ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 55

[FRL–5880–6]

RIN 2060–AG40 and AG39

Outer Continental Shelf Air Regulations Remands

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is revising the outer continental shelf (OCS) air regulations in response to two remands from the U.S. Court of Appeals for the District of Columbia Circuit. These regulations establish air pollution control requirements for certain sources located on the OCS.

In response to the requirements of section 328 of the Clean Air Act (Act), on September 4, 1992, EPA promulgated the OCS regulations setting up two regimes for controlling air pollution from OCS sources for the purposes of attaining and maintaining Federal air quality standards and to comply with certain Act requirements for preconstruction review of new and modified major sources on the OCS. The Santa Barbara County Air Pollution Control District (APCD) filed a petition for review of the regulations on several issues and the Court granted a remand on two of those issues.

The first issue raised concerned EPA's decision not to provide for delegation to State and local agencies of the authority to implement and enforce the regulations for sources located beyond 25 miles of the States' seaward boundaries (the 25-mile limit). The EPA requested a voluntary remand of this issue, and the court granted the remand. On May 20, 1996, EPA proposed revisions to the OCS regulations to provide for delegation to State and local agencies the authority to implement and enforce the OCS regulations beyond the 25-mile limit. By this action, EPA is promulgating those regulations. Delegation of the program to any specific State or local agency will be under separate action.

The Santa Barbara APCD also challenged the portion of the OCS regulations that set up special offset requirements for OCS sources located within the 25-mile limit. Upon review, the court found that the special offset provisions departed from the Act, vacated the regulation in part, and remanded that portion to EPA for further consideration.

On May 20, 1996, EPA promulgated revisions to the OCS regulations to delete the special offset provisions and to require that for sources located within the 25-mile limit, offset requirements apply as they are required in the corresponding onshore area (COA). The EPA promulgated these revisions as an interim final regulation and requested comments on the revisions. Today's action removes the interim status of those regulations.

DATES: The revisions to the regulations will be effective October 2, 1997.

ADDRESSES: Two public dockets for these actions are available for public inspection and copying between 8 a.m. and 4 p.m., Monday through Friday, at the Air and Radiation Docket and Information Center (6102), Attention Docket A–95–06 (for the Offset Remand) and Docket A–95–07 (for the delegation remand), South Conference Center, Room 4, 401 M Street, SW, Washington, DC 20460. A reasonable fee for copying may be charged.

FOR FURTHER INFORMATION CONTACT: Mr. David Stonefield, U.S. EPA, MD–15, Research Triangle Park, NC 27711, telephone (919) 541–5350.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

The 1990 Amendments to the Act (Pub. L. 101–549, 104 Stat. 2399 (1990)) added section 328 and transferred authority to regulate sources on part of the OCS from the Department of the Interior (DOI) to EPA. The DOI retained the authority to regulate OCS sources in the Gulf of Mexico, west of 87.5 degrees longitude. As to the remaining portions of the OCS—the Atlantic, Pacific, and Arctic coasts and the Gulf of Mexico, east of 87.5 degrees—section 328 requires EPA to establish requirements for the control of air pollution from OCS sources for attaining and maintaining Federal and State ambient air quality standards, and to comply with the prevention of significant deterioration (PSD) provisions of part C of title I of the Act. For sources within 25 miles of the States' seaward boundaries, those requirements must be the same as would be applicable if the source were located in the COA. For sources beyond the 25-mile limit, the Administrator had discretion in determining the requirements. The EPA proposed (56 FR 63774, December 5, 1991) and promulgated (57 FR 40792, September 4, 1992) regulations to implement the requirements of section 328. The regulations require, among other things, that sources located beyond 25 miles of States' seaward boundaries meet applicable Federal pollution control requirements which include PSD, new source performance standards (NSPS), and national emission standards for hazardous air pollutants (NESHAP) regulations to the extent that they are rationally related to protection of air quality standards or part C of title I of the Act (40 CFR 55.13).

B. Delegation Authority

Section 328(a)(3) of the Act permits States adjacent to an OCS source to adopt and submit to EPA regulations for implementing and enforcing the requirements of that section. It requires that:

> (i)f the Administrator (of EPA) finds that the State regulations are adequate, the Administrator shall delegate to that State any authority the Administrator has under this Act to implement and enforce such requirements.

