UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON. D.C. 20460

OFFICE OF
AIR AND RADIATION

MAY 31,1995

Mr. William R. Lewis
Morgan, Lewis and Bockius
1600 M Streets N.W.
Washington, D.C. 20036-5869

Dear Mr. Lewis:

As you know, the Environmental Protection Agency (EPA) is committed to working with industry and other stakeholders to develop flexible solutions to address the implementation concerns raised with our programs. Thanks in a large part to your initiative, we were able to hold a successful meeting with you and over 55 of your colleagues to discuss implementation issues of concern. I am providing our responses to the issues raised by the industry representatives at the April 12, 1995 meeting.

The EPA has made considerable progress in developing rules and guidance that take into consideration many of your concerns. Several of the concerns you raised are being addressed in rulemaking packages that are underway for new source review reform and operating permits. In addition we are holding stakeholder meetings on enhanced monitoring and section 112(g) EPA is also developing guidance in several areas that will help clarify a number of the uncertainties that have been raised in the industry comments.

I look forward to continue working with you as we move in developing rules that work for all parties and foremost in achieving clean air for all our citizens

Sincerely yours,

Mary D. Nichols
Assistant Administrator
for Air and Radiation

Attachment

ENVIRONMENTAL PROTECTION AGENCY
(EPA)

RESPONSE TO ISSUES RAISED BY INDUSTRY ON CLEAN AIR ACT IMPLEMENTATION REFORM

May 30, 1995

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EPA's RESPONSE TO ISSUES RAISED BY INDUSTRY ON CLEAN AIR ACT IMPLEMENTATION REFORM

EPA's RESPONSE TO INDUSTRY CONCERNS ON CLEAN AIR ACT IMPLEMENTATION REFORM

On April 12, 1995, EPA met with 55 industry representatives to discuss issues they had raised and to indicate what actions EPA intends to take on the issues. The specific issues raised by the various industry representatives and EPA's responses to those issues are attached. The vast majority of issues raised by industry were not new to EPA; the Agency has been working with industry representatives and other stakeholders for several months trying to find cost-effective, common sense solutions to these often complex issues.

It is also important to note that the responses included in this document reflect the Agency's positions as of mid-May 1995. On several of these issues, notably operating permits and 112(g), EPA is in the midst of reevaluating its programs in light of recent feedback from various stakeholders. In June 1995 EPA will meet with the Clean Air Act Advisory Committee to discuss options for addressing section 112(g). EPA is also currently working out final details of a proposed supplemental rule on operating permits and will shortly make available additional information about that proposal.

Enhanced Monitoring

In general, EPA agrees with concerns raised about the enhanced monitoring rule and has withdrawn the package from review by the Office of Management and Budget. EPA hopes to develop a strategy that will allow it to issue compliance assurance requirements that build on the requirements of existing rules and ensure that the environmental results expected from those rules are being achieved. EPA received an extension of the court-ordered deadline until June 30, 1995. EPA intends to seek a further extension of at least a year to allow time for stakeholder involvement in development of the rule. One of the first steps EPA will take is to hold a stakeholders meeting on May 31, 1995. EPA will work with representatives from industry, states, and environmental groups to obtain their assistance in developing a new flexible approach for the enhanced monitoring rule.

Operating Permit Program

Over the next month EPA plans to make several significant improvements to the permit program that will enhance a facility's ability to make process or operational changes without revising its Title V permit, make far greater use of existing State permit programs for purposes of Title V, and reduce the costs and burdens of developing permit applications. Some of these changes are described below. EPA intends to make available information about the other changes shortly.

In the last several months EPA has been working with representatives from industry, states, and environmental groups to find a solution that will allow a more streamlined process for permit revisions and provide more flexibility to states and industry. EPA plans to issue a supplemental proposed rule on operating permit revisions in June 1995. EPA has already shared a draft of the supplemental proposal with industry, states and other stakeholders to get their comments on the revised approach.

EPA is currently in the process of working out final details about what will be in the supplemental proposal, so it in not possible to fully describe the extent of the changes in that document here. However, in general the supplemental proposal will include a streamlined system for permit revisions that builds on existing successful State programs. Under this process, States would have greater flexibility to decide the amount of public review and EPA review for most permits, by matching the level of review to the environmental significance of the changes. A State would not be required to provide any EPA or public review for changes that it can show are de minimis.

EPA is also working on a series of guidance documents that will address many implementation issues raised by industry and states. This guidance is expected to clarify the flexibility allowed under the current rule and provide guidance on ways to reduce the costs and effort in preparing permit applications, which in turn will reduce the administrative and economic burdens of this program. As a result of concerns about the size and cost of some permit applications that have recently come to EPA's attention, the Agency plans to hold meetings with industry and State stakeholders in June to clarify the requirements on permit application content and ensure that State or local agencies do not request needless information in the applications.

New Source Review

EPA has worked through the Clean Air Act Advisory Committee to obtain independent advice and counsel on policy and technical issues associated with reforming the New Source Review program. Through these efforts, EPA provided a draft NSR reform, rule for stakeholders, comment in 1994. Based on input received from the industry, states, environmental and other groups, EPA has revised the draft rule and intends to propose the reform rule in July 1995. The proposed revisions provide stakeholders with more certainty and flexibility to comply with EPA's NSR requirements, and promote the use of innovative control technologies and pollution prevention

While EPA views the NSR proposal package as being balanced and as not sacrificing environmental protection, this package provides industry with several important benefits. To name just a few, EPA

plans to exempt certain "clean" emission units, and pollution control and pollution prevention projects from NSR altogether. EPA also plans to provide an approach that promotes voluntary use of plant-wide applicability limits which allows industry to operate without changes to its' permit as long as the plant's emissions do not exceed a cap.

Air Toxics

EPA recognizes that states and industry need lead time to be able to implement the modification provisions contained in Section 112(g). EPA published an interpretive notice in February 1995 advising states that they are not required to implement the modification provisions until EPA issues the final rule. This reversed an earlier EPA legal interpretation. In developing the final section 112(g) rule, EPA will consider the need for additional lead time to implement the modification provisions following promulgation of the rule.

In response to comments received on the proposed rule, EPA is considering making several significant changes. EPA plans to discuss these proposed changes at the June meeting of the Clean Air Advisory Committee meeting. As it develops the final rule, EPA plans to hold meetings with industry, states and other stakeholders about potential changes to the proposed rule. EPA plans to issue the final rule in early 1996.

Potential to Emit

EPA's requirements for a source's limits on its potential to emit to be federally enforceable is currently in litigation. In that litigation EPA has taken the position that it has the legal authority to require federal enforceability. EPA believes there should be a credible system to ensure adherence to restrictions which allow a source to avoid federal requirements. Federal enforceability provides EPA the opportunity to ensure compliance; it also provides citizens the opportunity to ensure that sources in their communities are taking steps to reduce toxic air pollution.

In January 1995, EPA issued a memorandum outlining alternative ways that restrictions on potential to emit could be less burdensome. For example, EPA identified approaches such as general rules and general permits to create restrictions on large numbers of sources without having to resort to individual permits. To ensure that states have sufficient time to implement these approaches, EPA provided a two-year transition period. During the transition period, sources emitting less than 50 percent of the major source threshold would be excluded from having federally enforceable limitations, as long as appropriate records are kept. Sources above the 50 percent threshold that have State permit limits can simply submit certifications that

accept their State limits as federally enforceable. EPA is giving serious consideration to extending the provision for sources emitting less than the 50 percent cutoff beyond the two-year period.

Fugitive Emissions

EPA continues to conduct section 302(j) rulemakings where required under the Act, but believes section 112 does not require such a rulemaking. A court decision on the legal issue of whether such rulemaking is required under section 112 is expected to be issued shortly. EPA is interested in specific concerns about the technical feasibility of measuring fugitive hazardous air pollutant emissions, and in providing guidance in this area.

EPA has committed to issue guidance in May 1995 on treatment of co-located sources of fugitive emissions that have not been listed under section 302(j).

EPA's RESPONSE TO ISSUES RAISED BY INDUSTRY ON
CLEAN AIR ACT IMPLEMENTATION REFORM

Operating Permit Program

REDUCING PERMIT APPLICATION BURDENS

Issue 1: To reduce the burden of the permit Application, EPA should issue guidance to confirm that sources are not required to include a substantial level of detail in their permit applications. Specifically covered should be limiting detail an emissions and reviews related to Identification of applicable requirements.

Responses:

- EPA agrees and is creating guidance on this and many other implementation issues.

- EPA's guidance will address the extent to which emissions must be quantified for purposes other than determining a facility's potential emissions. EPA will clarify that extensive emission inventories are not the main goal of the Title V operating permit program, and that documentation of emissions may be reduced where the purpose is for cataloging emissions rather than, for example, determining whether a State or federal rule applies.

