ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 52

[AD–FRL–7781–4; E–Docket ID No. OAR–2002–0068; Legacy Docket No. A–2002–04]

RIN–2060–AK28

Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion; Reconsideration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of reconsideration of final rule; request for public comment; notice of public hearing.

SUMMARY: On October 27, 2003 and December 24, 2003, the EPA revised regulations governing the major New Source Review (NSR) programs mandated by parts C and D of title I of the Clean Air Act (CAA or Act). Following these two actions, the Administrator received petitions for reconsideration from a collection of environmental and public interest groups and a group of states. Today, we, the EPA, are announcing our reconsideration of certain issues arising from the final rules of October 27, 2003 and December 24, 2003. We are requesting public comment on three issues as to which we are granting reconsideration. The issues are described in section II of this notice. We plan to issue a final decision on these issues and other issues raised in the various petitions by December 28, 2004.

We are only seeking comment on provisions of the major NSR rules as specifically identified in this notice. We will not respond to any comments addressing any other provisions of the NSR rules or program.

DATES: *Comments.* Comments must be received on or before August 30, 2004. Because of the need to resolve the issues raised in this notice in a timely manner, we will not grant requests for extension beyond this date.

Public Hearing. The public hearing will convene at 9 a.m. e.d.t. and will end after all registered speakers have had an opportunity to speak but no later than 10 p.m. e.d.t. on approximately August 2, 2004. We will publish a notice to announce the specific date for this hearing. For additional information on the public hearing and requesting to speak, see the **SUPPLEMENTARY INFORMATION** section of this preamble.

ADDRESSES: *Comments.* Comments may be submitted by mail to U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Ave., NW., Rooms: B108, Mail Code: 6102T, Washington, DC 20460, Attention E–Docket ID No. OAR–2002–0068 (Legacy Docket ID No. A–2002–04). Comments may also be submitted electronically, by facsimile, through hand delivery/courier, or by phone.

Public Hearing. A public hearing will be held at a hotel near Research Triangle Park, North Carolina. We will publish a notice to announce the specific location of the hearing.

FOR FURTHER INFORMATION CONTACT: Mr. David Svendsgaard, Information Transfer and Program Integration Division (C339–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, telephone (919) 541–2380, or electronic mail at *svendsgaard.dave@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. What Are the Regulated Entities?

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

Industry group	SIC [a]	NAICS [b]
Electric Services	491	221111, 221112, 221113, 221119, 221121, 221122.
Petroleum Refining	291	324110.
Industrial Inorganic Chemicals	281	325181, 325120, 325131, 325182, 211112, 325998, 331311, 325188.
Industrial Organic Chemicals	286	325110, 325132, 325192, 325188, 325193, 325120, 325199.
Miscellaneous Chemical Products	289	325520, 325920, 325910, 325182, 325510.
Natural Gas Liquids	132	211112.
Natural Gas Transport	492	486210, 221210.
Pulp and Paper Mills	261	322110, 322121, 322122, 322130
Paper Mills	262	322121, 322122.
Automobile Manufacturing	371	336111, 336112, 336211, 336992, 336322, 336312, 336330, 336340, 336350, 336399, 336212, 336213.
Pharmaceuticals	283	325411, 325412, 325413, 325414.

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

Entities potentially affected by the subject rule also include State, local, and tribal governments that are delegated authority to implement these regulations.

B. How Can I Get Copies of This Document and Other Related Information?

1. Docket. EPA has established an official public docket for this action under E–Docket ID No. OAR–2002–0068 (Legacy Docket ID No. A–2002–04). The official public docket consists of the documents specifically referenced in this action, any public comments received, and other information related to this action. Although a part of the official docket, the public docket does not include Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. The official public docket is the collection of materials that is available for public viewing at the EPA Docket Center, (Air Docket), U.S. Environmental Protection Agency, 1301 Constitution Ave., NW., Room: B108, Mail Code: 6102T, Washington, DC 20460. The EPA Docket Center Public Reading Room is open from 8:30 a.m. to 4:30 p.m., Monday through Friday, excluding legal holidays. The telephone number for the Reading Room is (202) 566–1742. A reasonable fee may be charged for copying.

2. Electronic Access. You may access this **Federal Register** document electronically through the EPA Internet under the ''**Federal Register**'' listings at *http://www.epa.gov/fedrgstr/.*

An electronic version of a portion of the public docket is available through EPA's electronic public docket and comment system, EPA Dockets. Interested persons may use EPA Dockets at *http://www.epa.gov/edocket/* to submit or view public comments, access

the index listing of the contents of the official public docket, and access those documents in the public docket that are available electronically. Once in the system, select ''search,'' then key in the appropriate docket identification number.

