Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for EPA, 725 17th Street, NW, Washington, DC 20503.

Dated: July 20, 1998.

Joseph Retzer,

Director, Regulatory Information Division.

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ENVIRONMENTAL PROTECTION AGENCY

[FRL–6128–5]

Notice of Availability; Alternatives for New Source Review (NSR) Applicability for Major Modifications; Solicitation of Comment

AGENCY: Environmental Protection Agency.

ACTION: Notice of availability.

SUMMARY: The EPA is soliciting comments on a specific alternative for determining the applicability of NSR to modifications of major stationary sources, under the Prevention of Significant Deterioration (PSD) and the nonattainment provisions of the Clean Air Act (Act). This alternative would allow any source to legally avoid major NSR review for a physical or operational change to an existing emissions unit by taking an enforceable temporary limit on emissions from that unit for a period of at least 10 years after the change. In addition, the Agency is seeking comment upon when and under what circumstances permitting authorities should have to revise the emissions level set under a plantwide applicability limitation (PAL) for any given source.

DATES: Written comments must be received on or before August 24, 1998.

ADDRESSES: Comments must be identified by the docket number [A–90–37], and should be submitted (in duplicate, if possible) to: Air and Radiation Docket and Information Center (6102), Attention Docket Number A–90–36, Room M–1500, U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460. The EPA requests a separate copy also be sent to the contact person listed below (see **FOR FURTHER INFORMATION CONTACT**).

Comments may also be submitted electronically by sending electronic mail (e-mail) to: a-and-r-docket@epamail.epa.gov. Submit comments as an ASCII file avoiding the use of special characters and any form of encryption. Comments and data will also be accepted on a diskette in WordPerfect 5.1 or 6.1 or ASCII file format. Identify all comments and data in electronic form by docket number A–90–37. No Confidential Business Information (CBI) should be submitted through e-mail.

Information submitted as a comment concerning this document may be claimed confidential by marking any part or all of that information as CBI. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. A copy of the comment that does not contain CBI must be submitted for inclusion in the public record. Information not marked confidential will be included in the public docket by EPA without prior notice.

FOR FURTHER INFORMATION CONTACT: By mail: David Solomon, Integrated Implementation Group, Information Transfer and Program Integration Division, (MD–12), Environmental Protection Agency, Research Triangle Park, N.C. 27711, telephone 919–541–5375, facsimile 919–541–5509, or e-mail solomon.david@epamail.epa.gov. For information on the section of this notice addressing PAL's, contact Mike Sewell at the above address, telephone 919–541–0873, facsimile 919-541–5509, or e-mail sewell.mike@epamail.epa.gov.

Electronic Availability: Internet

Electronic copies of this document also are available from the EPA home page at the **Federal Register**—Environmental Documents entry for this document under ''Laws and Regulations'' (http://www.epa.gov/fedrgstr/) or from the Office of Air and Radiation home page at http://www.epa.gov.ttn/oarpg.

I. Purpose

The first purpose of this notice is to solicit comment from the interested public on a specific policy option for determining the applicability of NSR to modifications at existing major stationary sources. Although this option was one of many proposed in an earlier Notice of Proposed Rulemaking, EPA now seeks comment on a single alternative in order to ensure that the public has full opportunity to evaluate its merit. Second, the Agency is seeking comment on a specific approach with regard to PAL's. Previously EPA solicited and received several hundred comments on its NSR reform package proposed in July 1996. The EPA has reviewed and is duly considering these comments. For purposes of this Notice of Availability, commenters should limit their remarks to the issues discussed below. Because of the opportunity provided previously for comment on the NSR Reform items, comments relating to issues other than those set forth in this Notice will not be considered.

II. Background

On July 23, 1996, EPA proposed to make significant changes to the existing major NSR program (''NSR Reform'') [See 61 FR 38249]. In large part, these proposed changes concern the applicability of the major NSR requirements to modifications at existing stationary sources. The Agency solicited comment on a number of methodologies for determining NSR applicability when a source undergoes a modification [See id. at 38266–70]. As a result of comments received, changed circumstances, and further review of the issues by the Agency, EPA is seeking further comment on one particular methodology.

In the same earlier notice, EPA proposed to authorize permitting authorities to establish facility-specific PAL's based on the source's historic actual emissions. The Agency solicited public comment on what circumstances would necessitate revision of PAL limits. Several commenters suggested that PAL's must be periodically changed to reflect recent actual emissions. The EPA is also concerned that legal considerations may require a periodic evaluation of the PAL limit.

III. Applicability Methodology for Modifications to Existing Major Sources

A. Current NSR Applicability Test for Major Modifications

1. In General

Major NSR—that is, PSD or nonattainment NSR—applies to all ''major modifications.'' A ''major modification'' is ''any physical change or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the Act.'' In other words, major NSR applies if, as a result of the change, the total emissions from new and existing emission units at the source, which are otherwise affected by or part of the change, exceed the current actual emissions of those units by a significant amount (as defined in the regulations). [1]

[1] When post-change emissions from a changed unit and all other affected units are significant, the proposed change at the source may nevertheless avoid review if, when considering any other contemporaneous emission increases and decreases at the source, the net emissions increase is less than significant. The summing of increases and deceases at a source that are contemporaneous with, but not resulting from, a proposed change for the purpose

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Vital, then, to determining NSR applicability is evaluating a source's ''actual emissions'' both before and after a physical or operational change to determine whether it constitutes a major modification. Pre-change actual emissions for the various emissions units at the source constitute the ''baseline'' for this evaluation. Under current regulations, the baseline is calculated based on the average annual emissions during the 2-year period preceding the change (or, where the permitting authority determines that another period is more representative of normal source operations, it uses that period). *Eg.*, 40 CFR 52.21(b)(21)(ii).

Once the baseline is determined it must be compared to emissions after the change. Since NSR applicability is determined prior to construction, some projection of post-change emissions must be made for the comparison. Existing emissions units that are not undergoing, or otherwise affected by, a physical or operational change are deemed to have ''begun normal operations,'' and baseline actual emissions are simply projected forward to the post-change timeframe; thus, these units fall out of the applicability calculus. Under EPA's current regulations, post-change actual emissions for units which have ''not begun normal operations * * * equal the potential to emit (PTE) of the unit on that date.'' *Eg.*, 40 CFR 52.21(b)(21)(iv). For new units, which obviously have not begun normal operations, the pre-change baseline is zero, and the post-change emissions equal the units' PTE. Determining post-change emissions for existing units that *are* modified or otherwise affected by the change can be more complex. The regulatory test for these situations has come to be known as the ''actual-to-potential'' methodology.