- EPA will clarify that emissions of very small amounts of pollutants could be reported as present in "trace" amounts, instead of calculating the actual quantity of emissions. The guidance will clarify that calculation of tons per year emissions of pollutants covered under the accidental release program [section 112(r)] is not required, unless the pollutant is also a hazardous air pollutant (HAP) under the air toxics provisions in section 112(b).

- Although not part of industry's recommendation, another means of reducing the burden of permit applications is to allow part of an application to be submitted within the one year deadline and the remaining information to be submitted nearer the date of permit issuance for sources whose required date for permit issuance is significantly later in the state's 3-year transition period. EPA will clarify that permit authorities may initially deem an application complete, provided core information is included, and then allow submittal of additional necessary information nearer the date of permit issuance. The application shield will continue to be provided to applications deemed complete in this manner.

UPDATED EMISSIONS-ESTIMATES

Issue 2: EPA should issue guidance that, at a minimum establishes the following:

1) If emissions estimates developed in preparing Title V applications differ from prior good faith estimates# then use of the prior estimates should not be called into question by the new estimates, and

2) If emission limits were based on prior good faith estimates that are lower than current estimates, then the previous emission limits may be revised using the Title V permit process to reflect estimates based on current methodologies.

Response:

- EPA recognizes the need for fair and appropriate measures under these circumstances.

- EPA is developing guidance on what effect new emission factors or information would have on a previously submitted permit application. This guidance is expected to be issued very shortly.

- EPA agrees that good faith estimates are an important factor in this issue. EPA is soliciting comments from industry on how it should address the issue of "good faith" estimates.

- EPA also agrees that changes to emission estimates should not require a revision of the operating permit if the new estimate has no affect on what requirements apply. If new requirements apply, the existing rule defines the procedures for incorporation into the permit.

INSIGNIFICANT ACTIVITIES

Issue3: EPA should allow States to exclude as insignificant activities any units with emissions below the State established significance thresholds -- even if the units are subject to an applicable requirement.

Response:

- EPA will provide additional guidance to States concerning exclusion of certain activities from the obtaining a permit.

- EPA will clarify through guidance that States may reduce the level of information in the application for activities subject to a generically applicable State implementation plan (SIP) requirement, such as small units subject to general SIP opacity requirements.

MINOR NEW SOURCE REVIEW/TITLE I MODIFICATIONS

Issue 4: EPA should immediately issue a ruling that Title I modifications include only changes explicitly defined as modifications under the Act, and do not include changes not covered by those definitions that are governed by State or local minor new source review (NSR) programs.

Response:

- EPA is continuing to consider how best to address this issue in the supplemental proposal it plans to issue in June 1995. In the meantime, EPA has approved a number of state permit programs that have not treated minor changes under their new source review program as "Title I modifications." These programs allow minor NSR changes to be processed as minor permit modifications under their Title V program.

- EPA's interpretation of the phrase "Title I modifications" in the current rule allows this approval and EPA will continue to grant similar approvals.

- As part of its supplemental proposal EPA currently intends to offer for public comment a streamlined two-tracked system for permit revisions that builds on existing successful State new source review programs Under this process, States have greater flexibility to decide the amount of ant EPA review for most, permit revisions, by matching the level of review to the environmental significance of the change. The new system for permit revisions will reduce the importance of the phrase "Title I modification" because consideration of whether the change is a Title I modification would not be a factor in determining what revision process is necessary.

APPLICABLE REQUIREMENTS - EXCLUSION OF CERTAIN TERMS

Issue 5: EPA should issue guidance confirming the following:

- States can limit minor NSR terms included in title V permits to those that they deem to be environmentally significant (but States would have the option to treat minor NSR and Title V separately), and

- States are only required to Include state implementation plan (SIP) terms that are necessary elements of an EPA-required nonattainment or maintenance plan.

Response:

- EPA agrees that some minor NSR term may be obsolete or inappropriate for operating permits.

- EPA intends to clarify through guidance that, for example, the permit would not need to incorporate the NSR application by reference or include certain other terms determined by the source and permit authority to be extraneous. This guidance will indicate the types of terms that may be extraneous and would suggest ways in which States may drop these requirements from NSR and Title V permits.

[For treating minor NSR and Title V separately, see response to the next issue.]

APPLICABLE REQUIREMENTS - LEVEL OF DETAIL

Issue 6: EPA should allow States to include a basic requirement to comply with a particular general program in the Title V permit, with an acknowledgment that compliance with the underlying requirements, as revised from time to time, will be required. These general programs would include:

- minor NSR

- monitoring and enhanced monitoring

- categories of de minimis reasonably available control technology (RACT) requirements and determination of RACT non-applicability

- 112(r) risk management plans

EPA should issue guidance to confirm that applicable requirements may be incorporated into Title V permits using citations (i.e., references) rather than narrative restatement.

Response:

- While EPA believes this approach could lead to permits that would not have specific, enforceable conditions for some of these

requirements, EPA is continuing to consider varying ways in which states may incorporate new source review requirements into Title V permits.

- Some requirements do lend themselves to generic treatment. In the March 1994 supplemental proposal on accidental releases under section 112(r), EPA proposed standard permit conditions that would assure compliance with requirements of the accidental release program. Under this approach the risk management plan would not be a part of the application or the permit. Changes to the risk management plan would not require revising the permit.

- EPA agrees that a citation-based approach to identifying underlying requirements is needed and will be issuing guidance on the use of citations in June 1995.

- EPA described for public comment an approach to cross-referencing in its August 29, 1994 proposal, and intends to expand on this approach in the guidance document mentioned above. Under the August proposal, the permit would need to include the emission limits and monitoring requirements, while test methods and lengthy procedures could be referenced. Any citation would need to ensure that judgements required in an underlying requirement are identified in the permit.

OPERATIONAL FLEXIBILITY AND PERMIT REVISION PROCEDURES

Issue 7: EPA should promulgate the operating permit revision procedures that reflect the approach set out in industry's "straw proposal."

Response:

- EPA's supplemental rule on Title V permit revisions, which will be issued in June 1995, will address this issue. This proposal will include an alternative, streamlined system for permit revisions that builds upon existing state permit programs.

- It will give States great flexibility to decide the amount of public and EPA review for most permit revisions, by matching the level of review to the environmental significance of the change. A State is not required to provide any review for changes that it can show are de minimis. The public, affected States, and EPA would have an adequate opportunity to review and comment on more environmentally significant actions.

- Under the June proposal, changes that do not require approval

under State minor NSR would be allowed to proceed, with no further review upon submittal of a notice to the State, provided the change would not conflict with the Title V permit.

- The permit revision procedures are expected to avoid duplication with existing State permit programs. For changes subject to preconstruction review, any public, affected State or EPA review would occur prior to construction of the project. This is where State review is already provided under new source review, and would avoid second-guessing of a preconstruction permit by EPA.

TITLE V MONITORING

Issue 8: EPA should issue Title V monitoring guidance that provides:

1) Existing monitoring established as part of an applicable requirement should satisfy the Title V monitoring requirement.

2) If no such monitoring is provided in the underlying requirement, states can establish Title V monitoring as part of the permitting process, subject to the following constraints:

- monitoring data that is sufficient to determine compliance with the underlying applicable requirement shall be the objective of any new monitoring, and where the applicable requirement was established through rulemaking, should only serve as indicator monitoring until the compliance determination aspects of the underlying requirement can be formally reviewed and revised through rulemaking.

- costs shall he taken in account in determining such expressly recognizing that monitoring may not be feasible for certain units because any benefits will be outweighed by associated costs.

- monitoring must be established in a manner that will assure that an increase in stringency of the underlying requirement will not result.

3) States should be able to exempt small units from monitoring.

Response:

- Several of the points raised are related to EPA's enhanced monitoring proposed rule which EPA is currently reexamining. Either as part of that reexamination, or in separate guidance EPA will clarify what in necessary to meet the operating permit rule requirements on periodic monitoring.

- EPA agrees directionally with the points that periodic monitoring should be satisfied by monitoring included in an applicable requirement.

- EPA also agrees that periodic or enhanced monitoring is not intended to increase the stringency of the underlying requirement.

RESEARCH AND DEVELOPMENT ACTIVITIES

Issue 9: EPA should exclude research and development (R&D) and related activities from coverage under Title V and section 112(g). At a minimum, the current Title V rule must be implemented consistent with the preamble to make clear that states have authority to treat co-located R&D facilities and related activities separately in determining whether they are a Title V major source.

