contacts related to employment services where the seller or telemarketer requests or receives payment prior to providing the promised services, business ventures, investment opportunities, prize promotions, or credit-related programs.

§ 310.7 Actions by States and private persons.

Any attorney general or other officer of a State authorized by the State to bring an action under the Telemarketing and Consumer Fraud and Abuse Prevention Act, and any private person who brings an action under that Act, shall serve written notice of its action on the Commission, if feasible, prior to its initiating an action under this Rule. The notice shall be sent to the Office of the Director, Bureau of Consumer Protection, Federal Trade Commission, Washington, D.C. 20580, and shall include a copy of the State's or private person's complaint and any other pleadings to be filed with the court. If prior notice is not feasible, the State or private person shall serve the Commission with the required notice immediately upon instituting its action.

§ 310.8 Federal preemption.

Nothing in this Rule shall be construed to preempt any State law that is not in direct conflict with any provision of this Rule.

§ 310.9 Severability.

The provisions of this Rule are separate and severable from one another. If any provision is stayed or determined to be invalid, it is the Commission's intention that the remaining provisions shall continue in effect.

By direction of the Commission.

Donald S. Clark,

Secretary.

[FR Doc. 95–3537 Filed 2–13–95; 8:45 am]

BILLING CODE 6750–01–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 63

[AD–FRL–5155–2]

Hazardous Air Pollutants: Provisions Governing Constructed, Reconstructed or Modified Major Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Interpretive notice.

SUMMARY: This notice announces the EPA's revised interpretation of the Clean Air Act's (Act) requirements regarding the effective date of section 112(g) of the Act. The interpretation adopted here postpones the effective date of section 112(g) until after the EPA has promulgated a rule addressing that provision.

EFFECTIVE DATE: February 14, 1995.

FOR FURTHER INFORMATION CONTACT: Ms. Kathy Kaufman at (919) 541–0102, Information Transfer and Program Integration Division (MD–12), U. S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION:

I. Summary of EPA's Policy

The Administrator of the EPA is today announcing the EPA's interpretation of the Act requirements regarding the effective date of section 112(g) during the period prior to promulgation of a Federal rule addressing implementation of that section. This notice effects changes from the view embodied in the preamble to the proposed rulemaking under section 112(g), **Federal Register** notices of proposed and final approvals of operating permits programs under title V of the Act, and in guidance issued by the EPA's Office of Air Quality Planning and Standards (OAQPS).

For the reasons set forth in this notice, the EPA now interprets section 112(g) not to take effect before the EPA issues notice and comment guidance addressing implementation of that section. In the interim period before this guidance is promulgated, States may, as a matter of State law, implement a program for the review of section 112(g) modifications, constructions, or reconstructions. However, the section 112(g) requirement that major source modifications, constructions, or reconstructions meet the maximum achievable control technology (MACT)—as determined on a case-by-case basis where no Federal standard for a source category has been set—will not take effect as a matter of Federal law until the section 112(g) rule is promulgated.

II. Discussion

A. Requirements of Section 112(g). Previous Policy Position

After the effective date of a title V permit program in a State, section 112(g) prohibits any person from constructing or reconstructing a major source of hazardous air pollutants (HAP), or modifying a major HAP's source, without a determination from ''the Administrator (or the State)'' that MACT will be met. The determination must be on a case-by-case basis by ''the Administrator (or the State)'' if no MACT standard has been issued. Section 112(g)(1)(B) also provides that the Administrator ''shall, after notice and opportunity for comment and not later than [May 15, 1992] publish guidance with respect to implementation of this subsection.'' The guidance must address the relative hazard of HAP in a manner ''sufficient to facilitate the offset showing'' allowed in the definition of ''modification.''

The EPA proposed a rule implementing section 112(g) on April 1, 1994 (59 FR 15504). The EPA currently anticipates promulgation of this rule during the summer of 1995. In anticipation of the fact that many title V permit programs would be approved before the section 112(g) rule was promulgated, the OAQPS issued a guidance memorandum on June 28, 1994 [1] to assist States in their implementation of section 112(g) during this transition period. The guidance states that section 112(g) takes effect upon approval of a title V program in a State regardless of whether the EPA's rule has been promulgated. The guidance also offers suggestions for how States may implement section 112(g) during the transition period.