In brief, under the current regulations, changes to a unit at a major stationary source that are non-routine or not subject to one of the other major source NSR exemptions are deemed to be of such significance that pre-change emissions for the affected units should not be relied on in projecting post-change emissions. For such units, ''normal operations'' are deemed not to have begun following the change, and are treated like new units. Put another way, the regulatory provision for units which have ''not begun normal operations'' reflects an initial presumption that a unit that has undergone a non-routine physical or operational change will operate at its full capacity year-round. A source owner or operator may rebut the presumption that the unit will operate at its full potential by agreeing to limit its PTE through enforceable restrictions that limit the units' ability to emit more than their pre-modification actual emissions (plus an amount that is less than significant'').[2]

The term ''actual-to-potential'' is somewhat of a misnomer, because in practice, this methodology involves a determination of future *actual* emissions to the atmosphere. That is, source owners and operators contemplating a modification project assess the likely utilization of the affected units following the change. If those levels of utilization, when combined with the hourly emissions rates (and contemporaneous emissions increases and decreases elsewhere at the plant), would result in future actual emissions significantly higher than the pre-change baseline, the owner or operator must obtain a major NSR permit. If the owner or operator projects that future actual emissions will not significantly exceed the baseline, the owner or operator instead obtains a *minor* NSR permit or other device that legally limits the affected units' emissions to a level that is not significantly above baseline. The end result under this second scenario are individual limits on the emissions of the new, modified, and affected units which assures that net emissions at the plant will not significantly increase as a result of the change. Nevertheless, the owner or operator is always free to change plans in the future. If, for example, a new assessment indicates that it would be economically useful to utilize the affected units at levels that would exceed the established limits, the owner or operator may obtain a major NSR permit at that future time. *See* e.g., 40 CFR 52.21(r)(4).

The practical workings of the current regulations, as described above, have long been controversial. Industry representatives maintain that the ''actual-to-potential'' methodology results in ''confiscation'' of unused plant capacity following a modification project. Environmental groups respond that plant capacity unaffected by the modification project can continue to be used at any desired level of utilization (subject to any prior limits on that use), and that any constraints are imposed appropriately, i.e., only where the utilization of pre-existing plant capacity is likely to be affected by the modification project in a way that will significantly increase actual emissions over baseline emissions.

2. Litigation Over the Actual-to-Potential Test

Because the presumption discussed above forces sources whose post-change potential emissions exceed their pre-change actual emissions to undergo NSR or take a limit on the affected units' potential emissions, industry has, as noted, long objected to the Agency's use of the ''actual-to-potential'' methodology for existing units undergoing a non-routine change. The EPA's interpretation of its regulations consequently has been at issue in two cases, *Puerto Rican Cement Co.* v. *EPA*, 889 F.2d 292 (1st Cir. 1989), and *Wisconsin Electric Power Co.* v. *Reilly*, 893 F.2d 901 (7th Cir. 1990) (''*WEPCO*''). Specifically, each of these cases addressed whether the Agency acted reasonably in treating units which had undergone a non-routine physical or operational change as not having ''begun normal operations.''

In *Puerto Rican Cement*, the court found reasonable EPA's presumption that a physical or operational change (in this case, the conversion of a cement plant from a wet process to a more efficient dry process) could enable a modified unit to be used at a higher capacity than prior to the change, and endorsed the Agency's use of the actual-to-potential test in such circumstances. See 889 F.2d at 297. In particular, the court noted that the company ''operated its old kilns at low levels in the past; its new, more efficient kiln might give it the economic ability to increase production; consequently, EPA could plausibly fear an increase in actual emissions. * * *'' *Id.* at 298.

By contrast, in *WEPCO*, the court held that EPA acted unreasonably in applying the actual-to-potential methodology in the case of WEPCO's

of avoiding NSR is commonly referred to as a ''netting'' analysis. The alternative discussed in this notice only involves modifications that do not trigger a netting analysis.

[2] The ''PTE'' is currently defined as the ''maximum capacity of a stationary source to emit a pollutant under its physical and operational design.'' Any physical or operational limitation on the capacity of the source to emit a pollutant, including a permit limitation, is treated as part of its design provided the limitation or its effect on emissions is federally enforceable (e.g., *see* existing sections 51.165(a)(1)(iii) and 51.166(b)(4)).

In recent decisions, *National Mining Ass'n* v. *EPA*, 59 F.3d 1351 (D.C. Cir. 1995) and *Chemical Manufacturers Ass'n* v. *EPA*, No. 89–1514, slip op. (D.C. Cir. Sept. 15, 1995), the District of Columbia Circuit court addressed challenges related to EPA's requirement that a source which wishes to limit its PTE must obtain a federally enforceable limit. The EPA is currently reviewing its Federal enforceability requirements in light of these court decisions, and has not yet decided how it will address this issue. Once EPA has completed its review of the Federal enforceability requirements in all relevant programs including NSR, the Agency will make available in a **Federal Register** notice its response to the court decisions.

life-extension project, in which WEPCO sought to replace numerous components of the steam generating units at the facility. The court objected to EPA's refusal to consider the past operating conditions of a source in evaluating the likely post-change emissions. It coined the term ''like-kind replacement,'' and ruled that the application of the actual-to-potential test to like-kind replacements of components of an existing emissions unit was not a reasonable interpretation of the regulations. Accordingly, upon remand from the court, EPA assessed the changes at WEPCO based on a comparison of its pre-change actual emissions and its predicted post-change actual emissions. This approach has come to be known as the ''actual-to-future-actual'' methodology.

3. Electric Utility Steam Generating Units

In July 1992, the Agency promulgated limited amendments to the existing major NSR regulations, in part to respond to the *WEPCO* decision. The ''WEPCO rule'' extended a different applicability test—an actual-to-future-actual approach—solely to electric utility steam generating units.[3] Under this new system, a utility unit's pre-change actual emissions are compared to its post-change ''representative actual emissions,'' defined as ''the average rate, in tons per year, at which the source is projected to emit a pollutant for the 2-year period after a physical change or change in the method of operation of a unit. * * *'' To guard against the possibility that significant unreviewed increases in actual emissions would occur under this methodology, the regulations provide that sources with utility units using the actual-to-future-actual approach must submit to the permitting authority sufficient records annually for 5 years after the change which demonstrate that the change has not resulted in an increase above the baseline levels.

Under EPA's regulations, unless a change ''results in'' an increase in actual emissions, it need not undergo major NSR. In the WEPCO rule, the Agency attempted to define a situation in which EPA would assume that there was no causal link between a post-change emissions increase and a particular physical change or change in the method of operation for electric utility steam generating units. The EPA reasoned that increased utilization due to demand growth at a utility unit did not result from particular physical or operational changes, but rather from market forces unrelated to the change. Consequently, the regulations now provide that, in projecting future actual emissions, electric utility steam generating units may exclude from the estimate any emission increase which results from increased capacity utilization as a consequence of ''independent factors,'' such as demand growth.

The WEPCO rule applies only to the modification of existing electric utility steam generating units for several reasons. The Agency noted that local public utility commissions (PUC) require utility sources to make reliable estimates of future capacity utilization, and that utilities' historic experience in doing so would make the application of an actual-to-future-actual methodology reasonable for utility units. In addition, EPA concluded that its past regulatory experience with the electric utility industry, especially the requirement from title IV of the Act that generators install highly accurate monitoring, made units in the electric power industry more amenable to the sophisticated tracking essential to make sure that the future actual emission predictions of a source are accurate. The Agency committed to consider in a different rulemaking the propriety of extending the actual-to-future-actual methodology to other source categories.