Response:

In the June 1995 supplemental proposal on permit revisions, EPA will clarify that under the current rule, R&D facilities may be considered separately from the manufacturing facility at which they are located. This means that R&D laboratories would not be required to obtain a permit, unless the R&D facility alone is a major source.

EPA'S RESPONSE TO ISSUES RAISED BY INDUSTRY ON
CLEAN AIR ACT IMPLEMENTATION REFORM

New Source Review

SUMMARY OF RECOMMENDATIONS

Issue 1: New source review (NSR) is triggered by two types of activities at existing sources: installing new emissions units and changing existing emissions units. With respect to new units, the NSR "emission increase" tests exclusively govern NSR applicability. As to existing units, the NSR "exclusions" from "physical or operational change," as well as the "emissions increase" tests determine applicability. EPA's July NSR reform package addressed both types of activities and contains certain solutions that industry supports. It contains other provisions that industry does not support in their present form. Finally, the July package omits provisions that industry believes are essential to meaningful reform.

"One size does not fit all" in a principle that needs to be recognized in the NSR program. Both “exclusion” provisions and "the emission increase" tests must reflect this principle.

The "exclusions" to NSR either focus on conduct that existing facilities normally undertake during their useful life or on conduct that the Agency wishes to encourage because it is in the public interest. Different “exclusions" are needed in order to reflect different conditions that exist in different facilities. The "exclusion” options need to be expanded.

Options are also needed under the emissions increase test. An allowable-to-allowable test should be provided for sources that have undergone NSR review and for sources where the State implementation plan (SIP) is consistent with that approach. EPA should also confirm the existing discretion of sources to use an actual-to-actual approach. Source owners should also have discretion to choose from a menu that includes, at a minimum, these tests and plantwide applicability limits (PALs).

Response:

- EPA began a comprehensive reassessment of its NSR program over two years ago. That process involved extensive discussions with representatives from all the stakeholder groups and resulted in recommendations forwarded to EPA from the Clean Air Act Advisory Committee (CAAAC).

- EPA has developed a regulatory package addressing the recommended changes and expects the proposed rules to be signed by the Administrator within the next few months.

- While EPA views the package as being balanced and as not sacrificing the environmental protection inherent in the New Source Review program, there is no doubt that the package will provide industry with several important benefits including:

    - Deregulation of many changes at “clean" emissions units and pollution control and pollution prevention projects -- Sources that have clean emissions units or are undertaking projects to clean up air pollution would generally not be targeted for federal new source review.

    - Promotion of voluntary plant-wide limits -- Rather than face potentially complicated, piecemeal applicability decisions every time a change at a plant is contemplated, most plant managers prefer to work with an emissions cap or budget, an annual emissions limit that allows managers to make almost any change any time as long as the plant's emissions do not exceed the cap. EPA will include this option in the proposed rule.

    - Help for cyclical industries such as the automobile manufacturing companies industry alleges that existing regulations unintentionally Penalize that have suffered recent downturns and inhibit modernizing changes that are vital to their recovery, even when changes at a plan'. lower emissions. EPA's proposal will level the playing field for these sources by extending the range of years they can use to establish their emissions baseline.

    - Encouragement of pollution prevention and innovative control technologies -- The proposed changes will ensure that bona fide pollution prevention qualifies for the pollution control project exclusion and revamp the under-used innovative control technology waiver to simplify the process and eliminate penalties for good faith failures.

- Better coordination of permits impacting Class I areas -- EPA will clarify the role of the Federal Land Manager, the State permitting authority and the applicant with regard to the NSR permitting process. Other changes establish de minimis levels for air quality impacts and provide mitigation alternatives for sources whose proposed new emissions threaten Class I areas. The changes should dramatically reduce delays and disputes currently associated with permitting near federal Class I areas.

- Increased State flexibility -- instead of one-size-fits-all solutions to applicability and other issues, States would be explicitly allowed for the first time to choose applicability and implementation approaches from a menu of alternatives.

EXCLUSIONS FROM PHYSICAL AND OPERATIONAL CHANGES

Issue 2: Pollution Control Project (PCP) Exclusion: The exclusion should follow the Wisconsin Electric Power Company (WEPCO) exclusion by dropping the following from the July draft:

- The requirement that the source owner seek and obtain a prior state determination that the pollution control project exclusion applies "up-front" before commencing construction on a project.

- The mandatory control requirements of collateral emissions increases.

- The "offset" requirement for nonattainment areas.

- The "air toxics" risk evaluation.

Response:

- EPA generally agrees and as mentioned above, EPA will be proposing a pollution control project exclusion as Part of NSR reform package to allow exemptions for sources that have clean emission units or undertaking projects to clean up air pollution.

- This exclusion will not include any specific requirement for State pre-authorization. EPA expects that most projects will be reviewed by states as part of their minor NSR programs. As with EPA's existing NSR exclusions, the timing and nature of this state minor NSR approval will be left for states to determine.

- The proposed exclusion will include the following safeguard used in the WEPCO rule to ensure that pollution control projector do not have an adverse environmental impact: The project cannot cause or contribute to a violation of a national ambient air quality standards (NAAQS), or prevention of significant deterioration (PSD) increment or have an adverse impact on air quality related values (AQRVs) in a Class I area.

    - Under this test, states are to consider the collateral emissions from a project and ensure that new emissions of nonattainment pollutants do not contribute to the existing problem. EPA regulations will not specify how the state must deal with increases that do not contribute to a nonattainment problem.

- EPA will not require an evaluation for toxic emissions for pollution control projects that are add-on or fuel switches to a less polluting fuel. EPA's experience with such projects has shown that a toxics safeguard is not needed. Given the uncertain nature of many pollution prevention projects, EPA believes that it is a reasonable environmental safeguard to confirm that such projects result in an environmental benefit before a pollution control project exemption is granted. As part of an evaluation of whether a project is environmentally beneficial, EPA would expect states to consider any increase in toxic emissions.

Issue 3: Pollution Prevention Exemption: As EPA has recognized in numerous public statements, "pollution prevention" projects (i.e., projects that allow a facility to produce a product with less environmental discharges per unit of product made) must be encouraged. To effectuate this policy, the pollution prevention" exclusion proposed by the Agency should

- Eliminate the July draft requirement that the project not improve efficiency nor increase annual utilization.

- Exclude all "pollution prevention" projects from NSR unless the project increases the source's “potential to emit.”

Response:

- The pollution control project exclusion included in the NSR Reform rulemaking will extend the exclusion to pollution prevention projects. Any pollution prevention project will qualify as long as it is “environmentally beneficial" and will not cause or contribute to a violation of a NAAQS or PSD increment, or cause a Class I adverse impact.

- These conditions are patterned after the WEPCO rule and will create a broad, flexible exclusion for pollution prevention projects.

- An exclusion of projects that do not increase a source's potential to emit would create an exclusion that could considerably reduce the effectiveness of the NSR program. Almost any modernization that a source undertakes has the incidental effect of lowering emissions. A new emissions unit or modernization generally has fewer emissions that one built 40 years earlier. Since these types of changes would not likely increase a source's potential to emit, industry would claim this as a pollution prevention project -- even though its, pollution prevention aspects are likely to be negligible and actual emissions may increase dramatically due to increased utilization.

Issue 4: A New “Cross Media” Project Exclusion: EPA should recognize that pollution control projects required under other laws may result in "collateral" emissions increases of air pollutants. The PCP exclusion for air pollution projects should be extended to these projects.

Response:

- Cross media project exclusions are under consideration by EPA. EPA will solicit comments on extending the PCP exclusion to cover these types of projects, provided they do not cause or contribute to NAAQS violation, PSD increment violation or adverse impact on Class I area.

- Also this issue may be addressed in multi-media permitting pilot initiative currently underway.

Issue 5: “Routine Maintenance, Repair and Replacement” Exclusion: The July guidance on this exclusion should be dropped Instead, the following guidance should be in the proposal:

> "Routine maintenance, repair, and replacement means maintenance, repair and replacement projects occurring on a regular basis, on a cyclical basis, or due to unanticipated failure of equipment, which are undertaken in an industrial category to maintain competitive position or reliable operation."

Response:

- EPA agrees with removing the routine maintenance, replacement language from the proposal package.

- With other changes being made to NSR applicability, this issue becomes less important. Both PALs and the Clean Unit Test (included in the NSR Reform proposal rule) will provide clear distinction of the types of changes that can be undertaken without triggering NSR.

Issue 6: A "Restoration" Exclusion: A new exclusion, based on the "results in" language in the modification definition, should be included for activities that restore a unit to the highest capacity achievable in the previous five years. The exclusion would be limited in time and would recognize that requirements governing the timing of capital expenditures vary depending upon market conditions, and may not allow an industry to make a capital investment to restore operations immediately after a problem occurs. It would also recognize that units that have deteriorated over more than a five year period of time should be evaluated under other tests. This is consistent with the WEPCO rule's implementation of the "causal link" requirement though the rule's focus on representative baseline" year conditions in the definition of "representative actual annual emissions."