Certain types of information will not be placed in the EPA Dockets. Information claimed as CBI and other information whose disclosure is restricted by statute, which is not included in the official public docket, will not be available for public viewing in EPA's electronic public docket. EPA's policy is that copyrighted material will not be placed in EPA's electronic public docket but will be available only in printed, paper form in the official public docket. To the extent feasible, publicly available docket materials will be made available in EPA's electronic public docket. When a document is selected from the index list in EPA Dockets, the system will identify whether the document is available for viewing in EPA's electronic public docket. Although not all docket materials may be available electronically, you may still access any of the publicly available docket materials through the docket facility identified in section I.B.1. EPA intends to work towards providing electronic access to all of the publicly available docket materials through EPA's electronic public docket.

For public commenters, it is important to note that EPA's policy is that public comments, whether submitted electronically or in paper, will be made available for public viewing in EPA's electronic public docket as EPA receives them and without change, unless the comment contains copyrighted material, CBI, or other information whose disclosure is restricted by statute. When EPA identifies a comment containing copyrighted material, EPA will provide a reference to that material in the version of the comment that is placed in EPA's electronic public docket. The entire printed comment, including the copyrighted material, will be available in the public docket.

Public comments submitted on computer disks that are mailed or delivered to the docket will be transferred to EPA's electronic public docket. Public comments that are mailed or delivered to the Docket will be scanned and placed in EPA's electronic public docket. Where practical, physical objects will be photographed, and the photograph will be placed in EPA's electronic public docket along with a brief description written by the docket staff.

For additional information about EPA's electronic public docket visit EPA Dockets online or see 67 FR 38102, May 31, 2002.

C. How and to Whom Do I Submit Comments?

You may submit comments electronically, by mail, by facsimile, through hand delivery/courier, or by phone. To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your comment. Please ensure that your comments are submitted within the specified comment period. Comments received after the close of the comment period will be marked ''late.'' EPA is not required to consider these late comments. If you wish to submit CBI or information that is otherwise protected by statute, please follow the instructions in section I.D. Do not use EPA Dockets or e-mail to submit CBI or information protected by statute.

1. Electronically. If you submit an electronic comment as prescribed below, EPA recommends that you include your name, mailing address, and an e-mail address or other contact information in the body of your comment. Also include this contact information on the outside of any disk or CD–ROM you submit, and in any cover letter accompanying the disk or CD–ROM. This ensures that you can be identified as the submitter of the comment and allows EPA to contact you in case EPA cannot read your comment due to technical difficulties or needs further information on the substance of your comment. EPA's policy is that EPA will not edit your comment, and any identifying or contact information provided in the body of a comment will be included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment.

a. EPA Dockets. Your use of EPA's electronic public docket to submit comments to EPA electronically is EPA's preferred method for receiving comments. Go directly to EPA Dockets at *http://www.epa.gov/edocket,* and follow the online instructions for submitting comments. To access EPA's electronic public docket from the EPA Internet Home Page, select ''Information Sources,'' ''Dockets,'' and ''EPA Dockets.'' Once in the system, select ''search,'' and then key in either Docket ID No. A–2002–04 or E-Docket ID No. OAR–2002–0068 (for which A–2002–04 is now a legacy number). The system is an ''anonymous access'' system, which means EPA will not know your identity, e-mail address, or other contact information unless you provide it in the body of your comment.

b. E-mail. Comments may be sent by electronic mail (e-mail) to *a-and-r-docket@epamail.epa.gov,* Attention E-Docket ID No. OAR–2002–0068 (Legacy Docket ID No. A–2002–04). In contrast to EPA's electronic public docket, EPA's e-mail system is not an ''anonymous access'' system. If you send an e-mail comment directly to the Docket without going through EPA's electronic public docket, EPA's e-mail system automatically captures your e-mail address. E-mail addresses that are automatically captured by EPA's e-mail system are included as part of the comment that is placed in the official public docket, and made available in EPA's electronic public docket.

c. Disk or CD–ROM. You may submit comments on a disk or CD–ROM that you mail to the mailing address identified in section I.C.2. These electronic submissions will be accepted in WordPerfect or ASCII file format. Avoid the use of special characters and any form of encryption.

2. By Mail. Send two copies of your comments to: U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Ave., NW., Room: B108, Mail Code: 6102T, Washington, DC 20460, Attention E-Docket ID No. OAR–2002–0068 (Legacy Docket ID No. A–2002–04).

3. By Hand Delivery or Courier. Deliver your comments to: EPA Docket Center, (Air Docket), U.S. Environmental Protection Agency, 1301 Constitution Ave., NW., Room: B108, Mail Code: 6102T, Washington, DC 20460, Attention Docket ID No. A–2002–04. Such deliveries are only accepted during the Docket's normal hours of operation as identified in section I.B.1.