4. Proposal to Change NSR Applicability

In the July 1996 NSR Reform package, EPA proposed, among other things, to expand the use of the actual-to-future-actual approach. The Agency noted that, in general, sources potentially subject to major NSR would be required to install highly accurate monitoring devices under other provisions of the Act. Consequently, such sources could be similar to the utility units that currently are permitted to use an actual-to-future-actual test. Nonetheless, other industries also differ from the electric power sector insofar as electric utilities are the only sources whose estimates of demand and capacity utilization are subjected to independent review and have been historically limited to a clearly defined local market area. The Agency reasoned that permitting authorities, thus, could rely upon the predictions of post-change utilization in the electric power sector more comfortably than in other industries. To ensure the reliability of future predictions for non-utility units, EPA solicited comment on the adequacy of the current 5-year tracking requirement (which requires sources to report annually their emissions to the permitting authority for 5 years) and sought suggestions for improving it.[4]

B. Comments Received and Changed Circumstances

In weighing the desirability of expanding the actual-to-future-actual test to other source categories, EPA has considered a number of issues. First, are there principled reasons for treating non-electric utility sources differently? Second, have intervening events or further reflection called into question any of the bases upon which the Agency relied in adopting the test, and are changes therefore necessary?

In the prior NPRM, the Agency specifically solicited comment on whether sufficient safeguards exist such that other industries should be able to take advantage of the actual-to-future-actual methodology. The EPA received several public comments (see EPA Air Docket A–90–37) claiming that non-utility units are situated similarly enough to utility units that it makes sense to extend the actual-to-future-actual test beyond the limited scope of electric steam generating units to other sectors. These commenters observed that the Act's monitoring requirements, as embodied in the Compliance Assurance Monitoring rule and its title V reporting and recordkeeping requirements, both would ensure that sources' future actual emission predictions would be verifiable. See,

[3] For NSR purposes, the definition of ''electric utility steam generating unit'' means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility. See e.g., 40 CFR 52.21(b)(31). References in this notice to utility units is meant to include all units covered by this definition.

[4] As a result of the NSR Reform proposal, the Agency received comment from certain non-utility industrial stakeholders who claimed that the flexibility given to utilities in the WEPCO rule was not limited to the utility sector. Specifically, these commenters argued that sources generally were entitled to employ the actual-to-future-actual methodology for many physical or operational changes, because the changes were not of such significance (such as ''like-kind'' replacements) that it could reasonably be claimed that the source had ''not begun normal operations.'' The EPA disagrees with the commenters.

The NSR regulations contain only two applicability tests for modified units. One of these, the actual-to-future-actual approach, is limited to electric utility steam generating units. See, e.g., 40 CFR section 51.165(a)(1)(xii)(E). The other alternative is the actual-to-potential methodology, applicable when the source has ''not begun normal operations.'' This approach applies to all changes at major sources that are not otherwise excluded from being considered a physical or operational change, such as routine maintenance, repair, and replacement. Under the current rules, therefore, it is improper for a non-utility source to employ anything but an actual-to-potential test for examining physical or operational changes.

e.g., comments IV–D–112 and –121. In addition, commenters noted that other industry sectors routinely project market demand and, consequently, capacity utilization, and these commenters argued that such predictions are as reliable as those submitted to PUCs by electric companies. See, e.g., comment IV–D–146. Taken together, these comments suggest to EPA that the actual-to-future-actual test should be expanded beyond utility units. However, the Agency also received a number of comments that recommended limiting the methodology to utility units, reasoning that there still exists a disparity between utility and non-utility units in terms of their ability to predict and track their future emissions accurately. See, e.g., comments IV–D–109 and –125. Given these divergent views, EPA again requests comment upon the adequacy of existing emission projection and tracking capabilities at non-utility industrial sources for purposes of applying the actual-to-future-actual test.

Notwithstanding strong support from industry for the expansion of the actual-to-future-actual test, EPA believes that its experience with the methodology gives cause for caution in continuing this test *in its present form*. The regulations provide that sources with utility units employing the actual-to-future-actual approach must maintain and submit to the permitting authority ''information demonstrating that the physical or operational change did not result in an emissions increase'' for a 5-year period. However, the rules do not specifically detail either the means for conducting such verification or the consequences of a source's failure to meet its projected emissions level. For example, since the issuance of the WEPCO rule, it appears that although there are a substantial number of changes to existing units, as well as an increase in the amount of electricity being generated for use outside of the local service district, changes to utility units as well as post-change emissions estimates are not being reported to permitting agencies.

Moreover, the Agency is concerned that a 5-year overview of emissions is too short a period to encompass all increases in capacity utilization that could result from a particular change. As EPA noted in the NSR Reform proposal's discussion of the baseline for establishing pre-change actual emissions, see 61 FR at 38258, numerous industry commenters claim that 10 years is a fair and representative time period for encompassing a source's normal business cycle, and in the Reform proposal EPA has proposed to adopt a 10-year lookback period for establishing pre-change baseline emissions. If EPA ultimately promulgates a 10-year period for baseline purposes, the rationale for doing so would suggest that 10 years is likewise appropriate for tracking future actual emissions after a change. Accordingly, the Agency requested comment on extending and/or strengthening the existing 5-year tracking requirement for future actual emissions. See *id.* at 38268.

One particular circumstance where EPA has been dissatisfied with the WEPCO rule is in the exclusion of demand growth from predictions of utility units' future actual emissions. The Agency's promulgation of the WEPCO rule represented a departure from longstanding practice under which emissions increases that followed non-routine and otherwise nonexempt changes at a source were presumed to result from the change. At the time, EPA believed that there was a way to disassociate utility units' post-change emission increases which would have otherwise occurred due to demand growth as a purely independent factor from those that resulted directly from the physical or operational change. The EPA has reconsidered that departure, and has tentatively concluded that its 1992 departure is not appropriate and should not be continued, both as a general matter and especially in view of recent developments in the electric power sector.

The EPA's experience leads to the conclusion that sources generally make non-routine physical or operational changes which are substantial enough that they might trigger NSR in order to increase reliability, lower operating costs, or improve operational characteristics of the unit and do so in order that they may improve their market position. A proximate cause for making such changes may be to respond to increased demand, or to more efficiently compete for share of a market that has flat, or even decreasing, demand. For these reasons, EPA now seriously questions whether market demand should ever be viewed as a significant factor in answering the relevant regulatory question of whether an emissions increase results from a physical or operational change at an existing source, since in a market economy, all changes in utilization—and hence, emissions—might be characterized as a response to market demand. Accordingly, a conclusion that an emissions increase at a plant is in response to market demand does little to determine whether the increase results from a change at the plant; an affirmative answer to the first question is consistent with an affirmative answer to the latter.

The generation of electricity is currently being transformed from a highly regulated monopoly to a competitive market. More than a dozen states are implementing retail electricity competition where consumers may choose their electricity supplier, and most remaining states have such policies under consideration. Moreover, the Administration in March 1998 proposed a Comprehensive Electricity Competition Plan in order to facilitate more competitive electricity markets and several similar proposals have been introduced in Congress.

