ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 49 and 51

[EPA–HQ–OAR–2003–0076; FRL–8210–4]

RIN 2060–AH37

Review of New Sources and Modifications in Indian Country

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) proposes to promulgate a Federal Implementation Plan (FIP) under the Clean Air Act (the Act) for tribes in Indian country. The FIP would include two basic air quality regulations for the protection of communities in Indian country. The first rule would apply to minor stationary sources and minor modifications at major stationary sources in Indian country (minor NSR rule). The second rule would apply to all new major stationary sources and major modifications located in areas of Indian country that are designated as not attaining the National Ambient Air Quality Standards (NAAQS) (nonattainment major NSR rule). These rules would be implemented by EPA, or a delegate tribal agency assisting EPA with administration of the rules, until replaced by an EPA-approved tribal implementation plan for an area of Indian country.

DATES: *Comments.* Comments must be received on or before November 20, 2006. Under the Paperwork Reduction Act, comments on the information collection provisions must be received by OMB on or before September 20, 2006.

Public Hearing. If anyone contacts us requesting to speak at a public hearing by September 11, 2006, we will hold a public hearing. Additional information about the hearing would be published in a subsequent **Federal Register** notice.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA–HQ–OAR–2003–0076, by one of the following methods:

- *http://www.regulations.gov.* Follow the on-line instructions for submitting comments.
- *E-mail: a-and-r-docket@epamail.epa.gov.*
- *Fax:* 202–566–1741.
- *Mail:* Attention Docket ID No. EPA–HQ–OAR–2003–0076, U.S. Environmental Protection Agency, EPA West (Air Docket), 1200 Pennsylvania Avenue, Northwest, Mailcode: 6102T, Washington, DC 20460. Please include a total of 2 copies. In addition, please mail a copy of your comments on the information collection provisions to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attn: Desk Officer for EPA, 725 17th St., NW., Washington, DC 20503.
- *Hand Delivery:* U.S. Environmental Protection Agency, EPA West (Air Docket), 1301 Constitution Avenue, Northwest, Room B–102, Washington, DC 20004, Attention Docket ID No. EPA–HQ–OAR–2003–0076. Such deliveries are only accepted during the Docket's normal hours of operation, and special arrangements should be made for deliveries of boxed information.

Instructions. Direct your comments to Docket ID No. EPA–HQ–OAR–2003–0076. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at *http://www.regulations.gov,* including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI or otherwise protected through *http://www.regulations.gov* or e-mail. The *http://www.regulations.gov* Web site is an ''anonymous access'' system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through *http://www.regulations.gov* your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD–ROM you submit. 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. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses. For additional instructions on submitting comments, go to I C & D of the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: All documents in the docket are listed in the *http://www.regulations.gov* index. Although listed in the index, some information is not publicly available, *e.g.*, CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will be publicly available only in hard copy. Publicly available docket materials are available either electronically in *http://www.regulations.gov* or in hard copy at the U.S. Environmental Protection Agency, Air Docket, EPA/DC, EPA West, Room B102, 1301 Constitution Ave., NW., Washington, DC. The 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 Public Reading Room is (202) 566–1744, and the telephone number for the Air Docket is (202) 566–1742.

FOR FURTHER INFORMATION CONTACT: For technical information, contact Raj Rao, Air Quality Policy Division, U.S. EPA, Office of Air Quality Planning and Standards (C504–03), Research Triangle Park, North Carolina 27711, telephone number (919) 541–5344, facsimile number (919) 541–5509, electronic mail e-mail address: *rao.raj@epa.gov.* To request a public hearing or information pertaining to a public hearing on this document, contact Ms. Pamela S. Long, Air Quality Policy Division, U.S. EPA, Office of Air Quality Planning and Standards (C504–03), Research Triangle Park, North Carolina 27711, telephone number (919) 541–0641, facsimile number (919) 541–5509, electronic mail e-mail address: *long.pam@epa.gov.*

SUPPLEMENTARY INFORMATION:

I. General Information

A. Does This Action Apply to Me?

Entities potentially affected by this proposed action include owners and operators of emission sources in all industry groups located in Indian country, EPA, and tribal governments that are delegated administrative authority to assist EPA with the implementation of these Federal regulations. Categories and entities potentially affected by this action are expected to include:

Category	NAICS [a]	Examples of regulated entities
Industry	4471	Gasoline station storage tanks and refueling.
	5614	Lumber manufacturer support.
	21211	Coal mining.
	31332	Surface coating operation.
	33712	Furniture manufacture.
	56221	Medical waste incinerator.
	115112	Repellent and fertilizer applications.
	211111	Natural gas plant.
	211111	Oil and gas production.
	211112	Fractionation of natural gas liquids.
	212234	Copper mining and processing.
	212312	Stone quarrying and processing.
	212313	Stone quarrying and processing.
	212321	Sand and gravel production.
	221112	Power plant-coal-fired.
	221119	Power plant-biomass fueled.
	221119	Power plant-landfill gas fired.
	221210	Natural gas collection.
	221210	Natural gas pipeline.
	321113	Sawmill.
	321911	Window and door molding manufacturer.
	323110	Printing operations.
	323113	Surface coating operations.
	324121	Asphalt hot mix plants.
	325188	Elemental phosphorus plant.
	325188	Sulfuric acid plant.
	331314	Secondary aluminum production and extrusion.
	331492	Cobalt and tungsten recycling.
	332431	Surface coating operations.
	332812	Surface coating operations.
	421320	Concrete batching plant.
	422510	Grain elevator.
	422710	Crude oil storage and distribution.
	422710	Gasoline bulk plant.
	486110	Crude oil storage and distribution.
	486210	Natural gas compressor station.
	562212	Solid waste landfill.
	811121	Automobile refinishing shop.
	812320	Dry cleaner.
Federal government	924110	Administration of Air and Water Resources and Solid Waste Management Programs.
State/local/tribal government	924110	Administration of Air and Water Resources and Solid Waste Management Programs.

[a] North American Industry Classification System.

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. To determine whether your facility is regulated by this action, you should examine the applicability criteria in the proposed minor and major NSR programs for Indian country, proposed 40 CFR 49.153 and 49.168, respectively. If you have any questions regarding the applicability of this action to a particular entity, contact the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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

1. *Submitting CBI.* Do not submit this information to EPA through *http://www.regulations.gov* or e-mail. Clearly mark the part or all of the information that you claim to be CBI. For CBI information in a disk or CD ROM that you mail to EPA, 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 claimed as CBI. In addition to one complete version of the comment that includes 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. Information so marked will not be disclosed except in accordance with procedures set forth in 40 CFR part 2. Send or deliver information identified as CBI only to the following address: Roberto Morales, OAQPS Document Control Officer (C404–02), U.S. EPA, Research Triangle Park, NC 27711, Attention Docket ID No. EPA–HQ–OAR–2003–0076.

2. *Tips for Preparing Your Comments.* When submitting comments, remember to:

- Identify the rulemaking by docket number and other identifying information (subject heading, **Federal Register** date and page number).
- Follow directions—The agency may ask you to respond to specific questions or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.
- Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.
- Describe any assumptions and provide any technical information and/or data that you used.
- If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.
- Provide specific examples to illustrate your concerns, and suggest alternatives.

• Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

• Make sure to submit your comments by the comment period deadline identified.

C. Where Can I get a Copy of This Document and Other Related Information?

In addition to being available in the docket, an electronic copy of this proposal will also be available on the WWW. Following signature by the EPA Administrator, a copy of this notice will be posted in the regulations and standards section of our NSR home page located at *http://www.epa.gov/nsr* and on the tribal air home page at *http://www.epa.gov/oar/tribal.*

D. How Can I Find Information About a Possible Hearing?

Persons interested in presenting oral testimony should contact Ms. Pamela Long, New Source Review Group, Air Quality Policy Division (C504–03), U.S. EPA, Research Triangle Park, NC 27711, telephone number (919) 541–0641 or e-mail *long.pam@epa.gov* at least 2 days in advance of the public hearing. Persons interested in attending the public hearing should also contact Ms. Long to verify the time, date, and location of the hearing. The public hearing will provide interested parties the opportunity to present data, views, or arguments concerning these proposed rules.

E. Overview of Rule

In this rulemaking, we [1] are proposing to fill a regulatory gap that currently exists in Indian country. We are proposing two new source review (NSR) rules under which the reviewing authority will issue pre-construction permits for certain stationary sources of air pollution in Indian country. These proposed rules would provide additional regulatory tools for us to use in implementing the Act in Indian country. The minor NSR rule would apply to new and modified minor sources and to minor modifications at major stationary sources. Sources subject to this rule would apply control technology, if any, as determined by the reviewing authority on a case-by-case basis. In rare instances at the discretion of the reviewing authority, such sources may also be required to submit an air quality analysis as part of their permit application. We are proposing to establish minor NSR thresholds so that only minor sources with a potential to emit (PTE) equal to or higher than these thresholds would be subject to this rule. Additionally, this rule would allow otherwise major stationary sources in Indian country to voluntarily accept emission limitations on their PTE to become ''synthetic minor sources.'' Such synthetic minor sources would include sources that emit hazardous air pollutants (HAP). In such a case, they would not be subject to major source MACT regulations under 40 CFR part 63. Any limitations on PTE must be enforceable as a practical matter (that is, legally and practically enforceable).

Under the nonattainment major NSR rule, affected sources would be required to comply with the provisions of 40 CFR part 51, appendix S, a transitional rule which generally applies to areas that do not have a State Implementation Plan (SIP). Sources subject to this rule would be subject to requirements for Lowest Achievable Emission Rate (LAER) control technology, emissions offsets, compliance certification, and net air quality benefit analysis. Due to the limited number of sources in Indian country, offsets are not generally available. We have proposed options for addressing the lack of availability of offsets in Indian country.

The information presented in this preamble is organized as follows:

II. Purpose

The purpose of today's rulemaking is to ensure that air resources in Indian country will be protected in the manner intended by the Act as amended in 1990 by establishing a permitting program for

[1] In this proposal, the term ''we'' refers to the EPA and the term ''you'' refers to stationary sources of air pollution and their owners and operators.

stationary sources in Indian country. Currently in Indian country, there is no permitting mechanism for new or modified minor sources; minor modifications at major sources; or new major stationary sources or major modifications of regulated NSR pollutants in nonattainment areas. In addition, there is no minor source permitting mechanism for major stationary sources looking to voluntarily limit emissions to become synthetic minor sources [2] or for approving case-by-case maximum achievable control technology (MACT) determinations. Today's proposed rules will fill this regulatory gap and provide regulatory certainty to allow for environmentally sound economic growth in Indian country. By establishing this FIP for Indian country, we will provide more consistency with the requirements and programs of the States and thus create a more level regulatory playing field for owners and operators within and outside of Indian country. We are proposing these permit programs pursuant to section 110(a)(2)(C), part D of title I, and section 301(d) of the Act.

III. Background

A. The New Source Review (NSR) Program

1. What are the general requirements of the major NSR program?

The major NSR program contained in parts C and D of title I of the Act is a preconstruction review and permitting program applicable to new major stationary sources and major modifications at such sources. In areas not meeting health-based NAAQS and in ozone transport regions (OTR), the program is implemented under the requirements of part D of title I of the Act. We call this program the ''nonattainment'' major NSR program. In areas meeting the NAAQS (''attainment'' areas) or for which there is insufficient information to determine whether they meet the NAAQS (''unclassifiable'' areas), the NSR requirements under part C of title I of the Act apply. We call this program the Prevention of Significant Deterioration (PSD) program. Collectively, we also commonly refer to these programs as the major NSR program. These rules are contained in 40 CFR 51.165, 51.166, 52.21, 52.24, and part 51, appendices S and W.

For newly constructed, ''greenfield'' sources, the determination of whether a source is subject to the major NSR program is based on the source's PTE. The Act, as implemented by our rules, sets applicability thresholds for major sources in nonattainment areas. These thresholds are 100 tons per year (tpy) of any pollutant subject to regulation under the Act, or smaller amounts, depending on the nonattainment classification. For attainment areas the thresholds are 100 or 250 tpy, depending on the source type. A new source with a PTE at or above the applicable threshold amount ''triggers,'' or is subject to, major NSR.

For existing major sources, major NSR applies to a ''major modification.'' For a modification to be major, the following three criteria have to be met:

(1) A physical change in or change in the method of operation of a major stationary source must occur;

(2) The increase in emissions resulting from this change must be significant (equal to or above the significance levels defined in 40 CFR 52.21(b)(23)); and

(3) The increase in emissions resulting from the change must be a significant net emissions increase. In other words, when the increase from the project is added to other contemporaneous increases or decreases in actual emissions [3] at the source, the net emissions increase must be significant (equal to or above the significance levels defined in 40 CFR 52.21(b)(23)).

Major sources and major modifications subject to nonattainment major NSR must apply state-of-the-art emissions control technologies, including any pollution prevention measures, to achieve the LAER. The LAER is based on the most stringent emission limitation in the implementation plan of any State, or achieved in practice, for the source category under review.

Each major source subject to nonattainment major NSR must also ''offset'' its emissions increase by obtaining emissions reductions from other sources in the area, or in an area of equal or higher nonattainment classification that contributes to nonattainment in the subject source's area. The ratio of the offset relative to the proposed increase must be at least one-to-one and is based on the severity of the area's nonattainment classification. For ozone and particulate matter less than 10 microns in aerodynamic diameter (PM–10), the more polluted the air is where the source is locating or expanding, the greater is the required offset ratio. The emissions reductions to be used as offsets must be surplus (not otherwise required by the Act), quantifiable, federally enforceable, and permanent. *See* sections 173(a) and (c) of the Act and 40 CFR 51.165(a)(3).

Additionally, each major nonattainment NSR permit applicant must also conduct an analysis of ''alternative sites, sizes, production processes, and environmental control techniques demonstrating that the benefits of the proposed emissions source significantly outweigh the environmental and social costs of its location, construction, or modification.'' Moreover, each major nonattainment NSR permit applicant must demonstrate that all other major stationary sources under her/his control in the same State are in compliance or on a schedule of compliance with all emission limitations and standards of the Act.

Under the PSD program for attainment areas, a major source or modification must apply Best Available Control Technology (BACT), which may be based on pollution prevention techniques. In addition, the source must analyze the impact of the project on ambient air quality to assure that no violation of the NAAQS or PSD increments will result, and must analyze impacts on soil, vegetation, and visibility. Sources or modifications that would impact Class I areas (*e.g.*, national parks) may be subject to additional requirements to protect air quality related values (AQRVs) that have been identified for such areas.

2. What are the general requirements of the minor NSR program?

Section 110(a)(2)(C) of the Act requires that every SIP include a program to regulate the construction and modification of stationary sources, including a permit program as required by parts C and D of title I of the Act, to ensure attainment and maintenance of NAAQS. Parts C and D address the major NSR program for major stationary sources, and the permitting program for minor stationary sources is addressed by section 110(a)(2)(C) of the Act. We commonly refer to the latter program as the ''minor NSR'' program. A minor stationary source means a source whose PTE is lower than the major source applicability threshold for a particular pollutant as defined in the applicable nonattainment major NSR program or PSD program.

[2] Sources located within the exterior boundaries of Indian reservations in Idaho, Oregon, and Washington can apply for a non-Title V operating permit to establish synthetic minor status under the FIP established for those reservations. *See* 40 CFR 49.139 and 40 CFR part 49, subpart M.

[3] In approximate terms, ''contemporaneous'' emissions increases or decreases are those that have occurred between the date 5 years immediately preceding the proposed physical or operational change and the date that the increase from the change occurs. *See,* for example, 40 CFR 52.21(b)(3)(ii).

The Federal requirements for minor source programs are outlined 40 CFR 51.160 through 51.164. States must develop minor source programs to attain and maintain NAAQS. The Federal regulations for minor source programs are considerably less detailed than the requirements for major sources. As a result, there is a wider variety of programs and requirements for these ''nonmajor'' preconstruction activities.

Section 110(a)(2)(C) of the Act provides us with a broad degree of discretion in developing a program to regulate new and modified minor stationary source construction activities in Indian country.

B. Status of Air Quality Programs in Indian Country

As we have discussed in previous rulemaking actions which affect Indian country, in the absence of an EPA-approved program, we are authorized to develop a FIP to protect air quality by directly implementing provisions of the Act throughout Indian country. *See, e.g.*, 59 FR 43958–61 (August 25, 1994), 63 FR 7262–64 (February 12, 1998), and 62 FR 13750 (March 21, 1997). Previously, we had already promulgated rules establishing requirements for major stationary sources in attainment areas and have issued PSD permits in Indian country (*See* 40 CFR 52.21).

Under the Act and the Tribal Authority Rule (TAR) (*See* 40 CFR part 49, subpart A), eligible tribes may seek approval of their own PSD programs for their reservations and/or for other areas under their jurisdiction. Currently, no tribe is administering an EPA-approved PSD program. Therefore, we implement the PSD program in Indian country. Unlike for the PSD program, there is currently no FIP to implement either the nonattainment major NSR program or the minor NSR program in Indian country. Hence, there is a regulatory gap in Indian country. Today's proposed rule will allow us to fully implement the NSR program in Indian country. We are proposing the minor NSR program at 40 CFR 49.151 through 49.165 and the nonattainment major NSR program at 40 CFR 49.166 through 49.175. It is important to recognize, however, that even if we adopt a Federal program that applies in Indian country, the tribes may still develop Tribal Implementation Plans (TIPs), similar to SIPs, to implement these programs. If a tribe develops a TIP to implement NSR, the TIP, once it is approved, will replace the Federal program as the requirement for that area of Indian country and the tribe will become the reviewing authority.

Sources that obtain enforceable emission limitations can avoid major source status by reducing their PTE below the applicable major source thresholds. Such sources are commonly referred to as ''synthetic minors.'' The practice of creating synthetic minor sources to avoid major NSR and title V is common under most State and local minor NSR permitting programs. However, outside of Idaho, Oregon, and Washington, no such minor source permitting mechanism is currently available in Federal regulations for Indian country.[4] We therefore believe that inclusion of this provision in the proposed rules would significantly benefit large sources in Indian country by providing them with a means to legally avoid more stringent major NSR rules otherwise required by title I of the Act. We are establishing this mechanism for both stationary sources of regulated NSR pollutants and HAPs.

C. Consultation With Tribal Representatives

Prior to undertaking this rulemaking, we sought to include tribes early in the rulemaking process. On June 24, 2002, we sent approximately 500 letters to tribal leaders seeking their recommendations for effective consultation and their involvement in developing this rule.

We received responses from 75 tribes. Of these 75 tribes, 69 designated an environmental staff member to work with us on developing the rules. Aside from the designated staff, many tribal leaders asked that we keep them informed of our progress through e-mail, meetings with the EPA Regional Offices, newsletters, and Web sites. However, 53 percent of the tribal leaders also requested direct phone calls or conference calls to discuss the subject. Only 16 percent of the respondents requested face-to-face consultation. Of these, only six tribes requested senior EPA staff to meet with tribal leaders.

As a result of this feedback, we developed a consultation plan that included three meetings held at the reservations of the Menominee Tribe in Wisconsin, the Mohegan Tribe in Connecticut, and the Chehalis Tribe in Washington. A fourth meeting was held in conjunction with the Institute of Tribal Environmental Professionals' (ITEP) 10th anniversary meeting in Flagstaff, Arizona. In addition to conducting these meetings, we also visited tribal environmental staff in Indian country. Over 30 tribes attended these meetings. As part of our outreach efforts to the tribes, we participated in numerous national and regional forums including the National Tribal Forums sponsored by the ITEP, two National Tribal Air Association meetings, and at meetings with tribal consortia, such as the National Tribal Environmental Council, United Southern and Eastern Tribes, Inter-Tribal Environmental Council, Inter Tribal Council of Arizona, and others.

Although much of our effort focused on outreach to the tribes, we also interacted with State and local air pollution control agencies during development of this rule. We had two meetings with the State and Territorial Air Pollution Program Administrators and the Association of Local Air Pollution Control Officers (STAPPA/ALAPCO) to present the draft rules.

IV. Proposed Rules for Indian Country

A. Minor NSR Program

Today's action proposes provisions for a minor NSR program in Indian country. We propose to codify these provisions at 40 CFR 49.151 through 49.165. Our primary goal in developing this proposed rule is to ensure that air resources in Indian country will be protected in the manner intended by the Act. In addition, we seek to establish a flexible preconstruction permitting program for minor stationary sources in Indian country that is comparable to that which applies outside of Indian country, in order to create a more level regulatory playing field for owners and operators within and outside of Indian country.

It is important to note, however, that outside of Indian country there is a great deal of variation among State minor NSR permitting programs. As a result, it would be impossible to create a single program that creates precisely equivalent regulations among all areas of Indian country and the surrounding State areas. Instead, we designed the proposed rules to ensure that stationary sources in Indian country would operate with a reasonable level of air pollution control, if necessary, and in such a manner to ensure that air resources in Indian country would be protected.