4. By Facsimile. Fax your comments to the EPA Docket Center at (202) 566–1741, Attention Docket ID No. A–2002–0068 (Legacy Docket ID No. A–2002–04).

5. By Phone. You may call and leave oral comments on a public comment phone line. The number is (919) 541–0211. EPA will log and place in E-Docket ID No. OAR–2002–0068 (Legacy Docket ID No. A–2002–04) any comments received through this phone number.

D. How Should I Submit CBI to the Agency?

Do not submit information that you consider to be CBI electronically through EPA's electronic public docket

or by e-mail. Send or deliver information identified as CBI only to the following address: Mr. David Svendsgaard, c/o OAQPS Document Control Officer (C339–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711, Attention E-Docket ID No. OAR–2002–0068 (Legacy Docket ID No. A–2002–04). You may claim information that you submit to EPA as CBI by marking any part or all of that information as CBI. (If you submit CBI on disk or CD–ROM, mark the outside of the disk or CD–ROM as CBI and then identify electronically within the disk or CD–ROM the specific information that is CBI.) Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2.

In addition to one complete version of the comment that includes any information claimed as CBI, a copy of the comment that does not contain the information claimed as CBI must be submitted for inclusion in the public docket and EPA's electronic public docket. If you submit the copy that does not contain CBI on disk or CD–ROM, mark the outside of the disk or CD–ROM clearly that it does not contain CBI. Information not marked as CBI will be included in the public docket and EPA's electronic public docket without prior notice. If you have any questions about CBI or the procedures for claiming CBI, please consult the person identified in the **FOR FURTHER INFORMATION CONTACT** section.

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

You may find the following suggestions helpful for preparing your comments.

- Explain your views as clearly as possible.
- Describe any assumptions that you used.
- Provide any technical information and/or data you used that support your views.
- If you estimate potential burden or costs, explain how you arrived at your estimate.
- Provide specific examples to illustrate your concerns.
- Offer alternatives.
- Make sure to submit your comments by the comment period deadline identified.
- To ensure proper receipt by EPA, identify the appropriate docket identification number in the subject line on the first page of your response. It would also be helpful if you provided the name, date, and **Federal Register** citation related to your comments.

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

The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning the issues raised in this notice. Persons interested in attending or presenting oral testimony are encouraged to register in advance by contacting Ms. Chandra Kennedy, OAQPS, Integrated Implementation Group, Information Transfer and Program Integration Division (C339–03), U.S. Environmental Protection Agency, Research Triangle Park, NC 27711; telephone number (919) 541–5319 or e-mail kennedy.chandra@epa.gov no later than July 19, 2004. Presentations will be limited to 5 minutes each. We will assign speaking times to speakers who make a timely request to speak at the hearing. We will notify speakers of their assigned times by July 26, 2004. We will attempt to accommodate all other persons who wish to speak, as time allows.

The EPA's planned seating arrangement for the hearing is theater style, with seating available on a first come first served basis for about 250 people. Attendees should note that the use of pickets or other signs will not be allowed on hotel property.

As of the date of this announcement, the Agency intends to proceed with the hearing as announced; however, unforeseen circumstances may result in a postponement. Therefore, members of the public who plan to attend the hearing are advised to contact Ms. Chandra Kennedy at the above referenced address to confirm the location and date of the hearing. You may also check our New Source Review Web site at *http://www.epa.gov/nsr* for any changes in the date or location.

The record for this action will remain open until 30 days after the public hearing date, or the deadline for public comments, whichever is later to accommodate submittal of information related to the public hearing.

G. Where Can I Obtain Additional Information?

In addition to being available in the docket, an electronic copy of today's notice is also available on the World Wide Web through the Technology Transfer Network (TTN). Following signature by the EPA Administrator, a copy of today's notice will be posted on the TTN's policy and guidance page for newly proposed or promulgated rules at *http://www.epa.gov/ttn/oarpg*. The TTN provides information and technology exchange in various areas of air pollution control. If more information regarding the TTN is needed, call the TTN HELP line at (919) 541–5384.