Therefore, EPA included § 55.11 in the OCS regulations to authorize the delegation of the implementation and enforcement authority to State and local agencies for OCS sources that are located within the 25-mile limit. The EPA did not provide for the delegation of the implementation and enforcement authority for sources beyond the 25-mile limit. (See the preamble to the proposed regulatory revision, 61 FR 25173, May 20, 1996, for further information on the background of this issue.)

C. Offset Provision

Generally, in nonattainment areas, a new source or existing source undergoing modification which results in increased emissions must secure emission reductions of an equal or greater amount from existing sources in that area to ''offset'' its new emissions. In promulgating the OCS regulations, EPA required that OCS sources obtain offsets based on the requirements imposed in the COA and in accordance with special offset requirements for OCS sources that EPA established in 40 CFR 55.5(d). The EPA set up three zones based upon where the offsets were obtained and applied the offset program differently in each. Offsets obtained seaward of the proposed source, zone 1, were subject to the requirements of the COA including any distance penalty or discount. Offsets obtained between the proposed source and the State's seaward boundary, zone 2, were subject to the offset ratio of the COA but not any distance penalties or discounts. Offsets obtained on the landward side of the State's seaward boundary, zone 3, were subject to the requirements of the COA including any distance penalty or discount, but for the purpose of determining the distance from the source to the offset emissions, the

proposed source was assumed to be located at the State's seaward boundary (40 CFR 55.5(d) and 57 FR 40796). (See the preamble to the interim final regulation, 61 FR 25149, May 20, 1996, for further information on the background of this issue.)

D. Judicial Review

On November 2, 1992, the Santa Barbara County APCD filed a petition for review of the OCS regulations with the U.S. Court of Appeals for the District of Columbia Circuit (*Santa Barbara County Air Pollution Control District* v. *EPA*, 31 F. 3rd 1179 (D.C. Cir., 1994)). One of the issues that the Santa Barbara County APCD raised was EPA's failure to provide for delegation of the authority to implement and enforce the OCS regulations for sources located beyond 25 miles from a State's seaward boundary. Another issue raised by the Santa Barbara County APCD petition involved the regulatory offset provisions for OCS sources.

In reviewing the delegation issue, EPA determined that section 328 of the Act requires it to delegate ''any'' authority the EPA has under the Act to implement and enforce the requirements of section 328(a) if it determines that the State government has adequate regulations. Therefore, EPA requested the court to remand this issue to it for reconsideration. The court granted EPA's voluntary request for a remand.

On August 12, 1994, the Court of Appeals vacated the offset portion of the OCS regulations as it applied to zones 2 and 3, finding that EPA should promulgate the same offset requirements for OCS sources as would be applicable if the OCS sources were located in the COA. The court remanded the provision to EPA for further consideration (*Santa Barbara* 31 F. 3rd at 1181–82).

II. Response to the Delegation Remand

A. Proposed Revisions to the Regulations

On May 20, 1996 at 61 FR 25173, EPA proposed to revise the OCS regulations to provide for the delegation authority to implement and enforce the regulations for sources located beyond the 25-mile limit. The EPA proposed revisions to specific language in §§ 55.3(c), 55.6(d), and 55.11(a) to allow for such delegation. In addition, EPA proposed revisions in the wording of other sections to clarify the regulations as they pertain to the delegation of authority for sources located beyond the 25-mile limit. The specific regulatory changes proposed included revisions to § 55.2 (definition of nearest onshore area) and the addition of § 55.11(j) (exercising delegation authority).

The EPA rescinded that preamble language which specifically stated that delegation beyond the 25-mile limit is unacceptable (57 FR 40794, 40797, 40801, and 40802).

B. Response to Public Comments

The EPA received one comment in response to its proposed regulatory change. The Minerals Management Service (MMS) of the DOI expressed one general concern and raised three issues about specific wording in the notice and the proposed regulations. The general concern involved the precedent established by delegating to State and local agencies the authority to control sources located up to 200 miles off the shore. The EPA understands MMS' concern about the potential precedent of delegating the implementation and enforcement authority for sources located on the OCS, however, the Act clearly states that EPA must allow such delegation. Although sources locating beyond the 25-mile limit are only subject to the Federal regulations developed and promulgated by EPA, many State and local districts already have the authority to implement and enforce those regulations onshore and within the State's seaward boundary. Therefore, many State and local agencies have already demonstrated their ability to implement and enforce these Federal regulations.

