater than zero.

(2) A list of all sulfur-free generators from which the unit's dispatch system actually acquired electrical energy during the calendar year and that are not designated in a reduced utilization plan that is in effect for the calendar year for any unit under paragraph (c)(3)(i) of this section. The list shall include the "potential shift to sulfur-free generator" calculated for each sulfur-free generator as the lesser of:

(i) The amount of electrical energy actually acquired during the calendar year from the sulfur-free generator by the unit's dispatch system, which amount shall be supported by documentation submitted with the annual compliance certification report even if the amount under paragraph (c)(2)(ii) of this section is the lesser amount; or

(ii) Actual sulfur-free generation—[average 1985–87 sulfur-free generation × (1 + percentage change in dispatch system sales)] where:

(A) "Actual sulfur-free generation" is the actual annual generation (in Kwh) of the sulfur-free generator for the calendar year.

(B) "Average 1985–87 sulfur-free generation" is the sum of annual generation (in Kwh) for 1985, 1986, and 1987 for the sulfur-free generator, divided by three.

(C) "Percentage change in dispatch system sales" is as calculated under paragraph (a)(3)(iii)(C) of this section; provided that if the result is less than or equal to zero, then percentage change in dispatch system sales shall be treated as zero only for purposes of paragraph (c)(2) of this section.

(D) If the result under paragraph (c)(2)(ii) of this section is less than or equal to zero, then that result shall be treated as zero.

(iii) Notwithstanding paragraph (c)(2)(ii) of this section, if two or more dispatch systems, with any Phase I units governed by paragraph (c) of this section, acquired electrical energy during the calendar year from the same sulfur-free generator, the designated representative of all such units may apportion the amount under paragraph (c)(2)(ii) of this section and use the respective dispatch system's share as the amount under paragraph (c)(2)(ii) of this section; provided that:

(A) The designated representatives shall submit with their annual reports a certification signed by such designated representatives. The certification shall apportion the amount under paragraph (c)(2)(ii) of this section among such dispatch systems.

(B) Each designated representative shall use, as the amount under paragraph (c)(2)(ii) of this section, only the respective dispatch system's share of the amount, in accordance with the certification.

(3) Dispatch system potential reduced generation, calculated as follows:

Dispatch system potential reduced

$$\text{generation} = \sum_{i=1}^u \text{potential reduced generation}_i - \sum_{i=1}^s \text{potential shift to sulfur-free generator}_i$$

where:

- (i) u = all units in the dispatch system that:
 - (A) Are listed in Table 1 of § 73.10(a) of this chapter; or
 - (B) Are substitution units for the calendar year under approved substitution plans.
 - (ii) "Potential reduced generation_i" is as calculated under paragraph (c)(1) of this section separately for each unit under paragraph (c)(3)(i) of this section. The designated representative of each such unit shall certify the figure for potential reduced generation for the respective unit.
 - (iii) s=all sulfur-free generators listed under paragraph (c)(2) of this section.
 - (iv) "Potential shift to sulfur-free generator_i" is the figure calculated for each sulfur-free generator under paragraph (c)(2) of this section.
 - (v) If the result of the formula for "dispatch system potential reduced generation" is less than or equal to zero, then "dispatch system potential reduced generation" shall be deemed to be zero. Any reduced utilization plan that designates any compensating units for any Phase I units in the dispatch system shall be in effect for the calendar year only if dispatch system potential reduced generation is greater than zero.
 - (4) The list of all compensating units designated by any Phase I unit in the unit's dispatch system under a reduced utilization plan approved for the calendar year. The list shall include the potential compensating generation of each compensating unit, calculated for each compensating unit as follows:

Potential compensating generation=highest generation – actual generation + compensating generation provided to units in dispatch system
- where:
- (i) "Highest generation" is the figure under § 72.43(c)(4)(v) for the compensating unit, as adjusted by the Administrator in approving the reduced utilization plan.
 - (ii) "Actual generation" is the actual annual generation (in Kwh) for the calendar year for the compensating unit.
 - (iii) "Compensating generation provided to units in dispatch system" is the sum of each "shift to compensating unit", as calculated under paragraph (a)(3)(iv) of this section, that is attributed to the compensating unit in the annual compliance certification report submitted by the Phase I unit or any other unit in the Phase I unit's dispatch system.

(5) Specification of those compensating units on the list in paragraph (c)(4) of this section whose potential compensating generation is necessary to cover the dispatch system's potential reduced generation. A compensating unit's potential compensating generation shall be deemed necessary only if the following requirement is met:

$$(\text{Dispatch system potential reduced generation} - \sum_{i=1}^{r-1} \text{potential compensating generation}_i) > 0$$

where:

(i) r=the rank of the compensating unit that the designated representative is considering for specification under paragraph (c)(5) of this section.

(ii) i=the rank of a compensating unit on the list under paragraph (c)(4) of this section.

(iii) "Dispatch system potential reduced utilization" is the figure calculated under paragraph (c)(3) of this section.

(iv) "Potential compensating generation;" is the figure calculated under paragraph (c)(4) of this section for a compensating unit with rank i.

(v) Any reduced utilization plan that designated any compensating units for any Phase I units in the dispatch system shall be in effect for the calendar year only for compensating units whose potential compensating generation is deemed necessary under paragraph (c)(5) of this section and from which the acquisition of electrical energy is documented under paragraph (a)(6) of this section.

(6) If the unit is a designated compensating unit for any Phase I units under any other reduced utilization plans, the identification of such Phase I units whose plans are in effect for the unit and for the calendar year.

Option 2 No Paragraph (c) To Be Added

PART 73—[AMENDED]

7. The authority citation for part 73 is revised to read as follows:

Authority: 42 U.S.C. 7601 and 7651 *et seq.*

8. Section 73.52 is amended by revising paragraph (a)(3) to read as follows:

§ 73.52 EPA recordation.