As the electricity industry is restructured, generation planning decisions will be made not by state public utility commissions, but by the forces of a competitive market. State utility regulators are therefore eliminating requirements for electric companies to report generation-related information such as projections of future capacity utilization. Consequently, with respect to the electric power industry in particular, even accepting the viability of the 1992 decisionmaking framework, attempting to discern whether increased utilization and emissions should be attributed to physical or operational changes versus purely independent demand-satisfying increased capacity utilization will be much more difficult in the future, as restructuring in the electric power industry allows electric generating companies to compete for retail customers. As a result, the marketplace will drive electric generators to function as any other consumer-driven industry, that is, to ensure their ability to supply the market and collaterally to increase their revenues. In addition, as utilities respond to a competitive market for the generation of electric power they can no longer be expected to accurately predict their level of operations and post-change emissions. Each physical or operational change that makes it possible for a source to efficiently increase its level of utilization, then, will likely be pursued and turned into electricity for sale. One can therefore predict that any physical or operational change will result in an emissions increase to the extent that there is market demand for additional power.

For the same reason that the demand growth exclusion would ignore the realities of a deregulated electric power sector, EPA believes that it should not be extended to non-utility units. For consumer-driven industries, demand is inextricably intertwined with changes that improve a source's ability to utilize

its capacity; thus, it cannot be said that demand growth is an ''independent factor,'' separable from a given physical or operational change. Modifications which affect operational characteristics of a unit are not made without reason, and the most likely reason for an economically competitive source to undertake such changes is to enable it to create or respond to increased demand.[5] In short, there is a direct causal link between most physical or operational changes that enable a source to use existing capacity and the use of such capacity.

In addition, the demand growth exclusion is problematic because it is self-implementing and self-policing. Because there is no specific test available for determining whether an emissions increase indeed results from an independent factor such as demand growth, versus factors relating to the change at the unit, each company with a utility unit presently adopts its own interpretation. Interpretations may vary from source to source, as well as from what a permitting agency would accept as appropriate. Moreover, such companies are not necessarily required to provide their interpretation of demand growth-related emissions to the permitting agency. Thus, with minimal, if any, explanation, a source may merely deduct the emissions increases it believes are attributable to demand growth from the total emissions data its supplies to the permitting agency demonstrating that it is below its projected future actuals. Vesting such unrestricted discretion in the regulated entity inevitably leads to enforcement problems.

Finally, the demand growth exclusion may make less sense in the near future in view of the fact that, as proposed in the NSR Reform package, the Agency is considering adopting a regulatory provision that bases the calculation of pre-change actual emissions upon a source's highest capacity utilization in the past ten years. If an emission unit undergoes a physical or operational change, or is affected by such change, and the source projects utilization in excess of its historical high in the preceding ten years, such utilization is likely not attributable to market variability (which is accounted for by a 10-year baseline), but rather results from the change itself.

C. NSR Applicability Test for All Major Modifications

1. In General

The EPA is presently considering, and by this Notice is seeking comment upon, amending the current applicability test for modifications of electric steam generating units and extending it to all source categories. Specifically, the major modification applicability methodology would be to retain the actual-to-future-actual component for utility units and apply it to all source categories, to make enforceable for a 10-year period emissions levels used by the source in projecting future actual emissions for all source categories, and eliminate the demand growth exclusion for all source categories.

The way that the methodology would work in practice is that owners or operators of units which undergo a non-routine physical or operational change will determine the applicability of NSR solely by reference to actual emissions. First, owners or operators must determine which emissions units are being changed or may be affected by the change, then calculate each unit's baseline actual emissions (EPA has proposed at 61 FR 38258–60 to allow sources generally to set their baseline in reliance on the highest emissions in the past ten years adjusted to reflect current emission factors). Second, post-change actual emissions from the affected units must be forecast. The sum of the pre-change actual emissions is then compared to the sum of the post-change actual emissions. If the difference between these two figures exceeds the significance threshold for a pollutant, major NSR is triggered (unless the source is otherwise able to net the change out of review).[6] If the difference is less than significant, the source avoids major NSR. In the latter case, for each unit that is changed or affected by the change, the source must incorporate that unit's future emissions projection into a temporary, practically and legally enforceable condition of a preconstruction permit (most likely a minor NSR permit). The limit must apply for at least 10 years after the source recommences normal operation of the affected unit.[7] EPA believes that a source would not purposefully modify a unit and then not use it at its intended capacity for 10 years merely to avoid major NSR permitting. Therefore, EPA believes 10 years represents a realistic period for applying an enforceable temporary emission limit. By adhering to such a limit, the source demonstrates to the permitting authority that the physical or operational change did not result in a significant emission increase. Consequently, subsequent to the expiration of the limit, EPA will presume that any increases in capacity utilization and emissions are not the result of the physical or operational change that necessitated the temporary limit.[8] Finally, source owners or operators may not exclude predicted capacity utilization increases due to demand growth from their predictions of future emissions.

Underlying this new approach is an attempt to mitigate the concerns raised by industry that the actual-to-potential methodology unfairly ignores past operation of a unit and assumes that it will operate at full capacity following a non-routine change. At the same time, the methodology addresses environmental groups' legitimate claims that sources who seek to avoid review based on projected actual emissions must also be prepared to be accountable for adhering to those projections. Finally, the test recognizes that in a market economy, sources often make physical or operational changes in order to respond to market forces and, consequently, there is no plausible distinction between emissions increases due solely to demand growth as an independent factor and those changes at a source that respond to, or create new, demand growth which then result in increased capacity utilization.

This temporary emissions cap approach also address certain compliance assurance and enforcement concerns. Specifically, under the current regulations, a company need not discuss its determination that projected future emissions from a utility unit will be below a certain level with a permitting agency prior to undertaking

[5] The EPA believes that the rulemaking record for NSR Reform supports the conclusion that market demand and source modifications are highly intertwined. Industrial commenters generally were strongly supportive, for instance, of the concept of PAL's. Many industrial interests argued that PAL's, because they allow changes at existing facilities to occur without NSR so long as an emission cap is maintained, are needed in order to give companies flexibility to make physical or operational changes quickly to maintain or acquire a competitive advantage in an ever changing global marketplace. The Agency believes that these claims regarding PAL's do not support the argument that changes at facilities are independent from market demand. Rather, they illustrate that sources frequently undertake modifications to enable them better to compete in an open market.

[6] Although the source may still avoid major NSR by netting out of review, the actual-to-enforceable-future-actual test would not apply in calculating the increase from the proposed change or any other emissions level for use in the netting analysis. Post change emissions for netting purposes would continue to equal potential emissions.

[7] Units that have a temporary limit may subsequently undergo or be affected by a modification. In such cases a new temporary limit of at least 10 years will need to be established.

[8] This limit is solely for the purpose of demonstrating that the physical change or change in the method of operation did not result in a significant emission increase. The imposition or expiration of this limit does not relieve the source of its obligation to comply with all requirements otherwise applicable to the unit.

the modification. Rather, it merely needs to supply ''information'' demonstrating that the future actual emissions did not exceed the significance level for the 5-year period following the modification. Thus, a permitting agency is unable to determine if the change will result in an emissions increase and require a major NSR permit before construction at the utility unit; it can only examine data submitted after-the-fact by the source. The NSR program, however, is a *pre*-construction program that requires an applicability determination prior to commencing construction to avoid equity-in-the-ground issues and retroactive control technology costs.