We are not attempting through this proposed rulemaking to establish a new set of minimum criteria that an eligible tribe, or a State, would need to follow in developing its own minor source permitting program. Rather, this proposal simply represents how we would implement the program in Indian country in the absence of an EPA-approved implementation plan. However, if a tribe is developing its own program, this can serve as one example of a program that meets the objectives

[4] *See* footnote 2 for more information on the FIP that is in place in within the exterior boundaries of Indian reservations in these three States.

and requirements of the Act. We are proposing a minor source permitting program that addresses, on a national level, many environmental and regulatory issues that are specific to Indian country. We understand that States and eligible tribes may face different issues, and may therefore choose to develop different programs for their own State or Tribal Implementation Plans.

1. What is a minor source and which minor sources are subject to this rule?

A minor source means a source whose PTE is lower than an applicable major source threshold. For the NSR program in Indian country, the major source thresholds are defined in the PSD program (*See* 40 CFR 52.21) and in today's proposed nonattainment major NSR program (see proposed 40 CFR 49.167), as applicable, and differ for attainment areas and nonattainment areas for the same pollutant. For example, in attainment areas the major source threshold for Nitrogen Oxides (NO_X) for a source is 250 tpy, unless the source belongs to a source category that is listed in the major NSR rules (*See* 40 CFR 52.21(b)(1)(i)(a)), in which case the major source threshold is 100 tpy. In contrast, the major source threshold for NO_X in ozone nonattainment areas can vary from 10tpy in an extreme ozone nonattainment area to 100 tpy in a marginal ozone nonattainment area. A source can be a major source for some pollutants and a minor source for others.

Today, we are proposing to establish a minor NSR threshold as provided in section IV.A.3 of this preamble. The proposed rule would apply to only those minor sources whose PTE is equal to or greater than the minor NSR threshold for the regulated NSR pollutant. Such sources would include (1) New minor sources, (2) modified minor sources, and (3) synthetic minor sources including HAP sources. A source's PTE for a pollutant is expressed in tpy and generally is calculated by multiplying the maximum hourly emissions rate in pounds per hour (lbs/hr) times 8,760 (which is the number of hours in a year) and dividing by 2,000 (which is the number of pounds in a ton), unless the source is restricted by permit conditions that are enforceable as a practical matter.

Section IV.A.6 of this preamble includes detailed flowcharts to aid you in determining if a proposed new source would be subject to the proposed rule. The flowcharts differentiate between attainment areas and nonattainment areas because the applicability criteria are different for PSD and nonattainment major NSR.

2. What is a modification and what modifications are subject to this rule?

For the purposes of this rule, a modification is defined at proposed 40 CFR 49.152(d) as (any physical or operational change at a stationary source that would cause an increase in the allowable emissions of the affected emissions units for any regulated NSR pollutant or that would cause the emission of any regulated NSR pollutant not previously emitted.(The following exemptions would apply:

- A physical or operational change does not include routine maintenance, repair, or replacement.
- An increase in the hours of operation or in the production rate is not considered an operational change unless such increase is prohibited under any federally-enforceable permit condition or other permit condition that is enforceable as a practical matter.
- A change in ownership at a stationary source is not considered a modification.

Note that this definition differs from the term ''modification'' as used in the major NSR program, primarily in that it is based on an increase in allowable emissions rather than actual emissions. Parts C and D of title I of the Act ''the statutory basis for the major NSR program' refer to section 111(a)(4) of the Act [the definition of ''modification'' for purposes of the new source performance standards (NSPS) program] to define ''modification'' for purposes of the major NSR program. In a recent decision, the D.C. Circuit Court of Appeals ruled that, based on the wording of the definition of ''modification'' in section 111(a)(4) of the Act, the applicability of major NSR to modifications must be based on changes in actual emissions (*State of New York, et al.*, v. *U.S. EPA*, June 24, 2005). However, because the statutory basis for the minor NSR program is section 110(a)(2)(C) of the Act, which does not define or refer to a definition of ''modification,'' we believe that we have discretion in defining the term as we think it best for the minor NSR program in Indian country that we are proposing today. We do not believe that the recent decision of the D.C. Circuit Court of Appeals applies to minor NSR programs. We seek comment on whether our proposed definition of modification is appropriate for minor NSR for minor sources.

This rule would apply to certain modifications at minor sources and to minor modifications (not major modifications as defined in proposed 40 CFR 49.167 and in 40 CFR 52.21) at major sources. How such modifications would be addressed under the proposed rule is explained in section IV.A.6 of this preamble. Section IV.A.6 also includes detailed flowcharts to aid you in determining if a proposed modification would be subject to the proposed rule.

3. What are the minor NSR thresholds and how did we develop them?

A review of several State minor NSR programs indicated that a number of State programs have established cutoff levels or minor NSR thresholds, below which sources are exempt from their minor NSR rules. We believe that such an approach is also appropriate in Indian country. Section 110(a) (2)(C) of the Act requires minor NSR programs to assure that the NAAQS are attained and maintained. Applicability thresholds are proper in this context provided that the sources and modifications with emissions below the thresholds are inconsequential to attainment and maintenance of the NAAQS. As discussed further, the minor NSR thresholds that we are proposing today meet this criterion. In addition, these thresholds will result in a more cost-effective program and reduce the burden on sources and reviewing authorities.

In today's rulemaking, we are proposing to adopt minor NSR thresholds as emission rates in tpy. In setting the minor NSR thresholds for minor sources of regulated NSR pollutants, we decided to use emission rates, rather than air quality impacts, as the basis for the exemption. We chose this approach because we were concerned that applicability determinations based on projected air quality impacts would be excessively complex and resource intensive. In addition, it is consistent with the approach used in major NSR.

We are proposing minor NSR thresholds that we have developed based on a review of several State minor NSR programs. We found that there is variation in State approaches to minor NSR applicability. Some States do not prescribe source applicability thresholds, instead providing a list of emission units and activities that are excluded from minor NSR. Many of the States that do have applicability thresholds also provide a list of excluded emission units and activities. In today's rulemaking, we propose threshold levels that we believe are neither the most stringent nor the least stringent of the levels found in existing State minor NSR rules. These threshold levels represent a reasonable balance between environmental protection and

economic growth, since we did not want them to be so high that they were not environmentally protective or so low that they ensured environmental protection at the cost of discouraging economic growth. We consider the proposed thresholds to be representative of such thresholds in State minor NSR programs, and we believe that these limits will be appropriate for use in Indian country. The proposed thresholds are listed in Table 1.

TABLE 1.—MINOR NSR THRESHOLDS

Regulated NSR pollutant	Minor NSR thresholds for non-attainment areas (tpy)		Minor NSR thresholds for attainment areas (tpy)
	Extreme ozone areas	Other areas	
Carbon monoxide (CO)	5	5	10
Oxides of nitrogen (NO_X)	0	5	10
Sulfur dioxide (SO_2)	5	5	10
Volatile Organic Compounds (VOC)	0	2	5
PM	5	5	10
PM–10	1	1	5
PM–2.5	0.6	0.6	3
Lead	0.1	0.1	0.1
Fluorides	NA	NA	1
Sulfuric acid mist	NA	NA	2
Hydrogen sulfide (H_2S)	NA	NA	2
Total reduced sulfur (including H_2S)	NA	NA	2
Reduced sulfur compounds (including H_2S)	NA	NA	2
Municipal waste combustor emissions	NA	NA	2
Municipal solid waste landfills emissions (measured as Non Methane Organic Compounds)	NA	NA	10

The selected minor NSR thresholds distinguish between minor stationary sources of regulated NSR pollutants located in nonattainment versus attainment areas and by pollutant. We believe this distinction is important because of the different air quality goals in nonattainment and attainment areas.

In some cases, a tribe's area of Indian country may be divided between a nonattainment area and an attainment area. In this situation, the applicable threshold for a proposed source or modification would correspond to the designation of the area where the source would be located. If a source straddles the two areas, the more stringent thresholds would apply.

To evaluate how the proposed minor NSR thresholds might affect new sources locating in Indian country, we looked at the size distribution of existing sources across the country. Using the National Emission Inventory (NEI), which includes the most comprehensive inventory of existing U.S. stationary point sources that is available, we determined how many of these sources fall below the proposed minor NSR thresholds, how many are between the minor NSR and major NSR thresholds, and how many are above the major NSR threshold.[5] If we assume that the distribution of new sources will mirror the existing source distribution, this analysis approximates the fraction of new sources that will be exempt from minor NSR, subject to minor NSR, and subject to major NSR, respectively. The results of this analysis by pollutant are summarized in Table 2.

TABLE 2.—DISTRIBUTION OF SOURCES AND EMISSIONS UNDER PROPOSED MINOR NSR THRESHOLDS

Pollutant	Total facilities		Unregulated minor sources		Minor sources		Major sources	
	No. ($\times 10^3$)	TPY ($\times 10^6$)	% of total	% of TPY	% of total	% of TPY	% of total	% of TPY
CO	28.9	4.43	65	0.8	29	11	6	88
SO_2	21.2	13.90	76	0.1	16	1	8	99
PM_{10}	33.9	1.69	65	1.3	32	22	4	76
$PM_{2.5}$	33.8	1.33	59	0.8	38	23	3	76
Ozone—VOC	43.3	1.60	42	1.1	53	41	5	58
Ozone—NO_X	30.5	7.93	53	0.4	36	6	11	93
Nitrogen dioxide (NO_2)	30.5	7.93	59	0.6	32	7	9	92

As shown in Table 2, we performed the analysis for each of the criteria pollutants except lead, including VOC and NO_X emissions as the precursors of ozone.[6] For each pollutant, the table gives the total number of facilities in the emission inventory for that pollutant and the total, nationwide annual emissions of the pollutant. The column

[5] For this analysis, we used the final 1999 NEI, extrapolated to 2001. More on the 1999 NEI can be found at *http://www.epa.gov/ttn/chief/net/1999inventory.html.*

[6] For the analysis, we used the major NSR and proposed minor NSR thresholds for each pollutant based on the attainment status and classification of the county in which each source is located. We made certain simplifying assumptions, including using the 250 tpy major source threshold for all sources in attainment areas, regardless of source category or major source status for other pollutants. For the details of the analysis,*see* ''Analysis of the Proposed Minor NSR Thresholds'' dated October 24, 2005 in the docket for this rulemaking.

labeled ''unregulated minor sources'' represents the percentage of total sources that fall below the minor NSR threshold, along with the percentage of total annual emissions that those sources emit. The ''minor sources'' column gives the same information for sources that fall between the minor NSR threshold and the major NSR threshold, while the ''major sources'' column addresses sources that exceed the major NSR threshold.

We believe that Table 2 provides excellent evidence that sources with emissions below the proposed minor NSR thresholds will be inconsequential to attainment and maintenance of the NAAQS. For each pollutant, only around 1 percent (or less) of total emissions would be exempt from review under the minor NSR program. At the same time, the proposed thresholds will promote a cost-effective program. According to Table 2, anywhere from 42 percent to 76 percent of sources (depending on the pollutant) would be too small to be subject to preconstruction review.

We believe that the proposed minor NSR thresholds provide a reasonable approach to determining the applicability of the minor NSR program. These thresholds would prevent stationary sources that make negligible contributions to pollution from being regulated under this rule. However, this would not affect the applicability of other requirements, such as those found in an NSPS or a MACT standard. At the same time, the limits would ensure that intermediate-sized sources would be subject to reasonable control technology requirements. We seek comment on our approach to selecting the proposed minor NSR thresholds, on alternative approaches to selecting such thresholds, and on alternative applicability provisions (such as source category exemptions).

4. Are any emissions units and activities at stationary sources exempt from this rule?

Certain emissions units and activities at stationary sources either do not emit regulated NSR pollutants to the ambient air or emit these pollutants in negligible amounts. We propose that such activities located at a minor source be exempt from the requirements of this rule (*See* proposed 40 CFR 49.153(c)). We propose that such activities are limited to the following:

- Air-conditioning units for comfort that are not subject to applicable requirements under title VI of the Act and do not exhaust air pollutants into the ambient air from any manufacturing or industrial process;
- Ventilating units for comfort that do not exhaust air pollutants into the ambient air from any manufacturing or other industrial process;
- Heating units for comfort that do not provide heat for any manufacturing or other industrial process;
- Noncommercial food preparation;
- Consumer use of office equipment and products;
- Janitorial services and consumer use of janitorial products;
- Internal combustion engines used for landscaping purposes;
- Bench scale laboratory activities, except for laboratory fume hoods and vents; and
- Any emissions unit or activity that does not have the potential to emit a regulated NSR pollutant or HAP, so long as that emissions unit or activity is not part of a process unit that emits or has the potential to emit a regulated NSR pollutant or HAP.

5. What are the permit application, control technology, and air quality analysis requirements, and what is the permit issuance process?

Permit Application Requirements. Under today's proposed minor NSR program, as the owner or operator of a proposed new minor source or a proposed modification that is subject to this rule, you must submit a complete application to your reviewing authority requesting a minor NSR permit specific to your source (unless you wish to seek a ''general permit,'' if eligible). In addition to basic information identifying and describing your source, your application must include a list of all affected emissions units. ''Affected emissions units'' are defined as all the emissions units at your proposed new minor source or all the new, modified, and replacement emissions units that comprise your proposed modification (excluding the exempt emissions units and activities listed in proposed 40 CFR 49.153(c)). *See* proposed 40 CFR 49.152(d).

Your application also must document the increase in emissions of regulated NSR pollutants that will result from your new source or modification so that the reviewing authority can verify that you are subject to this proposed minor NSR program, rather than to major NSR. For each new emissions unit that you list, you must provide the PTE in tpy for each regulated NSR pollutant, along with supporting documentation. For any modified or replacement unit that you list, you must provide the allowable emissions of each regulated NSR pollutant in tpy both before and after the modification or replacement, along with supporting documentation. For emissions units that do not have an established allowable emissions level prior to the modification, you must report the PTE. The allowable emissions for any emissions unit are calculated considering any emission limitations that are enforceable as a practical matter on the unit's PTE. In calculating these emission levels for applicability purposes, we seek comment on whether you should include fugitive emissions, to the extent that they are quantifiable, for all sources, or include them only for source categories listed pursuant to section 302(j) of the Act or exclude them for all sources.

You may include in your application proposed emission limitations for the listed emissions units. If you do, you must account for these limitations in your calculations of post-construction PTE and/or allowable emissions. The application also must identify and describe any existing air pollution control equipment and compliance monitoring devices or activities relevant to the affected emissions units, as well as any existing emission limitations or work practice requirements to which any affected emissions units are subject. *See* proposed 40 CFR 49.154(a) for the complete requirements for your application for a minor NSR permit.

You may request that the reviewing authority establish an annual minor source plantwide applicability limitation (minor source PAL) for one or more of the regulated NSR pollutants emitted by your new or existing minor stationary source. A minor source PAL is a source-wide limitation on allowable emissions of a regulated NSR pollutant, expressed in tpy, that is established under the proposed 40 CFR 49.155 and that is enforceable as a practical matter (*See* proposed 40 CFR 49.152(d)).

For a new minor stationary source, you may request minor source PALs for some or all of the regulated NSR pollutants emitted by your source. For the other regulated NSR pollutants that your source emits (*i.e.,* the non-PAL pollutants), your permit will contain annual allowable emissions limits for each emissions unit.

You may request a minor source PAL for one or more regulated PAL pollutants at the time that you are modifying an existing minor stationary source. Each PAL will apply across all the emissions units at your source, whether or not they are affected by the modification. For the non-PAL pollutants, only the emissions units that are affected by the modification will receive annual allowable emissions limits. If you request one or more minor source PALs for an existing minor stationary source at a time when no

modification is planned, each PAL will apply across all the emissions units at your source, but your permit will include no new emission limits for the non-PAL pollutants.

If your source is in a source category covered by a ''general permit'' issued under proposed 40 CFR 49.156, you may apply for the general permit for that source category. A general permit is a permit developed by your reviewing authority for a general category of emissions units or stationary sources that are similar in nature, have substantially similar emissions, and would be subject to the same or substantially similar requirements governing operations, emissions, monitoring, reporting, and recordkeeping. The permit application requirements for a particular general permit will be specified in that general permit. General permits are discussed further in section IV.A.13 of this preamble.

Control Technology Review. As required under section 110(a)(2)(C) of the Act, the minor NSR permitting program that we are proposing today is primarily designed to assure that the NAAQS are achieved, and to prohibit any stationary source from emitting any air pollutant in amounts that would contribute to nonattainment or interfere with maintenance of the NAAQS. At the same time, we wish to provide flexibility in control technology requirements for minor sources located in Indian country to promote economic growth and development.

Therefore, in today's proposal, we are proposing that your reviewing authority perform a control technology review on a case-by-case basis when issuing the permit (other than a general permit). By ''control technology,'' we mean pollution prevention techniques, add-on pollution control equipment, design and equipment specifications, work practices, and operational restrictions. This review would consider local air quality needs, typical control technology used by similar sources in surrounding areas, anticipated economic growth in the area, and cost-effective control alternatives. At a minimum, the reviewing authority must require control technology that assures that the NAAQS are achieved and that each affected emissions unit will comply with all requirements of 40 CFR parts 60, 61, and 63 that apply. The required control technology resulting from such a review may range from technology that is less stringent than the reasonably available control technology (RACT) level of control (which is typically required for existing major sources in nonattainment areas), to technology that is the BACT level of control (which is the level required for new major sources and major modifications in attainment areas), depending on the air quality needs of the area, other applicable regulatory programs of the Act, and technical and economic feasibility.

Based on the results of the control technology review, the emission limitations required by the reviewing authority may consist of emission limits, pollution prevention techniques, design standards, equipment standards, work practice standards, operational standards, or any combination thereof. If it is technically and economically feasible, the reviewing authority must require an emission limit (*i.e.,* a limit on the quantity, rate, or concentration of emissions) for each affected emissions unit at your source.

For a new minor source that is subject to this rule, the case-by-case control technology review would be conducted for all emissions units [except the exempt emissions units and activities discussed in section IV.A.4 and listed in proposed 40 CFR 49.153(c)] that emit or have the potential to emit the pollutant for which the source is subject to this rule. However, for modifications, such control technology review would apply only to the affected emissions unit(s).

In establishing a case-by-case control technology review process to determine an appropriate level of control for minor sources and subject modifications in Indian country, we considered a number of factors. On the one hand, we believe that the control technology review process should be as flexible as possible to provide for the specific needs and conditions of each area of Indian country, consistent with the requirements of the Act. On the other hand, we believe that a reasonable level of air pollution control for new minor sources and subject modifications in Indian country is generally warranted to ensure protection of air resources in Indian country. In addition, we wish to ensure that Indian country not be seen as a potential ''pollution haven'' where minor stationary sources can go to escape air pollution control requirements. At the same time, we do not want to put tribes or owners and operators locating in Indian country at a competitive disadvantage by requiring substantially more stringent controls in Indian country than are required in the surrounding areas.

We are seeking comment on the proposed case-by-case control technology review for all new and modified sources subject to this minor NSR program. We also request comment on whether the program should have a control technology requirement at all. Section 110(a)(2)(C) of the Act requires a minor NSR program that assures that the NAAQS are achieved, but does not mandate that the program include a control technology requirement. We are seeking comment on whether a control technology requirement is necessary to achieve the purposes of the Act, or whether other approaches can achieve these purposes just as well with less cost or administrative burden.

Air Quality Impacts Analysis. Typically, for a new or modified minor source permit application, your reviewing authority would not require an Air Quality Impacts Analysis (AQIA). In rare instances, if your reviewing authority has reason to be concerned that the construction of your minor source or modification could cause or contribute to a NAAQS or PSD increment violation, to ensure protection of the NAAQS, we are proposing that your reviewing authority may require you to conduct an AQIA using dispersion modeling in accordance with 40 CFR part 51, appendix W to determine the impacts that will result from your new source or modification. If the AQIA demonstrated that the construction of your source or modification would cause or contribute to a NAAQS or PSD increment violation, you would be required to further reduce its impact before you could obtain a permit.

Permit Issuance Process. Within 45 days after receiving your permit application, your reviewing authority must either determine that the permit application is complete enough to commence a technical review or request additional information. If you do not receive a request for additional information or a notice of complete application within 50 days of your permitting authority's receipt of your application, your application would be deemed complete. (You should contact your reviewing authority to find out the date that it received your application so that you will know when this 50-day period is up.) Once the application is complete, your reviewing authority develops a draft permit and provides a public notice seeking comments on the draft permit for a 30-day period. After considering all timely, relevant comments, if your reviewing authority determines that your application meets all applicable requirements, it would issue you a final permit. Otherwise, the reviewing authority would send you a letter denying your permit application with reasons for the denial. We seek comment on the proposed permit issuance process.

We are proposing that your reviewing authority would issue you a permit with an allowable emissions limit in tpy for each affected emissions unit (Option A). You have the alternative of requesting a minor source PAL or cap in tpy (Option B), and your reviewing authority may issue such a permit. This type of permit can provide the flexibility to make frequent changes at your source without permit review. If you wish, you may request a minor source PAL for some pollutants and allowable emissions limits for each emissions unit for other pollutants.

Permit Term. A preconstruction permit does not expire. Your permit remains valid as long as you commence construction of your new source or modification within 18 months after the effective date of the permit, you do not discontinue construction for a period of 18 months or more, and you complete construction in a reasonable time. Your reviewing authority may extend the 18-month period where justified. The 18-month limit does not apply to the time period between construction of approved phases of a phased construction program; you must commence construction of each such phase within 18 months of the approved commencement date for that phase.