(a) * * *

Option 1 for Paragraph (a)(3)

(3) If allowances specified or indicated pursuant to § 73.50(b)(1)(ii) are subject to the limitation on transfer imposed pursuant to § 72.43(d)(2) or § 72.44(h)(1)(i) of this chapter, the transfer is in accordance with such limitation; and

Option 2 for Paragraph (a)(3)

(3) If allowances specified or indicated pursuant to § 73.50(b)(1)(ii) are subject to the limitation on transfer imposed pursuant to § 72.44(h)(1)(i) of this chapter, the transfer is in accordance with such limitation; and

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November 18, 1993

Part VI

**Environmental
Protection Agency**

40 CFR Part 761
Polychlorinated Biphenyls (PCBs);
Reclassification of PCB and PCB
Contaminated Transformers; Proposed
Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 761

[OPPTS-66015; FRL-3948-8]

RIN 2070-AC39

**Polychlorinated Biphenyls (PCBs);
Reclassification of PCB and PCB-
Contaminated Transformers**

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA is proposing to amend the requirements that govern the reclassification of transformers from a PCB (≥ 500 ppm PCBs) or a PCB-Contaminated ($\geq 50 - < 500$ ppm PCBs) status to a lower regulatory status as a PCB-Contaminated or a non-PCB (< 50 ppm PCBs) Transformer. This proposed rule would change the methods used to reclassify transformers by: Eliminating the 50° Centigrade (C) requirement for all PCB and PCB-Contaminated Transformers; eliminating the "in-service use" requirement for all transformers with a PCB concentration of $< 1,000$ ppm PCB; modifying the 90-day requirement for post-retrofill testing of PCB Transformers with a PCB concentration $< 1,000$ ppm PCB; eliminating the post-retrofill testing requirement for PCB-Contaminated Transformers after retrofill; and specifying the procedures that must be followed during a retrofill for these units. This proposed rule would amend the procedure for reclassification of certain transformers and reduce the regulatory and economic burden on those in the regulated community who wish to take advantage of the reclassification procedure.

DATES: Written comments must be received on or before January 3, 1994. If persons request time for oral comment by December 3, 1993, EPA will hold an informal hearing in Washington, DC on or about January 18, 1994. If a hearing is requested, the exact time and location of the hearing will be published in the **Federal Register** at least 30 days before the hearing.

ADDRESSES: Three copies of comments identified with the docket number OPPTS-66015 must be submitted to: TSCA Public Docket Office (TS-793), Office of Pollution Prevention and Toxics, Rm. NE G004, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Susan B. Hazen, Director, Environmental Assistance Division (7408), Office of Pollution Prevention and Toxics, Rm. E-

543B, Environmental Protection Agency, 401 M St., SW., Washington, DC 20460, Telephone: (202) 554-1404, TDD: (202) 554-0551, FAX: (202) 554-5603 (document requests only).

SUPPLEMENTARY INFORMATION: Section 6(e) of the Toxic Substances Control Act (TSCA) bans the manufacture, processing, distribution in commerce, and use of PCBs unless the PCBs are totally enclosed. Section 6(e) gives EPA authority, however, to authorize these PCB activities if the Administrator finds that they will not present an unreasonable risk of injury to human health or the environment. In the **Federal Register** of May 31, 1979 (44 FR 31514), EPA permitted routine servicing but prohibited rebuilding of PCB Transformers (40 CFR 761.31(a)). Routine servicing results in minimal exposures to PCBs and allows the use of most existing transformers to continue through their useful lifetimes. Rebuilding of PCB-Contaminated Transformers was allowed based on the lower concentration and corresponding lower risks to human health and the environment. Therefore, owners of PCB Transformers could only rebuild those units if they were reclassified to < 500 ppm PCBs. The guidelines for reclassification of transformers are currently found at 40 CFR 761.30(a)(2)(v).

I. Background

EPA published a final rule in the **Federal Register** of May 31, 1979 (44 FR 31514) which, among other things, authorized the rebuilding of PCB-Contaminated Transformers with concentrations < 500 ppm. Owners of PCB Transformers who wished to rebuild these units were required to reclassify them to PCB-Contaminated status prior to rebuilding (40 CFR 761.31(a)). Reclassification is the process by which a high PCB concentration in a transformer can be converted to a lower PCB concentration. To reclassify a PCB Transformer, it must be drained, refilled with non-PCB dielectric fluid, placed in service (i.e., operated) for at least 3 months, and finally, tested to determine if the PCB concentration has been reduced. If the transformer was tested and determined to be < 500 ppm PCBs, it could then be rebuilt rather than replaced. In 40 CFR 761.30(a)(2)(v), as published in the **Federal Register** of August 25, 1982 (47 FR 37342), EPA established more specific requirements for the reclassification of PCB Transformers. The rule currently states:

A PCB Transformer may be converted to PCB-Contaminated Electric Equipment or to a non-PCB Transformer and, a transformer that is classified as

PCB-Contaminated Electrical Equipment may be reclassified to a non-PCB Transformer by draining, refilling and/or otherwise servicing the transformer. In order to reclassify, the transformer's dielectric fluid must contain less than 500 ppm PCB (for conversion to PCB-Contaminated Electrical Equipment) or less than 50 ppm PCB (for conversion to a non-PCB Transformer) after a minimum of 3 months of in-service use subsequent to the last servicing conducted for the purpose of reducing the PCB concentration in the transformer. In-service means that the transformer is used electrically under loaded conditions that raise the temperature of the dielectric fluid to at least 50° Centigrade. The Director, Exposure Evaluation Division may grant, without further rulemaking, approval for the use of alternative methods that simulate the loaded conditions of in-service use. All PCBs removed from transformers for purposes of reducing PCB concentrations are subject to the disposal requirements of § 761.60.