Response:

- EPA believes the issue of how restoration of lost capacity should be treated for NSR applicability purposes is better resolved by the PAL, the Clean Unit Test, and other mechanisms in the NSR Reform package that provide sources with considerable flexibility to make changes. EPA believes that the routine maintenance exclusion already included in the existing NSR regulations also has the effect of excluding "routine restorations."

Issue 7: “Clean Unit” Exclusion: Establish an exclusion for sources that have installed BACT equivalent level of control or MACT or reasonably available control technology (RACT) or their equivalent, under a state or voluntary control program. Units that have undergone NSR should be subject to the "allowable-allowable" test discussed in the following issue.

Response:

- EPA agrees and has included a new clean unit exclusion which allows an operator of a unit to make changes to the unit provided the change does not increase hourly emissions (and is allowed under permit). EPA is taking comment on several alternative definitions for "clean unit" including the industry's suggested definition.

Issue 8: Non-Emissions Unit Exclusion: Industry supports EPA's suggestion in draft NSR package of last summer that a NSR exclusion be created for non-emitting units.

Response:

- After consultation with a number of state permitting authorities, EPA determined that a regulatory change is not required to exclude units that are generally not targeted as emitters of air pollutants. Moreover, there was concern that the draft non-emitting unit regulations could subject, units, currently excluded as a matter of common sense, to major NSR due to the narrow exclusion that was being proposed. To preserve the permitting authority's existing flexibility, EPA is not proposing a regulatory exclusion for nonemitting units. EPA will continue to evaluate this issue, particularly with regard to changes to units that affect the emissions at other units, and if warranted, provide guidance in the future.

EMISSIONS INCREASE TESTS

Issue 9: EPA's proposal should include a menu of alternative emissions increase tests. If a source owner could show that there would be no significant emission increase under a particular test, NSR would not be triggered.

(1) "Allowable-to-allowable" test for units that have undergone NSR. The allowable-to-allocable treatment for units that have undergone NSR review in a clarification of current law -- these units have been evaluated and permitted under the NSR program at the allowable level and have been evaluated for BACT or LAER at that level. Any changes in the unit that allow the unit to achieve permitted levels have been authorized by the NSR permit.

(2) An "actual-to-actual” tent for units that have "begun normal operations" with a 5 year look-back and explicit preamble language recognizing that if a projected or actual increase in production rate or hours of operation above past actual levels is not caused by a change, the hours of operation production rate increase exclusions applies.

(3) An actual-to-potential test with a 10 year lookback that applies to units that are now greenfield units, and at the option of the source owner, to units that have begun normal operations.

(4) Plant-wide applicability limits -- as in the July draft rule.

Response:

- EPA is for the first time proposing to give States a series of applicability options including versions of all four of these tests for determining whether an increase in emissions will follow from a proposed change. As a result, States may offer all of these options to industry with the only limitation that sources will not be allowed to "game" the system by switching between incompatible options. For instance, if a source chooses a PAL, it may not go above the PAL limit because it wants to use a "clean unit" test.

CLASS I AREAS

Issue 10: Permitting Authority Control: EPA's NSR rules must make it clear that it is the permit issuing agencies -- not Federal Land Managers (Fall) -- that have the authority to determine if a PSD permit applicants' proposed new source will have an adverse impact on air quality related values (AQRVs) in Class I areas.

Response:

- EPA's draft NSR Reform package sets up criteria for the permitting authority to consider when rejecting a FLM's finding of adverse impact. The draft preamble and regulations make clear that this is ultimately the permitting authority's decision when the proposed source does not cause or contribute to a Class I increment exceedance.

Issue 11: Class I Size/Distance Cut-Offs: EPA should set reasonable size/distance cut-offs so that sources can avoid all aspects of the Class I area review process if they are small enough or propose to locate far enough away from Class I areas.

Response:

EPA's draft NSR Reform package for the first time proposes Class I increment significance levels which will allow small sources

to demonstrate that they will have a de minimis impact on the Class I increment. Since AQRVs may be specific to the Class I area and involve secondary impacts that are considerably more complicated to assess than an increment, EPA does not set national significance levels for AQRVs. EPA expects that the existence of the Class I significance levels will help considerably in eliminating delays for small sources.

Issue 12: Early FLM Coordinations: Permit applicants should be encouraged, but not required, to notify FLMs early on of major sources proposing to locate within 100 km of a Class I area. This may be accomplished through establishment of a bulletin board service.

Response:

- EPA's draft proposal does address the establishment of a bulletin board system and calls for States to list projects on the data base. States are also required to include FLMs in any pre-application meetings involving projects within 100 kilometers (kms) of a Class I area and provide copies of permit applications for proposed sources within 100 kms of a Federal Class I area. For new, large projects outside of 100 kms, States are encouraged, but not required, to include the FLM in any pre-application meeting as appropriate.

Issue 13: EPA Approval of Models and Modeling Techniques: EPA should make it clear that permit issuing agencies need <u>not</u> give any deference to FLM claims of adverse impacts on AQRVs in a Class I area when the FLM claims are not based on use of EPA-approved models or modeling techniques for evaluating the impacts of a proposed new source on AQRVs.

Response:

- EPA’s draft proposal distinguishes between modeling to determine air quality impacts and an AQRV analysis. EPA does approve models used to predict the impact of emissions from a source on the surrounding air quality, and generally requires the use of an EPA-approved model for this showing. However, AQRV analyses generally start with the ambient loadings predicted by the EPA-approved models and then determine what the impact of that loading will be on the AQRV in question, such as the impact of ambient sulfur dioxide (and its derivatives) on visibility. In general, EPA has no approval procedures in place for these conversion methodologies and does not require that FLMs, States, or sources secure EPA approval. In the draft NSR Reform package, EPA provides that conversion methodologies be subject to public notice and comment, either before its use by a source or FLM or in conjunction with a determination on a specific permit.

Issue 14 : Mitigation of Source Impacts Through Offsets : EPA should provide States in rules for a broad range of approaches for assessing the adequacy of offsets in mitigation of adverse AQRV impacts.

Response:

- The draft NSR Reform Rule sets out general principles for assessing offsets. EPA is also taking comment on whether offsets for sources impacting Class I areas may include “double-counting” emissions reductions needed by a source to comply with other Clean Air Act requirements.

Issue 15: Existing Source Problems: EPA should not use the NSR process to address problems that may be caused by existing sources (including existing mobile sources) impacts on Class I areas.

Response:

- EPA is in the process of developing regional haze regulations that are focused on existing sources and Class I area visibility degradation caused by these existing emissions. Assuming all other applicable PSD requirements are met, the draft NSR Reform package would require permit denial for Class I area concerns if the new emissions will have an adverse impact on AQRVs. It is the state or other permitting authority, and not the FLMs, that will make the final determination as to whether the proposed source's emissions will have these proscribed results (for AQRVs, the state decides when the proposed source does not cause or contribute to a Class I increment exceedance)

<u>TOPDOWN BEST AVAILABLE CONTROL TECHNOLOGY</u>

Issue 16: Eliminate Top Down BACT: The top-down BACT approach removes from the States discretion that the Clean Air Act has given to them to make BACT determinations. EPA should substantially revise or eliminate the “top down BACT" approach.

Response:

- EPA does not require states to use the top down methodology for making BACT determinations in its draft NSR Reform package. Instead, EPA's proposed regulations for state programs will identify certain core criteria that BACT determinations must meet. These criteria include that the applicant consider the most stringent technology and provide an acceptable rationale if the most stringent technology is not accepted. EPA would propose a

top-down approach in its PSD regulations which are applicable to states without SIP approved PSD programs.

Issue 17: Require Exclusive Use of Incremental Costs: EPA should specify that incremental rather than average costs should be the basis for selection and rejection of control technologies under the BACT process.

Response:

- Since EPA's draft provides states with discretion in making BACT determinations and in evaluating the factors that go into that decision, it would be inappropriate for EPA to mandate that states use only incremental costs in assessing BACT options. The draft NSR Reform package would not change EPA's current policy that recommends states consider both average and incremental costs in selecting the final BACT level.

Issue 18: BACT "Cut-Off:" EPA must establish a "cut-off" date for considering undocumented new technologies in the' BACT selection. EPA should retain the proposed provision requiring commenters on draft PSD permits to show that technologies have been "demonstrated in practice," i.e., that a new or emerging technology must have six months of operating performance history to verify its claimed effectiveness.