6. When are modifications subject to this rule?

As discussed in section IV.A.2 of this preamble, for the purposes of the minor NSR program proposed today, a modification means any physical or operational change at a stationary source that would cause an increase in the allowable emissions of the affected emissions units for any regulated NSR pollutant or that would cause the emission of any regulated NSR pollutant not previously emitted (with the exclusions outlined in section IV.A.2 of this preamble). The proposed rule would apply to certain modifications at your minor sources and minor modifications at your major sources. For such modifications, you would have to meet the application requirements and comply with any control technology requirements as discussed in section IV.A.5 of this preamble. In rare instances, if your reviewing authority has reason to believe that your modification could result in a violation of the NAAQS or PSD increment, you would be required to conduct an AQIA.

In all NSR applicability determinations, you must evaluate each regulated NSR pollutant individually. The area where your source is located may be attainment for some pollutants and nonattainment for others, which affects which pollutants are regulated as well as the major and minor NSR applicability thresholds. For a given modification, a particular pollutant may be subject to review under PSD, nonattainment major NSR, or minor NSR, or may not be subject to any of these programs.

The first step in determining whether your proposed physical or operational change is subject to the minor NSR program proposed today is to determine whether the change is subject to the applicable major NSR program (*i.e.*, proposed 40 CFR 49.167 or 40 CFR 52.21 for nonattainment and attainment areas, respectively). If you are changing an existing major source, you would determine whether the change qualifies as a major modification using the procedures in the applicable major NSR program. If you are changing an existing minor source, you would determine whether the change would qualify as a major stationary source by itself under the applicable major NSR program. If your proposed physical or operational change is subject to review under major NSR for a regulated NSR pollutant, it is not subject to the minor NSR program for that pollutant.

If your proposed physical or operational change is not subject to major NSR, the next step is to determine whether the change qualifies as a modification under the minor NSR program. To be a modification, the change must result in an increase in allowable emissions at your source. Thus, the next step is to calculate whether, and by how much, allowable emissions would increase as a result of the change. If your minor stationary source is subject to a minor source PAL for a regulated NSR pollutant (Option B in section IV.A.5 of this preamble), the emissions increase for that pollutant would be the PAL level after the physical or operational change minus the PAL level prior to the change. For physical or operational changes at other minor stationary sources (*i.e.*, those with annual allowable emissions limits for each emissions unit (Option A), those that are unpermitted, and those with a combination of unpermitted emissions units and emissions units with annual allowable emissions limits) and at major stationary sources, the total increase in allowable emissions resulting from your proposed change would be the sum of the following:

- For each new emissions unit that is to be added, the emissions increase would be the PTE of the unit.
- For each emissions unit with an allowable emissions limit that is to be changed or replaced, the emissions increase would be the allowable emissions of the emissions unit after the change or replacement minus the allowable emissions prior to the change or replacement. This may be a negative value for an emissions unit if its allowable emissions would be reduced as a result of the change or replacement.
- For each unpermitted emissions unit that is to be changed or replaced, the emissions increase would be the allowable emissions of the unit after the change or replacement minus the PTE prior to the change or replacement. It is necessary to use PTE since these emissions units will not have a allowable emissions limit prior to the change. This may be a negative value for an emissions unit if its post-change allowable emissions would be less than its pre-change PTE.

This process of summing the emissions increases and decreases across all the affected emissions units is called ''project netting,'' which is discussed later in this section of the preamble.

If your proposed physical or operational change qualifies as a modification (*i.e.*, causes an increase in allowable emissions), the final step in determining whether the proposed modification is subject to today's proposed minor NSR program is to compare the increase in allowable emissions to the applicability criteria for the type of source and emission limits that you have. Your modification would be subject to the minor NSR program in the following circumstances:

- If your minor source has a permit with a minor source PAL in tpy (Option B in section IV.A.5 of this preamble) and the modification would result in any increase in the PAL level. To determine if an increase in the PAL level is necessary, you must evaluate whether your source's actual emissions after the modification would exceed the PAL level by any amount. If you could construct and operate the modification without your actual emissions exceeding your minor source PAL, then no permit action would be required.
- For other minor sources, if the modification would increase total allowable emissions from the affected emissions units by an amount that equals or exceeds any of the minor NSR thresholds listed in Table 1 of this preamble.
- If the minor modification at your major source would increase total allowable emissions from the affected emissions units by an amount that equals or exceeds any of the minor NSR thresholds listed in Table 1 of this preamble.
- In addition, if the modification would increase allowable emissions from any emissions unit above an

established unit-specific allowable emission permit limit, even if the total increase for your source would be less than the corresponding minor NSR threshold listed in Table 1 of this preamble. In this case, the needed increase in the unit-specific allowable emissions permit limit can be accomplished through an administrative permit revision (*See* proposed 40 CFR 49.159(f)).

In addition, a physical or operational change may be subject to today's proposed minor NSR program even if it is not classified as a modification (*i.e.*, it does not increase allowable emissions of a regulated NSR pollutant or result in emission of a pollutant not previously emitted). For example, a proposed change might increase allowable emissions from some emissions units and decrease emissions at others so that, overall, emissions from the affected units would stay the same or decrease. If the post-change emissions at any emissions unit would exceed a permitted allowable emissions limit for that unit, you must apply to revise the existing permit limit before you may implement the change. The needed increase in the unit-specific allowable emissions permit limit can be accomplished through an administrative permit revision (*See* proposed 40 CFR 49.159(f)).

Similarly, other proposed physical or operational changes that could not be implemented within the requirements of an existing permit would necessitate a permit revision, even if they are not otherwise subject to major or minor NSR. We believe that this fact will serve to ensure that the types of changes that could significantly alter the dispersion characteristics of the air pollutants emitted by your source will be brought to the attention of your reviewing authority. Thus, the reviewing authority will be in the position to evaluate whether the change has the potential to increase ambient concentrations outside the boundaries of your source. If so, the reviewing authority can require measures to mitigate any unacceptable air quality impacts (*i.e.*, to protect the NAAQS and PSD increments) as part of the permit revision process.

Flowcharts to aid in determining major and minor NSR applicability are presented in Figures 1 through 6. These flowcharts illustrate the applicability process for new sources and modifications in attainment areas and nonattainment areas. The flowcharts should be used to evaluate each regulated NSR pollutant individually since different flow charts may apply to different pollutants depending on the attainment status of the area for each pollutant.

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Figure 1. New Source Review Flowchart

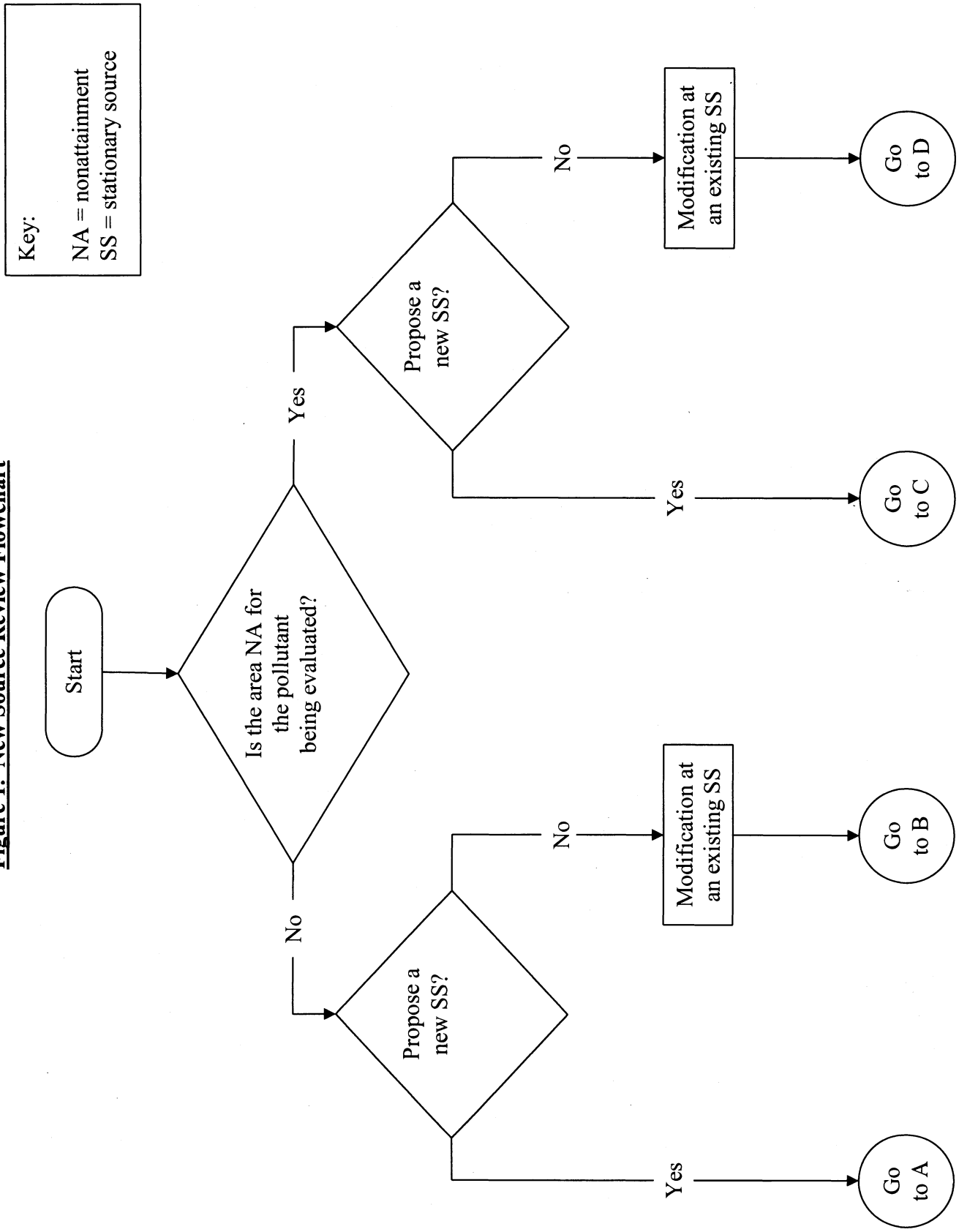


Figure 2. New SS in an Attainment or Unclassifiable Area

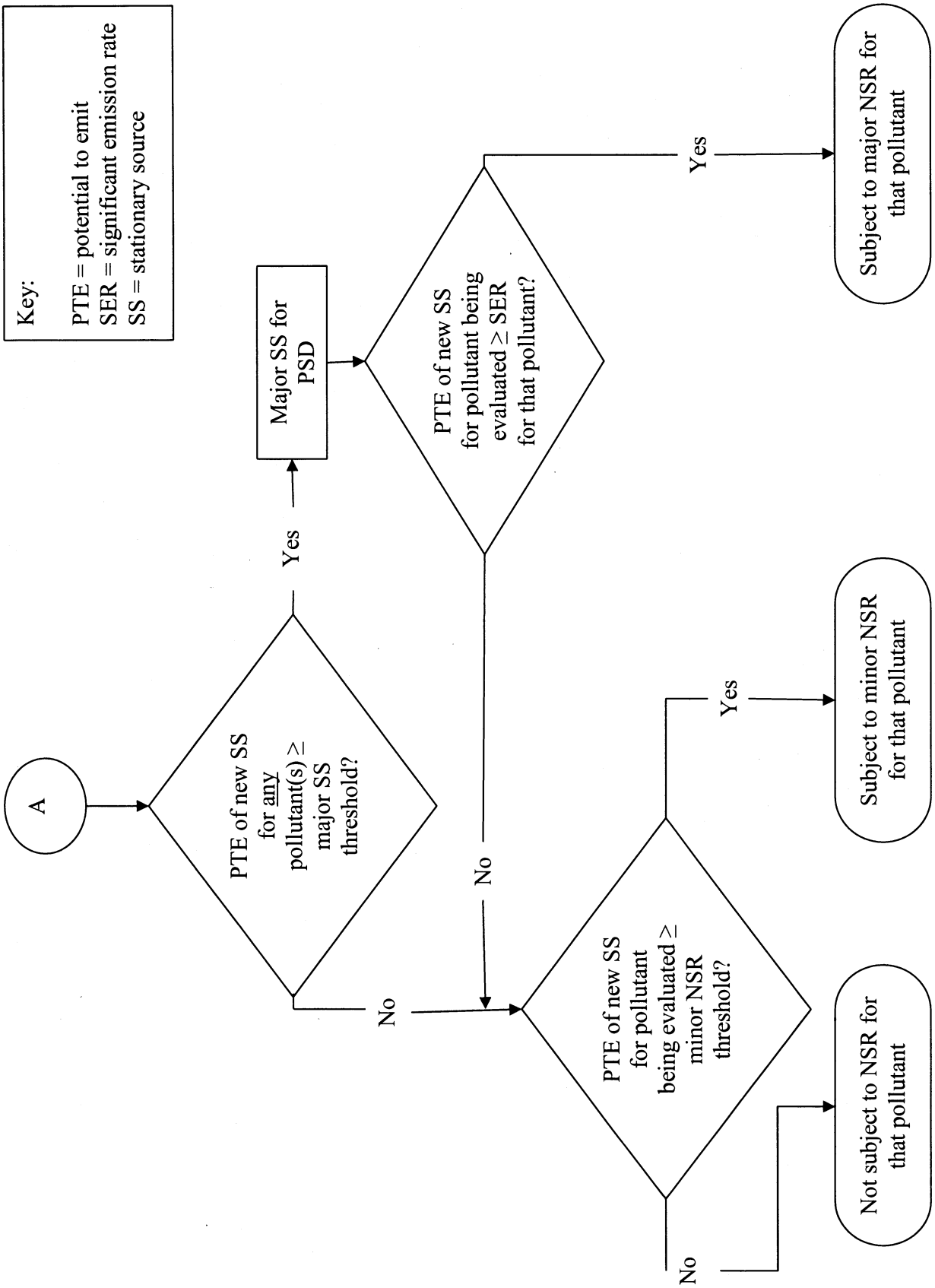


Figure 3. Modification at an Existing SS in an Attainment or Unclassifiable Area – Major NSR Applicability

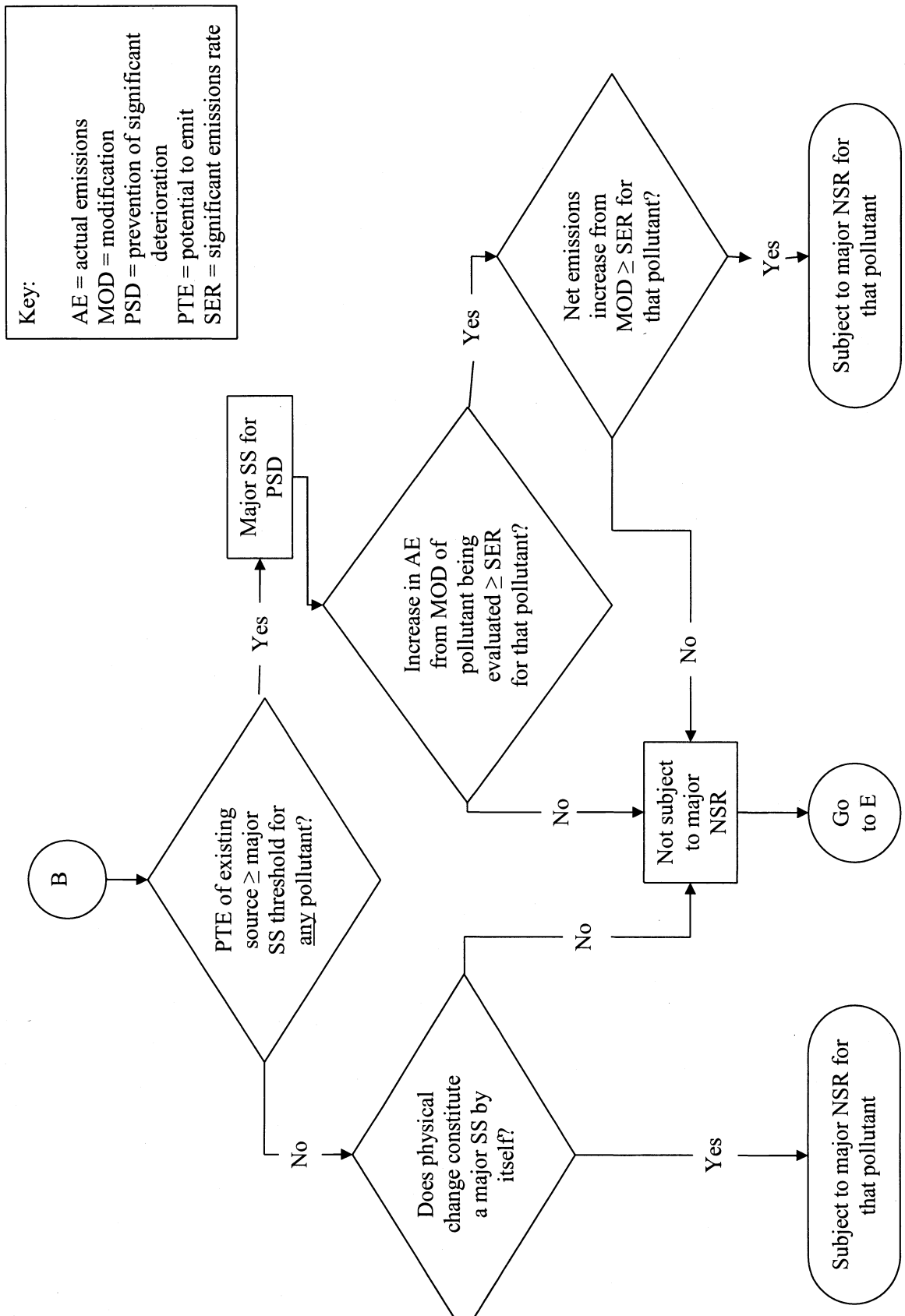


Figure 4. New SS in a Nonattainment Area

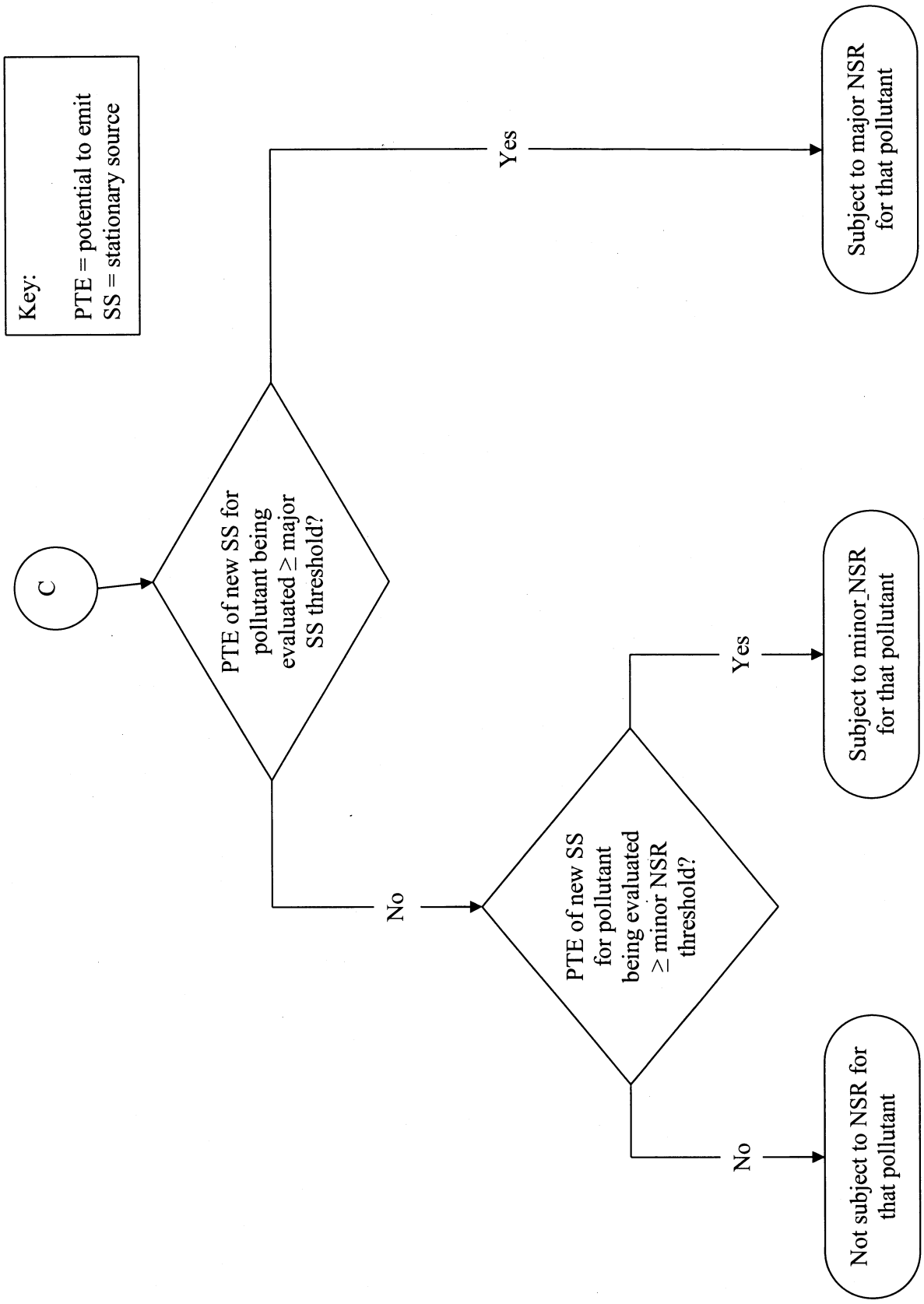


Figure 5. Modification at an Existing SS in a Nonattainment Area – Major NSR Applicability