One of the specific wording issues raised by MMS concerned an apparent discrepancy between the preamble language and the Act's language. In the preamble to the proposed regulations, EPA stated ''[s]ources located within 25 miles of the States' seaward boundaries (the 25-mile limit) must comply with the regulations which are, *in most respects*, the same as the regulations for similar sources located onshore'' (emphasis added). While the Act states that the '' * * * those requirements *must be the same as* would be applicable if the source were located in the corresponding onshore area * * *'' (emphasis added). Although, as MMS pointed out, the CAA uses the phrase ''must be the same as,'' it also provides for exemptions based on health and safety considerations. Furthermore, as provided in the preamble to the OCS regulations, EPA has the authority not to promulgate State or locally-adopted rules which it determines are arbitrary and capricious (57 FR 40802). While these exceptions from enforcing all COA requirements are few in number, EPA is justified in using the phrase ''in most respects.''

The MMS also suggests revisions in the wording of proposed §§ 55.6(d)(2) and 55.11(a). Specifically, MMS identified a typographical error in proposed § 55.6(d)(2) and suggested numbering the phrases in § 55.11(a) to clarify that there are two types of delegations, one for sources located within the 25-mile limit and one for sources located beyond that limit. In both cases, the wording of the final rules has been revised consistent with MMS's comments.

C. Today's Action

Except for the minor clarifications to the wording of the regulations as discussed above, EPA is promulgating the revisions to the delegation provisions of the OCS regulations as they were proposed.

III. Response to the Offset Remand

A. Revisions to the Regulations

The EPA addressed the court's August 12, 1994 decision by promulgating an interim final rule revising the offset provision that applies to OCS sources (61 FR 25149, May 20, 1996). Because the court vacated the existing regulations as they apply to zones 2 and 3, and created a gap in continuity of the regulation, EPA, under provisions of the Administrative Procedure Act (APA) (5 U.S.C. 553(b)(B)), promulgated final rules without prior notice and an opportunity for comment. The EPA did, however, provide the public with the opportunity to comment on this interim final action. The EPA committed to reevaluating its decision in light of any comments received during the comment period and taking a subsequent final action.

B. Response to Public Comments

The EPA received one comment on the interim final regulation. The Santa Barbara County APCD supported and agreed with EPA's action. However, the APCD also criticized EPA's estimated costs for complying with the revised regulations. The APCD noted that the cost for obtaining the required offsets was overstated, and APCD provided examples of lower costs offsets. The EPA agrees that the cost may have been overstated, but the estimations were made as a rough measure as to whether this action should be considered as a major rule. Since the estimates were far below the minimum levels for a major rule, no further refinement of the estimates were or are necessary.

C. Today's Action

In light of the favorable comment to its interim final rule regarding offsets, EPA finds that the interim rule does not

need revision, and thus, is revoking the interim status of the rule, effective 30 days following publication of this action in the **Federal Register**.

IV. Administrative Requirements

A. Review by the Office of Management and Budget

Under Executive Order 12866 (58 FR 51735 (October 4, 1993)) the Agency must determine whether the regulatory action is ''significant'' and therefore subject to OMB review and the requirements of the Executive Order. The 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.

Because the OCS sources would be regulated by two Federal agencies, EPA and DOI, EPA submitted the May 20, 1996 proposed regulation concerning the delegation remand and the interim final regulation concerning the offset remand to Office of Management and Budget (OMB) for review. Changes made in response to OMB suggestions or recommendations are documented in the public dockets. However, since EPA received minimum public comments on the notices, made no substantive changes in the delegation remand notice and is not revising the offset interim rules, this final rule was considered not significant by the OMB.

B. Unfunded Mandates Act

Section 202 of the Unfunded Mandates Reform Act of 1995 requires that EPA prepare a budgetary impact statement before promulgating a rule that includes a Federal mandate that may result in expenditures by State, local, and tribal governments, in aggregate, or by the private sector, of $100 million or more in any 1 year. Section 203 requires EPA to establish a plan for obtaining input from, informing, educating, and advising any small governments that may be significantly or uniquely affected by the rule.

Under section 205 of the Unfunded Mandates Reform Act, EPA must identify and consider a reasonable number of regulatory alternatives before promulgating a rule for which a budgetary impact statement must be prepared. The EPA must select from those alternatives the least costly, most cost-effective, or least burdensome alternative that achieves the objective of the rule, unless EPA explains why a particular alternative is not selected or the selection of a particular alternative is inconsistent with law.