Response:

- In the draft NSR Reform Package, EPA is including a presumptive cut-off date and a provision that undocumented new technologies considered in determining BACT must have six months of operations to verify claimed effectiveness.

<u>AIR QUALITY ISSUES</u>

Issue 19: EPA should delete pre-construction monitoring requirements from the PSD rules. Where post-construction monitoring can produce useful data, it may be appropriate for EPA to require such monitoring.

Response:

- Section 165(e)(1) of the CAA requires each PSD source (or permitting authority) to conduct a preconstruction analysis of the ambient air quality at the proposed site and in areas which my be affected by the source's emissions, in accordance with regulations issued by EPA. EPA believes that it is appropriate to reevaluate the regulatory requirements for preconstruction monitoring for proposed PSD construction where air quality data

cannot feasiblely be used to analyze a source's impact upon air quality standards. in the draft NSR Reform Rule, EPA is soliciting comment on the appropriateness of providing an exemption for some cases from PSD preconstruction monitoring.

- Existing regulations [e.g., 51.166(m)(2)] provide for the use of post-construction monitoring when in the opinion of the permitting authority such monitoring is necessary to determine the effect emissions may have, or are having, on air quality in any area. However, existing regulations do not specify that such ambient monitoring may include the monitoring of air quality related impacts in Federal Class I areas. In the draft NSR Reform Rule, EPA is proposing to amend its PSD regulations to clarify that post-construction ambient monitoring may be required for the purpose of determining the effect emissions from a facility may have, or are having, on AQRVs in a Federal Class I area.

Issue 20: Since the Clean Air Act specifically exempts from PSD review pollutants that are regulated under section 112, EPA should drop its proposal for air quality impact analyses for section 112 pollutants.

Response:

- Section 112(b)(6) of the Act provides that part C requirements for prevention of significant deterioration (PSD) do not apply to hazardous air pollutants (HAPs) listed under section 112. In a March 11, 1991 memorandum, EPA stated that it would no longer consider HAPs to be individually regulated under the Federal PSD regulations at 40 CFR 52.21. However, EPA also indicated that any HAP that is a constituent of a more general pollutant listed under section 108 of the CAA (e.g., VOC, particulate matter) remains regulated under PSD as part of that regulated pollutant. See 57 FR 18070 at 18074-75 (April 28, 1992)(publication of March 11, 1991 memorandum). This policy will be addressed in EPA's rulemaking initiative to update the PSD and NSR regulations based on the 1990 CAA Amendments, scheduled for proposal this summer. EPA has removed additional discussion of HAPs/PSD implementation issues from the draft NSR Reform rule and will evaluate the need for further guidance over the next several months.

LOWEST ACHIEVABLE EMISSION ION RATE

Issue 21: Lowest Achievable Emission Rate (LAER) determinations should factor in economic considerations.

Response:

- As opposed to BACT, the definition of LAER does not provide for the consideration of economics. However, EPA's existing guidance provides, in a generic sense, for limited consideration of economic factors in a LAER determination. EPA's policy is that if an emission limit will preclude construction of new plants within a class or category of sources, then there is justification for the permitting authority to reevaluate that particular LAER limit for that class or category of source. If another plant in the same (or comparable) industry already uses that control technology, then such use constitutes evidence that the cost to industry of that control technology is not prohibitive. Thus, LAER costs are considered only to the degree that they reflect unusual circumstances which, in some manner, differentiate the cost of control for a source from control costs for the rest of the industry.

UNDEMONSTRATED CONTROL TECHNOLOGY /APPLICATION (UT/A) AND DEMONSTRATED POLLUTION PREVENTION

Issue 22: EPA must extend the UT/A waiver to LAER decisions for sources in nonattainment areas. Although the UT/A waiver provides evidence that the LAER definition can be interpreted to provide for "comparability," the concept was not properly extended to projects that employ demonstrated pollution prevention technologies in nonattaimment areas.

Response:

- EPA agrees that applicability of the UT/A should be extended to nonattainment areas and is proposing to do so in the draft NSR Reform Rule.

- The UT/A waiver does not provide evidence that the LAER definition can be interpreted to provide for comparability and that it should be extended to demonstrated control techniques or applications. The draft UT/A waiver regulations, consistent with the Agency's interpretation of LAER, require an undemonstrated control technique installed in a nonattainment area to achieve applicable LAER limits. The comparability concept is applicable only to an undemonstrated technique that marginally fails to achieve its permitted limit. As crafted, the permitting authority

establishes marginal failure emission limits which are included in the UT/A's permit and subject to public review and comment. This concept is designed to enhance and encourage the installation of undemonstrated control techniques or applications by providing the permitting authority with increased flexibility to either accept or reject an UT/A that marginally fails to achieve its permitted limit. This flexibility is not available under existing innovative control technology waiver regulations.

Issue 23: The concept of "comparable emission reductions" which EPA has proposed for UT/A waivers in nonattainment areas should be extended to demonstrated pollution prevention technologies in nonattainment areas.

Response:

- The concept of "comparable emission reductions" and its application to demonstrated pollution prevention technologies in nonattainment areas is addressed in the Agency's response to Issue 22 above.

EPA's RESPONSE TO ISSUES RAISED BY INDUSTRY ON
CLEAN AIR ACT IMPLEMENTATION REFORM

Air Toxics – Section 112

Issue 1: The Section 112 program being developed and Implemented by EPA is contrary to Congress's plan for regulating air toxics, and is fundamentally unfair to the regulated community because controls are required sooner, apply more broadly, and are more stringent than Congress intended. EPA must adopt an air toxics program that reflects the gradations and distinctions mandated by Congress. By imposing overly-broad regulations EPA is severely complicating the implementation of Section 112 and forcing regulated sources to commit substantial human and financial resources to meet standards that are neither justified nor authorized by the Clean Air Act.

Response:

- Section 112 is a common sense approach to the regulation of, air toxics across the Nation. For 20 years, the Clean Air Act directed EPA to use risk assessment to regulate hazardous air pollutants to an “ample margin of safety” level. By 1990, there was broad consensus that this approach had failed. Due to controversy and litigation over risk assessments and "how safe is safe," EPA had managed to set standards for only seven toxic air pollutants and a handful of sources. More than two-and-one-half billion pounds of toxic chemicals were still released into the air each year, according to industry-reported Toxics Release Inventory (TRI) data. Thus, industry, environmentalists, States and EPA broadly agreed in 1990 to use a technology based approach as the primary means of reducing emissions of air toxics.

- Congress created the Maximum Achievable Control Technology or MACT program as a practical approach: based on evaluation of existing control technologies, EPA must establish control requirements to assure all major sources of hazardous air pollutants (HAPs) achieve the level of control already being achieved by the better performing similar sources. The MACT program provides for environmental equity by leveling the playing field for industry so that cleaner facilities are not at a competitive disadvantage relative to their dirtier competitors.

- EPA believes the MACT program is working. In the four years since 1990, the air toxics program has achieved more than was accomplished during the prior 20 years. EPA already has set standards for 10 major industries, which when fully implemented will reduce toxic emissions by more than one billion-pounds per

year. In doing so, EPA is implementing the MACT program in a creative and flexible manner to ensure that the standards are practical, make common sense, and focus on environmental results.

- EPA has worked closely with industry and others on each MACT standard. Where high costs or other problems are identified, EPA is taking a cooperative and problem-solving approach. The statute provides a menu of tools EPA is actively using to smooth the rough edges that can sometimes occur with a technology-based approach. These include:

  - Applicability cutoffs
  - Subcategorization
  - Emissions averaging
  - Breadth of affected source definition
  - Compliance schedule beyond three-year compliance date when environmental benefits warrant it
  - Prohibitory (exclusionary) rules in MACT standards (which serve as limits on potential emissions)

- EPA remains committed to working with industry and other stakeholders in the development of its air toxics rules to assure common sense approaches can be implemented.

I. THE DEFINITION OF MAJOR SOURCE AND THE APPLICABILITY OF MACT AND GACT

Issues 2, 3 and 4:

Major sources must be defined with reference to section 112(c) source categories.

MACT for Categories of Major Sources must apply only to co-located sources of HAPs in a given source category that together have the potential to exceed the 10/25 tons per year major source thresholds. MACT for a given major source category must not extend to co-located area sources or in co-located major sources in different source categories.

MACT and GACT for Categories of Area Sources -- Area sources (including area sources co-located with major sources) should be subject to MACT or GACT for categories of area sources only after EPA demonstrates that the area source category presents a threat of adverse effects to human health or the environment that warrants regulations.

Response:

- These three issues concern the definition of major source, which in the subject of a pending court decision. EPA agrees that it is important to resolve this issue an soon as possible because of its broad implications for the section 112 program.