Also in this rule, EPA clarified the definition of "in-service use" for transformers by specifying that a minimum dielectric fluid temperature of 50° C must be reached. This temperature had been shown experimentally to be associated with a condition of light electrical loading, and to cause a release of PCBs from the internal components of the transformer into the dielectric fluid, i.e., leachback.

Alternate methods, as authorized at 40 CFR 761.30(a)(2)(v), involve simulating loaded conditions of in-service use. Based on the vast number of requests received for approval of alternate methods, it has been EPA's experience that these requests for an alternate method are typically necessary when a transformer has failed, is being serviced and is therefore not on line, or for some other reason cannot be operated under normal loaded conditions. Requests for reclassifying transformers using an alternate method have typically involved simulating in-service use or requesting that the temperature requirement of 50° C (interpreted by EPA to mean at whatever frequency the transformer normally reaches 50° C during operation, i.e., once per week, once per month, etc.) for the 90-day time period be waived.

Over the last few years, EPA has received information that questions the correlation between both the 90-day time period for testing after retrofill and the 50° C temperature requirements of reclassification, and the leachback of dielectric fluid from the internal components of a transformer. Additionally, information submitted to EPA indicates that many transformers, even under normal operating conditions, never reach 50° C because

of the technical limitations of the equipment. Transformers may also fail to reach 50° C due to equipment failure, low ambient temperatures, or transformer loading restrictions (Refs. 3, 6, 7, 11, 12, 13, and 14).

EPA believes there are drawbacks associated with attempting to comply with the 50° C temperature requirement by simulating in-service use of the transformers. These include safety risks to maintenance personnel, fire hazards associated with energizing or insulating equipment which is not designed to withstand heavy loads or increased temperatures, and the economic and resource commitment that must be borne by the transformer owners (Ref. 4). EPA solicits comments on the validity and accuracy of these drawbacks and seeks data concerning whether to drop the 50° C temperature requirement.

The utility industry has also suggested that the 50° C requirement has no bearing on the degree of the leachback of PCBs from the internal components of a transformer. Further, EPA has been criticized for relying on a single study which correlates 50° C with "light electric loading," and thus failing to justify the selection of the 50° C temperature requirement as a criterion for reclassification (Ref. 1 and 2).

An industry-sponsored study was conducted to assess the various regulatory criteria for the reclassification of transformers. Data collected during the study were analyzed and summarized in a report (Ref. 3). The report indicates that there is no statistical correlation between the 50° C temperature or the 90-day time requirements in accelerating the leachback of PCBs from the internal components of a wide variety of PCB and PCB-Contaminated Transformers. EPA later conducted independent statistical analyses of this data and reached the same conclusions (Ref. 4). The variables addressed by this report included an assessment of the following characteristics:

1. Transformer manufacturer.
2. Transformer KVA rating.
3. Transformer age (in years).
4. Pre-retrofill PCB concentration.
5. Whether the transformer was flushed.
6. Whether the transformer was energized (i.e., whether voltage was applied to the primary side; minimally operational).
7. Whether the transformer was loaded (i.e., fully operational).
8. Whether the transformer was heated to 50° Centigrade.
9. Post-retrofill PCB concentration.
10. Number of days from "Pre" test to "Post" test. ("Pre-test" refers to the PCB concentration measured prior to the retrofill of the transformer. "Post-test" refers to the PCB concentration measured after the retrofilling procedure.)

Study data were collected from more than 380 transformers that were retrofilled by several dozen utility companies. EPA's assessment of the data, however, focused only

on the 263 transformers for which the submitted data were deemed complete. The data revealed that of the 175 retrofilled transformers with pre-retrofill PCB concentrations of <500 ppm and not energized to reach 50° C, 99.43 percent were reduced to <50 ppm PCBs. The concentrations were tested both immediately after and 90 days following the retrofill. Only one transformer (0.57 percent of the units) was found to have an asymptotic (leveling off) PCB concentration >50 ppm (that concentration was 53 ppm). Further examination of 88 retrofilled, unenergized transformers, with pre-retrofill PCB concentrations \geq 500 ppm, but <1,000 ppm, show that only 8 (9.0 percent) had asymptotic post-retrofill concentrations >50 ppm. The mean asymptotic post-retrofill concentration for these eight transformers was 64.4 ppm. EPA's assessment of the relevant data from actual transformers indicates that there is no correlation or direct relationship between either elevated temperatures of dielectric fluid or a 90-day in-service time period prior to testing, and an increase in the leaching of PCBs from the inner core and coil of the transformer into the newly retrofilled fluid (Ref. 4).

The conclusion which these data strongly support is that retrofilled, unenergized transformers with pre-retrofill PCB concentrations <500 ppm very rarely have PCB concentrations >50 ppm after retrofill, therefore, EPA is proposing to eliminate the post-retrofill testing requirement for these units. In addition, EPA is proposing to eliminate the 50° C and modify the 90-day time requirements for testing PCB Transformers containing <1,000 ppm PCBs.