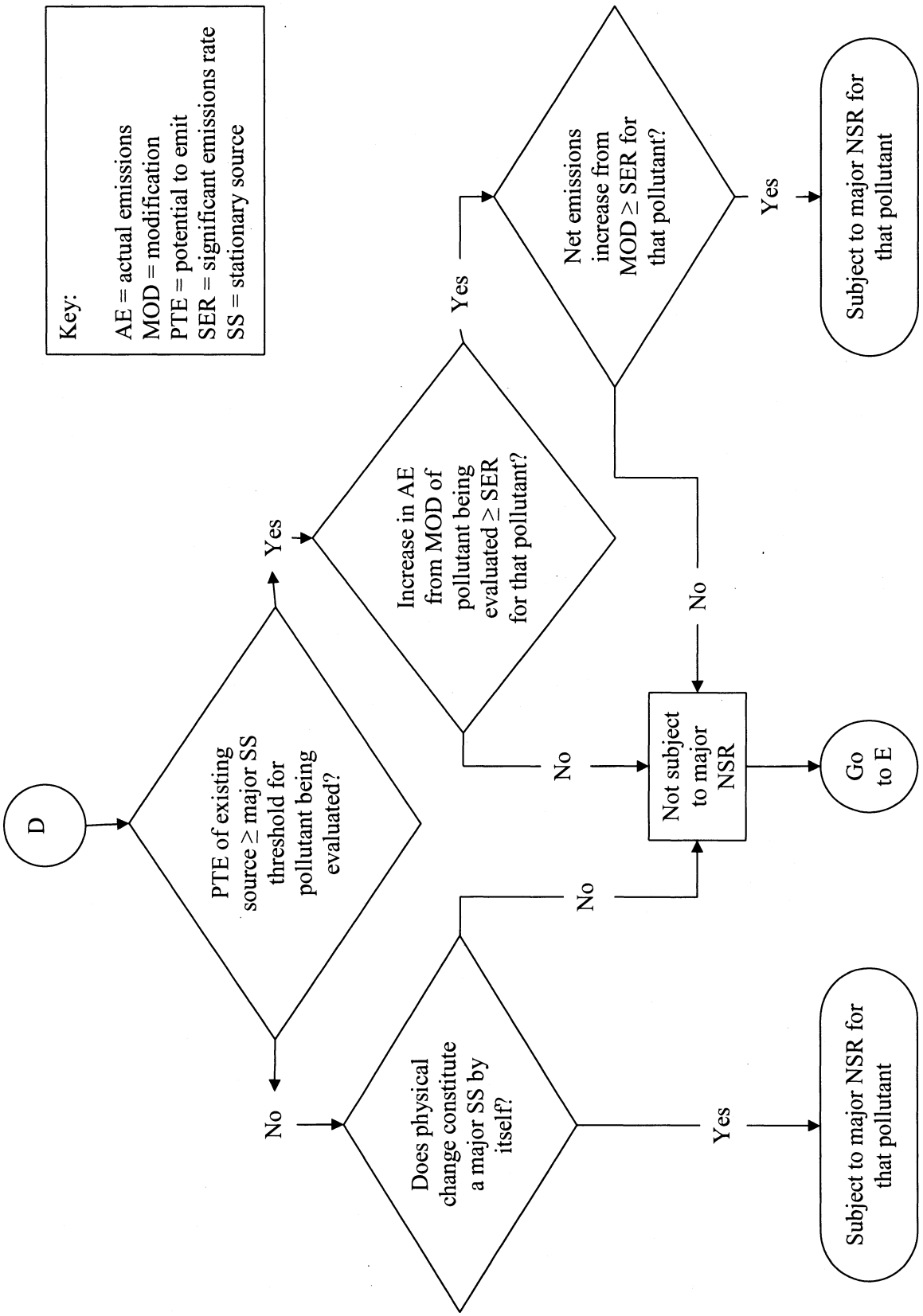
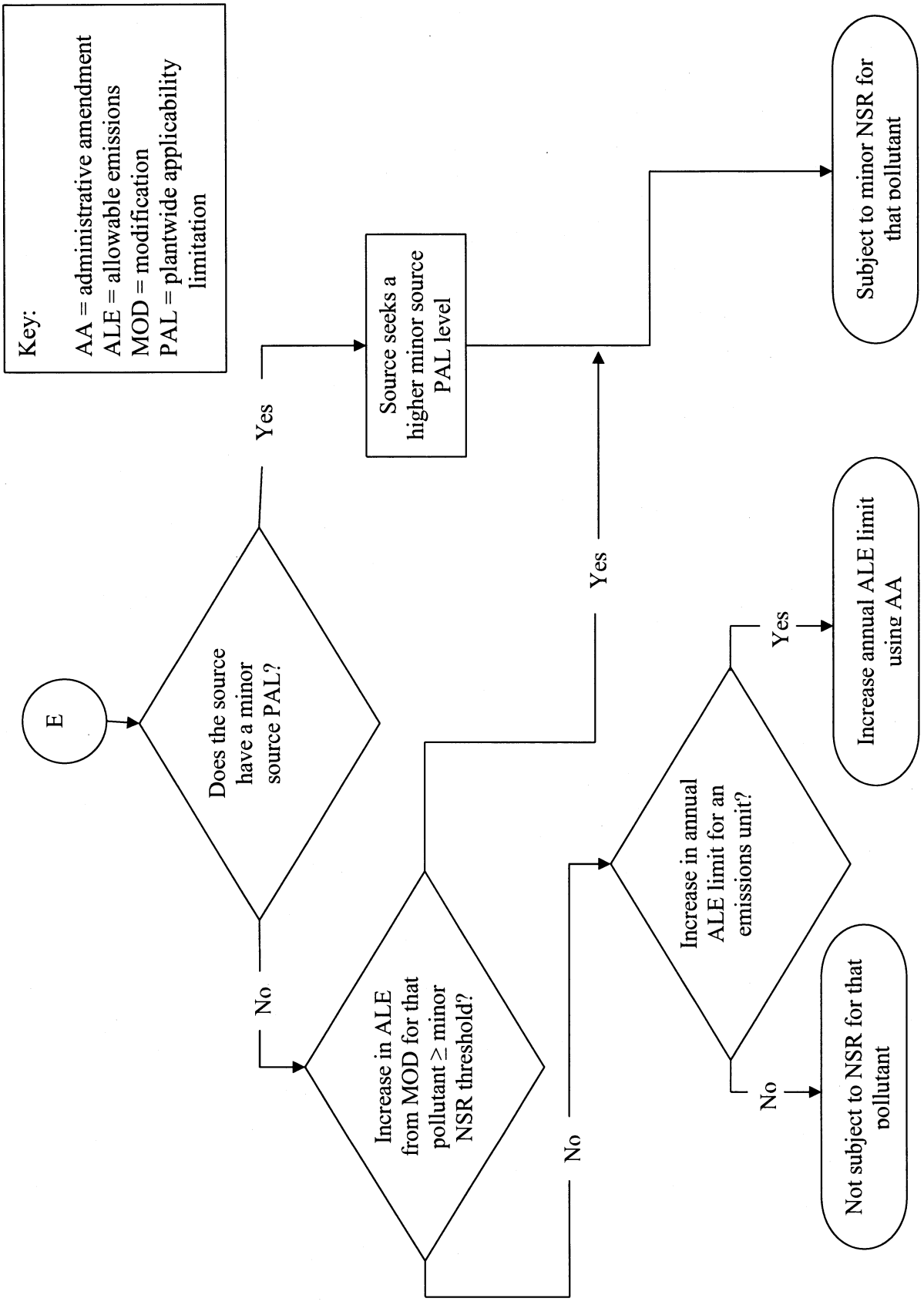


Figure 6. Modification at an Existing SS – Minor NSR Applicability



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7. Why do we believe that an allowable-to-allowable test is appropriate for minor sources?

As discussed earlier, we are proposing an ''allowable-to-allowable'' applicability test as the primary test for modifications under this minor NSR program. We evaluated the three basic types of applicability tests (actual-to-potential, actual-to-projected-actual, and allowable-to-allowable) and determined that the allowable-to-allowable test is most suitable for minor NSR in Indian country.

We rejected the actual-to-potential test for many of the same reasons that we have moved away from this test in the major NSR program. In this type of system, the emissions increase that results from a change is determined by comparing the emissions unit's PTE after the change to its actual emissions prior to the change. If pre-change actual emissions are well below the unit's PTE, as is generally the case, any change will result in a large emissions increase when calculated in this manner. To avoid triggering NSR, a source must accept a limit on the unit's post-change PTE at a level that exceeds pre-change actual emissions by less than the applicable NSR threshold.

As discussed in our December 2002 NSR Improvement rulemaking, there are numerous objections to the actual-to-potential test (67 FR 80194). Industry has long believed that the need to take a PTE limit to avoid NSR has the effect of unfairly confiscating the emissions unit's unused operating capacity even though, in many cases, the changed unit as a practical matter will function essentially as it did before the change and emissions to the environment will not increase. In addition, the actual-to-potential test discourages sources from making the types of changes that improve operating efficiency, implement pollution prevention projects, and result in other environmentally beneficial effects.

In the December 2002 NSR Improvement rulemaking for major NSR, we promulgated an alternative ''actual-to-projected-actual'' test for major modifications. However, we do not propose to adopt the same course for the minor NSR program in Indian country. We believe that determining emissions changes in terms of changes in allowable emissions typically will be easier and more straightforward for the minor sources subject to this program. In particular, the major NSR procedures for projecting and tracking future actual emissions may be somewhat complicated for minor sources. While we believe that this system is within the capabilities of major sources, we believe that a simpler system is more appropriate for the minor sources in Indian country, many of which are unaccustomed to any type of regulation.

We are proposing an allowable-to-allowable test for modifications in the Indian country minor NSR program. We believe that this relatively simple and straightforward system is most appropriate for the minor sources found in Indian country. In addition, we believe that it is beneficial to use allowable emissions as the currency for attainment planning, in that they represent the worst-case post-change emissions. This approach is consistent with section 173(a)(1)(A) of the Act, which requires new and modified major sources to obtain offsets based on allowable emissions. (While we are not requiring offsets for minor sources in Indian country nonattainment areas, we believe that the language in section 173(a)(1)(A) provides validation for our proposed minor NSR modification test.) Finally, we understand that many State minor NSR programs use an allowable-to-allowable test.

As discussed in section IV.A.2 of this preamble, we believe that we have the discretion to use an allowable-to-allowable test for this minor NSR program because the statutory basis for minor NSR is section 110(a)(2)(C) of the Act, rather than section 111(a)(4). We seek comment on using the proposed allowable-to-allowable test for addressing modifications and on the alternative of using the actual-to-projected-actual test.

As laid out in the second step for determining if a proposed modification is subject to minor NSR, we are proposing to allow ''project netting.'' This means that both increases and decreases in allowable emissions are summed when determining the total emission increase that would result from a proposed modification.

The major NSR program uses a two-step procedure for determining applicability. First, the emission increases from the proposed project are summed. If the total emission increase from the project is ''significant'' (that is, equal to or greater than the major NSR threshold), the second step in the process is ''contemporaneous netting.''

In contemporaneous netting, the emission increase due to the proposed modification is summed with all other emission increases and decreases that have occurred at the major source during the contemporaneous period (generally 5 years). If the net emission increase determined in this way is significant, the proposed modification is a ''major modification'' that is subject to review under major NSR.

We considered including contemporaneous netting in today's minor NSR program, but have elected not to propose it as our preferred approach. Contemporaneous netting has proved to be a complicated aspect of the major NSR program. While major sources are accustomed to contemporaneous netting and have built the capacity to track emissions changes and carry out this procedure, many minor sources that would be covered by today's proposed minor NSR program lack such capacity. We believe that a simpler system is more appropriate for the minor sources in Indian country.

Nevertheless, we believe that minor sources should be able to receive credit for the emission decreases that would result from a proposed modification. Hence, we are proposing to allow project netting in today's minor NSR program.

We believe that project netting calculations are relatively straightforward and are within the capacity of most minor sources. For example, an existing minor source might wish to expand by adding a second production line to go with an existing, uncontrolled line. If the proposed project includes adding an air pollution control device to control emissions from both lines, it would result in an allowable emissions increase attributable to the new line, as well as an allowable emissions decrease from the existing, previously uncontrolled line. Determining the overall net emission change that would result from the proposed modification would be a straightforward exercise. However, to validate the project net emissions increase, as in the major NSR program, the source must take limits on allowable emissions for both lines that are enforceable as a practical matter.

We believe that in proposing to allow project netting, but not contemporaneous netting, we have struck an appropriate balance for the minor NSR program in Indian country. We believe that the resulting program properly allows you to receive credit for emission reductions that are achieved as part of an overall project, without introducing too much complexity into the program. We invite comment on this approach, as well as on other approaches that would allow minor sources in Indian country to take credit for emission reductions.

8. Is your existing minor source subject to this rule?

States develop, adopt, and submit to us for approval a SIP that contains a

broad range of measures to attain and maintain the NAAQS and to meet other requirements of section 110(a) of the Act. The SIPs typically include some emission limitations for existing sources, even those that do not modify their operations. Hence, a SIP provides an infrastructure to achieve the air quality goals of attaining and maintaining the NAAQS.

Tribes are not required to submit implementation plans, and to date, very few tribes have sought our approval of such plan. Consistent with our approach to Federal implementation of the Act's requirements, we issue FIPs for areas of Indian country as necessary or appropriate. However, there is still a regulatory gap in relevant infrastructure in much of Indian country. Because of this unique situation, we are raising the question of whether it may be appropriate to regulate existing minor sources in Indian country under this minor NSR program to attain and maintain NAAQS. We are proposing Option 1 and soliciting comment on Options 2, 3, and 4:

Option 1. Exempt existing minor sources from this rule. This option would not affect any existing sources (unless they propose a modification) and, thus, be the least burdensome for such sources in Indian country. Many State minor NSR rules do not apply to such sources; hence this would be consistent with many of the areas that surround Indian country. Under this option, we are seeking comment on whether such an exempt minor source should be allowed to opt for a permit under this program (without being subject to any of the requirements) merely to establish enforceable limits and conditions associated with a consent decree or other enforcement mechanism.

Option 2. Require existing synthetic minor sources to become subject to the minor NSR program requirements (including control technology review and other requirements as provided in section IV.A.5. of this preamble) and to submit a permit application within 1 year after the effective date of the program. This option would draw into the regulatory scheme the biggest minor sources and may result in large emissions reductions in instances where the required control technology review would result in new or more stringent controls. Option 2 would affect relatively few existing minor sources in Indian country.

Option 3. Require all existing minor sources to register within 1 year after the effective date of this program, but not be subject to the permitting requirements. This option would affect all minor sources in Indian country, but would involve very little burden to sources, since this would be a one-time registration. Option 3 would allow your reviewing authority to collect information on the number and size of existing minor sources, which would assist with NAAQS maintenance and attainment planning in Indian country.

Option 4. Require all existing minor sources to be subject to the minor NSR program requirements (as provided in section IV.A.5. of this preamble). While this option would result in significant emissions reductions, it would also require significant EPA resources and may also be overly burdensome on minor sources in Indian country. Additionally, we believe that subjecting all minor sources to this program is not necessary to achieve the NAAQS, as demonstrated by state minor NSR programs.

We also seek comment on any other approaches for addressing existing minor sources.

9. How are ''synthetic minor sources'' subject to this rule?

Some sources have the potential to emit one or more pollutant in major source amounts, but have actual emissions that are below the major source thresholds. One of our primary objectives for this rulemaking is to create a mechanism by which you can obtain emission limitations for such sources that are enforceable as a practical matter, so that they can become ''synthetic minor sources'' and avoid major source status. We are therefore proposing to create such a mechanism in 40 CFR 49.158 of the proposed rules. The proposed rules allow for designation of synthetic minor sources (for regulated NSR pollutants) and synthetic minor HAP sources. It is important to note that although you may choose to obtain such emission limitations at your own discretion, once you have accepted an enforceable emission limitation, you must comply with that limitation. This is necessary to ensure that you are legally prohibited from operating as a major source. We are taking comment on the proposal to allow your stationary sources to become synthetic minors in Indian country.

Our 1999 policy memo on synthetic minor sources in Indian country currently provides guidance on how sources that would otherwise be major sources under section 302 or part D of title I of the Act can become synthetic minor sources if their actual emissions remain below 50 percent of the relevant major source PTE threshold and they comply with all other requirements of the policy memo.[7] However, as the memo specifies, this PTE transition policy terminates when we adopt and implement a mechanism that you can use to limit your PTE, or we explicitly approve a tribe's program providing such a mechanism. Today's proposed minor NSR program would provide such a mechanism. Therefore, upon the effective date of these rules when promulgated, the PTE transition policy will expire and you will have to obtain a permit under this minor NSR program for any subsequent synthetic minor sources.

Additionally, for your existing synthetic minor sources under the current policy, you will have 1 year from the effective date of the final rules to apply for a permit under the proposed minor NSR program. If you submit a permit application in accordance with the requirements of proposed 40 CFR 49.158(c) by that date, we will continue to consider your source a synthetic minor source until we issue a permit with synthetic minor limits. The permit will contain monitoring, recordkeeping, reporting, and testing requirements as needed to assure compliance with your synthetic minor permit, but will not impose any additional requirements. Should you fail to submit an application within 1 year of the effective date of the final rules, your source will no longer be considered a synthetic minor source or synthetic minor HAP source (as applicable), and will immediately become subject to all requirements for major sources.

10. How would section 112(g) case-by-case MACT determinations be addressed by this rule?

Section 112(g)(2)(B) of the Act provides that you may not construct or reconstruct a major source of HAPs unless you install MACT. If the Administrator has not established a MACT standard for the source category, the Act requires that MACT must be determined on a case-by-case basis.

Where there is no EPA-approved program in an area of Indian country, we are the reviewing authority for case-by-case MACT under section 112(g)(2)(B). The requirement for a case-by-case MACT determination prior to construction or reconstruction of a major source of HAPs is found at 40 CFR 63.42(c). In 40 CFR 63.43(c), we provide a number of review options for these determinations. These options

[7] John S. Seitz and Eric V. Schaeffer. Policy memo. ''Potential to Emit Transition Policy for Part 71 Implementation in Indian Country.'' March 7, 1999.

include using a title V permit, applying for and obtaining a Notice of MACT Approval, and ''any other administrative procedures for preconstruction review and approval established by the reviewing authority for a State or local jurisdiction which provide for public participation * * *.'' Currently, no tribes have an EPA-approved title V permitting program or the ''other administrative procedures'' for this purpose, although one tribe has been delegated authority to assist us with implementation of the Federal part 71 operating permit program (*i.e.*, the Federal program for issuing title V permits). While we can permit a section 112(g) case-by-case MACT determination through a part 71 permit or a Notice of MACT Approval, we believe that if your source is major only for HAPs it would be administratively convenient for us and you to combine the construction permit process for both regulated NSR pollutants and HAPs under this proposed minor NSR program, rather than also go through the part 71 permit or Notice of MACT Approval process to address HAPs. Therefore, we are proposing to allow for review of section 112(g) case-by-case MACT determinations through this minor NSR program and seek comment on this approach. *See* proposed 40 CFR 49.153(a)(5) for the provisions related to section 112(g) case-by-case MACT determinations. Note that you ultimately will have to obtain a part 71 permit for your major source of HAPs.

11. What are the proposed requirements for public participation in the permitting process?

Our requirements for State preconstruction review programs at 40 CFR 51.161 require such programs to provide for public availability of permit applications as well as the reviewing authority's analysis of the application. In addition, State programs must provide opportunity for public comment on permitting actions. To be consistent with these requirements for State programs, we are proposing to require the reviewing authority to make non-confidential information on the permit available to the public and to provide public notice and an opportunity to comment on the draft minor NSR permit. *See* proposed 40 CFR 49.157.

Specifically, we would require that the reviewing authority prepare a draft permit and provide adequate public notice to ensure that the affected community and the general public have reasonable access to the application and draft permit information. The reviewing authority must make such information available for public inspection at the appropriate EPA Regional Office and in at least one location in the area affected by the source, such as the tribal environmental office or a local library. The public notice must provide an opportunity for public comment and a public hearing on the draft permit. The appropriate types of notice may vary depending on the proposed project and the area of Indian country that would be affected.