- The Agency believes that its definition of major source makes common sense, is consistent with the law, and addresses public concerns about air toxics. Under EPA's definition, the determination of whether a facility is a major source depends upon total HAP emissions from the entire facility, not just from equipment within the same source category. Congress selected the 10/25 tons per year threshold based on the common sense view that all the emissions from a plant site contribute to health and environmental threats.

- EPA's program ensures that air toxics controls are required for all industrial and commercial plant sites that emit major amounts. This would not be true under the suggested alternative, which would carve plants into pieces and consider whether each piece emits major amounts.

- Take for example a facility that emits multiple HAPs and is composed of three 20-ton sources in different source categories. Under the suggested alternative, this facility would be considered to be a trio of area sources. It would be exempt from major source controls although its toxic emissions would total 60 tons a year -- far above the 25-ton major source threshold. This would not result in a credible air toxics program nor satisfy public concerns about toxic emissions.

- With regard to area sources, EPA has made findings under section 112(c)(3) for the area sources EPA has regulated.

- EPA is working to ensure that MACT requirements are reasonable and cost-effective. The Agency is using tools available under the statute -- such as applicability cutoffs, subcategorization and emissions averaging -- to achieve this result. EPA is willing to explore concepts such as broader emissions averaging within plant sites to provide additional flexibility.

Issue 5: New and Existing Source MACT for Categories of Major Sources New source MACT for categories of major sources must only apply to constructed or reconstructed major sources (i.e., a greenfield major source or the reconstruction of at least 50% of an existing major source). similarly, existing source MACT for categories of major sources applies to existing major sources and modified major sources. Section 112(g) is the gatekeeper that determines whether and where new and existing source MACT for categories of major sources apply -- i.e., section 112(g) guides the identification of major source constructions and reconstructions to which new source MACT applies, and major source modifications to which existing source MACT applies.

Response:

- EPA has agreed to discuss the relationship of section 112(g) to sections 112(d) and 112(j) in upcoming meetings with litigants on this issue, as well as with other stakeholders.

- In EPA's view, for purposes of 112(d) and 112(j) new source MACT applies when an affected source is constructed or reconstructed. The scope of the affected source is defined in each MACT standard, after notice and comment. This approach provides flexibility to tailor the applicability of new source MACT to the source category in question.

- Although the Agency's interpretation of the statute differs from the alternative interpretation above, EPA agrees that new source MACT should be applied to units for which new source MACT is reasonable. Where appropriate, EPA has defined the "affected source" broadly, preventing small chances at existing sources from being subject to new source MACT. EPA believes that proposed and promulgated MACT standards would apply new source MACT to appropriate units, but is willing to consider and discuss any information to the contrary.

- EPA is carefully considering voluminous comments on this issue that were received during the public comment period on the proposed section 112(g) rule. The Agency is considering a very broad definition of major source for purposes of that rule, which would limit the applicability of new source MACT for that rule.

Issue 6: Consistency Among Key Section 112 Programs - The three MACT standard setting provisions - sections 112(d), (g), and (j) - must be co-extensive. That in, a major source with a section 112(g) case-by-case MACT limitation by definition satisfies subsequent 112(d) or (j) MACT requirements. Likewise, a major source with a section 112(j) MACT limitation by definition satisfied subsequent sections 112(d) requirements.

Response:

- This issue is part of the ongoing litigation on the section 112(j) rule. EPA will address it in the context of that litigation.

II. DETERMINING POTENTIAL TO EMIT

Issue 7: Potential to Emit -- All controls and limitations (including voluntary controls approved by the State) must be considered when determining the potential to emit HAPs under section 112 -- not just those that are federally enforceable.

Response:

- This topic is addressed under the potential to emit issues section.

Issue 8: Fugitive emissions may not be considered for purposes of determining a source's potential to emit under section 112 until EPA conducts a section 302(j) rulemaking.

Response:

- This topic is addressed under the fugitive emissions issues section

III . MACT STANDARD SETTING ISSUES

Issue 9: The MACT Floor for New Major or Area Sources must be set at the emissions limitation achieved by the best controlled similar source in the same source category.

Response:

- In general EPA agrees with this issue. While the Clean Air Act allows EPA to select the best controlled similar source (without limitation to a source within the regulated source category), this source is almost always going to be found in the source

category being regulated. EPA is not aware of situations where it has gone outside the regulated source category for new source MACT.

Issue 10: The MACT Floor for Existing Major or Area Sources First, the MACT floor for existing sources must be set at the average emissions limitation achieved by all of the best performing 12 percent of sources in the relevant source category or, for categories with fewer than 30 sources, the average emissions limitation achieved by all of the beat performing 5 sources in the relevant source category. Second, If data is not available on every source in the category, EPA must demonstrate that the floor that is calculated on the basis of the partial data is the same as the floor that would be calculated if data were available on every source in the source category. Additionally, EPA must validate all data used to support a MACT floor determination to ensure its quality.

Response:

- The Clean Air Act states that the MACT floor for existing sources must be based on the <u>average</u> emission limitation achieved by the best performing 12% of the sources in the regulated source category. The term "all" does not appear in the Act. EPA's approach to determining the MACT floor was developed after a very open discussion and EPA has not been litigated over this issue. In each rule, EPA develops the data used to support the MACT floor and its validity and use are subject to review and comment.

- As stated in the Federal Register notice enunciating EPA's position on determining the MACT floor (59FR29200), EPA plans to retain its discretion, in setting MACT floors. For example, the CAA authorizes EPA to establish subcategories of sources, which results in a separate floor determination for sources in the subcategory.

Issue 11: The Theoretical "Superfacility" (EPA "Model Plant") --New and existing source MACT floors are based on the average emission limitation achieved by major sources in the relevant source category. In other words, MACT limitations are not separately calculated for each emission unit of major sources in the source category such that only a fictional "superfacility" can comply without installing additional controls.

Response:

- EPA is using the best information it can gather in developing MACT floors. Usually the best information EPA can obtain is on an emission unit by emission unit basis. With this information

EPA determines the MACT floor for the emission unit. If industry representatives believe EPA should use an emissions database based on plant-wide estimates to establish MACT floors and then MACT, EPA is willing to discuss this approach to help affected industries collect the appropriate data needed for this approach.

IV. ADDITIONAL SECTION 112 IMPLEMENTATION ISSUES

Section 112 General Provisions

Issue 12: The section 112 General Provisions should apply only an expressly specified in each promulgated MACT standard.

Response:

- EPA agrees and is attempting to do this already.

Issue 13: HAPs should be listed by regulation and a procedure should be provided by which pollutants may be delisted if an applicant demonstrates that a listed HAP alone, or in a particular use, does not pose a threat to public health or the environment. If new HAPs are added to the list, they must not be subject to regulation under previously promulgated MACT standards.

Response:

- The Clean Air Act contains provisions to delist HAPs from the list in section 112(c). EPA has developed a set of procedures and provided those to the public. EPA has used these procedures to evaluate delisting petitions such as the pending caprolactum petition as called for under the Act. As a result, EPA is now planning to delist caprolactam.

- With respect to "particular use," EPA believes the Act provides that HAPs are either covered or not covered under section 112. However, section 112(c) also provides that a particular source category can be delisted if the appropriate findings are made.

- With respect to the last question, EPA notes that there has been no petitions to list new HAPs. EPA will consider whether existing MACT standards should apply to any newly listed HAPs as new HAPs are listed. EPA would only consider applying MACT standards to newly listed HAPs after taking public comment and making final decisions on the finding that such application is reasonable and appropriate for affected sources.

Issue 14: The definition of "affected facility” must be consistent with the definition of major source to ensure that the given standard is not applicable to area sources or other categories of major sources.

Response:

- EPA uses the term "affected source” to clearly define which equipment are affected by the MACT standards. The substance of this issue is handled under Issues 2, 3, and 4 of this section.

Issue 15 Existing major sources must not be subject to new source MACT when modified.

Response:

- EPA agrees that existing sources are not subject to new source MACT when modified. When a large readily segregated unit or collection of equipment is constructed (readily identified by the States and the public as a new affected source), however, this equipment can be defined as a new source and therefore subject to new source MACT under section 112(d). Generally EPA has defined "affected sources" broadly, thus eliminating small changes at existing sources from being subject to new source MACT. For example in the Hazardous Organic NESHAP (HON), EPA defines the chemical manufacturing process unit for purposes of setting what pieces of equipment are subject to new source MACT requirements.

Issue 16: Nonapplicability determinations must not be required.

Response:

- EPA generally agrees with this issue based on an initial review of 40 CFR 63.1(b)(3). EPA has discussed this issue with affected interests and plans to review and, perhaps, revise this requirement in light of recent discussions on potential to emit.