To date, the EPA has approved several title V programs, the first of which was for the State of Washington on November 9, 1994 (59 FR 55813). EPA also has proposed approval of numerous other programs. In each of these notices, the Agency has restated its position that the requirements of section 112(g) would take effect in these States upon approval of the title V program, and has described its understanding of how section 112(g) would be implemented in that State during the transition period.

B. Reconsideration Based on Concerns Raised

States and the regulated community have voiced considerable concern with the impracticality of implementation of section 112(g) during the transition period.[2] These concerns have focused on the provisions for determining the applicability of section 112(g), and in particular on provisions addressing *de minimis* levels and offsets for modifications, as well as the definition of ''major source'' for constructions and

[1] Guidance for the Initial Implementation of Section 112(g), Memorandum from John S. Seitz to EPA Regional Air Division Directors, June 28, 1994.

[2] For State and regulated community comments submitted on the proposed section 112(g) rule, see Docket Number A–91–64 inserts IV-D–199, IV-D–213, IV-D–217, IV-D–219, IV-D–222, IV-D–229, IV-D–255, IV-D–295, IV-D–323, IV-D–333, IV-D–337, IV-D-PH217, IV-D–199, IV-D–213, IV-D–295, IV-D-PH221, and IV-D-PH222.

reconstructions. States and the regulated community have noted that the applicability of the section 112(g) modification provisions have the potential to vary significantly depending on how these issues are addressed in the final section 112(g) rule, that these provisions are among the most complex and controversial in the section 112(g) proposal, and that implementation of these provisions in the absence of a promulgated rule will present considerable uncertainty and legal and financial risk for States and emissions sources.

After careful consideration, the EPA concludes that these concerns are valid and, as a policy matter, justify re-examining and modifying the Agency's interpretation concerning the effective date of section 112(g). Moreover, the EPA believes it should announce its revised view now, before there is a significant expenditure of State, source, and Agency resources and before questions of source liability are raised. In light of this conclusion, the EPA has revisited its prior legal interpretation that section 112(g) must take effect upon approval of the title V program regardless of whether a rule has been promulgated. These practical difficulties confirm for the Agency the soundness of a reading that implementation of section 112(g) is to be delayed until a rule is promulgated.

C. Analysis of Statutory Requirements for Modifications

On its face, the section 112(g) requirement for case-by-case MACT determination for new major sources, reconstructed sources, and modifications to existing major sources appears to be triggered upon the title V program effective date. However, the Act also calls for guidance ''with respect to the implementation of'' section 112(g) to be issued ''after notice and opportunity for comment and not later than'' May 15, 1992. Section 112(g)(1)(B). Section 112(g)(1)(A) provides further that a greater-than-*de minimis* increase ''shall not be considered a modification'' if it is offset by an equal or greater decrease in a more hazardous pollutant, ''pursuant to guidance issued by the Administrator under subparagraph (B).'' The guidance must specifically ''facilitate the offset showing'' and ''include an identification, to the extent practicable, of the relative hazard to human health resulting from emissions'' of HAP.

Section 112(g) is analogous in certain important respects to statutory provisions at issue in the recent D.C. Circuit decision concerning inspection and maintenance (I/M) programs under the Act. *Natural Resources Defense Council* versus *EPA*, 22 F.3d 1125 (D.C. Cir. 1994). Section 182(c)(3) of the Act requires States to establish programs for ''enhanced'' vehicle inspection and maintenance programs. The statute further requires that these programs must be in compliance with regulatory ''guidance'' published by the Administrator, and must be effective by Nov. 15, 1992. In *NRDC* versus *EPA*, the Court held that, because the EPA was late in issuing the guidance called for in the statute, without which it was impossible as a practical matter for States to create their own programs, the statutory requirement for States to have an effective program should be delayed.