In all cases, the proposed rule requires the reviewing authority to mail a copy of the notice to you, the appropriate Indian governing body, and the tribal, State, and local air pollution authorities having jurisdiction in areas outside of the area of Indian country potentially impacted by your source. The proposed rule lists optional approaches that the reviewing authority may elect to use to provide public notice as appropriate for a given situation, depending on such factors as the nature and size of your source, local air quality considerations, and the characteristics of the population in the affected area. The optional methods of notifying the public include the following:

- Mailing or e-mailing a copy of the notice to persons on a mailing list developed by the reviewing authority consisting of those persons who have requested to be placed on such a mailing list.
- Posting the notice on its Web site.
- Publishing the notice in a newspaper of general circulation in the area affected by the source. Where possible, the notice may also be published in a tribal newspaper or newsletter. We do not believe that such a notice is appropriate for every single minor source permit application since this would require a heavy resource commitment for the reviewing authority, while not necessarily being as effective as some other measures.
- Providing copies of the public notice for posting at locations in the area affected by your source. We expect that such locations might include Post Offices, libraries, tribal environmental offices, community centers, and other gathering places in the community.
- Other appropriate means of notification.

We believe that this combination of mandatory and optional approaches to providing notice is appropriate for today's proposed minor NSR program in Indian country. In addition, we believe that the proposal is consistent with 40 CFR 51.161, which requires a ''notice by prominent advertisement in the area affected,'' but does not specify a newspaper advertisement. We believe that in many areas of Indian country, notices posted in locations frequented by the local population and on agency Web sites, as well as mailed or e-mailed to concerned parties, will provide more ''prominent advertisement'' than would publication in a newspaper.

The reviewing authority must provide for a 30-day public comment period on the draft permit. After considering all relevant public comments, the reviewing authority will make a final decision to issue or deny your permit. The public (including you, the permit applicant) will have an opportunity to appeal the final decision under 40 CFR 49.159 of the proposed rule.

These proposed public participation requirements would apply to preconstruction permits, minor source PAL permits, synthetic minor permits, and the initial issuance of general permits. We seek comment on the proposed public participation requirements in 40 CFR 49.157.

We are also proposing very similar public participation requirements for the nonattainment major NSR program. *See* section IV.B.3 of this preamble.

12. What are the monitoring, recordkeeping, and reporting requirements?

Sections 110(a)(2)(A) and (C) of the Act require that a preconstruction permitting program provide for the enforcement of measures that include ''enforceable emission limitations'' and other control measures, means, or techniques * * * as well as schedules and timetables for compliance.'' Section 110(a)(2)(F) additionally requires that a permitting program may require ''the installation, maintenance, and replacement of equipment, and the implementation of other necessary steps by owners and operators of stationary sources to monitor emissions from such sources,'' as well as ''periodic reports on the nature and amounts of emissions and emission-related data from such sources.''

Generally, we are proposing that all permits issued under this minor NSR program contain emission limitations that are enforceable as a practical matter, as well as adequate monitoring, recordkeeping, and reporting requirements as may be necessary to assure compliance with those limitations. The requirements for monitoring, recordkeeping, and reporting are discussed below; *See* 40 CFR 49.155(a) of the proposed rule for the complete requirements.

Monitoring requirements. The permit must include monitoring requirements sufficient to assure compliance with any control technology requirements contained in the permit. Monitoring

approaches may include continuous emissions monitoring systems (CEMS), predictive emissions monitoring systems (PEMS), continuous parameter monitoring systems (CPMS), periodic manual logging of monitor readings, equipment inspections, mass balances, periodic performance tests, and/or emission factors, as appropriate for your minor source based on the types of emissions units, magnitude of emissions, and air quality considerations. Such monitoring shall assure use of terms, test methods, units, and averaging periods consistent with the control technology and emission limitations required for your source. If the permit includes a minor source PAL for a pollutant at your minor stationary source, it must also include monitoring to determine the actual emissions from your source for each month and the total actual emissions for each 12-month period, rolled monthly, for that pollutant.

Recordkeeping requirements. The permit must include recordkeeping requirements sufficient to assure compliance with the enforceable emission limitations in your permit. Records of required monitoring information must include all calculations using emissions factors, all stack tests or sampling information including date and time of test or sampling, the name of the company or entity that performed the analyses, the analytical techniques or methods used, the results of such analyses and the operating conditions existing at the time of sampling or measurement. All such records including support information must be retained for 5 years from the date of the record. Support information may include all calibration and maintenance records and all original strip-chart recordings or electronic records for continuous monitoring instrumentation.

Reporting requirements. You must provide annual monitoring reports showing whether you have complied with your permit emission limitations. You also must provide prompt reports of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. Within a permit, the reviewing authority must define ''prompt'' in relation to the degree and type of deviation likely to occur.

13. What are the criteria for general permits, what source categories generally qualify for them, and what are the permit application requirements for a general permit?

A ''general permit'' is a preconstruction permit that may be applied to a number of similar emissions units or stationary sources. The purpose of a general permit is to simplify the permit application and issuance process for similar facilities so that a reviewing authority's limited resources need not be expended for case-by-case permit development for such facilities. A general permit may be written to address a single emissions unit, a group of the same type of emissions units, or an entire minor source.

The minor NSR program proposed in this action would allow your reviewing authority to issue general permits for categories of emissions units or stationary sources that are similar in nature, have substantially similar emissions, and would be subject to the same or substantially similar permit requirements. ''Similar in nature'' refers to size, processes, and operating conditions. To issue a general permit, the reviewing authority must provide the same opportunities for public participation and administrative and judicial review that apply to minor NSR permits issued to a specific source under this program. This is true with respect to all aspects of the general permit except its applicability to an individual source. *See* proposed 40 CFR 49.156(b).

Once a general permit has been issued for a source category or category of emissions units, you may submit an application to be covered under the general permit if your proposed new minor source or modification qualifies for coverage under that general permit. Your reviewing authority may grant or deny your request to construct under a general permit without further public participation. However, when you receive approval to be covered under a general permit, you must post a prominent notice at your source of this approval to construct under the general permit. Someone may seek judicial review only on the issue of whether your source qualifies for the general permit. *See* proposed 40 CFR 49.156(e). We believe that general permits offer a cost-effective means of issuing permits and provide a quicker and simpler alternative mechanism for permitting your minor sources than the site-specific permitting process discussed previously.

In setting criteria for sources to be covered by general permits, your reviewing authority would consider the following factors. First, categories of sources or emissions units covered by a general permit should be generally homogeneous in terms of operations, processes, and emissions. All sources or emissions units in the category should have essentially similar operations or processes and emit pollutants with similar characteristics. Second, the sources or emissions units should be expected to warrant the same or substantially similar permit requirements governing operation, emissions, monitoring, recordkeeping, or reporting.

Your sources covered under a general permit would be issued a letter approving coverage under the general permit. You must maintain the general permit and the letter at your source location at all times to be made available for inspection by the reviewing authority.

General permits may be issued to cover any category of numerous similar sources, provided that such sources meet the appropriate criteria. For example, permits can be issued to cover small businesses such as gas stations or dry cleaners. General permits may also, in some circumstances, be issued to cover discrete emissions units, such as individual solvent cleaning machines at industrial complexes. We request comment on the use of general permits, eligible emissions units and source categories, and the process of issuing general permits.

14. What is the administrative and judicial review process proposed for this program?

We are proposing and seeking comment on two options for reviewing initial permit decisions by reviewing authorities under this program. We will discuss these options further, but first we will present the proposed administrative procedures that we expect to be the same regardless of which review option we ultimately select.

The final permit issuance procedures and related notice requirements are proposed in 40 CFR 49.159(a). After decision on a permit, the reviewing authority must notify you of the decision, in writing, and if the permit is denied, of the reasons for the denial. If the reviewing authority issues a final permit to you, it must make a copy of the permit available at all of the locations where the draft permit was made available. In addition, the reviewing authority must provide adequate public notice of the final

permit decision to ensure that the affected community, general public, and any individuals who commented on the draft permit have reasonable access to the decision and supporting materials. Depending on the circumstances of your permit, the reviewing authority may elect to provide notice directly to the individuals who commented on the draft permit and/or use any of the other methods of public notice discussed in section IV.A.11 of this preamble (related to public notice of the draft permit).

We are proposing a requirement that the reviewing authority's final decision on your permit be based on an administrative record and requirements on what must be in that record. *See* proposed 40 CFR 49.159(b) and (c). The proposed rules also include provisions at 40 CFR 49.159(e) that address reopening a permit after it has been issued if it contains a material mistake or fails to assure compliance with the permit requirements. In addition, proposed 40 CFR 49.159(f) contains provisions for administrative permit revisions to make minor changes in the permit without being subject to the permit application, issuance, public participation, or administrative and judicial review requirements of the program.

We are proposing two options for reviewing initial permit decisions by reviewing authorities. In Option 1, review of minor NSR permits would be similar to review of major PSD permits issued under 40 CFR 52.21. To challenge the terms of your permit, you or another party would have to file a petition for review with our Environmental Appeals Board (EAB). Decisions by the EAB could be appealed to the Federal Court of Appeals for the tribal area. Alternatively, in Option 2, the reviewing authority's initial permit could be appealed directly to the appropriate Federal Court of Appeals without a requirement to appeal to the EAB first. There are advantages and disadvantages to both approaches. We solicit comment on which option we should adopt.

Option 1. Under Option 1, the proposed administrative and judicial review process for the minor NSR program parallels the process for PSD permits issued under 40 CFR 52.21, which is found in 40 CFR part 124. Since not all of the provisions of part 124 need to apply to this program, rather than adding the minor NSR program to the list of programs to which part 124 applies, in this option we are proposing to include the desired provisions in 40 CFR 49.159. The proposed provisions are very similar to the part 124 provisions, although they have been modified to better suit the small sources that will be covered under the minor NSR program.

The major difference between Option 1 and Option 2 is that, under Option 1, permit decisions may be appealed to the EAB within 30 days after a final permit decision has been issued, and a final permit typically would not become effective until 30 days after issuance. Upon filing of a petition for review, the permit would be stayed (*i.e.*, not go into effect) until the EAB decides whether to review any condition of the permit and the reviewing authority takes any action required by the EAB. When the EAB has issued its final order on an appeal, a motion to reconsider the final order may be filed with the EAB within 10 days. Only after all administrative remedies under proposed 40 CFR 49.159 have been exhausted could the person(s) filing the petition seek judicial review.

Option 2. Option 2 has two major differences from the appeals process we proposed in Option 1. First, we propose under Option 2 that permits would become immediately effective upon issuance by the reviewing authority unless a later effective date is specified. Second, there is no requirement for seeking EAB review before filing a petition for review in the Federal Court of Appeals with jurisdiction of the tribal area. The final agency action for purposes of judicial review is the issuance of the final permit by the reviewing authority. The permit is not stayed by the filing of a petition for review. If a party challenging a permit would like to have your permit stayed, that party may seek a stay under the provisions of the Administrative Procedures Act (APA), 5 U.S.C. 705.

Because the regulatory language for Option 1 is more detailed than would be required for Option 2, the proposed regulatory text only addresses Option 1.

Advantages and Disadvantages of Options 1 and 2. The different approaches to appeals of reviewing authority decisions result from section 704 of the APA. This section provides that an agency action that is otherwise final is final for purposes of judicial review unless the agency otherwise requires by rule that a party must seek review by a superior authority within the agency and the agency's action is meanwhile inoperative. Therefore, if we were to require administrative review by the EAB or another part of EPA before allowing anyone to seek judicial review of a permit, then we would be required to stay the permit for the duration of the appeal. The two options balance the advantages of EAB review of permits with the desire to not unnecessarily and inappropriately delay your ability to construct or modify a new minor source.

On the one hand, minor NSR permits are for sources and modifications that emit less than new major sources and major modifications to major sources. An automatic stay would delay these smaller projects from going ahead when there is less environmentally at stake than in a challenge to a PSD or nonattainment major NSR permit. In those instances where there would be irreparable harm caused by a project proceeding under a flawed permit, there would still be available the opportunity to seek a stay under the APA.

On the other hand, review of permit decisions by the EAB serves as quality control over decisions by various parts of EPA. The EAB can ensure that the policies of the Administrator are applied consistently and appropriately in permit decisions. This may be important when a tribe receiving a delegation under this rule or an EPA Regional Office acting as the reviewing authority makes an error in applying the relevant rules.

One important consideration would be the timeliness of any review process. The EAB has specialized expertise in environmental issues, unlike courts with broader case-loads. The EAB is likely to process a petition for review faster than a Court of Appeals. Courts of Appeals necessarily give priority criminal appeals over civil regulatory matters and thus may delay addressing and resolving permit appeals. In either the EAB or the Courts of Appeals, it is unlikely that review of minor NSR permits will be expedited ahead of matters with greater environmental impact.

Under Option 2, you may be placed in a difficult situation of having a permit revoked after proceeding with construction while an appeal was pending. However, under Option 1, your project cannot proceed so long as the EAB appeal is pending.

We seek comment on how to balance these issues. Which option do you prefer and why? We invite comment on whether either Option 1 or Option 2 is more appropriate for general permits than individual minor source permits. We also ask for comment on whether there should be a short delay of 30 days before a permit is effective under Option 1 in order to allow for parties to seek administrative stays during reconsideration or to obtain a judicial stay before a permit goes into effect. Should we establish a mechanism for administrative reconsideration though the EAB, even when a party is seeking judicial review in the Court of Appeals? Any input on these issues with

supporting documentation will help us in structuring the final rule.

B. Major NSR Program in Nonattainment Areas of Indian Country

In today's rulemaking, we are proposing to establish a major NSR program for new major stationary sources and major modifications at existing major stationary sources in nonattainment areas of Indian country at 40 CFR 49.166 through 49.175. This program is designed to meet the requirements of part D of title I of the Act, and sources subject to this program would be required to comply with the requirements of 40 CFR part 51, appendix S (appendix S).

Appendix S is entitled ''Emission Offset Interpretative Ruling'' and sets forth preconstruction review requirements for major stationary sources and modifications locating in nonattainment areas where the State does not have an EPA-approved nonattainment major NSR program. In general, appendix S is a transitional nonattainment major NSR program that covers the period after an area has been newly designated as nonattainment, up until the State has amended its SIP's nonattainment major NSR program, as needed, to address the new nonattainment area. The requirements under appendix S are essentially the same as our requirements for State nonattainment major NSR programs at 40 CFR 51.165.

Primarily, we believe it is appropriate to apply appendix S provisions in Indian country for administrative convenience. Additionally, since appendix S generally applies in nonattainment areas where there is no approved nonattainment major NSR program, and since no tribe currently has such a program, we believe that appendix S should also apply in Indian country. Another reason for requiring sources subject to this program to comply with appendix S requirements is that the EPA Regional Offices (which will be implementing the program until an EPA-approved implementation plan is in place) and several major sources in Indian country are familiar with the implementation and provisions of appendix S.

We considered and rejected the option of amending appendix S to extend its application to Indian country, since we believe that sources in Indian country are more likely to look for regulations applicable to them under part 49, which is solely dedicated to regulations that apply in Indian country. We also considered drafting a parallel major NSR regulation to apply to sources in Indian country, but rejected this option since it would essentially re-propose appendix S provisions, which have been in effect outside of Indian country for many years. We wanted to avoid any potential confusion or possible perception that these parallel regulation requirements would be different than the appendix S requirements.

It is important to keep in mind that, in this rulemaking, we are only seeking comment on our general approach of requiring sources subject to the major NSR program in Indian country to be subject to the provisions of appendix S. While we will consider any compelling rationale or justification from a commenter that a particular provision in appendix S is not appropriate for Indian country, we will not entertain general comments on the appendix S provisions, since this transitional program has been implemented in States across the country for many years.

1. What are the requirements for major source permitting under appendix S?

Pursuant to paragraph IV of appendix S, a reviewing authority may issue a permit for a new major source or a major modification locating in a nonattainment area, if it complies with the following conditions:

- The new major source or a major modification meets the LAER for that source utilizing add-on controls or pollution prevention measures.
- The applicant certifies that all existing major sources owned or operated by the applicant (or any entity controlling, controlled by, or under common control with the applicant) in the same State as the proposed source are in compliance with (or under a federally-enforceable compliance schedule for) all applicable emission limitations and standards under the Act.
- Emission reductions (offsets) from existing sources in the area of the proposed source (whether or not under the same ownership) are obtained such that there will be reasonable progress towards attainment of the applicable NAAQS. Only intrapollutant emission offsets will be acceptable (*e.g.*, NOx for NOx).
- The emission offsets provide a net air quality benefit in the affected area.

2. What are the options we are proposing to address the lack of available offsets in Indian country?

Tribal representatives have repeatedly stated that requirements for emission offsets are problematic in Indian country for the following reasons. Many tribes believe that transport is a major cause of pollution in Indian country. Tribes, with few exceptions, do not have many existing sources within their area of Indian country from which offsets can be obtained. In addition, administrative barriers may hinder tribal access to otherwise available offsets. Therefore, tribal representatives have advocated for additional flexibility to address offsets, such as the provision of NSR offset set-asides (which we expect would come from State offset pools or banks). Tribal representatives have raised these and other concerns in discussions on implementation of the 8-hour ozone and $PM_{2.5}$ standards, and in comments on the 8-hour ozone implementation rule.[8]

We recognize the unique circumstances that tribes face. Unlike States that have a SIP, a huge industrial base with several hundred existing sources, and a broad range of measures to attain and maintain NAAQS, a tribe generally has neither a TIP nor many existing sources from which to generate offsets. Under these circumstances, we are proposing two options to address the lack of availability of offsets for tribes: (1) The Economic Development Zone (EDZ) option and (2) the appendix S, paragraph VI option. We also are requesting comment on other potential options for offset relief in Indian country.

Economic Development Zone Option. We would rely on section 173(a)(1)(B) of the Act wherein the Administrator, in consultation with the Secretary of Housing and Urban Development (HUD), would identify areas in Indian country as EDZs such that sources subject to major NSR located in EDZs in Indian country would be exempt from the offset requirement in section 173(a)(1)(A) of the Act.

Section 173(a)(1) of the Act provides for the issuance of permits to construct and operate a new or modified major stationary source if the reviewing authority determines that (A) ''* * * sufficient offsetting emissions reductions have been obtained * * *'' or (B) ''in the case of a new or modified major stationary source which is located in a zone (within the nonattainment area) identified by the Administrator, in consultation with the Secretary of Housing and Urban Development, as a zone to which economic development should be targeted, that emissions of such pollutant resulting from the proposed new or modified major stationary source will not cause or contribute to emissions levels which

[8] For example, see the letter from Bill Grantham, National Tribal Envrionmental Council, to docket EPA–HQ–OAR–2003–0076, providing comments on the proposed 8-hour ozone implementation rule (66 FR 32802).

exceed the allowance permitted for such pollutant for such area from new or modified major stationary sources under section 172(c).''

Once the Administrator has identified an area that should be targeted for economic development in consultation with HUD, major sources that construct or modify within that area are relieved of the offset requirement if the State/tribe can demonstrate that the new permitted emissions are consistent with the achievement of reasonable further progress pursuant to section 172(c)(4) of the Act, and will not interfere with attainment of the applicable NAAQS by the applicable attainment date.

We understand that HUD's Initiative for Renewal Communities, Urban Empowerment Zones, and Urban Enterprise Communities generally require that participating communities demonstrate pervasive poverty, high unemployment, and general distress throughout the designated area. The U.S. Department of Agriculture requires similar eligibility criteria for participating communities located in rural areas. We believe that many areas of Indian country may meet these criteria and hence could qualify for this offset relief provision. We seek comment on whether these criteria are appropriate for use in identifying EDZs in Indian country and if we should consider any other criteria.

We are also proposing to have the Administrator consult with HUD only once to develop a general set of approval criteria, such that a consultation is not required every time a tribe applies for its area of Indian country to be designated as an EDZ. EPA would provide assistance as needed for a tribe to complete an EDZ designation request. Once the Administrator approves such a request from a tribe, a new major source or a major modification locating in that EDZ would be exempt from the offset provisions. We seek comment on this approach for providing offset relief.

Appendix S, Paragraph VI Option. Paragraph VI of appendix S notes that in some cases, the dates for attainment of the primary or secondary NAAQS may not have passed. In such cases, appendix S provides that a new source locating in a nonattainment area may be exempt from the requirements of paragraph IV.A of appendix S (discussed in section IV.B.1 of this preamble), including the offset requirement, if the following conditions are met:

- The new source complies with the applicable implementation plan emission limitations;
- The new source will not interfere with the attainment date for a regulated NSR pollutant; and
- We have determined that the preceding two conditions are satisfied and such determination is published in the **Federal Register**.

Tribes would be able to use this option for offset relief for the 8-hour ozone and PM2.5 NAAQS. For instance, the attainment dates for 8-hour ozone nonattainment areas range from 2007 for marginal areas to 2021 for severe areas. Hence, a new major source or a major modification locating in such a nonattainment area prior to the attainment date may be exempt from the requirements of paragraph IV of appendix S, if the associated conditions are met.

It is important to note that this option would provide only temporary offset relief because it would cease to be available once the attainment date for a pollutant has passed. For instance, this option would not be available to marginal 8-hr ozone nonattainment areas after 2007. We seek comment on this paragraph VI option for offset relief.

We are seeking comment on other potential options for addressing the lack of availability of offsets in Indian country.