H. How Is This Preamble Organized?

The information presented in this preamble is organized as follows:

I. General Information
A. What Are the Regulated Entities?
B. How Can I Get Copies of This Document and Other Related Information?
1. Docket
2. Electronic Access
C. How and To Whom Do I Submit Comments?
1. Electronically
2. By Mail
3. By Hand Delivery or Courier
4. By Facsimile
5. By Phone
D. How Should I Submit CBI to the Agency?
E. What Should I Consider as I Prepare My Comments for EPA?
F. What Information Should I Know About the Public Hearing?
G. Where Can I Obtain Additional Information?
H. How is This Preamble Organized?
II. Background
A. ERP and PSD FIP Rulemakings
B. Reconsideration Petitions
C. Schedule for Reconsideration
III. Discussion of Issues
A. Legal Basis
B. The 20 Percent Replacement Cost Threshold
C. Revisions to the Format for Incorporating the PSD FIP Into State Plans
IV. Statutory and Executive Order Reviews
A. Executive Order 12866—Regulatory Planning and Review
B. Executive Order 13132—Federalism
C. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments
D. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks
E. Paperwork Reduction Act
F. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 *et seq.*
G. Unfunded Mandates Reform Act of 1995
H. National Technology Transfer and Advancement Act of 1995
I. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use
J. Executive Order 12988—Civil Justice Reform
V. Statutory Authority

II. Background

A. ERP and PSD FIP Rulemakings

On October 27, 2003, EPA published the Equipment Replacement Provision (''ERP'') amendments to its regulations implementing the major NSR requirements of the CAA. The ERP amended the exclusion from major NSR for ''routine maintenance, repair, and

replacement'' (''RMRR'') activities at existing major sources. For background on NSR, RMRR, and the ERP, please see the notice promulgating the ERP, especially sections II, ''Background,'' and III.A, ''Equipment Replacement Provision—Overview and Justification for Today's Final Action.'' 68 FR 61248, 61249—52 (Oct. 27, 2003). Several parties sought judicial review of the ERP in the U.S. Court of Appeals for the District of Columbia Circuit. See *State of New York* v. *EPA,* No. 03–1380 and consolidated cases (DC Cir.). As a result of a court order, the ERP is ''stayed'' (*i.e.*, not in effect) until the court decides this case.

On December 24, 2003, EPA published a rule amending the PSD provisions of state programs that did not have approved state rules for PSD. 68 FR 74483. In each of these states, EPA previously had made the area subject to the PSD rules in 40 CFR 52.21, the Federal Implementation Plan (''FIP'') for PSD. Please see 68 FR 74483 (December 24, 2003), for additional background on this rule. Parties have also sought judicial review of this rule, and their petitions for review have been consolidated with the challenges to ERP.

B. Reconsideration Petitions

On December 24, 2003, petitioners [1] asked EPA to reconsider three aspects of the Equipment Replacement Provision that we published on October 27, 2003. Specifically, the petitioners assert that our legal basis for the ERP is flawed, the basis for the 20 percent ERP cost threshold is arbitrary and capricious, and EPA has retroactively applied the ERP. On January 16, 2004, a subset of the petitioners on the ERP rule filed a petition for reconsideration of the December 24, 2003 rule that incorporated the ERP into the FIP portion of a State plan where the State does not have an approved PSD State Implementation Plan (SIP). This petition reiterated the issues raised in the December 24, 2003 petition concerning the ERP. On February 23, 2004, a group of states and the District of Columbia filed a petition for reconsideration of the December 24, 2003 rule. This petition raised two issues. First, it asked for reconsideration on whether EPA needed to make a finding of deficiency for the PSD portions of each SIP before it amended the incorporation of the PSD FIP into the state plans. Second, it challenged whether EPA needed to provide an opportunity for comment on the revised format for incorporating the PSD FIP into state plans, which would automatically update the state plans whenever EPA amended the PSD FIP.

We have decided to grant reconsideration and request comment on three issues raised by petitioners—specifically, the contentions that our legal basis is flawed, that our selection of 20 percent for the cost limit is arbitrary and capricious and lacks sufficient record, and that we should provide an opportunity for comment on the revised format for incorporating the PSD FIP into state plans. Without prejudging the information that will be provided in response to this notice, we note that, to date, petitioners have not provided information which persuades us that our final decisions are erroneous or inappropriate. While we do not agree with Petitioners' claims, we have decided to grant reconsideration on these issues because of the importance EPA attaches to ensuring that all have ample opportunity to comment. Each of these issues is described in detail below.

C. Schedule for Reconsideration

Our final decision on reconsideration for all the issues in the petitions for reconsideration will be issued no later than the date by which we take final action on the issues with respect to which we have decided to grant reconsideration. We plan to take final action on all issues approximately 180 days after publication of today's notice.