2. Limitations on Methodology and Solicitation of Comments

It is important to recognize the limited nature of the proposed methodology. The actual-to-enforceable-future-actual test would not apply when determining an emission level (i.e., increase or decrease) for use in a netting analysis or for the purpose of complying with any major NSR permitting requirement, such as BACT, LAER, offsets or an ambient air impact analysis. Specifically, the test would apply only to modifications to existing units for the sole purpose of determining if a proposed change to that unit, or a change at the facility which otherwise would affect the unit, will result in an emissions increase at the source. New units have no operating history upon which a reliable prediction of future utilization can be made. Thus, under the regulations, such units have not ''begun normal operations,'' and permitting authorities must assess NSR applicability based on the new unit's potential emissions. In addition, the Agency seeks comment on the appropriateness of applying an actual-to-enforceable-future-actual test where a physical or operational change increases the design capacity or PTE of a given unit. Such changes result in alternative modes of operation (and emissions levels) which are not currently achievable in practice for the unit. In such circumstances, the unit's past utilization arguably is a poor proxy for its future operation and, therefore, ''normal operations'' are impossible to identify. Furthermore, emissions levels which can not be achieved in practice but for a physical or operation change are clearly connected to the change. Consequently, the Agency is seeking comment on whether any increase in emissions resulting from a mode of operation which could only have been achieved through a physical or operational change must be presumed to have resulted from the change, even if such increase were to occur later than ten years after the change.

IV. Adjustments of PAL's

A. Background

1. Introduction

In the July 23, 1996 Reform package, EPA proposed a new method for determining major NSR applicability for existing sources in attainment or unclassifiable areas and existing and proposed sources in nonattainment areas. Under this proposal, an existing major source, if the State's SIP provides, may apply for a permit which bases the source's major NSR applicability on a pollutant-specific plantwide emissions cap, termed a PAL. The EPA proposed that a facility's allowable emissions under a PAL would generally be based on plantwide ''actual emissions'', as that term would be defined under the proposal, plus an additional amount of emissions less than the applicable significant emissions rate. The voluntary [9] source-specific PAL is a straightforward, flexible approach to determining whether changes at existing major stationary sources result in emissions increases which trigger major NSR. So long as source activities do not result in emissions above the cap level, the source will not be subject to major NSR. It also contains proposed regulatory language for PAL's for the PSD rules at 40 CFR 51.166 and 52.21, and the nonattainment NSR rules at 51.165. The July 23, 1996 proposal contains a thorough discussion of the proposed PAL concept and the background information used to develop the proposal.

B. PAL Advantages

The EPA has determined that the voluntary source-specific PAL is a practical method to provide both flexibility and regulatory certainty to many existing sources, as well as benefits to permitting authorities, while maintaining air quality. For example, PAL's provide the ability to make timely changes to react to market demand, certainty regarding the level of emissions at which a stationary source will be required to undergo major NSR, and a decreased permitting burden for the source and the permitting authority. In addition, because a source with a PAL will have more flexibility to make reductions to create room for growth, PAL's should lead to innovative control technologies, pollution prevention and emissions reductions concurrent with economic expansion.

C. PAL Adjustment Issues

The EPA proposed that PAL's, once included in a permit, may be adjusted for a number of reasons. In particular, the Agency solicited ''comment on why, how, and when a PAL should be lowered or increased without being subject to major NSR.'' 61 FR at 38266. Moreover, the rule language permitting PAL's provides for periodic adjustment to reflect, among other things, ''appropriate considerations.'' See *id.* at 38327.

The need for adjustments would arise in a number of scenarios: (1) Where technical errors have been made; (2) when new requirements apply to the PAL pollutant, such as RACT, NSPS or SIP-required reductions; [10] (3) where emissions reductions below PAL levels are used for offsets; (4) for permanent shutdowns where the State has the authority to remove permanent shutdowns from the emissions inventory after a certain time period; and (5) when any changes (though consistent with the PAL) might cause or contribute to a violation of any NAAQS or PSD increment or would have an adverse impact on air quality related values.

The EPA received many comments regarding the appropriate considerations for PAL adjustment. Based on these comments and further deliberation, EPA is considering whether it is appropriate to reevaluate PAL levels and adjust them to reflect actual emissions to address legal concerns associated with the Court's decision in *Alabama Power Co.* v *Costle*, 636 F.2d 323 (D.C. Cir. 1979) and because of environmental policy reasons.

1. Legal Concerns

As stated, where a facility with a PAL adds a new emitting unit or modifies an

[9] This Notice uses the term ''voluntary'' to mean not required by the regulations or a SIP, rather than not enforceable by a State, local, or Federal agency or the public.

[10] In the July 1996 NSR Reform package, EPA proposed that emissions reductions of HAP to meet MACT at emissions units under a PAL would generally not necessitate a downward adjustment to the PAL because the PAL is not designed to limit HAP. However, if MACT reductions are relied on in the SIP (e.g., VOC reductions in nonattainment areas used for RFP or attainment demonstrations) then the PAL rules would require adjustment downward. This position is consistent with EPA's policy that emissions reductions from meeting MACT requirements are generally not precluded from being creditable for NSR netting provided the reductions are otherwise creditable under major NSR. The EPA is concerned that the benefits of HAP reductions to meet MACT at units under the PAL may be diminished since the HAP reduction may be used indefinitely, rather than for a shorter contemporaneous time period, to add new or modified units under the PAL. Therefore, EPA is seeking additional comment on the proposal to not adjust PAL's for MACT purposes.

existing unit, the unit would not undergo major NSR (nonattainment or PSD) if the PAL is not exceeded. That is, if the source generates sufficient emission reductions, it may add equivalent emission increases up to the PAL level without triggering NSR.

Under present regulations, a source that adds or modifies a unit that would result in a significant emissions increase may ''net'' that particular change out of review if the new emission increase plus the sum of all other contemporaneous increases and decreases elsewhere at the source are less than significant. When the netting calculus is triggered (that is, there is a significant emission increase as a result of the addition of a new unit or the modification of an existing unit), the source must also consider those emission increases and decreases that have occurred at the facility during a ''contemporaneous'' period. In the federal PSD regulations, this period is 5 years. See 40 CFR section 52.21(b)(3)(ii). States implementing the PSD program or the nonattainment program under an EPA-approved SIP may define a different reasonable contemporaneous period.

The current regulations' requirement of contemporaneity derives from the interpretation of the Act's provisions governing modifications set forth in *Alabama Power Co.* v. *Costle*. In that case, the court held that EPA's 1978 regulations limiting netting to a less than plantwide scope conflicted with the language and purpose of the Act and ruled that EPA must permit sources to net on a plantwide basis. According to the court, plantwide netting was implicit in the statutory term ''modification'' and the purposes of the Act. At the same time that it required EPA to expand the scope of the netting concept, the court also interpreted the statute as imposing a limit on plantwide netting: contemporaneity. The court stated, ''[t]he Agency retains substantial discretion in applying the bubble concept. First, any offset changes claimed by industry must be substantially contemporaneous. The Agency has discretion, within reason, to define which changes are substantially contemporaneous.'' *Id*. at 402; see also *id*. at 403 (''Where there is no net increase from contemporaneous changes within a source, we hold that PSD review, whether procedural or substantive, cannot apply.''). Thereafter, EPA codified contemporaneity as a regulatory requirement. *See* 45 FR 52676, 52700–02 (August 7, 1980).