The section 112(g) modification provisions bear two important similarities to the statutory provisions at issue in *NRDC* versus *EPA*. First, the EPA was obligated to issue guidance on section 112(g) for the States well before they were expected to begin implementing section 112(g) on the effective date of title V programs. Second, that guidance is intended to be binding. This is because the guidance forms an essential link between the statutory directives triggered on the effective date of permit program approval and the ability to actually implement these directives.

Regarding offsets, section 112(g)(1)(A) provides that offsets are to be determined ''pursuant to guidance issued by the Administrator * * *'' It follows that the absence of guidance precludes the issuance of valid offset determinations by a reviewing agency. Moreover, the absence of guidance makes it impossible for the owner or operator of the source to submit a ''showing'' provided for by the last sentence ''that such increase has been offset under the preceding sentence,'' that is, pursuant to the Administrator's guidance (emphasis added). While a State permitting authority could decide to impose offsetting provisions that are more stringent than those in the EPA guidance, the EPA believes that Congress intended the EPA guidance as integral to the implementation of this provision.

The concept of *de minimis* values is likewise integral to the definition of ''modification'' in section 112(a)(5). This is because a ''modification'' is defined in section 112(a)(5) as a ''physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant * * * by more than a de minimis amount * * *.'' Until *de minimis* values are established in the section 112(g) rule, the definition of ''modification'' remains incomplete, lacking the lower boundary that the statute contemplates will be established through a notice and comment process. The statute, recognizing that establishment of *de minimis* values would require the application of scientific expertise and judgment, called for the EPA to set these values based on a notice and comment process. It would be contrary to the intent of the Act to require the section 112(g) program for review of modifications to go forward when the issue of what constitutes a ''modification'' cannot be resolved with the degree of certainty envisioned by the statute.

It thus appears that certain crucial elements in the section 112(g) program for dealing with modifications are missing until the EPA promulgates guidance. Under these circumstances, it is consistent with the statute, and with applicable precedent, to conclude that the obligation of States to establish the required program for review of modifications hinges on promulgation of the requisite ''guidance''—which is in fact, as the statute makes clear, a binding rule—governing both offsets and *de minimis* values.

D. Analysis of Statutory Requirements for Major Source Construction and Reconstruction

The guidance required to be published under section 112(g)(1)(B) addressing implementation of ''subsection'' 112(g) must extend not only to modifications under section 112(g)(2)(A), but also to major source constructions and reconstructions addressed in section 112(g)(2)((B). This general directive aside, the statutory linkage between the section 112(g) guidance and implementation is not as detailed for constructions and reconstructions as it is for modification requirements. Notwithstanding this, the EPA believes that even with regard to constructions and reconstructions, guidance is necessary to resolve issues critical to the scope of applicability of these provisions, and that delaying the effectiveness of these provisions therefore represents a permissible reading of the Act.

In the April 1, 1994 proposal, the EPA solicited comment on two alternative interpretations of the phrase ''construct a major source.'' *See* 59 FR 15517. One interpretation would treat new major-emitting equipment at existing major source plant sites as ''modifications,'' while the other interpretation would treat such additions as ''constructions.'' Under the ''modification'' alternative, such equipment could be offset by a decrease elsewhere at the plant site. Under the ''construction'' alternative,

such equipment would be required to install new source technology and offsets would not be available.

Similarly, the April 1, 1994 proposal contained two alternative definitions of major source ''reconstruction.'' The alternative definitions are similar in that, for each, the replacement of components, where the cost of the replacement components is greater than 50 percent of the capital cost of ''constructing a major source,'' would trigger reconstruction requirements. The alternatives differ in that one alternative treats the entire plant site as the basis for comparison, while the other alternative treats a major-emitting ''emission unit'' as the basis for comparison.

The ambiguities surrounding the term ''construction'' have potentially significant impacts on the nature and scope of the Federal program, particularly in a transition period during which the modification provisions of section 112(g) are delayed. While there are likely to be few constructions of ''greenfield'' facilities emitting major amounts of HAPs prior to promulgation of the section 112(g) rule, there will be a far greater number of additions of major-emitting units at existing major source plant sites. Until the issue of whether these additions constitute a ''construction'' is clarified through rulemaking, there will be uncertainty as to how these additions must be treated as a matter of Federal law. For similar reasons, the scope of the section 112(g) requirements for ''reconstructions'' will continue to be in doubt until the section 112(g) rule is promulgated.