3. What are the proposed public participation requirements for this program?

We believe that the public participation requirements of 40 CFR 51.161 apply to permitting under appendix S. Additionally, for the nonattainment major NSR program, we are proposing detailed public notice requirements at 40 CFR 49.171. The proposed requirements for the nonattainment major NSR program are very similar to those proposed for the minor NSR program at 40 CFR 49.157. *See* section IV.A.11 for more information on the proposed requirements.

4. How do I meet the statewide compliance certification requirement of the Act?

Pursuant to the statewide compliance certification requirements of section 173(a)(3) of the Act, an owner or operator of a proposed new or modified major stationary source must demonstrate that all other major stationary sources under her/his control in the same State are in compliance or on a schedule for compliance with all emission limitations and standards of the Act. It is important to recognize that the proposed rules will not impact this statewide compliance certification requirement. However, in the context of Indian country, we are seeking comments on whether this requirement should be expressed as an Indian country-wide compliance certification or remain a statewide certification. In other words, should you be required to certify that all your sources in the State where your proposed source is locating are in compliance, or that all your sources in all of Indian country are in compliance?

Note that we are proposing a minor change to appendix S that is related to the ''emission limitations and standards of the Act.'' Existing paragraph II.B of appendix S requires the reviewing authority to review each proposed new major source and major modification to determine whether it will meet ''any applicable new source performance standard in 40 CFR part 60, or any national emission standard for hazardous air pollutants in 40 CFR part 61.'' While we have incorporated this requirement into proposed 40 CFR 49.169(a), we believe that it should be expanded to include the newer national emission standards for hazardous air pollutants codified at 40 CFR part 63 (commonly referred to as MACT standards). Accordingly, we are proposing to revise paragraph II.B of appendix S to add these standards under the Act, and proposed 40 CFR 49.169(a) would match the revised language of this paragraph.

V. Legal Basis, Statutory Authority, and Jurisdictional Issues

A. What is the basis for our authority to implement these programs?

Today's proposed rules are intended to fill a regulatory gap in the protection of air quality in Indian country. Although many States have developed regulatory programs for minor sources, those programs do not apply in Indian country unless explicitly approved by EPA for such areas. In addition, there is no Federal minor NSR program or major nonattainment NSR program in Indian country. Part D of title I of the Act requires that each SIP include preconstruction review and permitting rules for the construction and operation of new and modified major stationary sources located in designated nonattainment areas. The TAR authorizes eligible Indian tribes to implement EPA-approved nonattainment NSR (part D of title I of the Act), PSD (part C of title I of the Act), and other programs under the Act in the same manner as States. However, if Indian tribes are unable, or choose not, to develop a nonattainment NSR program in a TIP, we will implement the program where necessary or

appropriate. Today's proposed requirements are intended to provide the mechanism for implementation of the Federal major nonattainment NSR and minor NSR programs in Indian country.

The purpose of the proposed rules is to ensure that the NSR program is implemented throughout the United States and that any economic growth occurring in Indian country will do so in harmony with the preservation of existing clean air resources. Today's proposed rules provide both Indian tribes and businesses operating or considering locating in Indian country an understanding of the NSR programs for stationary sources. They also provide businesses and tribes procedures to comply with the major nonattainment NSR and minor NSR programs.

The Act gives us the authority to protect the Nation's air resources. Furthermore, title I of the Act requires that the NSR program be established to protect public health and welfare, national parks, and wilderness areas as new sources of pollution are built or existing sources are modified. The program is designed to ensure that emissions will be well controlled and that there will be protection of the NAAQS in Indian country. We understand that not all tribes have the resources to design and implement NSR programs; therefore, in today's proposal, we are providing a Federal program to apply in Indian country and that tribes may use as a model if they choose to develop their own implementation programs and obtain our approval.

Under today's proposed rule, the Federal program at 40 CFR 49.151 through 49.165 for minor stationary sources would apply throughout Indian country, except where we explicitly approve an implementation plan for such programs. The Federal rule at 40 CFR 49.166 through 49.175 for new and modified major stationary sources in nonattainment areas located in Indian country would likewise apply in an area of Indian country until an implementation plan has been approved by us.

As discussed previously, the Act provides us with broad authority to protect air resources throughout the Nation, including air resources in Indian country. *See*, for example, the preamble discussion for the proposed and final TAR (59 FR 43956, 43958–61, August 25, 1994; 63 FR 7254, 7262–64, February 12, 1998) and the preamble discussion for the proposed revisions to the part 71 Federal operating permits program for Indian country (62 FR 13748, 13750, March 21, 1997). In the preambles to the proposed and final TAR, we discussed generally the legal basis under the Act for EPA and tribal regulation of sources of air pollution in Indian country. We concluded that the Act constitutes a statutory delegation of Federal authority to eligible tribes over all sources of air pollution within the exterior boundaries of their reservations.

Further, under the Act, tribes may also apply to administer tribal air quality programs for non-reservation areas over which they can show jurisdiction.[9] *See* 63 FR 7254–7259, 59 FR 43958–43960, *Arizona Public Service Co.* v. *EPA,* 211 F.3d 1280 (D.C. Cir. 2000), cert. den., 532 U.S. 970 (2001).

In the preamble to the TAR, we also concluded that the Act authorizes us to protect air quality throughout Indian country. *See* 63 FR 7262, 59 FR 43960–43961 citing sections 101(b)(1), 301(a), and 301(d) of the Act.

In addition, sections 301(d) and 110(o) of the Act give the tribes the authority to develop their own tribal programs. We encourage eligible tribes to develop their own minor and major nonattainment NSR programs for incorporation into their TIPs. In the absence of EPA-approved programs, we believe that, in most cases, it would be neither practical nor administratively feasible for us to develop and implement a separate program for each area of Indian country. As a result, we are proposing to implement a flexible FIP for Indian country that provides new and modified minor sources and major sources in nonattainment areas with procedures to demonstrate that they will be operating in a manner that is protective of air resources and the NAAQS.

Section 301(a) of the Act provides us broad authority to issue such regulations as are necessary to carry out the mandates of the Act. Further, several provisions of the Act call for Federal implementation of a program where, for example, a State, or in this case a tribe, fails to adopt a program or adopts an inadequate program. *See,* for example, sections 110(c)(1), 502(d)(3), and 502(i)(4) of the Act. These provisions exist in part to ensure that the benefits of the Act would be realized throughout the United States, whether or not local governments choose to participate in implementing the Act. Especially in light of the problems associated with transport of air pollution across State and tribal boundaries, it follows that Congress intended that we have the authority to operate a Federal program in the absence of an adequately implemented EPA-approved program. *See,* for example, 59 FR 43958–61, August 25, 1994; 62 FR 13750, March 21, 1997; and 63 FR 7262–64, February 12, 1998.

This interpretation is most evident from Congress' grant of authority to the EPA under section 301(d)(4) of the Act. Section 301(d)(4) authorizes the Administrator to directly administer provisions of the Act so as to achieve the appropriate purpose where tribal implementation of those provisions is inappropriate or administratively infeasible. We determined that it is inappropriate to subject tribes, among other things, to the mandatory submittal deadlines and to the related Federal oversight mechanisms in section 110(c)(1) of the Act, which are triggered when we make a finding that States have failed to meet required deadlines or disapprove a plan submittal. *See* 40 CFR 49.4(d).

By determining that tribes should not be treated similarly to States for purposes of the specific FIP obligation under section 110(c)(1) of the Act, we are not relieved of the general obligation under the Act to ensure the protection of air quality throughout the Nation, including throughout Indian country. Rather, consistent with the provisions of sections 301(a) and 301(d)(4) of the Act, we expressed our intent to promulgate

[9] We believe that in the context of programs under the Act, States generally lack the authority to regulate air quality in Indian country. *See Alaska* v. *Native Village of Venetie Tribal Government,* 522 U.S. 520, 527 fn. 1 (1998) (''Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States.''), *California* v. *Cabazon Band of Mission Indians,* 480 U.S. 202 (1987), and *HRI* v. *EPA,* 198 F.3d 1224 (10th Cir. 2000); see also discussion in EPA's final rule for the Federal operating permits program (64 FR 8251–8255, February 19, 1999). To provide additional certainty to regulated entities, we believe it is helpful to clarify the extent to which State NSR programs have force in Indian country. We make clear today that we interpret past approvals and delegations of NSR programs as not extending to Indian country unless the State has made an explicit demonstration of jurisdiction over Indian country, and we have explicitly approved or delegated the State's program for such area. This is consistent with Congress' requirement that we approve State and tribal programs only where there is a demonstration of adequate authority. See sections 110(a)(2)(E), 110(o), and 301(d) of the Act and 40 CFR part 49. Since States generally lack the authority to regulate air resources in Indian country, we do not believe it would be appropriate for us to approve State programs under the Act as covering Indian country where there has not been an explicit demonstration of adequate jurisdiction and where we have not explicitly indicated our intent to approve the State program for an area of Indian country. In State NSR program approvals and delegations, we generally were not faced with State assertions of authority to regulate sources in Indian country. However, to the extent States or others may have interpreted our past approvals or delegations that were not based on explicit demonstrations of adequate authority and did not explicitly grant approval in Indian country, as approvals to operate NSR programs in Indian country, we wish to clarify any such misunderstanding.

without unreasonable delay a FIP (where necessary or appropriate) to protect air quality if tribal efforts do not result in adoption and approval of tribal plans or programs. *See* 63 FR 7265, 40 CFR 49.11.

We propose to exercise our authority to administer the minor NSR permitting program and the nonattainment major NSR program in Indian country, which is generally the area over which a tribe may potentially receive approval of programs under the Act. As noted in the final TAR, we interpret the Act as establishing a territorial approach to implementation of the Act within Indian reservations by delegating to eligible tribes authority over all reservation sources without differentiating among the various categories of on-reservation lands (63 FR 7254–7258). In addition, the Act authorizes eligible tribes to implement tribal programs under the Act in non-reservation areas over which a tribe has jurisdiction, generally including all areas of Indian country (63 FR 7258–7259).

Under section 301(d)(4) of the Act, Congress authorized the EPA to maintain the territorial approach by implementing the Act in Indian country in the absence of an EPA-approved program. We believe that Congress authorized us, consistent with our Indian policy, to avoid the checkerboarding of reservations based on land ownership by federally implementing the Act over all reservation sources in the absence of an EPA-approved tribal program. *See* S. Rep. No. 228, 101st Cong., 1st Sess. 79 (1989) (implementation of the Act to be in a manner consistent with EPA's Indian policy). In addition, section 301(d)(4) authorized us to implement the Act in non-reservation areas of Indian country in order to fill any gap in program coverage and to ensure an efficient and effective transition to EPA-approved programs.

Our interpretation of section 301(d) of the Act as authorizing our implementation throughout Indian country is also supported by the legislative history. *See* S. Rep. No. 228, 101st Cong., 1st Sess. 80 (1989) (noting that section 301(d) of the Act authorizes the EPA to implement provisions of the Act throughout ''Indian country'' when there is no approved tribal program); Id. at 80 (noting that criminal sanctions are to be levied by the EPA, ''consistent with the Federal government's general authority in Indian country''); *Id.* at 79 (the purpose of section 301(d) is to ''improve the environmental quality of the air within Indian country in a manner consistent with the EPA Indian Policy'').

In order to further our commitment to use our authority under the Act to protect air quality throughout Indian country by directly implementing the Act's requirements, we are now exercising the rulemaking authority entrusted to us by Congress to directly implement the minor NSR permitting program and nonattainment major NSR permitting program throughout all areas of Indian country. *See* generally, *Chevron USA, Inc.* v. *NRDC*, 467 U.S. 837, 842–45 (1984).

B. How does a tribe receive delegation to assist EPA with administration of the Federal minor and major NSR rules?

Section 301(a)(1) of the Act provides that the Administrator is authorized to prescribe such regulations as are necessary to carry out his or her functions under the Act. Pursuant to this authority, proposed 40 CFR 49.160 and 49.172 of the minor and major NSR rules, respectively, provide that partial administration of the Federal NSR programs may be delegated to a tribal agency that submits a request for delegation which includes the information set forth in the proposed sections.[10] Any Federal requirements under these programs that are administered by the delegate tribal agency will be subject to enforcement by EPA under Federal law. Nothing in the proposed rules would require us to delegate administration of any aspect of the Federal program to a tribal agency.

As noted elsewhere, we have established a process in the TAR pursuant to section 301(d) of the Act for tribes to seek treatment in a similar manner as a State (TAS) for various provisions and programs of the Act. Under the procedures set forth in the TAR, tribes may seek to demonstrate eligibility for approval of tribal programs under the Act, including a tribal NSR program, under tribal law. The TAR allows tribes to seek approval for such programs covering their reservations or other areas within their jurisdiction. We recognize that some tribes may choose not to develop tribal NSR programs for submission to us for approval under the TAR, but that these tribes may still wish to assist us in implementing the Federal NSR program for their area of Indian country. By assisting us with administration of the Federal program, tribes remain appropriately involved in implementation of an important air quality program and may develop their own capacity to manage such programs in the future should they choose to do so. Proposed 40 CFR 49.160 and 49.172 of the minor and major NSR rules, respectively, provide tribal governments the option of seeking delegation from us of the administration of the Federal NSR program, or aspects of the program, for their area of Indian country. Such administrative delegation is to be distinguished from the TAS process under the TAR whereby tribes seek approval to run programs under tribal law. Tribes would not need to seek TAS under the TAR in order to request delegation of administration of aspects of these Federal NSR programs. Tribes would, however, need to provide the relevant application information described in those sections. In addition, program functions delegated under proposed 40 CFR 49.160 or 49.172 would remain part of the relevant FIP administered under Federal law. The delegate tribal agency would simply assist EPA with administration of the program to the extent of the functions delegated.

We have well-established processes for delegating our Federal authority to States for administering Federal rules under the Act, including conducting new source review under 40 CFR 52.21(u), and issuing Federal operating permits under 40 CFR 71.4(j) and 71.10. The process we would follow to delegate the administration of the Federal NSR program to a tribal agency is similar to the process we follow to delegate the administration of Federal programs to States. Prior to finalizing any delegation agreement with a tribal agency, we would consult with other Federal, State, tribal, or local governmental entities, or other governmental agencies in the area, as appropriate. Although sections 110(o) and 301(d) of the Act and the TAR authorize us to review and approve TIPs, neither the Act nor the regulations provide that approval of tribal programs under tribal law is the sole mechanism

[10] This information includes identifying the specific rules and provisions and the area of Indian country for which the delegation is requested. In addition, tribal agencies seeking delegation must provide a statement by the tribe's legal counsel or equivalent official including a statement that the tribe is recognized by the Secretary of the Interior, a descriptive statement demonstrating that the tribe is currently carrying out substantial governmental duties and powers over a defined area (this statement should be consistent with the type of information described in 40 CFR 49.7(a)(2), which relates to the separate process by which tribes apply to be treated in a similar manner as States for various purposes under the Act), a description of the laws of the tribe that provide adequate authority to administer the Federal rules and provisions for which the delegation is requested, and a descriptive statement demonstrating that the tribal agency has, or will have, the technical capability and adequate resources to administer the Federal rules and provisions for which the delegation is requested.

available for tribal agencies to take on permitting responsibilities. Accordingly, we propose to exercise our discretion to delegate administration of the Federal NSR program to interested tribal agencies satisfying the requirements of proposed 40 CFR 49.160 and 49.172.

The delegation of administration of the Federal NSR program to tribes proposed in these rules is to be distinguished from our interpretation that the Act constitutes a delegation of Federal authority from Congress to tribes over their reservations as described in the TAR. *See* 63 FR 7254–59. As described in the preamble to the TAR, it is our position that the TAS provision of the Act constitutes a statutory delegation of authority to eligible tribes over their reservations. As described earlier, the TAR established procedures for our approval of tribal eligibility applications to operate the programs of the Act under tribal law. Where we approve a tribal eligibility application and approve a tribal NSR program, the approved tribe will manage the program under tribal law, and the tribal program becomes federally enforceable. Among the required elements of a tribal eligibility application under the TAR is a demonstration of the tribe's authority, including appropriate enforcement authority, to regulate air quality for the areas to be covered by the program. For air resources within the exterior boundaries of a tribe's reservation, the tribe may rely on the Congressional delegation of Federal authority to operate approved tribal programs. Tribes may also attempt to demonstrate authority to operate the programs of the Act over other areas outside of their reservations, generally including non-reservation areas of Indian country.

In contrast, the delegation approach proposed in these rules provides for us to delegate administration of the Federal program operating under Federal law to interested tribes that provide the information described in proposed 40 CFR 49.160(b)(1) and 49.172(b)(1). Since this program operates throughout Indian country under Federal authority, tribes would not need to demonstrate either Congressionally-delegated authority over air resources within the exterior boundaries of their reservations or authority of non-reservation areas of Indian country. Instead, tribal agencies would assist us in implementing the Federal program by taking delegation of the administration of particular activities conducted under our authority in Indian country. Under proposed 40 CFR 49.160(b)(1)(iii)(C) and 49.172(b)(1)(iii)(C), tribes would only need to show that their laws provide adequate capacity and authority to carry out the delegated activities. For example, where a tribe seeks administrative delegation for permit issuing activities of the Federal program, the tribe may, among other things, need to show it has in place an appropriate agency with legal authority to review applications and issue permits on behalf of the delegate tribal government. For these administratively delegated programs, Federal program requirements will continue to be subject to enforcement by us, not the delegate tribal agency, under Federal law. Administrative appeals of permitting decisions would also continue to be made directly to the EAB under our administrative procedures with any subsequent judicial review to be conducted in Federal court. In the proposed rules we make it clear that we will not delegate enforcement or appeal components of the program to tribal agencies.

In order to be delegated authority to administer the proposed rules for a particular area of Indian country, the authorized representative of a tribal agency must demonstrate that it has the authority and technical capability to carry out the provisions of the rules for which delegation is requested. When delegation is approved, a Partial Delegation of Administrative Authority Agreement between the Administrator and the tribal agency will set forth the terms and conditions of the delegation, and will also specify the rules and provisions that the tribal agency is authorized to implement. Once the delegation becomes effective, the tribal agency will have the authority under the Act, to the extent specified in the Agreement, to administer the rules in effect for the particular area of Indian country, and to act on behalf of the Administrator. The Federal requirements administered by the delegate tribal agency will be subject to enforcement by us under Federal law.

When we have delegated administration of the portion of the Federal minor or major NSR program that includes receipt of permit application materials and preparation of draft permits, the delegate tribal agency must provide us a copy of each permit application (including any application for permit revision) and each draft permit.[11] In any such delegation, we retain the authority to object to the issuance of any permit that we determine not to be in compliance with the requirements under the program or other requirements pursuant to regulations under the Act. For any such objections, we will outline the reasons for the objection in writing, and we will provide a copy of the written statement to the permit applicant. The delegate tribal agency may not issue a permit if we object to its issuance in writing. The delegate tribal agency may submit a revised draft permit to us in response to the objection. However, if it does not do so within 90 days, we will issue or deny the permit in accordance with the requirements of the Federal minor or major NSR program, as applicable.

[11] The proposed minor and major NSR programs provide that the delegate tribal agency may require the applicant to provide a copy of the permit application directly to us. In addition, with our consent, the delegate tribal agency may submit to us a permit application summary form and any relevant portion of the permit application.

C. What happens to permits previously issued by States to sources in Indian country?

As discussed previously, section 301(d) of the Act recognizes the authority of eligible tribes to implement the Act throughout their reservations and other areas under their jurisdiction. Historically, sources in some areas of Indian country may have received permits from States operating EPA-approved programs. However, States generally lack jurisdiction under the Act over these facilities and generally were not authorized under the Act to issue such permits in Indian country. We also recognize that just as it required many years to develop State and Federal programs to cover lands subject to State jurisdiction, it will also require time to develop tribal and Federal programs to cover areas of Indian country.

We have also mentioned before that we will ''promulgate without unreasonable delay such Federal implementation plan provisions as are necessary or appropriate to protect air quality, consistent with the provisions of sections 301(a) and 301(d)(4) [of the Act], if a tribe does not submit a tribal implementation plan. * * *'' *See* 40 CFR 49.11(a). Today's proposed rulemaking would provide a mechanism to change State permits issued to major sources of regulated NSR pollutants in nonattainment areas of Indian country to Federal major NSR permits. If you own or operate a major stationary source with a State-issued nonattainment major NSR permit, you must apply to convert the permit to a Federal permit under this program within 1 year of the effective date of this program. In this case, you would not be subject to any additional requirements under this program. *See* proposed 40 CFR 49.168(b).

The requirements contained in these State-issued permits have been relied on for protection of attainment and

maintenance of air quality in these nonattainment areas. We believe that transforming the State permits in to Federal major NSR permits for major sources in Indian country is appropriate to protect air quality in Indian country, as the tribes take on the effort to develop and/or run their own programs.

VI. Statutory and Executive Order Reviews

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 Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Executive Order defines a ''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 obligation 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, it has been determined that this is a ''significant regulatory action''. 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.

B. Paperwork Reduction Act

The information collection requirements in the proposed amendments have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501, et seq. The Information Collection Request (ICR) document prepared by EPA has been assigned OMB Control Number 2060–0003 (EPA ICR No. 1230.13).