II. Proposed Changes to the Reclassification Provision

Based upon the statistical data which suggest there is no strong evidence to support a correlation between temperature and the leachback of PCBs in a transformer, EPA is requesting comments on its proposal to modify the current regulations. The primary changes are as follows:

1. Eliminate the 50° C temperature requirement for all transformers undergoing reclassification.
2. Eliminate the 90-day "in-service use" requirement for all transformers with a PCB concentration <1,000 ppm.
3. Allow PCB Transformers with a PCB concentration <1,000 ppm to be initially tested after a 21-day time period rather than after 90 days, if a properly conducted retrofill was conducted. Then, if the results of the post-retrofill test are <25 ppm PCB, the transformer may be reclassified to non-PCB status. If the results are \geq 25 - <500 ppm PCB, it may be reclassified to PCB-Contaminated status.
4. Allow immediate reclassification rather than a 90-day post-retrofill test of PCB-Contaminated Transformers to non-PCB

status, after a properly conducted retrofill. An owner or operator would be able to assume, for purposes of compliance with the proposed reclassification requirements, that a properly reclassified transformer is regulated in accordance with its reclassified status. However, because of the potential for the concentration to "creep" upward, or due to errors in the reclassification process, the transformer owner would remain responsible and liable for any violation incurred if the PCB concentration of a transformer, even after a properly conducted retrofill, is tested and found to exceed the designated PCB-Contaminated or non-PCB levels.

The owner would be required to keep records, as proposed at § 761.180(a)(3), to substantiate that quality controlled and assured laboratory analyses were employed for all of the PCB concentration measurements, and that the proper reclassification procedures were followed. EPA recognizes gas chromatography as an accurate method for determining the concentration and nature of PCBs in oil (ASTM D 923-86 and 923-89). Accurate records are necessary in the event of an EPA inspection and/or subsequent PCB violation.

Owners of mineral-oil transformers who wish to take advantage of the reclassification provisions in this proposed rule would be required to test their units to determine the actual PCB concentration prior to retrofill. They could not assume that prior to retrofill the concentration is between 50 and 499 ppm. Based on the actual pre-retrofill PCB concentration in the dielectric fluid, EPA proposes, that for the purpose of identifying the procedures to be used in reclassifying transformers, the transformers be categorized into three groups by PCB concentrations that are: (1) \geq 50 ppm but <500 ppm, (2) \geq 500 but <1,000 ppm, and (3) \geq 1,000 ppm PCB. However, the standard PCB concentration categories (<50 ppm for non-PCB, 50 ppm to <500 ppm for PCB-Contaminated, and \geq 500 ppm for PCB) would still apply for designating the PCB reclassification status and for complying with all of the PCB regulatory provisions. Deviations from the requirements of this proposed rule would still require a waiver from EPA before undertaking such activity.

The following chart of the proposed modifications to the regulatory requirements for reclassification is provided to assist the reader in understanding this rule. It is not a substitute for the rule itself.

RECLASSIFICATION RULE CHART

Original concentrations	Proposed modification
<500 PPM PCB.	Remove 50° C Remove in-service loading Drain, flush and fill No testing required.

RECLASSIFICATION RULE CHART—
Continued

Original concentrations	Proposed modification
500 – <1000 PPM PCB.	Remove 50° C Remove in-service loading Drain, flush and fill Test after 21 days. If <25 ppm, reclassify as non-PCB. If ≥ 25 – <500 ppm, reclassify as PCB-Contaminated. If ≥ 500 ppm, retest after a total of 90 days.
≥ 1000 PPM PCB.	Remove 50° C In-service loading is still required Drain, flush (optional) and fill Testing still required after 90 days to determine PCB status.

III. Rationale Of Proposed Modifications

A. 50° Centigrade Requirement

This rule proposes to eliminate the 50° C temperature requirement for all reclassification of PCB and PCB-Contaminated Transformers. The original intent of the 50° C requirement was to achieve a temperature that would allow the natural convection forces of the dielectric fluid to circulate within the transformer (47 FR 37354, August 25, 1982). It was believed that this oil movement promoted leaching of PCBs from the core and coil and other internal parts of the transformer into the dielectric fluid and, thus, accelerated the process of reaching PCB equilibrium. Based on an analysis of the data indicating that temperature has little bearing on the leachback of PCBs into the dielectric fluid, as discussed under Unit I. of this preamble, EPA is soliciting comments on whether to drop the 50° C temperature requirement for all PCB and PCB-Contaminated Transformers.

B. In-Service Use Requirement

Using the same rationale as for eliminating the 50° C requirement, EPA also proposes to eliminate the “in-service use” requirement for transformers contaminated with <1,000 ppm PCB. But, any transformer with a 1,000 ppm or greater PCB concentration, such as most substation power transformers, must undergo a minimum 90-day in-service use period and post-retrofill testing. The difference between small, distribution transformers and the large, substation power transformers is that distribution transformers are usually PCB-Contaminated, are more peripherally located throughout a region than the substation power systems, and are difficult and dangerous to sample after having been reconnected. Most pole-top transformers fall into this “distribution transformer” category, as do many other equivalent size

power transformers such as pad-mounted transformers which are usually located on a concrete foundation. The larger power transformers contain greater volumes and higher concentrations of PCBs and, therefore, pose a potentially greater risk to the environment and human health. The in-service use requirement on the larger transformers poses less of a burden for those who operate them. Since they are essential for supplying major sources of power, most are in service on a regular basis. Furthermore, due to the design of the equipment and their locations, they can be conveniently and safely sampled while in active service.

Although there is some overlap between large, substation power transformers and typically smaller, distribution transformers, further support for distinguishing between the two categories is found in an American National Standards Institute (ANSI) publication C57 (Sections C57.12.20 through C57.12.26). ANSI indicates that distribution transformers with less than a 500 Kilovolt-ampere (KVA) rating are not required to have sampling valves. Power transformers, however, will almost always have sampling valves to allow for easy sampling of the transformer fluid (Ref. 5). Sampling valves are most typically found on transformers with a KVA rating of 500 or greater.