These implementation difficulties demonstrate that, as is the case for the section 112(g) modification provisions, rulemaking is needed to provide the degree of certainty EPA believes was intended by Congress regarding the applicability of the provisions for major source construction and reconstruction. For this reason, EPA believes it would be unreasonable to require the implementation of the section 112(g) provisions relating to construction and reconstruction prior to completion of the rulemaking.

F. Additional Clarifications

The EPA's interpretation, announced today, regarding the timing for implementation of section 112(g), applies to every title V program that has been or will be approved prior to promulgation of a Federal rule implementing section 112(g). The interpretation concerns the effective date of a Federal requirement set forth in the Act. In this sense, this interpretation need not be addressed in individual title V approvals. The EPA has indicated in a number of title V approval actions that the State would use its existing SIP-approved preconstruction review program to implement section 112(g) during the transition period. However, there have been no approvals of State programs designed specifically to implement section 112(g). Therefore, there is no need to revisit any EPA rulemaking action in order to implement today's notice.

This interpretation should not require significant changes to any title V program submittal. Each State program reviewed by EPA to date has included a general commitment to implement section 112(g), in accordance with the EPA regulations and/or guidance, upon approval of their title V program. However, those commitments were fashioned broadly enough to accommodate today's announced interpretation, and so no program revisions should be necessary for those States.

The EPA is aware of concerns that States may need additional time following the promulgation of the section 112(g) rule before they can begin implementing section 112(g). The EPA believes the statute may be read to allow for an additional period of delay so that States may adopt conforming rules if it would otherwise be impossible for States to implement the program. However, the EPA has not determined whether additional time will in fact be needed. If it is decided that additional time should be provided before the provisions of section 112(g) become effective, the EPA will so provide in the final section 112(g) rulemaking.

Finally, certain States have already promulgated regulations designed to implement section 112(g). The EPA wishes to emphasize that nothing in this notice is intended to preclude or discourage States from implementing a program similar to section 112(g) as a matter of State law prior to promulgation by the EPA of the section 112(g) guidance.

Dated: February 8, 1995.

Carol M. Browner,

Administrator.

[FR Doc. 95–3661 Filed 2–13–95; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 70

[MT–001; FRL–5155–3]

Clean Air Act Proposed Interim Approval, or in the Alternative Proposed Disapproval, of Operating Permits Program; State of Montana

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed interim approval.

SUMMARY: The EPA proposes interim approval of the Operating Permits Program submitted by the State of Montana for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources. In the alternative, EPA proposes disapproval of the Montana Operating Permits Program if the corrective actions necessary for final interim PROGRAM approval are not completed and submitted to EPA prior to the statutory deadline.

DATES: Comments on this proposed action must be received in writing by March 16, 1995.

ADDRESSES: Comments should be addressed to Laura Farris at the Region 8 address. Copies of the State's submittal and other supporting information used in developing the proposed rule are available for inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region 8, 999 18th Street, suite 500, Denver, Colorado 80202.

FOR FURTHER INFORMATION CONTACT: Laura Farris, 8ART–AP, U.S. Environmental Protection Agency, Region 8, Air Programs Branch, 999 18th Street, suite 500, Denver, Colorado 80202, (303) 294–7539.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

As required under title V of the 1990 Clean Air Act Amendments (sections 501–507 of the Clean Air Act (''the Act'')), EPA has promulgated rules which define the minimum elements of an approvable State operating permits program and the corresponding standards and procedures by which the EPA will approve, oversee, and withdraw approval of State operating permits programs (see 57 FR 32250 (July 21, 1992)). These rules are codified at 40 Code of Federal Regulations (CFR) part 70 (part 70). Title V requires States to develop, and submit to EPA, programs for issuing these operating permits to all