Issue 17: Sources must be able to bypass for brief periods during malfunction while minimizing emissions in the extent feasible.

Response:

- Whether a bypass action is permissible or a violation depends on the definition of malfunction and the factual circumstances of the action. The definition in the General Provisions governs although specific standards may supersede the General Provisions. If an operator experiences a sudden, infrequent and not

reasonably preventable event, then activities (such as bypassing control system) are permissible provided the operator takes action to minimize emissions. Generally, activities such as bypasses would be addressed in the startup, shutdown, and malfunction plan.

Issue 18: Startup, shutdown, and malfunction plans are not applicable requirements that must be included in Title V operating permits.

Response:

- EPA agrees that these plans do not need to be included in a Title V permit. The requirement to have the plans and the criteria governing the adequacy of the plans are referenced from the applicable requirements in the MACT General Provisions. The plans and actions required by the plans can be enforced independent of the Title V permit.

Modification Provisions [Section 112(g)]

Issue 19: Section 112(g) must not become effective until 16 months after promulgation of the section 112(g) regulation or until the relevant State promulgates a rule to implement section 112(g), whichever is later.

Response:

- EPA recognizes that states and industry need lead time to be able to implement section 112(g). The effective date of the section 112(g) program already has been delayed. EPA published an interpretive notice in February indicating that states and industry do not have to implement section 112(g) EPA issues a final rule. in developing the final 112(g) rule, EPA will consider the need for lead time for state development of section 112(g) programs. EPA is open to a reasonable time period after promulgation.

Issue 20: Section 112(g) must not apply to stationary sources that are included in a section 112(c) category of major sources.

Response:

- EPA believes sections 112(c) and 112(g) are meant to apply broadly to all major sources of toxic air emissions. All categories that contain major sources are meant to be listed on the source category list. EPA recognizes the need to amend the list if it finds sources that are not in listed categories. In the interim, section 112(g) ensures control of toxic emissions from constructed, reconstructed, and modified major sources in the category. The fact that EPA has inadvertently overlooked

a source category should not mean that citizens lose the protection from toxic emissions that is provided by section 112(g).

Issue 21: Research and development facilities should be exempt from section 122 (g)

Response:

- EPA received many comments expressing this concern during the public comment period. EPA is working an alternative approaches to exempting research and development facilities in the final rule.

Issue 22: Broad and self-implementing exclusions must be provided to effectuate Congressional intent that only significant changes should trigger the application of existing source MACT. An exclusion for operations that the major source is designed to accommodate in essential to the workability of section 112. Sources are “designed to accommodate" any activity that is permissible under the source's design specifications or Title V operating permit application or permit.

Response:

- The "designed to accommodate" language in the section 112(g) proposed rule was the result of intensive collaborative thinking among EPA staff and the Clean Air Act Advisory Committee. This issue also received voluminous comment during the public comment period. EPA is considering those comments as the final rule is developed.

- EPA does not believe, however, that it is appropriate to automatically exempt those changes that are represented only in a permit application, but not in an approved permit which has not been reviewed by the state or EPA.

Issue 23: Reasonable emission estimation techniques must be adopted that realistically assess whether a proposed change will cause an emissions increase.

Response:

- EPA understands the concern that it or a permitting authority could second-guess the methodology used in a de minimis determination after the fact, and possibly then bring enforcement action. EPA intends to address this concern in the final rule more directly than was done at proposal. EPA is looking for a way for sources to have more certainty that their emission estimates will be acceptable.

Issue 24: De minimis emission levels must be established at 10 tons per year unless it is demonstrated that a lower level is necessary to protect human health or the environment. Any de minimis level must be measurable.

Response:

- At proposal, many de minimis levels were set at 10 tons. Pollutants of relatively higher toxicity were given lower de minimis values based upon greater hazard. EPA is carefully considering comments received on this issue, including the concern that emissions be measurable, as stated above.

- In order to address the concern that small changes not overwhelm the system, EPA has provided numerous other exclusions, such as those for raw materials switches (“operations the major source is designed to accommodate") and those for production rate increases and routine maintenance, repair, and replacement.

Issue 25: A simple, streamlined offset procedure in required under section 112(g)(1). Sources only need to submit an "offset showing” - preapproval in not required. Sources must be able to claim offset credits for reductions taken under other programs and sources must be able to take credit for shutdowns and curtailments.

Response:

- Rather than require preconstruction review of offsets, as is required for case-by-case MACT determinations, the proposal only requires pre-operation review of offsets. EPA did not intend that this review be onerous. However in the final rule, EPA intends to address the concern that the offset procedures be simpler and more straightforward.

- As stated above, EPA is considering adopting a broad of major source that provides maximum flexibility for offsets. Should EPA do so, the definition would be linked to an approach that allows only those offsets which provide additional emission reductions.

Issue 26: Modified major sources must have three years after MACT in determined to achieve compliance.

Response:

- The proposed rule grants the permitting agency/authority to determine the time need to comply on a case-by-case basis. The permitting authority has the discretion to allow up to 3 years for compliance. Common sense would suggest that there are many MACT emission limitation measures, such as source reduction projects, that may not require 3 years for compliance.

- The new source review program, for example, provides no such lead time for compliance. MACT standards under section 112(d) require different compliance periods, up to three years maximum, on a source category by source category basis. Therefore, EPA believes it is reasonable to grant the permitting authority discretion to use common sense in making case-by-case compliance decisions -- just as they can approve MACT determinations on a case-by-case basis.

Issue 27: EPA has no authority to veto section 112(g) determinations made by States that have received section 112 delegation.

Response:

- The supplemental title V proposal contains a list of more environmentally significant permit revisions including section 112(g) determinations for which EPA will require an opportunity to review and object to the revision if appropriate. This does not mean that EPA intends to veto section 112(g) determinations; but rather is retaining the right to do so.

- It is to the source's advantage to provide an EPA veto opportunity upfront when making a section 112(g) determination. This is because the title V operating permit process provides for EPA veto opportunity when new requirements are entered into the permit. If that opportunity has been provided, then the source can more confidently incorporate 112(g) requirements into its permit. EPA is also considering ways to reduce the administrative burden associated with such permit changes.

Issue 28: Case-by-case MACT determinations must be streamlined, be based on information reasonably available to sources, and allow the use of MACT for similar sources.

Response:

- EPA agrees that case-by-case MACT determinations should be practical and based on reasonably available information. EPA is considering comments on its case-by-case MACT guidance and will address this issue in the final rule.

Section 112(j)

Issues 29 and 30:

> Applications for section 112(j) limitations are due 12 months after the section 112(j) deadline (1.e., 30 months after the section 112(e) scheduled promulgation date). Source category applicability must be defined before the section 112(j) deadline so that sources have notice that section 112(j) applies.

Response:

- These issues are part of the ongoing litigation on the section 112(j) rule. EPA does need to understand the issue better and will address it in the context of the litigation.

- In the final section 112(j) rule, EPA committed to sharing information with sources as the section 112(j) deadline approaches and information about a source category has been gathered, or EPA has made a presumptive MACT determination. EPA intends to work with stakeholders should section 112(j) ever become a reality for a source category.

EPA'S RESPONSE TO ISSUES RAISED BY INDUSTRY ON
CLEAN AIR ACT IMPLEMENTATION REFORM

Enhanced Monitoring

Issue 1:

- EPA's proposed "enhanced monitoring ("EM") regulations have a number of serious flaws that have not been adequately addressed by the Agency.
    - The proposed program focuses improperly on monitoring to detect small changes in emissions, which may be the result of the normal variability associated with the underlying process, emission control technology, and analytical methods, rather than on monitoring to detect large, and environmentally significant, excess emissions incidents.
    - The proposed program, which requires development of complicated and controversial new monitoring requirements on a case-by-case basis through the Title V permitting process, would impose huge burdens on industry and the state; would "gridlock" the permitting process; and would inevitably lead to the imposition of inconsistent requirements on similar sources.
    - The proposed program would impose enormous compliance costs on industry, that easily could exceed $1 billion/year, with little, if any, environmental benefit.
    - Despite Agency claims to the contrary, the proposed program would increase the stringency of many emission standards, contrary to law.
    - The proposed program would severely restrict emissions trading, averaging and netting, thereby compromising use of market-based incentives -- a critical tool for implementation of the 1990 amendments.
    - Monitoring approaches that would satisfy the criteria in the proposed rule are simply not available for some source categories (e.g., fugitive emission sources and batch processes). For other source categories (e.g., those subject to mass limits), companies would be required to use undemonstrated techniques.
- EPA should seek an extension of the deadline to engage in a meaningful stakeholder dialogue to develop a reasonable EM Program. In order to allow time for this dialogue to unfold, the Agency must seek a 12 month extension of the April 30, 1995 court-ordered deadline.