In a letter from Baltimore Gas and Electric (BG&E) to EPA (Ref. 12) BG&E states that distribution transformers with a KVA rating of 500 or less are not required to have sampling valves, and that sampling these units outside of the shop environment is precarious. BG&E argues that the 500 KVA benchmark for distribution transformers is a logical breakpoint for not requiring post retrofill testing, i.e., distribution transformers 500 KVA and below need not be tested and those greater than 500 KVA should be tested. EPA is soliciting comments on the appropriateness of factoring in the KVA rating of particular transformers insofar as it relates to the type of reclassification/sampling schedule a transformer owner may opt for, or whether the pre-retrofill concentration of the transformer, regardless of KVA rating, should be the only criteria. In addition, if KVA rating should be factored in, is there a corresponding PCB concentration that should be associated with that KVA rating, i.e., should testing be required of a transformer with ≥ 500 KVA and ≥ 1000 ppm PCB or should testing be required of only those transformers ≥ 500 KVA regardless of PCB concentration. EPA’s analysis of the data that were submitted for review looked exclusively at the PCB concentration of the transformers and did not factor the KVA rating into the reclassification equation. EPA, therefore, solicits data to support the relevance of including KVA rating into the reclassification equation.

C. Post Retrofill 90-Day Testing Requirement

1. *Elimination of post-retrofill testing requirement for transformers <500 ppm PCBs.* This rule proposes to eliminate the 90-day, post-retrofill test requirement for transformers containing pre-retrofill concentrations of <500 ppm PCBs, thereby allowing for immediate reclassification of PCB-Contaminated Transformers to non-PCB status after a properly conducted retrofill. Based on the data and rationale provided in Unit III.C.1 of this preamble, routine testing of retrofilled PCB-Contaminated Transformers may not be necessary to verify that PCB levels are <50 ppm. EPA is soliciting comments on whether PCB-Contaminated Transformers with a PCB concentration of <500 ppm should be immediately reclassified to non-PCB status (i.e., <50 ppm) after a properly conducted retrofill procedure as proposed in § 761.30(a)(2)(v). A “properly conducted retrofill” would mean a procedure where: (a) The PCB dielectric fluid is drained from the transformer and stored and disposed of pursuant to the storage and disposal requirements of 40 CFR 761.65 and 761.60 and the manifest requirements at § 761.207 to § 761.209; (b) the transformer is flushed with no less than 10 percent of the transformer’s volume (as reflected on the original nameplate) with a dielectric fluid that contains <2 ppm PCBs or with solvent in which the solubility of PCBs is 5 percent or more by weight (the flush material must be stored and disposed of in accordance with § 761.65 and § 761.60 and the manifest requirements of § 761.207 to § 761.209 must be adhered to); and (c) the transformer is refilled with <2 ppm PCB dielectric fluid. If no nameplate exists that provides volume information, the transformer height, width and depth would be measured to estimate the volume.

2. *Transformers with a PCB concentration ≥ 500 ppm but <1,000 ppm.* EPA is soliciting comment on its proposal to modify the 90-day requirement of § 761.30(a)(2)(v) for testing PCB Transformers with ≥ 500 ppm but <1,000 ppm PCBs. Transformers with PCB concentrations $\geq 1,000$ ppm PCBs will continue to be subject to the requirement to test the fluid 90 days after the retrofill.

To take advantage of the shortened post-retrofill testing requirement, i.e., 21 days vs. 90 days, for transformers between ≥ 500 and >1,000 ppm, the transformer would be required to undergo a properly conducted retrofill.

A statistical review conducted by EPA of the data submitted for 380 transformers of varying concentrations indicates that a properly conducted retrofill process removes a very high percentage of the PCBs (Ref. 4). A comparison of PCB concentration levels, at various points of time after a retrofill, indicates that leachback occurs at the highest rate over the first few days and becomes

statistically insignificant over time. Of all of the transformers tested, the vast majority which showed asymptotic (leveling off) PCB levels above 10 percent of the original PCB concentration had relatively low initial PCB concentrations (i.e., <200 ppm PCB). This means that a transformer with a pre-retrofill PCB concentration of 200 ppm may retain up to 25 percent of the original PCBs and still fall below the 50 ppm criterion for reclassification as a non-PCB Transformer. Over 80 percent of the transformers which were tested 90 days after such a retrofill, retained less than 8 percent of the original PCB concentration.

A post-retrofill measurement of the PCB level of the dielectric fluid would be required for reclassification to non-PCB status (i.e., <50 ppm) for all transformers with a PCB concentration ≥ 500 ppm. If the original PCB concentration of a transformer is ≥ 500 ppm but <1,000 ppm PCB, the post-retrofill measurement would be required to be taken at least 21 days after the last retrofill. If 21 days after retrofill the PCB concentration in the transformer is <25 ppm, the transformer would be immediately reclassified to non-PCB status. The existing transformer retrofill data indicate that the asymptotic PCB concentration in properly retrofilled transformers has a low statistical probability to ever increase as much as 200 percent over their tested post-21-day PCB concentration. Transformers that have a PCB concentration ≥ 25 ppm but <500 ppm after 21 days could be immediately reclassified to PCB-Contaminated status. If non-PCB status is still desired, retesting would be required 90 days after the initial retrofill. If the 90-day retest shows a PCB concentration of <50 ppm, the transformer would be immediately reclassified to non-PCB status. If the retest shows ≥ 50 - <500 ppm PCB it would be reclassified to PCB-Contaminated status.

EPA is proposing 25 ppm as the maximum concentration allowable for designation as non-PCB status after the 21-day test based on its analysis of existing industry test data. EPA solicits comment on whether this new limit is reasonable given the results of existing or new industry test data. Would setting the limit higher than 25 ppm be reasonable since there is a low statistical probability for the PCB concentration in a range above 25 ppm to exceed 50 ppm after 90 days? Alternatively, is a limit lower than 25 ppm justified? EPA also solicits comment on whether setting a limit of 25 ppm for non-PCB status would impose an unnecessary burden on retrofillers that desire non-PCB status due to the potential for test results to fall between 25 ppm and 50 ppm after the 21-day test and still be less than 50 ppm after 90 days.