As stated, EPA solicited comment on what ''appropriate considerations'' might necessitate revisions to the PAL allowable level. Having again reviewed *Alabama Power* and the Agency's subsequent interpretations of the case, the Agency is concerned that, because PAL's may be characterized as a form of netting and result in the avoidance of major NSR, the contemporaneity requirement for netting set forth in *Alabama Power* may also need to be applied to PAL's. Therefore, EPA is soliciting comment on whether and when to provide for subsequent adjustment of PAL's to address contemporaneity issues associated with *Alabama Power*.

2. Environmental Concerns

Several commenters encouraged the Agency to provide for periodic revision to the PAL allowable level to reflect a source's actual emissions in recent years. In the main, these commenters represented State pollution control agencies, the entities which will be charged with implementing individual PAL's. See, e.g., comments IV-D–52 and -137. Based on these comments and internal deliberations, the Agency is considering several options that would provide for periodic reevaluation of PAL levels to ensure that they reflect actual emissions and maintain or enhance environmental protection.

Under the current major NSR regulations, emissions decreases are creditable only if they are contemporaneous with a prospective modification project that would, standing alone, increase emissions at the source. The EPA is soliciting comment on whether the PAL alternative to traditional major NSR applicability can achieve equivalent or better environmental results, while employing a different approach.

The EPA believes that there are a number of policy reasons why the final PAL rules might provide for periodic reassessment and adjustment of PAL levels. First, as a general matter, a PAL operates as a form of allowable-to-allowable test, insofar as a source may avoid major NSR review if its emissions after a particular construction activity do not exceed the pre-change allowables. Of course, under the proposed rules PAL's would ensure that the allowable emissions are based on historic actual emissions. Nevertheless, as an allowable-to-allowable scheme, PAL's raise some of the same concerns as did the CMA Exhibit B test discussed in the NSR Reform preamble. Specifically, absent a requirement for periodic adjustment the PAL would allow a source to indefinitely keep, rather than eventually forfeit to the environment, emission reductions at the source, such as those achieved by the replacement of existing, and often higher-polluting, equipment with more efficient, and thus lower-polluting, equipment.

Second, a rule which provides for the periodic review of PAL's may ensure that individual sources do not indefinitely retain unused emissions credits to the detriment of other sources in the area wishing to use them. For example, where a State treats sources' PAL allowable levels as ''actual'' emissions, a rule which in some instances requires a downward adjustment of PAL's will therefore reduce the area's inventory of actual emissions. Such adjustments would ''free up'' a portion of the PSD increments in attainment areas for use by other sources in the area.

Third, an indefinite PAL may hinder a State's ability to plan effectively for attainment. If a State does its attainment planning based exclusively on source's actual emissions to the atmosphere, and does not treat a PAL allowable limit as the PAL source's ''actual'' emissions, then an emission credit created long in the past may reappear in the future as real emissions to the air, without being part of the State's attainment planning. For example, if a PAL-covered source replaces an oil boiler today with a more modern and efficient gas turbine and the State, in its next inventory, calculates the source's emissions at the new lower level, then bases its attainment planning on the assumption that the source will continue to emit at the lower level, the State may not meet its attainment goals (or, perhaps, fall out of attainment) if the PAL source decides to utilize its full PAL allowable at some point in the future.

V. PAL Review and Adjustment Options

The EPA is seeking comment on how the PAL concept can be reconciled with the legal and environmental policy concerns articulated above. Specifically, the Agency solicits input on the usefulness of a number of different options for periodically reviewing PAL allowable levels and on whether such options adequately address the legal issues associated with *Alabama Power* and environmental concerns posed by the long-term retention of unused allowable emissions.

It should be noted that EPA has not made a final decision on the frequency of a permitting authority's review of a PAL or the methodology used to establish a PAL baseline. The Agency is giving serious thought to 10 years as an approach. Therefore, the options discussed in this Notice assume a PAL with a term of 10 years with the PAL baseline established using the highest 1

year in the last ten years of historical emissions for the source. The Agency solicits comment on the appropriateness of reviewing PAL levels every 10 years and whether another period is more reasonable.

The EPA is considering several options to periodically revisit the appropriate PAL emission level. First, permitting authorities may adjust the PAL to account for emissions reductions from permitted units under the PAL that are shutdown or dismantled and the associated emission reductions remain unused for a period of at least 10 years. Second, the PAL may be reevaluated to account for emissions reductions where an emissions unit under the PAL operated for at least 10 years below the capacity level for that unit which was used to establish the previous PAL level. Third, the Agency is considering an option that would require PAL's to expire after 10 years or be renewed to reflect current actual emissions. Finally, EPA is soliciting comment on whether it is appropriate to adjust a PAL downward at all where all of the emission units subject to the PAL have good controls already in place (i.e., BACT, LAER) or where a source voluntarily implemented pollution prevention strategies which resulted in emissions reductions. The following discussion sets forth additional information on each of the PAL adjustment options.

A. PAL Adjustments for Shutdown or Dismantled Units

The first situation in which a downward PAL adjustment might be warranted is where emission reductions resulted from emission units under the PAL that were shutdown or dismantled. A shutdown unit would be one that the source did not operate at all during the 10-year life of the existing PAL. A dismantled unit would be one that was removed prior to the establishment of the current PAL level and the emissions capacity associated with such unit was not used by the source for ten years. Thus, the PAL level would be adjusted to remove only those emissions that could have potentially been emitted from any shutdown or dismantled units. The PAL would not be adjusted downward if the source had utilized those emission reductions from the shutdown or dismantled units elsewhere at the source (e.g., added new units or capacity or increased capacity utilization at existing units) during the period since the unit shut down or was removed. Nor would the PAL be adjusted downward due to underutilization of any units still in operation to any extent under the PAL.

For example, an initial PAL set in the year 2000 includes 600 tpy of VOC from unit A; unit A is shutdown in 2005. Periodic review occurs in 2010. In 2010, because unit A was used during the ten years prior to readjustment, the adjusted PAL level would assume that unit A was still operating. If by 2020, the next periodic review, the 600 tpy of emissions associated with the shutdown was not used by the source to make changes, the PAL level would be adjusted downward by 600 tpy. However, if between 2010 and 2020 the source used a portion of the shutdown emissions to add new units or make modifications under the PAL, then the PAL would be adjusted downward only for the emissions that remain unused.

The EPA believes that the periodic downward adjustment of PAL's for the failure to use emissions associated with shutdown or dismantled units is appropriate for air quality planning purposes. However, EPA is concerned that it may be difficult to determine whether an emissions increase under the PAL relied upon previous decreases at a shutdown or dismantled unit as opposed to other activities at the source. The Agency solicits comment on whether limiting the PAL adjustment to the situation of shutdown or dismantled units addresses the legal and policy concerns raised above and welcomes comments and suggestions on how to implement an adjustment option that would adjust downward only for those emissions from shutdown or dismantled units which the source failed to utilize for 10 years.

B. PAL Adjustments for Unused Capacity

The EPA is also considering periodic adjustments to a PAL where the emissions units under the PAL operate for a period of ten years below the capacity used initially to establish the PAL. The adjustment would be based on a review of the utilization of all emission units used to establish the PAL baseline, not just those that were shutdown or dismantled. Under this option, and in the example below, PAL adjustment would be based on the highest capacity utilization of each unit during any 12 month period in the past 10 years. Alternatively, EPA also solicits comment on whether the PAL adjustment should be based on the highest capacity utilization at the entire source during a single 12-month period within the past 10 years.