III. Discussion of Issues

A. Legal Basis

As set forth in the preamble to the final rule, we have ample legal authority for our final ERP rule. See 68 FR 61268–73. It is a basic tenet of administrative law that expert agencies have discretion to interpret ambiguous statutory terms. *Chevron, U.S.A. Inc.* v. *NRDC,* 467 U.S. 837 (1984). That is exactly what we did in the ERP. NSR applies to new and ''modified'' sources. The CAA defines ''modification'' as ''any physical *change* in, or *change* in the method of operation of, a stationary source which increases the amount any air pollutant emitted from such source of which results in the emission of any air pollutant not previously emitted.'' CAA sec. 111(a)(4) (emphasis added); CAA sec. 169(2)(C); CAA sec. 171(4). The CAA does not, however, define ''change.'' We historically have understood ''change'' as not including, among other things, ''routine maintenance, repair, and replacement'' of existing sources. See 40 CFR 51.165(a)(1)(v)(C)(1); 40 CFR 51.166(b)(2)(iii)(a); 40 CFR 52.21(b)(2)(iii)(a). But prior to our ERP rule, our regulations did not provide any further definition of RMRR. Our ERP rule was an exercise of our Chevron authority to do so and create a bright line to assist in determining whether certain activities qualify as RMRR.

Petitioners allege that we did not afford an adequate opportunity to comment on the legal basis for our ERP rule. To support their claim, petitioners point to the difference in the length of the legal analysis discussion in the final rule as compared to the proposed rule. We disagree with petitioners' assertion, and believe that commenters had sufficient notice and opportunity to comment on the legal basis for the rule, as indicated by the many comments we actually received on the issue. Nevertheless, we have decided to solicit additional comments on this question, and refer interested persons to the preamble to the proposed rule and section III. N of the final rule. 68 FR 61268–73.

We have received numerous comments regarding our legal authority to promulgate the ERP rule. Some commenters suggested that an ERP rule was justified under a ''Chevron I'' analysis, since the statute, in their estimation, is clear on its face that replacement of equipment with its functional equivalent is not a ''change.'' Others cited our *de minimis* authority, as articulated in *Alabama Power Co.* v. *Costle,* 606 F.2d 323, 360–61 (D.C. Cir. 1979). Commenters argued that the ERP rule was within our recognized authority to establish ''bright lines'' to reduce regulatory cost or establish certainty. See *Time Warner Entertainment Co. LP* v. *F.C.C.,* 240 F.3d 1126, 1141 (D.C. Cir. 2001). Several commenters questioned whether we have any authority to conclude that any equipment replacements are outside the scope of NSR, and indeed whether the RMRR exclusion itself is permissible, since in their view all such activities constitute ''changes'' as the term is used in the statutory definition of ''modification.'' We invite comment on all of these as well as other possible legal arguments. With respect to the issue of whether the modifier ''any'' in

[1] In this notice, the term ''petitioner'' refers only to those entities that filed petitions for reconsideration. The following parties filed petition for reconsideration of the October 27, 2003 rule: Natural Resources Defense Council, Environmental Defense, Sierra Club, American Lung Association, Communities for a Better Environment, United States Public Interest Research Group, Alabama Environmental Council, Clean Air Council, Group Against Smog and Pollution, Michigan Environmental Council, The Ohio Environmental Council, Scenic Hudson, and Southern Alliance for Clean Energy. A subset of these parties filed a petition to reconsider the December 24, 2003 rule. Several states also filed a petition for reconsideration of the December 24, 2003 rule. They include California, Illinois, Massachusetts, New Jersey, and New York, along with the District of Columbia.

the definition of modification compels the agency to adopt the broadest possible construction of ''physical change,'' we solicit comments on the recent Supreme Court case, *Nixon* v. *Missouri Municipal League,* ____ U.S. ____, 124 S.Ct. 1555, 1561 (2004). That case noted that Congress's understanding of ''any'' can differ depending upon the statutory setting. *Id.*

B. The 20 Percent Replacement Cost Threshold

In the December 31, 2002, proposed rule, EPA solicited comments on the ERP approach. At that time, we solicited comments on a range of possible percentages of cost that could serve as one of the criteria that must be met to qualify for the RMRR–ERP exclusion from NSR. We solicited comment on percentages ranging up to 50 percent, the threshold for reconstruction under the NSPS program. 67 FR at 80301.

In the final rule promulgating the ERP, we presented policy arguments and data analyses supporting 20 percent of replacement costs of a process unit as the threshold cost that would entitle an equipment replacement to qualify automatically as RMRR. 68 FR at 61255–58. In our summary of the basis of the rule, we discussed an analysis of the cost of replacements in six industries outside the electric generating sector. This analysis, which appears in Appendix C to the Regulatory Impact Analysis, was finalized in August of 2003 and is in the docket for this rule. See docket entries OAR–2002–0068–2207 to 2213. Additionally, we examined the cost of the activities at issue in *Wisconsin Electric Power Company* v. *Reilly,* 893 F.2d 901 (7th Cir. 1990) (''*WEPCO*''), and found that they would have exceeded the threshold established by the ERP. We also considered the costs of installing state-of-the-art controls on existing units and the point at which these would likely prevent facilities from replacing equipment necessary to ensure the safe, reliable and efficient operation. Furthermore, we discussed analyses of comments provided by the Utility Air Regulatory Group (''UARG'') and the American Lung Association. See docket entries OAR–2002–0068–1150 and –1213 through –1221.