EPA has determined that this rule does not impose any new mandates on State, local, or tribal governments, and the rule is estimated to result in the expenditures by State, local, and tribal governments or the private sector of less that $100 million in any one year. Thus, today's rule is not subject to the requirements of section 202 and 205 of UMRA. Because small governments will not be significantly or uniquely affected by this rule, this rule is not subject to the requirements of section 203. However, EPA will work with eligible State and local air pollution control agencies to assist them in requesting delegation of authority to implement and enforce the OCS regulations.

C. Paperwork Reduction Act

These rule revisions do not contain any information collection requirements subject to review by the OMB under the Paperwork Reduction Act, 44 U.S.C. 3501, *et seq.*

D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA), as amended in 1996, requires Federal agencies to identify potentially adverse impacts of Federal rules upon small entities. Small entities include small businesses, organizations, and governmental jurisdictions. In instances where a rule would create a significant economic impact on a substantial number of these entities, agencies are required to perform a regulatory flexibility analysis. These revisions to the OCS regulations do not, in themselves, impose any requirements on small entities, nor require or exclude small entities from meeting the requirements of the OCS regulations. As a result, EPA has determined that these revisions will not have a significant impact on a substantial number of small entities. Therefore, as required under section 605 of the RFA, 5 U.S.C. 605, I certify that these revisions do not have a significant impact on a substantial number of small entities.

E. Petition for Judicial Review

Under section 307(b)(1)of the Act, 42 U.S.C. 7607(b)(1), petitions for judicial review of these actions must be filed in the United States Court of Appeals for the District of Columbia Circuit by November 3, 1997. Filing petitions for reconsideration of these final rules by the Administrator does not affect the finality of these rules for the purpose of judicial review nor does it extend the time within which a petition for judicial review may be filed and shall not postpone the effectiveness of such rule or action. These actions may not be challenged later in proceedings to enforce the requirements.

F. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1)(A), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing these rules and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication in the **Federal Register**. These rules are not ''major rules'' as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 55

Environmental protection, Administrative practice and procedures, Air pollution control, Continental shelf, Intergovernmental relations, Nitrogen oxides, Ozone, Reporting and recordkeeping requirements, Sulfur oxides.

Dated: August 18, 1997.

Carol M. Browner,

Administrator.

For reasons set out in the preamble, 40 CFR part 55 is amended as follows:

PART 55—OUTER CONTINENTAL SHELF AIR REGULATIONS

1. The authority citation for part 55 continues to read as follows:

Authority: Sec. 328 of the Clean Air Act (42 U.S.C. 7401, *et seq.*) as amended by Pub. L. 101–549.

§ 55.2 [Amended]

2. In § 55.2 the definition of ''Nearest Onshore Area (NOA)'' is amended by adding a comma after ''OCS source'' and removing the words ''located within 25 miles of the States' seaward boundary,''.

3. Section 55.3 is amended by revising paragraph (c) to read as follows:

§ 55.3 Applicability.

* * * * *

(c) The OCS sources located beyond 25 miles of States' seaward boundaries shall be subject to all the requirements

of this part, except the requirements of §§ 55.4, 55.5, 55.12 and 55.14 of this part.

* * * * *

4. Section 55.6 is amended by revising paragraph (d)(2) to read as follows:

§ 55.6 Permit requirements.

* * * * *

(d) * * *

(2) The Administrator or delegated agency shall not issue a permit-to-operate to any existing OCS source that has not demonstrated compliance with all the applicable requirements of this part.

* * * * *

5. Section 55.11 is amended by revising paragraph (a) and by adding paragraph (j) to read as follows:

§ 55.11 Delegation.

(a) The governor or the governor's designee of any State adjacent to an OCS source subject to the requirements of this part may submit a request, pursuant to section 328(a)(3) of the Act, to the Administrator for the authority to implement and enforce the requirements of this OCS program: Within 25 miles of the State's seaward boundary; and/or Beyond 25 miles of the State's seaward boundary. Authority to implement and enforce §§ 55.5, 55.11, and 55.12 of this part will not be delegated.

* * * * *

(j) Delegated authority. The delegated agency in the COA for sources located within 25 miles of the State's seaward boundary or the delegated agency in the NOA for sources located beyond 25 miles of the State's seaward boundary will exercise all delegated authority. If there is no delegated agency in the COA for sources located within 25 miles of the State's seaward boundary, or in the NOA for sources located beyond 25 miles of the State's seaward boundary, the EPA will issue the permit and implement and enforce the requirements of this part. For sources located within 25 miles of the State's seaward boundary, the Administrator may retain the authority for implementing and enforcing the requirements of this part if the NOA and COA are in different States.

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