The following example illustrates how an initial review of the PAL and subsequent adjustments to the PAL could be handled under this option. As an example, unit A had operated at 80 percent during a 12-month period in the ten years prior to initial PAL establishment in 2000. In 2005, the source lowers unit A's utilization from 80 percent to 5 percent. At PAL review in 2010, because unit A's utilization in the past ten years (e.g., 2004) had reached 80 percent, the adjusted PAL level would assume a capacity utilization no lower than 80 percent. Under the alternative to this option the PAL adjustment would be based on the highest capacity for all units at the source during a single 12-month period within the past 10 years. If year 2005 is chosen as the single 12-month period for capacity review then the adjusted PAL level for unit A would assume a capacity utilization of 5 percent.

Where PAL's are adjusted because of long-term underutilization of capacity, EPA is also considering and seeking comments on the following alternatives and safeguards to ensure that an operating cushion exists: (1) Including in the adjusted PAL level an operating cushion that equals a fixed percentage (e.g., 10 percent, 15 percent, or 20 percent) of the current PAL, provided the adjusted PAL level does not exceed the current PAL level; (2) requiring no PAL adjustment due to underutilization of capacity if the emissions under the PAL are within a fixed percentage (e.g., 10 percent, 15 percent or 20 percent) of the current PAL baseline; (3) adjusting the PAL downward for unused capacity, but limit the potential downward PAL adjustment to a fixed percentage (e.g., 10 percent) of the current PAL level; and (4) re-setting the PAL as though it were being set initially (e.g., plantwide actual emissions plus an operating margin lower than the applicable significance threshold). The Agency seeks comment on whether these safeguards, if included in the final regulations, would both preserve sources' operational flexibility and address the specific legal and policy concerns raised above.

C. Capacity Adjustments for PAL Expiration and Renewal

The EPA is seeking comment on an option where the PAL expires as a major NSR applicability test for subsequent new units or subsequent modifications unless the source decides to renew the PAL. Under this option, a PAL would expire after ten years. When it expires, the PAL ceases to serve as the emissions baseline against which all source additions and modifications are measured for purposes of major NSR applicability. Instead, a source must revert to the traditional netting analysis to determine major NSR applicability for new or modified units.

At the time of PAL expiration, the source would choose either to re-establish the PAL for the entire facility after the expiration of the initial 10-year term or to allow it to expire. The source could also re-establish a PAL at some later date. If the renewal option is chosen by the source, the PAL baseline would be adjusted to reflect actual operating conditions and emissions for the 10 years prior to renewal, consistent with the procedures for setting a PAL. If the source elects not to renew the PAL, then subsequent new units and subsequent modifications are subject to the traditional netting analysis to determine major NSR applicability for those units. In addition, where the source elects not to renew the PAL for major NSR applicability purposes, the former PAL allowable limit would still remain in effect as an enforceable limit on total allowable emissions for those units previously covered under the PAL, notwithstanding its expiration as an applicability test.

The units previously subject to the PAL would remain free to increase emissions up to the former allowable PAL level, provided the increase is not the result of a physical or operational change at the source. The source retains the option to: (1) Reestablish an expired PAL to avoid major NSR for any subsequent physical or operational change at the source that is consistent with the reestablished PAL level, or (2) not to reestablish the PAL for the facility and process any new unit as a modification under the traditional major NSR applicability criteria to determine if a significant net emissions increase will result. In the latter case, emissions increases and decreases which have occurred during the term of the PAL as an applicability trigger would not count for netting purposes.

As an example, assume that in the year 2000 a source with five units establishes a PAL of 1000 tpy of pollutant X based on actual operations and emissions from the prior 10 years. During the period from 2000–2010 the source modifies three existing units and constructs two new units (Units 6 and 7), but within those 10 years operates the facility so as only to emit 700 tons of X per year. In 2010, the PAL (as an alternative applicability test for major NSR) must expire. If the source chooses to re-establish the PAL, based on the last 10 years of actual operating data the PAL baseline would be adjusted downward to reflect the 700 tpy level. The source could choose to continue the PAL at the adjusted 700 tpy level, or let the current PAL lapse for applicability purposes. If the source lets the PAL lapse, the original 1000 tpy cap would still remain for Units 1–7 to ensure that physical and operational changes which occurred during the life of the PAL do not result in actual emission increases that exceed the 1000 tpy cap without being subject to major NSR.

Suppose further that the PAL is not renewed and that in 2014, the actual plantwide emissions of pollutant X were 800 tpy, the highest actual emissions level for the previous ten years and that, in 2015, the source proposes to construct a new Unit 8 that emits 200 tpy of pollutant X. New Unit 8 would otherwise be subject to the traditional major NSR applicability test. The previous 1000 tpy PAL lapsed in 2010 and cannot include new units since 2010. As an alternative, the source may avoid major NSR for the new unit by establishing a new PAL at 800 tpy and include the new unit consistent with the newly established 800 tpy limit. In addition, once the PAL limit expires as a major NSR applicability limit compliance with the PAL as an allowable limit would still be required.

The EPA believes that the foregoing option provides sufficient flexibility to a source because it maintains the ability of the source to operate the units previously covered under the PAL at their full rated capacity. Additionally, it allows a source to add new units after the expiration of the PAL in accordance with the traditional NSR applicability determination, including the establishment of a new PAL at such time as it may be advantageous to the source to do so. Nevertheless, EPA solicits comment on whether this option sufficiently addresses the legal and policy concerns associated with PAL adjustments.

D. PAL Adjustments Where Sources Implement Good Controls or Pollution Prevention Initiatives

The EPA is also seeking comment on whether it is appropriate to adjust a PAL downward, even where unused capacity exists, if all of the emissions units subject to the PAL already have good controls in place (e.g, BACT, LAER), the source has installed innovative controls, or if the source created the emission reductions using pollution prevention strategies. The EPA believes that sources which voluntarily achieve emissions reductions through the installation of good and/or innovative controls throughout the facility or through pollution prevention initiatives should be encouraged to do so. By the terms ''good'' controls and ''innovative'' technology the Agency is referring to the types of controls and technology discussed previously in the July 1996 NSR Reform proposal for the ''clean unit'' and ''clean facility'' exclusion and undemonstrated control technology, respectively. *See* 61 FR at 38255 and 38281 (July 23, 1996). Additionally, the types of pollution prevention activities that would qualify are those consistent with the activities described in the July 1996 proposal and previous EPA policies. In light of the Agency's prior guidance and discussions concerning good controls, innovative technology, and pollution prevention initiatives, EPA seeks comment on whether the terms ''good controls'', ''innovative controls'', and ''pollution prevention initiatives'' are appropriately used and clearly defined for purposes of this option.