If reclassification of transformers ≥ 500 ppm - <1000 ppm PCB is not achieved after one retrofill, EPA is proposing that 90 days elapse between each subsequent retrofill. The goal is to achieve a stable equilibrium between the PCBs within the internal

components and the transformer core's dielectric fluid. Use of this approach is at the discretion of the transformer owner or operator. Notwithstanding a "properly conducted retrofill," the transformer owner or operator would remain responsible and liable for any subsequent violations associated with the reclassification of any transformer due to potential statistical deviations, laboratory calibration errors, variations in the design of the different models of transformers, etc.

3. *Transformers $\geq 1,000$ ppm.* PCB Transformers with a PCB concentration $\geq 1,000$ ppm must still be drained, refilled, and tested after a minimum of 90 days of in-service use, as currently specified at 40 CFR 761.30(a)(2)(v), in order to determine whether the transformer has been reclassified. However, under this proposal, the requirement to reach the 50° C temperature level would be eliminated. EPA lacks information on whether a properly conducted retrofill and/or the elimination of the post 90-day test after retrofill for transformers $\geq 1,000$ ppm PCBs is warranted. EPA solicits comments and/or data on this issue.

The proposed modifications to the reclassification requirements of § 761.30(a)(2)(v) should eliminate the need for submission of individual waiver requests to EPA, especially for those transformers <1,000 ppm PCBs. If, however, the transformer owner wished to deviate in any way from the specifications of the modifications contained in this proposed rule (e.g., by not employing a "properly conducted retrofill" as defined in Unit III.C.1 of this preamble and as proposed at § 761.30(a)(2)(v), by failing to wait the designated amount of time prior to conducting the post-retrofill, or by failing to obtain a laboratory analysis of the post-retrofill PCB concentration, etc.), the transformer would not be reclassified and the owner could be subject to an enforcement action if the owner is not in compliance with all of the appropriate regulatory provisions.

4. *Electromagnets, switches, and voltage regulators ≥ 500 ppm PCBs.* Currently, the PCB regulations at § 761.30(h)(2)(v) allow for the reclassification to non-PCB or PCB-Contaminated status of those voltage regulators, switches and electromagnets that are ≥ 500 ppm PCBs. The regulation does not require these pieces of electrical equipment to reach 50° C but does require a minimum of 3 months of in-service use subsequent to the last servicing conducted for purposes of lowering the concentration of this equipment. In this proposed rule, EPA is soliciting comments and requesting supporting data on whether the proposed criteria in this rule for PCB and PCB-Contaminated Transformers are also appropriate or viable for these other pieces of electrical equipment. In § 761.30(h)(2)(v), as is already the case in § 761.30(a)(2)(v), EPA is proposing to change the approval authority for granting the use of alternate methods to simulate the loaded

conditions of in-service use from the Assistant Administrator to the Director of the Chemical Management Division. EPA solicits comments on this proposed change in approval authority.

In addition, EPA is proposing recordkeeping requirements pursuant to § 761.180(a)(3) for this electrical equipment undergoing reclassification.

IV. Regulatory Assessment Requirements

A. Executive Order 12291

Under Executive Order 12291, issued February 17, 1982, EPA must judge whether a rule is a "major rule" and, therefore, subject to the requirement that a Regulatory Impact Analysis be prepared. EPA has determined that this proposed rule would not be a "major rule" as that term is defined in section 1(b) of the Executive Order because the annual effect of the rule on the economy will be considerably less than \$100 million; it will not cause any noticeable increase in costs or prices for any sector of the economy or for any geographic region; and it will not result in any significant adverse effects on competition, employment, investment, productivity, or innovation, or on the ability of U.S. enterprises to compete with foreign enterprises in domestic or foreign markets. This proposed rule would, in fact, mitigate the burden on industry to comply with requirements for reclassifying PCB and PCB-Contaminated Transformers. This proposed rule was submitted to the Office of Management and Budget (OMB) for review prior to publication, as required by Executive Order 12291.

B. Regulatory Flexibility Act

Section 603 of the Regulatory Flexibility Act (the Act), 5 U.S.C. 603, requires EPA to prepare and make available for comment an initial regulatory flexibility analysis in connection with rulemaking. The initial regulatory flexibility analysis must describe the impact of the rule on small business entities. Section 605(b) of the Act, however, provides that section 603 of the Act "shall not apply to any proposed or final rule if the Agency certifies that the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities."

EPA considers a small business to be one whose annual sales revenues are less than \$40 million. This cutoff is in accordance with EPA's definition of a small business for purposes of reporting under section 8(a) of TSCA, which was published in the **Federal Register** of November 16, 1984 (49 FR 45430).

In accordance with section 605(b) of the Act, the Administrator certifies that this proposed rule, if promulgated, would not have a significant adverse economic impact on a substantial number of small business entities. Rather, it would relieve the burden

placed on business by modifying the current regulations. In addition, EPA is sending a copy of this proposed rule to the Chief Counsel for Advocacy of the Small Business Administration.

C. Paperwork Reduction Act

The Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et seq., authorizes the Director of OMB to review certain information collection requests by Federal Agencies. EPA has determined that the recordkeeping requirements of this proposed rule constitute a "collection of information" as defined at 44 U.S.C. 3502(c).

The information collection requirements of this proposed rule have been submitted for approval to OMB under the Paperwork Reduction Act. An amended Information Collection Request document has been prepared by EPA (OMB Control numbers 2070-0112 and 2070-0061). The public recordkeeping burden for this collection of information is estimated to be 15 minutes per each reclassification project. These are records that are already generated by the respondent. This estimate is based on the need to maintain these documents on file at the facility.

Comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, should be submitted to the Chief, Information Policy Branch (PM-223), Environmental Protection Agency, 401 M St., SW, Washington, DC, 20460. These comments should also be submitted to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC, 20503, marked ATTENTION: Desk Officer for EPA. The final rule will respond to any OMB or public comments on the information collection requirements in this proposal.

V. Public Record

In accordance with the requirements of section 19(a)(3) of TSCA, EPA is issuing the following list of documents which constitute the record of this proposed rulemaking. This record includes basic information considered by the Agency in developing this proposal. The official records of previous PCB rulemakings are incorporated by reference as they exist in the TSCA Public Docket. A full list of these materials is available for inspection and copying in the TSCA Public Docket Office. However, any Confidential Business Information (CBI) that is part of the record for this rulemaking is not available for public review. A public version of the record, from which CBI has been excluded, is available for inspection. The address for the TSCA Public Docket Office appears under the "ADDRESSES" section of this proposed rule.

A. Previous Rulemaking Records

(1) USEPA. "Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions." Final Rule. 44 FR 31514, (May 31, 1979).

(2) USEPA. "Polychlorinated Biphenyls (PCBs) Manufacturing, Processing, Distribution in Commerce, and Use Prohibitions; Use in Electrical Equipment." Final Rule. 47 FR 37342, (August 25, 1982). Docket #OPTS-62015C.

B. References

(1) "Equilibrium Study of PCBs Between Transformer Oil and Transformer Solid Materials," by Electric Power Research Institute (EPRI). (December 3, 1981).

(2) Letter from C. H. Manger of Baltimore Gas and Electric Company to Denise Keehner, USEPA/OPTS/EED, challenging the 50° C temperature criterion of reclassification. (July 27, 1987).

(3) Baltimore Gas and Electric Company. "PCB-Contaminated Distribution Transformer Reclassification Study." Baltimore Gas and Electric Company, Electric Test Department, Paul J. Frey, (August 1986).

(4) Memorandum from Dan Reinhart to Tony Baney, "Background Report on Empirical Basis for Proposed Changes to Reclassification Criteria for PCB and PCB-Contaminated Transformers", USEPA/OPPTS/OPPT/EED/DDB, undated.

(5) American National Standards Institute, Inc., The Institute of Electrical and Electronics Engineers, Inc., Distribution, Power, and Regulating Transformers. Standard numbers: (a) C57.12.20-1988, (b) C57.12.21-1980, (c) C57.12.22-1989, (d) C57.12.23-1986, (e) C57.12.24-1988, (f) C57.12.25-1981, and (g) C57.12.26-1987.

(6) Excerpt from PCB Seminar Notebook, San Diego, California, October 3-9, 1989, Sponsored by the Electrical Power Research Institute, "Reclassification: Simulating In-service Use", H. Carl Manger, Baltimore Gas and Electric.

(7) Letter from Richard E. Bell, Resource Planning Corporation to Carl Manger, Baltimore Gas and Electric. Results of analysis from transformer retrofill data. (April 24, 1989).

(8) Letter from Don Clay, Director, Office of Toxic Substances, EPA, to Tim Hardy, Kirkland and Ellis. What constitutes in-service use and simulation of in-service use for purposes of reclassifying electrical transformers containing PCBs. (June 13, 1984).

(9) Letter from Joseph J. Merenda, Director, Exposure Evaluation Division, EPA, to Edward Karapetian, Department of Water and Power the City of Los Angeles. Response to request to waive the 50° C and 90-day testing requirements for reclassification of 95,000 pole-top transformers. (November 29, 1990).

(10) Letter from Joseph J. Merenda, Director, Exposure Evaluation Division, EPA, to Edward Karapetian, Department of Water and Power the City of Los Angeles. Response to request to waive the 50° C and 90-day testing requirements for reclassification of 95,000 pole-top transformers. (May 22, 1991).

(11) Memorandum from Dan Reinhart, EPA/OPTS/EED, to Joe Davia, EPA/OPTS/EED, "Examination of the Relationship Between PCB Leaching and Load Level in Transmission Transformers by Baltimore Gas and Electric Company." (May 20, 1988).

(12) Letter from H. C. Manger, Baltimore Gas and Electric Company to Jan Canterbury, EPA/OPTS/EED. Possible changes to the regulations regarding reclassification of oil-filled transformers containing PCBs. (July 24, 1991).

(13) Letter from Gil Addis, Electric Power Research Institute to Jan Canterbury, EPA/OPTS/EED. Reclassification of Mineral Oil transformers contaminated with PCB, and Askarel transformers. (November 6, 1990).

(14) Letter from Dana S. Myers, S.D. Myers Transformer Consultants to Jan Canterbury, EPA/OPTS/EED. Average operating temperature of an askarel transformer. (August 16, 1991).

(15) PCB Residues in Transformer Carcasses. EPRI EL-6237, Project 2028-19, Final Report, August 1989. Prepared by the General Electric Company, Pittsfield, Massachusetts.

List of Subjects in 40 CFR Part 761

Environmental protection, Hazardous substances, Labeling, Polychlorinated biphenyls, Reporting and recordkeeping requirements.

Dated: November 4, 1993.

Carol M. Browner,

Administrator, Environmental Protection Agency.

Therefore, it is proposed to amend 40 CFR Chapter I, as follows:

PART 761—[AMENDED]

1. The authority citation for part 761 continues to read as follows:

Authority: 15 U.S.C. 2605, 2607, 2611, 2614, and 2616.

2. In § 761.30 by revising paragraphs (a)(1)(iii)(C)(2)(iii), (a)(2)(v), and (h)(2)(v), to read as follows:

§ 761.30 Authorizations.