Certain records and reports are necessary for the tribal agency (or the EPA Administrator in non-delegated areas), for example, to: (1) Confirm the compliance status of stationary sources, identify any stationary sources not subject to the standards, and identify stationary sources subject to the rules; and (2) ensure that the stationary source control requirements are being achieved. The information would be used by the EPA or tribal enforcement personnel to (1) Identify stationary sources subject to the rules, (2) ensure that appropriate control technology is being properly applied, and (3) ensure that the emission control devices are being properly operated and maintained on a continuous basis. Based on the reported information, the delegate tribes can decide which plants, records, or processes should be inspected.

The major nonattainment NSR rule would have little impact on existing major stationary sources in Indian country because it would only affect such owners and operators if they propose a major modification; none are expected. The proposed rule would only result in an administrative change for new major sources in Indian country because, although the regulatory mechanism to issue permits is not yet available in the form of either a Federal nonattainment NSR rule or a TIP, we would be required to implement the program in Indian country, and would otherwise have to do source-specific FIP. As a result, there would no new or additional burden on industry.

With regard to the minor source permitting rule, the average capital cost per facility for the one-time activities is $13,088 per source; annualized, this cost is $1,863 per year per source. The total of the various annualized and recurring costs is an average of $7,598 per year per source. The annual reporting and record keeping cost burden is a total annualized capital/startup costs of $77,000, and total annual costs (operation and maintenance) of $235,000.

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 purposes of collecting, validating, and verifying information, processing and maintaining information, and disclosing and providing information; adjust the existing ways to comply with any previously applicable instructions and requirements; train personnel to be able to respond to a collection of information; search 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 the EPA's rules are listed in 40 CFR part 9 and 48 CFR chapter 15.

To comment on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including the use of automated collection techniques, EPA has established a public docket for this rule, which includes this ICR, under Docket ID number EPA–HQ–OAR–2003–0075. Submit any comments related to the ICR for this proposed rule to EPA and OMB. *See* **ADDRESSES** section at the beginning of this notice for where to submit comments to EPA. Send comments to OMB at the Office of Information and Regulatory Affairs, Office of Management and Budget, 725 17th Street, NW., Washington, DC 20503, Attention: Desk Office for EPA. Since OMB is required to make a decision concerning the ICR between 30 and 60 days after August 21, 2006, a comment to OMB is best assured of having its full effect if OMB receives it by September 20, 2006. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

C. Regulatory Flexibility Act (RFA)

The 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 today's proposed rule on small entities, ''small entity'' is defined as: (1) A small business as defined by the Small Business Administration's regulations at 13 CFR 121.201; (2) a small governmental jurisdiction that is a government or 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. Today's proposed rule only potentially affects small businesses, not small governments or small organizations.

The proposed rule potentially affects six types of stationary sources in Indian Country:

- New and modified minor sources of regulated NSR pollutants;

- Sources of regulated NSR pollutants choosing to accept enforceable emission limitations to avoid major source regulations (synthetic minors);
- Sources of HAP choosing to accept enforceable emission limitations to avoid major source regulations (synthetic minors);
- Minor modifications to major sources of regulated NSR pollutants;
- New major sources of regulated NSR pollutants in nonattainment areas; and
- Major modifications to major sources of regulated NSR pollutants in nonattainment areas.

The second, third, fifth, and sixth types of sources are projected to incur no incremental costs or to experience cost savings due to the proposed rule. The rule results in only an administrative change for new major sources in nonattainment areas. In the absence of the proposed rule, there is no regulatory mechanism to issue permits. We would be required to implement the program in Indian country, and such new major sources would have to be permitted through a source-specific FIP. The proposed rule would provide a regulatory mechanism for permitting such sources; because the compliance requirements are expected to be unchanged by the proposed rule, no change in control costs is expected. Because the permitting process may be less uncertain under the proposed rule, new and modifying major sources could potentially experience cost savings compared to baseline conditions. Choosing to accept enforceable emission limitations (become a synthetic minor) is entirely optional; rational firms would only make this choice if it resulted in a cost savings. For these four types of sources, therefore, no adverse economic impacts are expected to any businesses, including small businesses.

The screening assessment therefore focused on costs and impacts for new and modified minor sources and minor modifications at major sources. To analyze potential impacts to small companies owning such sources, we first estimated the number of new sources that would be sited in Indian country over the period 2004 through 2010, the time period selected for the analysis.[12] Generally, data on minor sources in Indian country is very limited. We conducted an exhaustive search for information available from EPA databases, the Small Business Administration, and EPA Regional Offices. We also encouraged the tribes to participate in the rulemaking, and inquired whether tribes had any information on minor sources but no data were received. We concluded that the information in 11 tribal emissions inventories maintained by EPA/OAQPS provided the best characterization of the types of minor sources that currently exist and the types of new minor sources that might be sited in Indian country in the future. We collected data from the Economic Census (1997) on the number of establishments of each type in each State, and allocated the establishments to Indian country based on tribes' share of State income. Then, we projected the number of new minor sources of each type that would be created in Indian country by applying the estimated growth rate for American Indian/Alaska Native (AI/AN) population in each State to the estimated baseline number of sources in Indian country in the State. Over the period from promulgation (2004) through (2010), we estimate that 288 new minor sources will be created in Indian country. We used data from financial databases to compute the share of companies in each sector that are owned by small businesses (based on the Small Business Administration small business size definitions at 13 CFR part 121). Assuming that the same share of new minor sources will be owned by small businesses, we estimate that 164 new minor source facilities, owned by 143 small businesses, will be created in Indian country during the period. Additionally, we project that 112 modifications to existing minor sources will occur during the period 2004 through 2010. Of these, we estimate that 51 small businesses will own 62 existing minor sources undergoing modifications during the period.

Finally, we estimate that one major source in Indian country will make a minor modification to its operations each year. Thus, we estimate that seven minor modifications to existing major sources will occur over the period 2004 to 2010. Of these, we estimate that 3 of these major sources will be owned by 3 small businesses.

Table 3 below summarizes the estimated numbers of affected facilities and small businesses.

TABLE 3.—PROJECTED NUMBER OF AFFECTED SMALL BUSINESSES AND ESTIMATED COSTS INCURRED BY SMALL BUSINESSES

[2004 through 2010]

Source type	Projected number of sources owned by small businesses	Estimated number of small businesses	Estimated costs incurred by small businesses ($ million) [a]
New Minor Sources	164	143	$2.68
Modified Minor Sources	62	51	0.97
Minor Modifications to Major Sources	3	3	0.02
Total	229	197	3.62

[a] Based on Year 2000 dollars.

To conduct our screening analysis of impacts on small businesses, we compared the estimated costs of compliance for each type of source in each sector with typical small business sales in each sector.

Based on the screening analysis of impacts on small entities, we certify that this action will not have a significant economic impact on a substantial number of small entities. Our analysis estimates that, of the projected 164 new minor source facilities owned by 143 small businesses, two (a natural gas compressor station and a landfill) will experience costs greater than 1 percent of sales and none will experience costs exceeding 3 percent of sales due to the proposed rule. Of the estimated 62 existing minor source facilities owned

[12] Based upon our evaluation of current Tribal emission inventories and the application of updated growth rates, we have determined that the analysis has not changed significantly to date; therefore, the May, 2003 analysis for the period 2004–2010 remains valid for the EIA, the associated ICR supporting statement and this RFA. This analysis will be updated for the final rulemaking.

by 51 small businesses projected to perform minor modifications that result in emissions increases greater than the minor NSR thresholds in Table 1, three may experience costs approximately equal to 1 percent of sales; none experience costs exceeding 3 percent of sales. The three major source facilities owned by small businesses projected to perform minor modifications during the period 2004 through 2010 will incur only the costs of obtaining a minor source permit, which represent a very small share of baseline company sales. Therefore, of these 229 potentially affected facilities owned by an estimated 197 small businesses, only 5 are projected to incur costs exceeding 1 percent of company sales, and none is projected to incur costs greater than 3 percent of company sales. Thus, the proposed rule will not impose a significant economic impact on a substantial number of small entities.

D. Unfunded Mandates Reform Act

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 the 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 aggregate, or to the private sector, of $100 million or more in any 1 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 have determined that this proposed rule does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any 1 year. The maximum total annual cost of this proposed rule for any 1 year has been estimated to be $312,000. Thus, today's proposed rule is not subject to the requirements of sections 202 and 205 of the UMRA. In addition, we have determined that this proposed rule contains no regulatory requirements that might significantly or uniquely affect small governments because it contains no requirements that apply to such governments or impose obligations upon them. Therefore, today's proposed rule is not subject to the requirements of section 203 of the UMRA.

The proposed rule does not require that any tribe accept delegation or develop their own permitting program; thus, it does not impose any burden on small tribes. We recognize, however, that some small tribes may choose to assist EPA with administration of the minor NSR program on their reservations. We thus analyzed the costs to small tribes if they did make this choice, using small tribes that have chosen to develop their own air programs as examples of the types of tribes that might choose to assist EPA with administration of the minor new source permitting program. We found that the cost per tribal member was less than $1 per year, and represented less than 0.01 percent of the per capita income of tribal members. Thus, if the costs of developing and implementing a permitting program for new minor sources were borne by the tribes' members, it would not be a significant burden to them.

E. Executive Order 13132: Federalism

Executive Order 13132 (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'' is 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.''

Under section 6 of Executive Order 13132, we may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or we consult with State and local officials early in the process of developing the proposed regulation. We also may not issue a regulation that has federalism implications and that preempts State law, unless we consult with State and local officials early in the process of developing the proposed regulation.

This proposed rule does not have federalism implications. It would not 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, as specified in Executive Order 13132. Pursuant to the terms of Executive Order 13132, it has been determined that this proposed rule does not have ''federalism implications'' because it does not meet the necessary criteria. Thus, the requirements of section 6 of the Executive Order do not apply to this proposed rule.

In the spirit of Executive Order 13132, and consistent with our policy to promote communications between us and State and local governments, we specifically solicit comment on this proposed rule from State and local officials. We felt it was important to ensure that the State and local air pollution control agencies and small business concerns had an opportunity to interact with development of this rule. To that end, we had two meetings with the STAPPA/ALAPCO to present the draft preamble and rule. We also met with the National Federation of Independent Business and provided outreach material through the small business ombudsman's office to get input from the small businesses that might be affected by this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

Executive Order 13175 (65 FR 67249, November 6, 2000), requires us to develop an accountable process to ensure ''meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.''

The EPA has concluded that this rule will have tribal implications, since it provides two preconstruction air permitting rules for stationary sources in Indian Country. These rules will be

implemented by EPA, or a delegate tribal agency assisting EPA with administration of the rules, until replaced by an EPA-approved tribal implementation plan. However, it will neither impose substantial direct compliance costs on tribal governments, nor preempt Tribal law.

The EPA consulted with tribal officials early in the process of developing this regulation to permit them to have meaningful and timely input into its development. In undertaking this rulemaking effort we wanted to ensure that the tribes were included in the rulemaking process from the beginning of the rule development effort. On June 24, 2002, we sent letters to tribal leaders seeking their input on how we could best consult with the tribes on the rulemaking effort.

We received responses from 75 tribes. Of these 75 tribes, 69 designated an environmental staff member to work with us on developing the rule. Aside from the staff designated to help with the rulemaking process, many tribal leaders wished to be kept informed of the rule development. Many of the tribal leaders indicated that they wished to be kept informed through e-mail, meetings with the EPA Regional Offices, newsletters, and Web sites. However, 53 percent of the tribal leaders also requested direct phone calls or conference calls to discuss the subject. Only 16 percent of the respondents requested face-to-face consultation. Even among the tribes requesting face-to-face consultation, there was some degree of latitude, with only six tribes requesting senior EPA staff to meet with tribal leaders.

As a result of this feedback we developed a consultation/outreach plan which included three meetings held at the reservations of the Menominee Tribe in Wisconsin, the Mohegan Tribe in Connecticut, and the Chehalis Tribe in Washington. A fourth meeting was held in conjunction with the Institute of Tribal Environmental Professionals' (ITEP) anniversary meeting in Flagstaff, Arizona. In addition to conducting these national meetings, we also visited tribal environmental staff on tribal lands, where time and travel permitted. Over 30 tribes attended these meetings. We have also provided outreach to the tribes in numerous national and regional forums including the National Tribal Forums put on by the Institute of Tribal Environmental Professionals, two National Tribal Air Association meetings, and at meetings with tribal consortia, such as the National Tribal Environmental Council, United Southern and Eastern Tribes, Inter Tribal Environmental Council, Inter Tribal Council of Arizona, and others.

In addition to the meetings, we also have an ongoing workgroup of tribal environmental staff that has worked with us on developing these rules. We propose to continue with this consultation and outreach process until we promulgate this rulemaking package. EPA specifically solicits additional comment on this proposed rule from tribal officials.

G. Executive Order 13045: Protection of Children From Environmental Health & Safety Risks

Executive Order 13045 (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 we have 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 reasonably feasible alternatives that we considered.

We interpret Executive Order 13045 as applying only to those regulatory actions that are based on health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This proposed rule is not subject to Executive Order 13045 because it does not establish environmental standards based on an assessment of health or safety risks. Furthermore, this proposed rule has been determined not to be ''economically significant'' as defined under Executive Order 12866.

H. Executive Order 13211: Actions That Significantly Affect Energy Supply, Distribution, or Use

This proposed rule 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.

I. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 requires that each Federal agency make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health environmental effects of its programs, policies, and activities on minorities and low-income populations.

The EPA believes that the two preconstruction air quality regulations proposed in this FIP should not raise any environmental justice issues. These regulations would provide regulatory certainty and fill a regulatory gap in Indian Country and result in emissions reductions from sources complying with these regulations. Consequently, the regulations should result in some health benefits to persons living in Indian Country, many of whom live in low-income and minority communities. Therefore, we believe that these regulations would not have a disproportionate adverse effect on the health or safety of minority or low income populations.

J. National Technology Transfer Advancement Act

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

This proposed rule does not involve technical standards. Therefore, we are not considering the use of any voluntary consensus standards.

VII. Statutory Authority

The statutory authority for this proposed action is provided by sections 101, 110, 112, 114, 116, and 301 of the Act as amended (42 U.S.C. 7401, 7410, 7412, 7414, 7416, and 7601).

List of Subjects

40 CFR Part 49

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

40 CFR Part 51

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

Dated: August 9, 2006.

Stephen L. Johnson,

Administrator.

For the reasons cited in the preamble, title 40, chapter I of the Code of Federal Regulations is proposed to be amended as follows:

PART 49—[AMENDED]

1. The authority citation for part 49 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

Subpart C—[Amended]

2. Subpart C of Part 49 is amended by adding an undesignated center heading and §§ 49.151 through 49.160, and adding and reserving §§ 49.161 through 49.165 to read as follows:

Federal Minor New Source Review Program in Indian Country

§ 49.151 Program overview.

(a) *What constitutes the Federal minor new source review (NSR) program in Indian country?* As set forth in this Federal Implementation Plan (FIP), the Federal minor NSR program in Indian country (or ''program'') consists of §§ 49.151 through 49.165.

(b) *What is the purpose of this program?* This program has the following purposes:

(1) It establishes a preconstruction permitting program for new and modified minor stationary sources (minor sources) and minor modifications at major stationary sources located in Indian country to meet the requirements of section 110(a)(2)(C) of the Act.

(2) It also provides a mechanism for an otherwise major stationary source to voluntarily accept restrictions on its potential to emit to become a synthetic minor source. This mechanism also may be used by an otherwise major source of Hazardous Air Pollutants (HAPs) to voluntarily accept restrictions on its potential to emit to become a synthetic minor HAP source. Such restrictions must be enforceable as a practical matter.

(3) It sets forth the criteria and procedures that the reviewing authority (as defined in § 49.152(d)) will use to administer the program.

(c) *When and where does this program apply?* (1) The provisions of this program apply in Indian country where there is no EPA-approved minor NSR program, beginning on [60 days from publication of final rule].

(2) The provisions of this program cease to apply in an area covered by an EPA-approved implementation plan on the date that our approval of that implementation plan becomes effective, provided that the implementation plan includes provisions that comply with the requirements of section 110(a)(2)(C) of the Act for the construction and modification of minor sources and minor modifications at major stationary sources.

(d) *What general provisions apply under this program?* The following general provisions apply to you as an owner/operator of a stationary source:

(1) If you propose to construct a new minor source, a modification at an existing minor source, or a minor modification at an existing major stationary source that would be subject to this program, you must obtain a minor NSR permit under this program before beginning actual construction. If you commence construction after the effective date of this program without applying for and receiving a permit pursuant to this program, you will be subject to appropriate enforcement action.

(2) If you construct or operate your source or modification not in accordance with the terms of your minor NSR permit, you will be subject to appropriate enforcement action.

(3) Issuance of a permit does not relieve you of the responsibility to comply fully with applicable provisions of any EPA-approved implementation plan or FIP and any other requirements under applicable law.

(4) Nothing in this program prevents a tribe from administering a minor NSR permit program with more stringent requirements in an approved Tribal Implementation Plan (TIP).

(e) *What is the process for issuing permits under this program?* For the reviewing authority to issue a final permit decision under this program (other than a general permit under § 49.156), all the actions listed in paragraphs (e)(1) through (8) of this section need to be completed. This paragraph (e) does not apply to general permits.

(1) You must submit a permit application that meets the requirements of § 49.154(a).

(2) The reviewing authority determines completeness of the permit application as provided in § 49.154(b).

(3) The reviewing authority determines the appropriate emission limitations for your affected emissions units under § 49.154(c).

(4) In those rare instances where the reviewing authority has reason to be concerned that the construction of your minor source or modification would cause or contribute to a NAAQS or Prevention of Significant Deterioration (PSD) increment violation, you must submit an air quality analysis upon request by the reviewing authority.

(5) The reviewing authority determines that the new or modified source will not cause or contribute to a NAAQS or PSD increment violation.

(6) The reviewing authority develops a draft permit that meets the permit content requirements of § 49.155(a).

(7) The reviewing authority provides for public participation according to the requirements of § 49.157.

(8) The reviewing authority either issues a final permit that meets the requirements of § 49.155(a), or denies the permit and provides reasons for the denial.

§ 49.152 Definitions.

(a) For sources of regulated NSR pollutants in nonattainment areas, the definitions in § 49.167 apply to the extent that they are used in this program (except for terms defined in paragraph (d) of this section).

(b) For sources of regulated NSR pollutants in attainment or unclassifiable areas, the definitions in § 52.21 of this chapter apply to the extent that they are used in this program (except for terms defined in paragraph (d) of this section).

(c) For sources of HAP, the definitions in § 63.2 of this chapter apply to the extent that they are used in this program (except for terms defined in paragraph (d) of this section).

(d) The following definitions also apply to this program: *Affected emissions units* means the following emissions units, as applicable:

(1) For a proposed new minor source, all the emissions units.

(2) For a proposed modification, the new, modified, and replacement emissions units involved in the modification.

(3) For an existing minor source applying for a minor source PAL, all the emissions units that emit the PAL pollutant. However, such units are considered affected emissions units only for the PAL pollutant.

Allowable emissions means ''allowable emissions'' as defined in § 52.21(b)(16) of this chapter, except that the allowable emissions for any emissions unit are calculated considering any emission limitations that are enforceable as a practical matter on the emissions unit's potential to emit.

Emission limitation means a requirement established by the reviewing authority which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or

maintenance of a source to assure continuous emissions reduction, and any design standard, equipment standard, work practice, operational standard, or pollution prevention technique.

Enforceable as a practical matter means that an emission limitation is both legally and practically enforceable as follows:

(1) An emission limitation is ''legally enforceable'' if the reviewing authority has the right to enforce it.

(2) Practical enforceability for an emission limitation in a permit for a source is achieved if the permit's provisions specify:

(i) A limitation and the emissions unit(s) at the source subject to the limitation;

(ii) The time period for the limitation (*e.g.*, hourly, daily, monthly, and/or annual limits such as rolling annual limits); and

(iii) The method to determine compliance, including appropriate monitoring, recordkeeping, reporting, and testing.

(3) For rules and general permits that apply to categories of sources, practicable enforceability additionally requires that the provisions:

(i) Identify the types or categories of sources that are covered by the rule or general permit;

(ii) Where coverage is optional, provide for notice to the reviewing authority of the source's election to be covered by the rule or general permit; and

(iii) Specify the enforcement consequences relevant to the rule or general permit.

Environmental Appeals Board means the Board within the EPA described in § 1.25(e) of this chapter.

Indian country, as defined in 18 U.S.C. 1151, means the following:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation; [1]

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

[1] Under this definition, EPA treats as reservations trust lands validly set aside for the use of a tribe even if the trust lands have not been formally designated as a reservation.

Indian governing body means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

Minor modification at a major stationary source means a modification at a major stationary source that does not qualify as a major modification under § 49.167 or § 52.21 of this chapter, as applicable.

Minor NSR threshold means any of the applicability cutoffs for this program listed in Table 1 of § 49.153.

Minor source plantwide applicability limitation (PAL) means a source-wide limitation on allowable emissions of a regulated NSR pollutant, expressed in tons per year, that is established for a minor source in a permit issued under § 49.155 and that is enforceable as a practical matter.