Petitioners ask that EPA reconsider the 20 percent threshold, and claim that none of EPA's arguments supporting the threshold had appeared in the proposed rule. While the petitioners' claim is overly broad, we nevertheless are soliciting additional comment on the data, our analyses, and the policy considerations supporting the 20 percent threshold. Commenters should refer to section III.C, ''What Cost Limit Has Been Placed on the Equipment Replacement Approach?'' in our final rule for our discussion of the data and our analyses. We invite comment on the matters discussed therein, as well as on the docket entries cited above.

In the course of considering how to proceed with respect to the reconsideration petition on this point, we also thought it might be of some interest to examine whether jurisdictions administering construction building codes use a percentage cost threshold for determining applicability of different requirements and if so, what that threshold might be. Our cursory review indicates that at least some jurisdictions specify a percentage cost threshold for determining what constitutes a building ''improvement,'' and require such improvements to comply with the current code. A common threshold is 50 percent, based on cost of the improvement as compared to the market value of the pre-existing structure. We have placed further information on what we learned from our review on this topic in our docket. See Docket OAR–2002–0068; Document No. 2337. We solicit comment on the accuracy and representativeness of this information and whether it is appropriate to consider approaches used in building code applicability when establishing criteria for RMRR determinations. We also request any new data or approach that supports or rejects a 20 percent cost threshold for the ERP.

C. Revisions to the Format for Incorporating the PSD FIP Into State Plans

The December 24, 2003, final rule revised the PSD provision in each state plan that lacked an approved state regulation concerning PSD. In lieu of an approved PSD SIP, each of these state plans contained a reference incorporating the relevant provisions of 40 CFR 52.21, the PSD FIP, that applied within the state. Prior to the December 24th rule, we incorporated the relevant paragraphs of 40 CFR 52.21 by referring to the range of paragraphs from the first paragraph incorporated to the last paragraph. For example, the March 10, 2003 referred to the incorporated paragraphs of section 52.21 as ''(a)(2) and (b) to (bb).'' This format required updates every time we added paragraphs to section 52.21. These periodic updates introduced the possibility of typographical errors in the CFR and confusion during the period between updates. The December 24th rule adopted a different cross-referencing format—''40 CFR 52.21 except paragraph (a)(1).'' Under the new format, the cross-references would automatically update whenever new sections were added to the PSD FIP.

A group of petitioners seek reconsideration of the new format. We seek comment on the new format for referencing the PSD FIP. We seek comment only on the issue of the new format and its ability to automatically update whenever EPA modifies the PSD FIP. At this time, we do not seek comment on a second issue raised in the petition for reconsideration, which is whether EPA must make a new finding of deficiency regarding the SIP before updating the state plans to reflect the ERP.

IV. Statutory and Executive Order Reviews

On October 27, 2003, we finalized rule changes to the regulations governing the NSR programs mandated by parts C and D of title I of the Act. With today's action we are proposing no changes to the final rules, and are seeking additional comments on some of the provisions finalized in the October 2003 **Federal Register** notice (68 FR 61248). Accordingly, we believe that the rationale provided with the final rules is still applicable and sufficient.

A. Executive Order 12866—Regulatory Planning and Review

Under Executive Order 12866 [58 FR 51735 (October 4, 1993)], we must determine whether the regulatory action is ''significant'' and therefore subject to review by the Office of Management and Budget (OMB) and the requirements of the Executive Order. The Executive Order defines ''significant regulatory action'' as one that is likely to result in a rule that may:

(1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs, or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, OMB has notified us that

it considers this a ''significant regulatory action'' within the meaning of the Executive Order. We have submitted this action to OMB for review. Changes made in response to OMB suggestions or recommendations will be documented in the public record. All written comments from OMB to EPA and any written EPA response to any of those comments are included in the docket listed at the beginning of this notice under **ADDRESSES.**

B. Executive Order 13132—Federalism

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

Today's action does not have federalism implications. Nevertheless, as described in section II.C of the October 27, 2003 notice, in developing the ERP, we consulted with affected parties and interested stakeholders, including State and local authorities, to enable them to provide timely input in the development of this rule. Today's action will not have substantial direct effects on the States, on the relationship between the national government and the State and local programs, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. We expect the ERP will result in some expenditures by the States, we expect those expenditures to be limited to $580,000 for the estimated 112 affected reviewing authorities. This estimate reflects the small increase in burden imposed upon reviewing authorities in order for them to revise their State Implementation Plans (SIP). However, this revision provides sources permitted by the States greater certainty in application of the program, which should in turn reduce the overall burden of the program on State and local authorities. Thus, the requirements of Executive Order 13132 do not apply to this rule.