* * * * *

(a) * * *

(1) * * *

(iii) * * *

(C) * * *

(2) * * *

(iii) Once a retrofilled transformer has been installed for reclassification purposes, it must follow the procedures specified in paragraph (a)(2)(v) of this section.

* * * * *

(2) * * *

(v) A PCB Transformer that has been tested and determined to have a concentration between ≥ 500 and $< 1,000$ ppm PCBs may be reclassified to a PCB-Contaminated Transformer or a non-PCB Transformer, and a PCB-Contaminated Transformer may be reclassified to a non-PCB Transformer by first performing a properly conducted retrofill. A properly conducted retrofill means the PCB dielectric fluid is drained from the transformer and stored and disposed of in accordance with § 761.60 and 761.65 and the manifest requirements of § 761.207 to 761.209 must be adhered to. Then the transformer must be flushed with dielectric fluid below 2 ppm PCB or a solvent in which

PCBs are at least 5 percent soluble by weight using no less than 10 percent of the original nameplate volume. If no nameplate exists that provides volume information, the transformer must be flushed with PCB dielectric fluid containing less than 2 ppm PCB or a solvent in which PCBs are at least 5 percent soluble by weight using no less than 10 percent of the estimated volume of the transformer. The flushed dielectric fluid must be stored and disposed of in accordance with the requirements of §§ 761.60 and 761.65 and the manifest requirements of §§ 761.207 and 761.209 must be adhered to. The transformer must be refilled with dielectric fluid below 2 ppm PCB.

(A) After properly retrofitting the transformer in accordance with the requirements in paragraph (a)(2)(v) of this section, the reclassification must be conducted as follows:

(1) A PCB Transformer that has been tested and determined to have PCB concentrations between ≥ 500 and $< 1,000$ ppm must be tested by a laboratory using an EPA-approved test method at least 21 days after the retrofit. The PCB Transformer may be reclassified to a non-PCB status if testing shows that the post-retrofill PCB concentration is < 25 ppm. If the post-retrofill PCB concentration is ≥ 25 ppm but < 500 ppm, the transformer may be reclassified to PCB-Contaminated status. If non-PCB status is still desired, the PCB Transformer must be re-tested 90 days after the initial retrofit to determine if it may be reclassified to a PCB-Contaminated status if the test shows a post retrofit concentration of ≥ 50 but < 500 ppm, or non-PCB status, if the post retrofit concentration is < 50 ppm.

(2) A transformer that has been tested and determined to be PCB-Contaminated (50 to < 500 ppm) may be reclassified immediately to a non-PCB Transformer (< 50 ppm).

(B) A PCB Transformer that has been tested and determined to be $\geq 1,000$ ppm PCBs must be operated electrically under loaded conditions for 90 days after retrofit.

After 90 days, the transformer must be analyzed for PCB concentration by a laboratory using EPA-approved testing methods. If the test shows a PCB concentration of 50–499 ppm, the transformer may be reclassified to PCB-Contaminated status. If the test shows a PCB concentration of < 50 ppm, the transformer may be reclassified to non-PCB status. The Director, Chemical Management Division may grant, without further rulemaking, approval for the use of alternative methods that simulate the loaded conditions of electrical operation.

(C) If the owner still wishes to reclassify the transformer but the test indicates failure to achieve the desired lower PCB status, the entire process as specified in paragraph (a)(2)(v)(A) or (a)(2)(v)(B), as appropriate, of this section must be repeated.

(D) Transformer owners that are reclassifying or have reclassified their transformers must keep records pursuant to § 761.180(a)(3).

(E) If, after reclassification, the transformer is tested and found to contain a higher PCB concentration, (i.e., ≥ 50 ppm if non-PCB status was desired or ≥ 500 ppm PCB if PCB-Contaminated status was desired) the reclassification is void, and the transformer is classified based on its actual concentration. The process as specified in paragraph (a)(2)(v)(A) or (a)(2)(v)(B), as appropriate, of this section must be repeated if reclassification is still desired. The transformer owner remains liable for any subsequent violation incurred if the PCB concentration of the transformer is found to exceed the designated PCB-Contaminated or non-PCB level after reclassification.

* * * * *

(h) * * *

(2) * * *

(v) An electromagnet, switch or voltage regulator with a PCB concentration of at least 500 ppm may be converted to PCB-Contaminated Electrical Equipment or to non-PCB status and PCB-Contaminated Electrical Equipment may be reclassified to non-PCB

status by draining, refilling and/or otherwise servicing the equipment. In order to be reclassified, the equipment's dielectric fluid must contain less than 500 ppm PCB (for conversion to PCB-Contaminated Electrical Equipment) or less than 50 ppm PCB (for conversion to a non-PCB classification) after a minimum of 3 months of in-service use subsequent to the last servicing conducted for the purpose of reducing the PCB concentration in the equipment. In-service use means that the transformer is used electrically under loaded conditions. The Director, Chemical Management Division may grant, without further rulemaking, approval for the use of alternative methods that simulate the loaded conditions of in-service use. All PCBs removed from this equipment for purposes of reducing PCB concentrations are subject to the disposal requirements of § 761.60. In addition, records must be kept pursuant to § 761.180(a)(3).

* * * * *

3. In § 761.180 by adding paragraph (a)(3), to read as follows:

§ 761.180 Records and monitoring.

* * * * *

(a) * * *

(3) Transformer owners and owners of electromagnets, switches, and voltage regulators that are reclassifying or have reclassified such equipment must keep the following documentation for at least 3 years after the equipment has been disposed of:

(i) The pre-retrofill concentration of the equipment.

(ii) The retrofit and reclassification schedule and procedure.

(iii) A copy of the analysis indicating the equipment's reclassified status (i.e., final PCB concentration).

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