- EPA should propose a reasonable EM program with the following elements:

  - The Agency should develop an EM program that uses legislative rulemakings - not the Title V permit program - as the process for determining EM for any emission standard that was originally established through rulemaking.

  - At most, the Agency should use the current EM rulemaking to articulate criteria for identifying emission standards with insufficient monitoring, and criteria for enhancing them to the point of sufficiency. The Agency could also use the current rulemaking to establish a schedule with deadlines for completing a review of existing standards, under an appropriate prioritization scheme.

  - The criteria articulated in this rulemaking should:

    - Establish as a goal selection of monitoring techniques that will provide data sufficient to prevent and detect large excess emission incidents, which have significant environmental impact, rather than monitoring techniques to detect small changes in emissions.

    - Include adequate safeguards to address costs and cost-effectiveness (1) by clearly providing for selection of the least-cost method that satisfies the criteria, and (2) by providing for rejection of any monitoring methods as EM that result in unreasonable costs.

    - Require use only of demonstrated monitoring techniques.

    - Provide clear and unequivocal safeguards to assure that changes in monitoring methods will not chance the stringency of the standard. These safeguards would include requiring consideration of the following: (1) the need for appropriate averaging times to take into account variability in emissions; (2) the need for a change in the numerical expression of standards) and (3) the need to establish start-up/shutdown/ malfunction exemptions.

- Once the criteria and schedule are established, EPA (for Federal standards) and the states (for state standards) would apply the criteria, and identify insufficient monitoring compliance methods. These standards would be candidates for rulemaking proceedings to enhance them.

Response:

- EPA agrees and has withdrawn from the office of Management and Budget its proposed rule for enhanced monitoring. It has received a 60-day extension of the court-ordered deadline and intends to seek a further extension of at least a year after it holds a meeting with interested stakeholders. EPA plans to issue a Federal Register notice that announces the process it intends to follow in reproposing and issuing the final enhanced monitoring rule. EPA has withdrawn the enhanced monitoring protocols f rom the, Technology Transfer Network (TTN) computer bulletin board and in the upcoming Federal Register notice will clarify that those protocols are no longer applicable.

- On May 31, 1995, EPA is meeting with representatives of industry, states and environmental groups to discuss further options for developing a new flexible approach for the enhanced monitoring rule.

- EPA hopes to develop an approach that will build on the requirements of existing rules and ensure that the environmental result expected from those rules are being achieved.

- One approach EPA is considering would focus on improving control equipment operating and current maintenance monitoring requirements, on enhanced operating and maintenance monitoring protocol would require that a source owner provide documentation that it has operated and maintained a pollution control device or process operation in accordance with established, reliable operating and maintenance practices and that any necessary corrective actions have been implemented to ensure that emissions have been reduced. At the May 31 stakeholders meeting, EPA anticipates discussing this option as well as any other options or issues raised by stakeholders.

EPA's RESPONSE TO ISSUES RAISED BY INDUSTRY ON
CLEAN AIR ACT IMPLEMENTATION REFORM

Potential to Emit

Issue 1: Federal Enforceability: EPA should eliminate "Federal enforceability" in determining a source's potential to emit because:

-- The requirement has no legal basis.

-- The requirement needlessly forces sources with realworld maximum emissions potential below the statutory thresholds to comply with the burdensome requirements designed for "major" sources or to attempt to render existing controls and limitations "federally enforceable" by entering a tedious and costly -- and often unavailable -- federal documentation process. Moreover, existing sources face lengthy and costly delays when making even routine changes because of the need to create or revise "federally enforceable" restrictions.

-- The requirement forces states to expend significant time and resources to develop and administer processes for non-major sources to render controls and limitations "federally enforceable."

-- The requirement is unnecessary for effective enforcement. States and localities can enforce restrictions imposed by their laws and permits. Moreover, if a source operates above a statutory threshold without complying with applicable "major" source requirements, EPA and citizens have enforcement tools available.

Response:

- EPA is in litigation on the federal enforceability issue. in that litigation EPA has taken the position that has legal to require federal enforceability.

- Equally important, EPA believes that the provision for federal enforceability makes sense. For sources that have the capability to emit major amounts, and avoid federal permits and federal emission reduction requirements by restricting their operations, EPA believes it is reasonable to ensure adherence to those restrictions by providing that they be enforceable by the federal government and citizens. The requirement for federal enforceability increases the credibility of the system by giving EPA the opportunity to address patterns of noncompliance. It also provides citizens an opportunity to ensure that sources in their

communities are not inappropriately avoiding requirements that, if complied with, would decrease exposures to hazardous pollutants.

- There are many ways to ensure that the creation of federally enforceable restrictions does not create a burden on industry. In a January 25, 1995 guidance memorandum, EPA identified approaches such as general rules and general permits that allow restrictions to be created for large numbers of sources without having to resort to individual permits. To ensure that states have sufficient time to implement any needed approaches, EPA has provided a two-year transition period. Under this transition policy, sources emitting less than 50 percent of the major source threshold would not be required to get permits but must only keep records reflecting their actual emissions. Sources emitting more than 50 percent of the major source threshold, and for which there are state permits limiting their emissions to less than major amounts, can submit a certification accepting the state limits as federally enforceable.

Issue 2: The transition policy announced by EPA on January 25 is not an adequate response to the public and private burdens imposed by the “federal enforceability” requirement.

Response:

- EPA believes that the transition policy eliminates any short-term administrative burden that would be imposed by the requirement. The policy does require sources emitting less than the 50 percent threshold to keep appropriate records of their operations sufficient to demonstrate that the 50 percent level is being adhered to. In most cases, such records will be related to the amount of materials used or processed and should not require any new recordkeeping activities. EPA does not intend to second-guess the actual emissions findings of sources and states. Sources that are very close to the major source threshold must merely certify that they have a permit that effectively restricts emissions and accept the limits in the permit as federally enforceable.

- EPA believes that the various approaches to eliminating the burden over the longer term (limitations by rule, general permits, clarifications regarding realistic worst-case activities) should be in place by the end of the transition period. EPA is open to reviewing this assessment as the end of this 2-year period approaches. EPA is also giving serious consideration to permanently extending the exemption for sources emitting less than the 50 percent cutoff.

Issue 3: EPA should develop general principles for realistic determinations of "maximum design capacity" which recognize inherent physical, operational, and other restrictions.

Response:

- EPA agrees that realistic assumptions of this nature need to be made and has initiated an effort to evaluate several categories of small sources (grain elevators, gas stations, automobile body shops, and emergency generators). EPA plans to follow up this effort with more general guidance on principles that can be used to evaluate additional categories.

Issue 4: EPA should allow sources to rely on objectively reasonable estimates of potential to emit, and issue presumptively acceptable methods for estimating potential emissions.

Response:

- EPA agrees that sources should use objective and reasonable methods, and that a general hierarchy for these methods has been established. Source-specific testing is generally preferred. Where no source-specific information is available or feasible to obtain, tests on similar facilities or emission factors can be used.

Issue 5: EPA should adopt an enforcement policy which does not penalize a source when post hoc application of an updated estimation method results in a determination that the source's potential to emit, as calculated today, would exceed an applicable threshold, where reliance on the prior estimation method was, at the time, objectively reasonable.

Response:

(Refer to Issue 2 in the Operating Permit Program section for response to this issue.)

EPA'S RESPONSE TO ISSUES RAISED BY INDUSTRY ON CLEAN AIR ACT IMPLEMENTATION REFORM

Fugitive Emissions

Issue 1: EPA must apply the 302 (j) rulemaking requirement across the board to all Clean Air Act programs that apply to major sources, including the section 112, title V, PSD, and nonattainment NSR.

Response:

- EPA continues to conduct section 302 (J) rulemakings where required under the Act, but EPA believes section 112 does not require such a rulemaking. A court decision on this legal issue should be issued shortly. EPA is interested in hearing specific concerns about the technical feasibility of measuring fugitive HAP emissions, and in providing guidance in this area.

Issue 2: In a section 302 (j) rulemaking, EPA must demonstrate that the benefits of regulating a source of fugitive emissions would outweigh the costs of such regulation.

Response:

- EPA historically has considered economic feasibility in rulemakings conducted under section 302(j).

Issue 3: EPA should issue guidance regarding the proper treatment of co-located sources of fugitive emissions that have not been listed pursuant to section 302(j). EPA committed to issue this guidance promptly in a February 10, 1995 motion to the D.C. Circuit.

Response:

- EPA has committed to issue this guidance in May 1995.