C. Executive Order 13175—Consultation and Coordination With Indian Tribal Governments

Executive Order 13175, entitled ''Consultation and Coordination with Indian Tribal Governments'' (65 FR 67249, November 6, 2000), requires EPA to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.'' We believe that this rule does not have tribal implications as specified in Executive Order 13175. Thus, Executive Order 13175 does not apply.

The purpose of the ERP is to add greater flexibility to the existing major NSR regulations. These changes will benefit reviewing authorities and the regulated community, including any major source owned by a tribal government or located in or near tribal land, by providing increased certainty as to when the requirements of the major NSR program apply. Taken as a whole, the ERP should result in no added burden or compliance costs and should not substantially change the level of environmental performance achieved under the previous rules and guidance.

We anticipate that initially these changes will result in a small increase in the burden imposed upon reviewing authorities in order for them to be included in the State's SIP. Nevertheless, these options and revisions will ultimately provide greater operational flexibility to sources permitted by the States, which will in turn reduce the overall burden on the program on State and local authorities by reducing the number of required permit modifications. In comparison, no tribal government currently has an approved Tribal Implementation Plan (TIP) under the CAA to implement the NSR program. The Federal government is currently the NSR reviewing authority in Indian country. Thus, tribal governments should not experience added burden, nor should their laws be affected with respect to implementation of this rule. Additionally, although major stationary sources affected by the ERP could be located in or near Indian country and/or be owned or operated by tribal governments, such affected sources would not incur additional costs or compliance burdens as a result of this rule. Instead, the only effect on such sources should be the benefit of the added certainty and flexibility provided by the rule.

We recognize the importance of including tribal outreach as part of the rulemaking process. In addition to affording tribes an opportunity to comment on the ERP, on which two tribes did submit comments, we have also alerted tribes of this action through our Web site and quarterly newsletter. EPA specifically solicits additional comments on today's notice from tribal officials.

D. Executive Order 13045—Protection of Children From Environmental Health Risks and Safety Risks

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

This notice is not subject to Executive Order 13045, because it is not economically significant as defined under Executive Order 12866 and because we do not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children.

E. Paperwork Reduction Act

This action does not impose any new information collection burden. We are not proposing any new paperwork (*e.g.*, monitoring, reporting, recordkeeping) as part of today's notice. With this action we are seeking additional comments on some of the provisions finalized in two **Federal Register** notices, the ERP (68 FR 61248 (Oct. 27, 2003)), and the related FIP update (68 FR 74483 (Dec. 24, 2003)). However, the information collection requirements in the ERP have been submitted for approval to OMB under the requirements of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* An ICR document has been prepared by EPA (ICR No. 1230.14), and a copy may be obtained from Susan Auby, U.S. Environmental Protection Agency, Office of Environmental Information, Collection Strategies Division (2822T), 1200 Pennsylvania Avenue, NW., Washington, DC 20460–0001, by e-mail at *auby.susan@epa.gov,* or by calling (202) 566–1672. A copy may also be downloaded off the Internet at *http://www.epa.gov/icr.* The information requirements included in ICR No. 1230.14 are not enforceable until OMB approves them.

The information that ICR No. 1230.14 covers is required for the submittal of a complete permit application for the construction or modification of all major new stationary sources of pollutants in

attainment and nonattainment areas, as well as for applicable minor stationary sources of pollutants. This information collection is necessary for the proper performance of EPA's functions, has practical utility, and is not unnecessarily duplicative of information we otherwise can reasonably access. We have reduced, to the extent practicable and appropriate, the burden on persons providing the information to or for EPA. In fact, we feel that this rule will result in less burden on industry and reviewing authorities since it streamlines the process of determining whether a replacement activity is RMRR.

However, according to ICR No. 1230.14, we do anticipate an initial increase in burden for reviewing authorities as a result of the rule changes, to account for revising state implementation plans to incorporate these rule changes. As discussed above, we expect those one-time expenditures to be limited to $580,000 for the estimated 112 affected reviewing authorities. For the number of respondent reviewing authorities, the analysis uses the 112 reviewing authorities count used by other permitting ICR's for the one-time tasks (for example, SIP revisions).