To require a PAL adjustment under these circumstances could create a disincentive to engage in these initiatives. However, this option raises certain enforcement concerns for the Agency. In particular, without additional clarification it may be difficult to determine if an emissions unit has good controls, utilizes innovative technology, or has reduced emissions because of pollution prevention initiatives, as opposed to other factors. Furthermore, EPA is concerned that if there is ambiguity about the meaning of these terms the public, sources, and permitting agencies may disagree about whether PAL adjustment is needed. Notwithstanding the Agency's interest in promoting innovative and voluntary pollution control and prevention initiatives, EPA does not believe voluntary emissions reductions achieved through the implementation of good controls, innovative technology and pollution prevention initiatives should necessarily relieve the source from other regulatory requirements. Accordingly, EPA seeks comment on these concerns as well as the types of circumstances that might be appropriate for a source that engages in innovative and positive environmental stewardship to avoid any downward adjustment to its PAL. The EPA also solicits comments on whether and how the policy and legal concerns set forth in this notice concerning PAL adjustments for sources which utilize innovative or good technology or engage in pollution prevention initiatives could otherwise be addressed.

Finally, given the flexibility and significant opportunities to utilize emissions reductions under the options described in this Notice, EPA solicits comment on whether additional PAL adjustment considerations are appropriate.

Dated: July 16, 1998.

Richard D. Wilson,

Acting Assistant Administrator.

[FR Doc. 98–19832 Filed 7–23–98; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–5494–1]

Environmental Impact Statements and Regulations; Availability of EPA Comments

Availability of EPA comments prepared July 6, 1998 Through July 10, 1998 pursuant to the Environmental Review Process (ERP), under Section 309 of the Clean Air Act and Section 102(2)(c) of the National Environmental Policy Act as amended. Requests for copies of EPA comments can be directed to the Office of Federal Activities AT (202) 564–5076. An explanation of the ratings assigned to draft environmental impact statements (EISs) was published in FR dated April 10, 1998 (63 FR 17856).

Draft EISs

ERP No. D–FRC–J05078–MT Rating EO2, Missouri-Madison Hydroelectric (FERC No. 2188) Project, Issuing a New licence (Relicense) for Nine Dams and Associated Facilities, MT.

Summary: EPA expressed environmental objections regarding FERC's rejection of Section 10 (j) recommendations; inadequacies in the analysis of thermal issues; the potential for impairment to the beneficial uses; and the rejection of some State Clean Water Act 401 conditions. EPA believes FERC should ensure license conditions that require hydropower operations be done in the best practicable manner to minimize harm to beneficial uses. License conditions also need to incorporate thermal success criteria and appropriate language to reopen the license if success criteria are not adequately attained by proposed mitigation. EPA believes additional information is needed to fully assess and mitigate all potential impacts of the management actions.

ERP No. D–IBR–J28020–UT Rating EO2, Narrows Dam and Reservoir Project, Construction of Supplemental Water Supply for Agricultural and Municipal Water Use, Gooseberry Creek, Sanpete and Carbon Counties, UT.

Summary: EPA expressed environmental objections to the proposed project, and stated that it believes additional, less damaging alternatives are available which would reduce the project related impacts. EPA requested additional detail on mitigation, project impacts, and alternatives.

ERP No. D–IBR–K39045–CA Rating EC2, Programmatic EIS—Central Valley Project Improvement Act (CVPIA) of 1992 Implementation, Central Valley, Trinity, Contra Costa, Alameda, Santa Clara and San Benito Counties, CA.

Summary: EPA expressed strong support for the overall intent of CVPIA implementation; alternatives which provide a strong two-pronged commitment to ecosystem restoration and flexible, efficient use of developed water supplies; and use of CVPIA tools to provide efficient management of existing, developed water supplies. EPA requested additional information and explanation on the range of implementation, relationship between PEIS and subsequent rules and regulations, and to the relationship of the PEIS to interim implementation programs and the ''Garamendi process''

ERP No. DR–DOI–K40222–TT Rating EO2, Palau Compact Road Construction, Revision to Major Transportation and Communication Link on the Island of Babeldaob, Implementation, Funding, Republic of Palau, Babeldaob Island, Trust Territory of the Pacific Islands.

Summary: EPA expressed environmental objections because the RDEIS did not provide sufficient documentation that all practicable means have been undertaken by the Corps and the Republic of Palau to avoid and minimize adverse impacts associated with placing dredged or fill material in wetlands and other aquatic resources protected under CWA Section 404.

Final EISs

ERP No. F–AFS–L65285–AK, Chasina Timber Sale, Harvesting Timber and Road Construction, Tongass National Forest, Craig Ranger District, Ketchikan Administrative Area, AK.

Summary: Review of the Final EIS was not deemed necessary. No formal comment letter was sent to the preparing agency.

ERP No. F–AFS–L65300–AK, Canal Hoya Timber Sale, Implementation, Stikine Area, Tongass National Forest, Value Comparison Unit (VCU), AK.

Summary: Review of the Final EIS was not deemed necessary. No formal comment letter was sent to the preparing agency.

Dated: July 21, 1998.

William D. Dickerson,

Director, NEPA Compliance Division, Office of Federal Activities.

[FR Doc. 98–19884 Filed 7–23–98; 8:45 am]

BILLING CODE 6560–50–U

ENVIRONMENTAL PROTECTION AGENCY

[ER–FRL–5493–9]

Environmental Impact Statements; Notice of Availability

Responsible Agency: Office of Federal Activities, General Information (202) 564–7167 OR (202) 564–7153.

Weekly receipt of Environmental Impact Statements

Filed July 13, 1998 Through July 17, 1998

Pursuant to 40 CFR 1506.9

EIS No. 980269, Draft EIS, AFS, ID, Eagle Bird Project Area, Timber Harvesting and Road Construction, Idaho Panhandle National Forests, St. Joe Ranger District, Shoshone County, ID, Due: September 07, 1998, Contact: Cameo Flood (208) 245–4517.

EIS No. 980270, Final EIS, FHW, NC, US 70 Improvements Project, I–40 to the Intersection of US 70 and US 70 Business, Funding and COE Section 404 Permit, Wake and Johnston Counties, NC, Due: August 24, 1998, Contact: Nicholas L. Graf, P.E. (919) 733–7842 ext. 260.

EIS No. 980271, Draft EIS, FHW, IN, US 231 Transportation Project, New Construction from CR–200 N to CR–1150′1, Funding, Right-of-Way Permit and COE Section 404 Permit, Spencer and Dubois Counties, IN, Due: October 15, 1998, Contact: Douglas N. Head (317) 226–7487.

EIS No. 980272, Draft EIS, NOA, MS, Grand Bay National Estuarine Research Reserve (NERR), Designation, To Conduct Research, Educational Project and Construction, East of the City of Biloxi, Jackson County, MS, Due: September 07, 1998, Contact: Stephanie Thornton (301) 713–3125 ext. 110

EIS No. 980273, Draft Supplement, FTA, PR, Tren Urbano Transit Project, Updated Information for the Minillas Extension, Construction and Operation, San Juan Metropolitan Area, Funding, NPDES Permit, US Coast Guard Bridge Permit and COE Section 10 and 404 Permits, PR, Due: September 07, 1998, Contact: Alex McNeil (404) 562–3511.

EIS No. 980274, Final EIS, FRC, NB, Kingsley Dam Project (FERC. No. 1417) and North Platte/Keystone Diversion Dam (FERC. No. 1835) Hydroelectric Project, Application for Licenses, Near the confluence of the North/South Platte Rivers, Keith, Lincoln, Garden, Dawson and Gasper Counties, NB, August 24, 1998, Contact: Frankie Green (202) 501–7704.