Burden means the total time, effort, or financial resources expended by persons to generate, maintain, retain, or disclose or provide information to or for a Federal agency. This includes the time needed to review instructions; develop, acquire, install, and utilize technology and systems for the purpose of responding to the information collection; adjust existing ways to comply with any previously applicable instructions and requirements; train personnel to respond to a collection of information; search existing data sources; complete and review the collection of information; and transmit or otherwise disclose the information.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. The OMB control numbers for EPA's regulations are listed in 40 CFR part 9 and 48 CFR chapter 15. We will continue to present OMB control numbers in a consolidated table format to be codified in 40 CFR part 9 of the Agency's regulations, and in each CFR volume containing EPA regulations. The table lists the section numbers with reporting and recordkeeping requirements, and the current OMB control numbers. This listing of the OMB control numbers and their subsequent codification in the CFR satisfy the requirements of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and OMB's implementing regulations at 5 CFR part 1320.

F. Regulatory Flexibility Act (RFA), as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), 5 U.S.C. 601 et seq.

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

For purposes of assessing the impacts of the ERP on small entities, small entity is defined as: (1) Any small business employing fewer than 500 employees; (2) a small governmental jurisdiction that is a government of a city, county, town, school district or special district with a population of less than 50,000; and (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of today's action on small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities. In determining whether a rule has a significant economic impact on a substantial number of small entities, the impact of concern is any significant adverse economic impact on small entities, since the primary purpose of the regulatory flexibility analyses is to identify and address regulatory alternatives ''which minimize any significant economic impact of this rule on small entities.'' 5 U.S.C. 603 and 604. Thus, an agency may conclude that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, or otherwise has a positive economic effect on all of the small entities subject to the rule. The ERP will not have a significant economic impact on a substantial number of small entities because it will decrease the regulatory burden of the existing regulations and have a positive effect on all small entities subject to the rule. The ERP improves operational flexibility for owners or operators of major stationary sources and clarifies applicable requirements for determining if a change qualifies as a major modification. We have therefore concluded that the ERP will relieve regulatory burden for all small entities. We do not expect that today's action will change our overall assessment of regulatory burden so substantially as to result in a significant adverse impact on any source. As a result, we do not expect that today's action will result in a significant adverse impact on any entity.

We continue to be interested in the potential impacts of today's action on small entities and welcome comments on issues related to such impacts.

G. Unfunded Mandates Reform Act of 1995

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104–4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of UMRA, we generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with ''Federal mandates'' that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector of $100 million or more in any one year. Before promulgating an EPA rule for which a written statement is needed, section 205 of the UMRA generally requires us to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective or least burdensome alternative that achieves the objectives of the rule. The provisions of section 205 do not apply when they are inconsistent with applicable law. Moreover, section 205 allows us to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the Administrator publishes with the final rule an explanation why that alternative was not adopted.

Before we establish any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, we must have developed under section 203 of the UMRA a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of our regulatory proposals with significant Federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We believe the ERP will actually reduce the regulatory burden associated with the major NSR program by improving the operational flexibility of owners or operators and clarifying the

requirements. Because we are proposing no changes to the final rule, we believe that the same is true for today's notice. Because the program changes provided in the rule are not expected to result in a significant increase in the expenditure by State, local, and tribal governments, or the private sector, we have not prepared a budgetary impact statement or specifically addressed the selection of the least costly, most cost-effective, or least burdensome alternative. Because small governments will not be significantly or uniquely affected by this rule, we are not required to develop a plan with regard to small governments. Therefore, this rule is not subject to the requirements of section 203 of the UMRA.

H. National Technology Transfer and Advancement Act of 1995

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs us to use voluntary consensus standards (VCS) in our regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. VCS are technical standards (for example, materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. The NTTAA directs us to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable VCS.

Although the ERP does involve the use of technical standards, it does not preclude the State, local, and tribal reviewing agencies from using VCS. The ERP is an improvement of the existing NSR permitting program. As such, it only ensures that promulgated technical standards are considered and appropriate controls are installed, prior to the construction of major sources of air emissions. Therefore, we are not considering the use of any VCS in the ERP.

I. Executive Order 13211—Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This notice is not a ''significant energy action'' as defined in Executive Order 13211, ''Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use'' (66 FR 28355 (May 22, 2001)) because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

The ERP improves the ability of sources to maintain the reliability of production facilities, and effectively utilize and improve existing capacity.

J. Executive Order 12988—Civil Justice Reform

Neither the ERP nor today's action has any preemptive or retroactive effect. This action meets applicable standards in sections 3(a) and 3(b)(2) of Executive Order 12988, Civil Justice Reform, to minimize litigation, eliminate ambiguity, and reduce burden.

V. Statutory Authority

The statutory authority for this action is provided by sections 101, 111, 114, 116, and 301 of the CAA as amended (42 U.S.C. 7401, 7411, 7414, 7416, and 7601). This rulemaking is also subject to section 307(d) of the CAA (42 U.S.C. 7407(d)).

List of Subjects in 40 CFR Parts 51 and 52

Environmental protection, Administrative practices and procedures, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: June 28, 2004.

Michael O. Leavitt,

Administrator.

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