Minor stationary source or *minor source* means a source that emits or has the potential to emit regulated NSR pollutants in amounts that are less than the major stationary source levels in § 49.167 or § 52.21 of this chapter, as applicable. The term ''minor stationary source'' applies independently to each regulated NSR pollutant that the source has the potential to emit.

Modification means any physical or operational change at a source that would cause an increase in the allowable emissions of the affected emissions units for any regulated NSR pollutant or that would cause the emission of any regulated NSR pollutant not previously emitted. The following exemptions apply:

(1) A physical or operational change does not include routine maintenance, repair, or replacement.

(2) An increase in the hours of operation or in the production rate is not considered an operational change unless such increase is prohibited under any federally-enforceable permit condition or other permit condition that is enforceable as a practical matter.

(3) A change in ownership at a source is not considered a modification.

Potential to emit means the maximum capacity of a source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable or enforceable as a practical matter. Secondary emissions, as defined at § 52.21(b)(18) of this chapter, do not count in determining the potential to emit of a source.

Reviewing authority means the Administrator, and may mean an Indian tribe in cases where a tribal agency is assisting EPA with administration of the program through a delegation.

Synthetic minor HAP source means a source that otherwise has the potential to emit HAPs in amounts that are at or above those for major sources of HAP in § 63.2 of this chapter, but that has taken a restriction so that its potential to emit is less than such amounts for major sources. Such restrictions must be enforceable as a practical matter.

Synthetic minor source means a source that otherwise has the potential to emit regulated NSR pollutants in amounts that are at or above those for major stationary sources in § 49.167 or § 52.21 of this chapter, as applicable, but that has taken a restriction so that its potential to emit is less than such amounts for major stationary sources. Such restrictions must be enforceable as a practical matter. The term ''synthetic minor source'' applies independently for each regulated NSR pollutant that the source has the potential to emit.

§ 49.153 Applicability.

(a) *Does this program apply to me?* The requirements of this program apply to you as set out in paragraphs (a)(1) through (5) of this section.

(1) *New and modified sources.* The applicability of the preconstruction review requirements of this program is determined individually for each regulated NSR pollutant that would be emitted by your new or modified source. For each such pollutant, determine applicability as set out in the relevant paragraph (a)(1)(i) or (ii) of this section. Flowcharts 1 through 6 of this section are provided as aids for making these applicability determinations.

(i) *New source.* Use the following steps to determine applicability for each regulated NSR pollutant. Flowchart 2 of this section addresses attainment and unclassifiable pollutants; Flowchart 4 of this section addresses nonattainment pollutants.

(A) *Step 1.* For the pollutant being evaluated, determine whether your proposed source is subject to review under the applicable major NSR program (that is, under § 52.21 of this chapter, under the Federal major NSR program for nonattainment areas in Indian country at §§ 49.166 through 49.75, or under a program approved by the Administrator pursuant to § 51.165 or § 51.166 of this chapter). If not, go to Step 2 (paragraph (a)(1)(i)(B) of this section).

(B) *Step 2.* Determine whether the source's potential to emit the pollutant that you are evaluating is greater than or equal to the corresponding minor NSR threshold in Table 1 of this section. If it is, you are subject to the preconstruction requirements of this program for that pollutant.

(ii) *Modification at an existing source.* If you propose to make a physical or operational change at an existing source, determine whether the change qualifies as a modification (as defined in § 49.152) using the procedures in paragraph (b) of this section to determine the increase in allowable emissions. If the change is a modification, use the following steps to determine applicability for each regulated NSR pollutant. Flowchart 3 of this section addresses attainment and unclassifiable pollutants; Flowchart 5 of this section addresses nonattainment pollutants. Flowchart 6 addresses minor NSR applicability. Note that if the physical or operational change is not a modification under this program, it may still be subject to some requirements under this program; *See* paragraphs (a)(2) through (5) of this section.

(A) *Step 1.* For the pollutant being evaluated, determine whether your proposed modification is subject to review under the applicable major NSR program. If not, go to Step 2 (paragraph (a)(1)(ii)(B) of this section).

(B) *Step 2.* Does your existing source have a minor source PAL for the pollutant that you are evaluating? If so, you are subject to the preconstruction requirements of this program for that pollutant. If not, go to Step 3 (paragraph (a)(1)(ii)(C) of this section).

(C) *Step 3.* Determine whether the increase in allowable emissions from the proposed modification (calculated using the procedures of paragraph (b) of this section) would be greater than or equal to the minor NSR threshold in Table 1 of this section for the pollutant that you are evaluating. If it is, you are subject to the preconstruction requirements of this program for that pollutant. If not, go to Step 4 (paragraph (a)(1)(ii)(D) of this section).

(D) *Step 4.* If any of the emissions units affected by your proposed modification currently has an annual allowable emissions limit for the pollutant that you are evaluating, determine whether the modification would increase any such unit's allowable emissions above its existing limit. If so, the proposed modification is subject to paragraph (a)(2) of this section. If not, your proposed modification is not subject to this program.

(2) *Increase in an emissions unit's annual allowable emissions limit.* If you propose a physical or operational change at your minor or major stationary source that would increase an emissions unit's allowable emissions of a regulated NSR pollutant above its existing annual allowable emissions limit, you must obtain an increase in the limit prior to making the change. For a physical or operational change that is not otherwise subject to review under major NSR or under this program, such increase in the annual allowable emissions limit can be accomplished through an administrative permit revision as provided in § 49.159(f).

(3) *Synthetic minor permits.* If you propose to establish a synthetic minor source or synthetic minor HAP source, you must apply for a permit under § 49.158. Additionally, if you currently own or operate such a source that was established by maintaining your actual emissions at less than 50 percent of the relevant major source threshold, you must obtain a synthetic minor permit under this program according to the requirements of § 49.158.

(4) *Minor source PALs.* If you propose to establish a minor source PAL for your existing minor source, you must apply for a permit under § 49.154.

(5) *Case-by-case maximum achievable control technology (MACT) determinations.* If you propose to construct or reconstruct a major source of HAPs such that you are subject to a case-by-case MACT determination under section 112(g)(2) of the Act, you may elect to have this determination approved under the provisions of this program. (Other options for such determinations include a title V permit action or a Notice of MACT Approval under § 63.43 of this chapter.) If you elect this option, you still must comply with the requirements of § 63.43 of this chapter that apply to all case-by-case MACT determinations.

(b) *How do I determine the increase in allowable emissions from a physical or operational change at my source?* Determine the resulting increase in allowable emissions in tons per year (tpy) of each regulated NSR pollutant after considering all increases and decreases from the change according to paragraph (b)(1) or (2) of this section, as applicable. A physical or operational change may involve one or more emissions units.

(1) For a change at a minor source with a minor source PAL, the emissions increase would be the PAL level after the change minus the PAL level prior to the change.

(2) For other changes, the total increase in allowable emissions resulting from your proposed change would be the sum of the following:

(i) For each new emissions unit that is to be added, the emissions increase would be the potential to emit of the emissions unit.

(ii) For each emissions unit with an allowable emissions limit that is to be changed or replaced, the emissions increase would be the allowable emissions of the emissions unit after the change or replacement minus the allowable emissions prior to the change or replacement. This may be a negative value for an emissions unit if the allowable emissions of the unit would be reduced as a result of the change or replacement.

(iii) For each unpermitted emissions unit that is to be changed or replaced, the emissions increase is the allowable emissions of the emissions unit after the change or replacement minus the potential to emit prior to the change or replacement. This may be a negative value for an emissions unit if its post-change allowable emissions would be less than its pre-change potential to emit.

(c) *What emissions units and activities are exempt from this program?* This program does not apply to the following emissions units and activities at a source that are listed in paragraphs (c)(1) through (10) of this section.

(1) Mobile sources.

(2) Air-conditioning units used for comfort that are not subject to applicable requirements under title VI of the Act and do not exhaust air pollutants into the ambient air from any manufacturing or other industrial process.

(3) Ventilating units used for comfort that do not exhaust air pollutants into the ambient air from any manufacturing or other industrial process.

(4) Heating units used for comfort that do not provide heat for any manufacturing or other industrial process.

(5) Noncommercial food preparation.

(6) Consumer use of office equipment and products.

(7) Janitorial services and consumer use of janitorial products.

(8) Internal combustion engines used for landscaping purposes.

(9) Bench scale laboratory activities, except for laboratory fume hoods or vents.

(10) Any emissions unit or activity that does not emit or have the potential to emit a regulated NSR pollutant or HAP, so long as that emissions unit or activity is not part of a process unit that emits or has the potential to emit a regulated NSR pollutant or HAP.

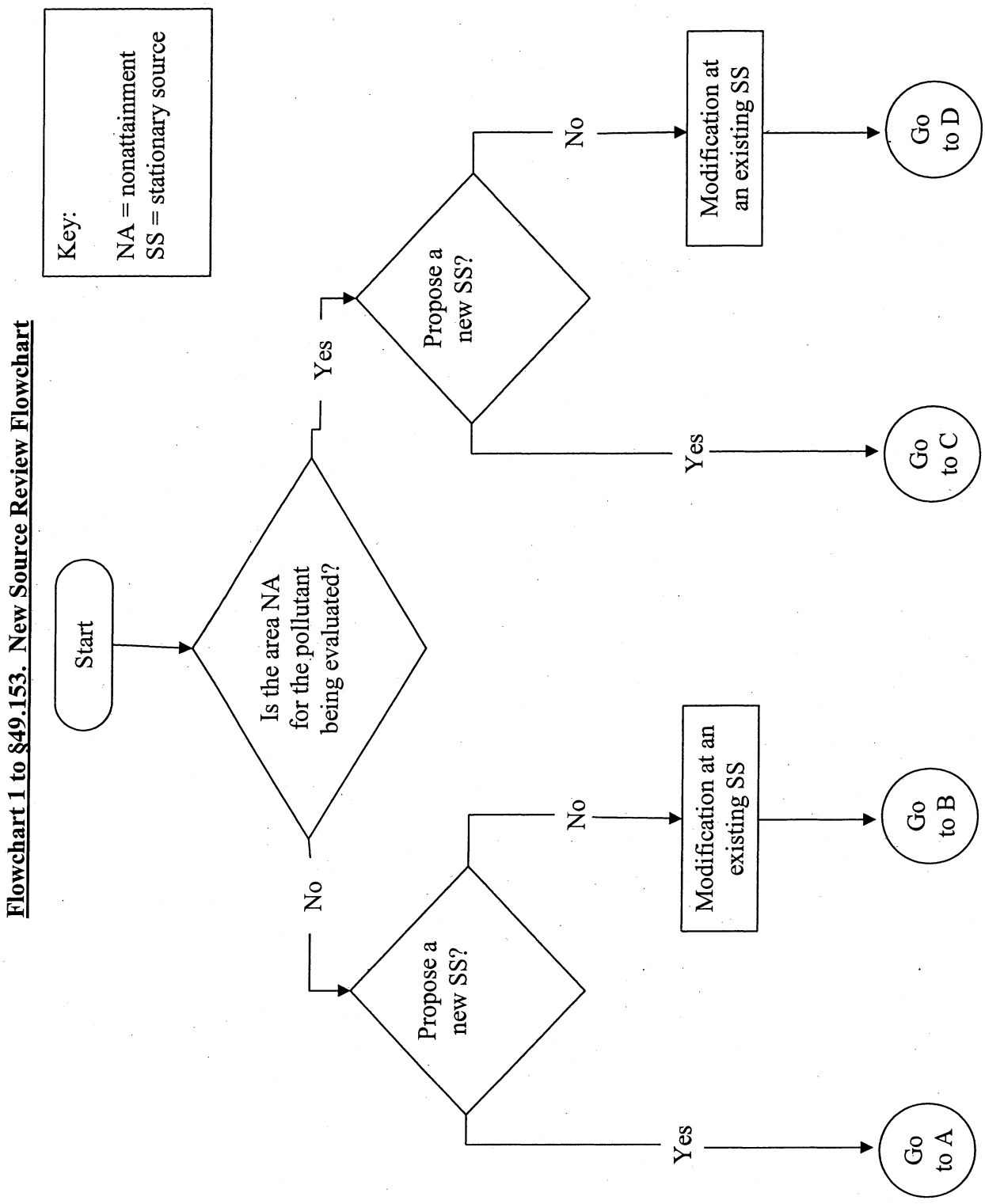
TABLE 1 TO § 49.153. MINOR NSR THRESHOLDS.[1]

Regulated NSR pollutant	Minor NSR thresholds for nonattainment areas (tpy)		Minor NSR thresholds for attainment areas (tpy)
	Extreme ozone areas	Other areas	
Carbon monoxide	5	5	10
Oxides of nitrogen	0	5	10
Sulfur dioxide	5	5	10
VOC	0	2	5
PM	5	5	10
PM–10	1	1	5
PM–2.5	0.6	0.6	3
Lead	0.1	0.1	0.1
Fluorides	NA	NA	1
Sulfuric acid mist	NA	NA	2
Hydrogen sulfide (H_2S)	NA	NA	2
Total reduced sulfur (including H_2S)	NA	NA	2
Reduced sulfur compounds (including H_2S)	NA	NA	2
Municipal waste combustor emissions	NA	NA	2
Municipal solid waste landfills emissions (measured as nonmethane organic compounds)	NA	NA	10

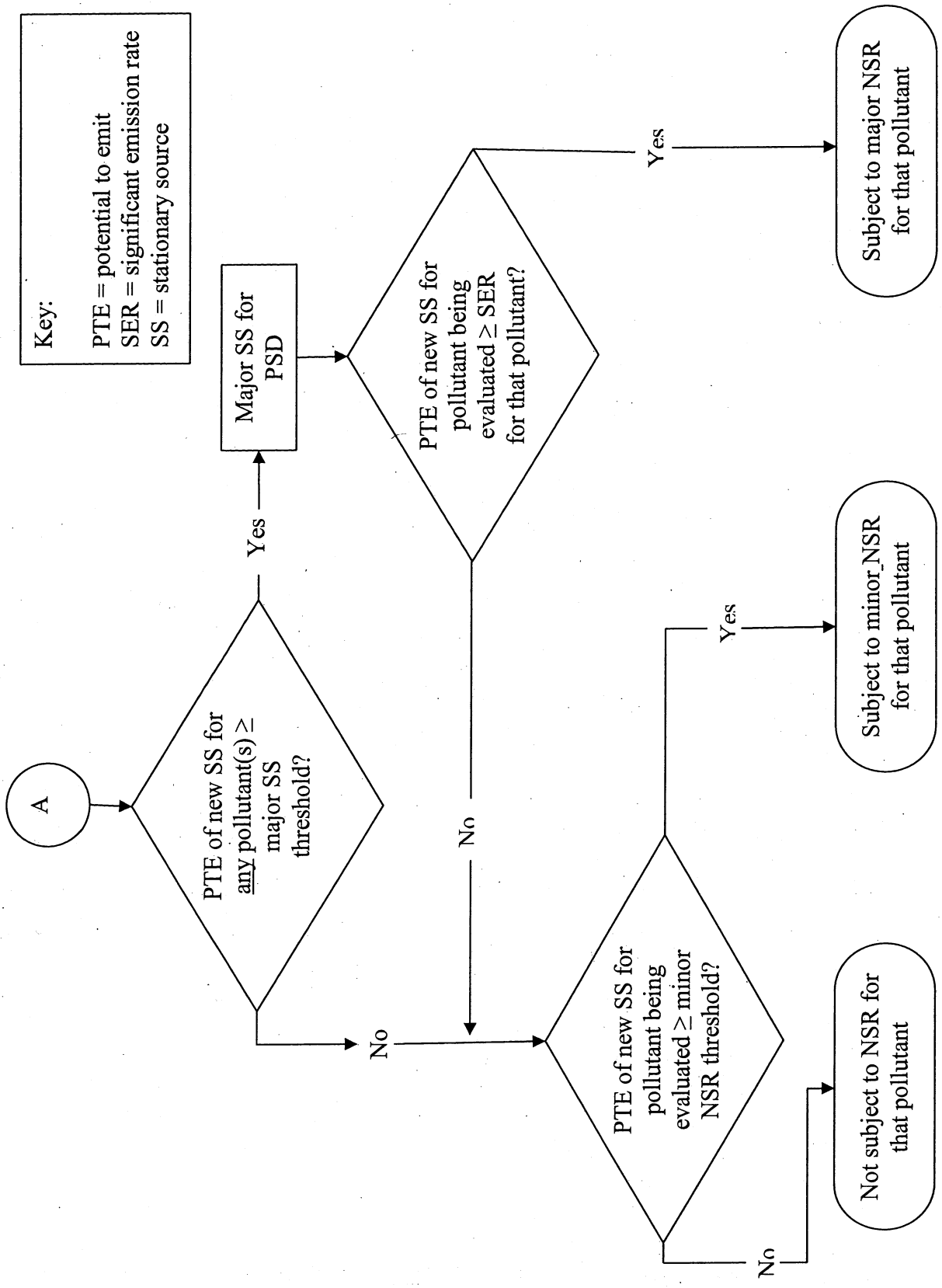
[1] If part of a tribe's area of Indian country is designated as attainment and another part as nonattainment, the applicable threshold for a proposed source or modification is determined based on the designation where the source would be located. If the source straddles the two areas, the more stringent thresholds would apply.

BILLING CODE 6560–50–P

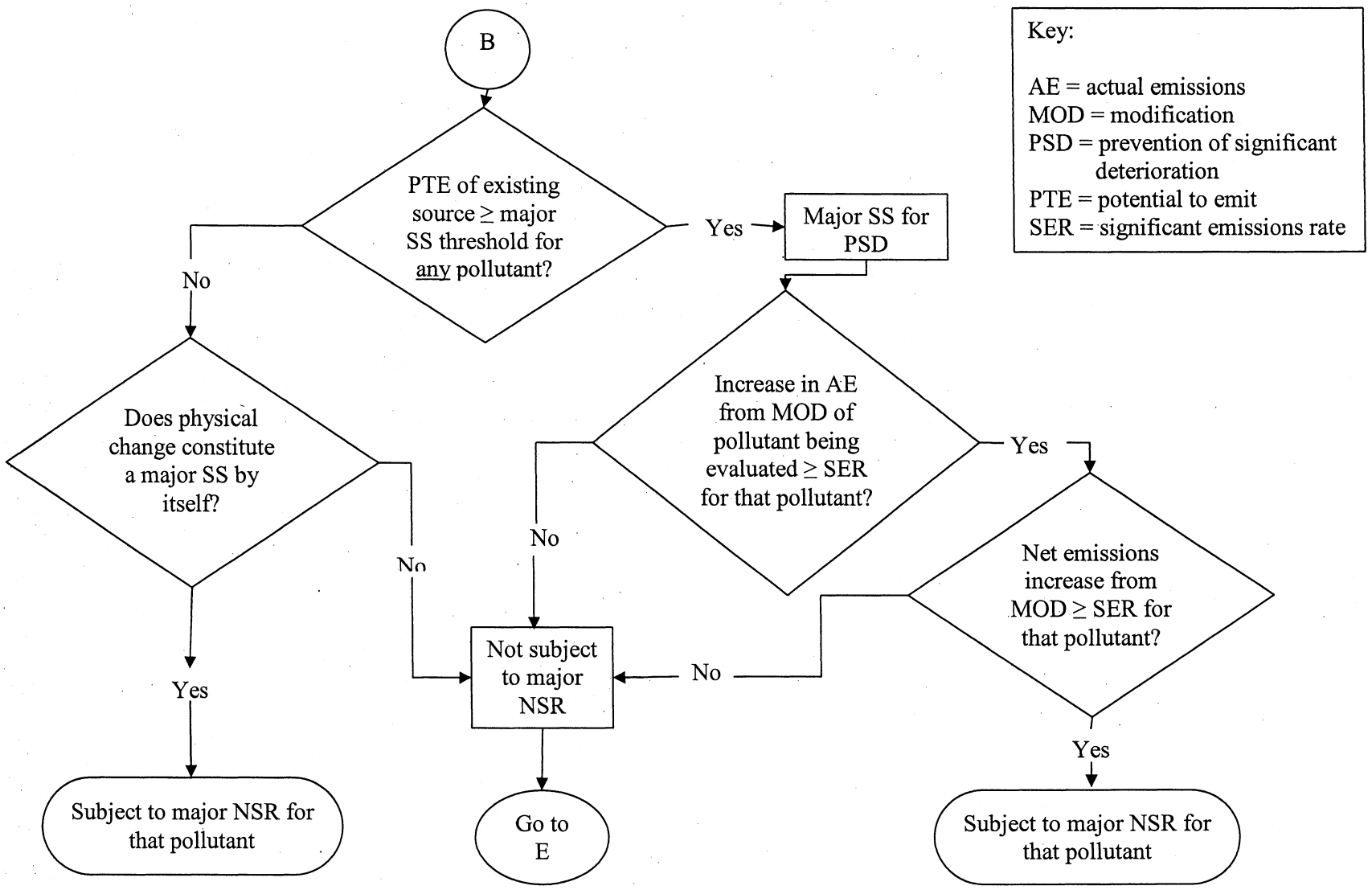
Flowchart 1 to §49.153. New Source Review Flowchart



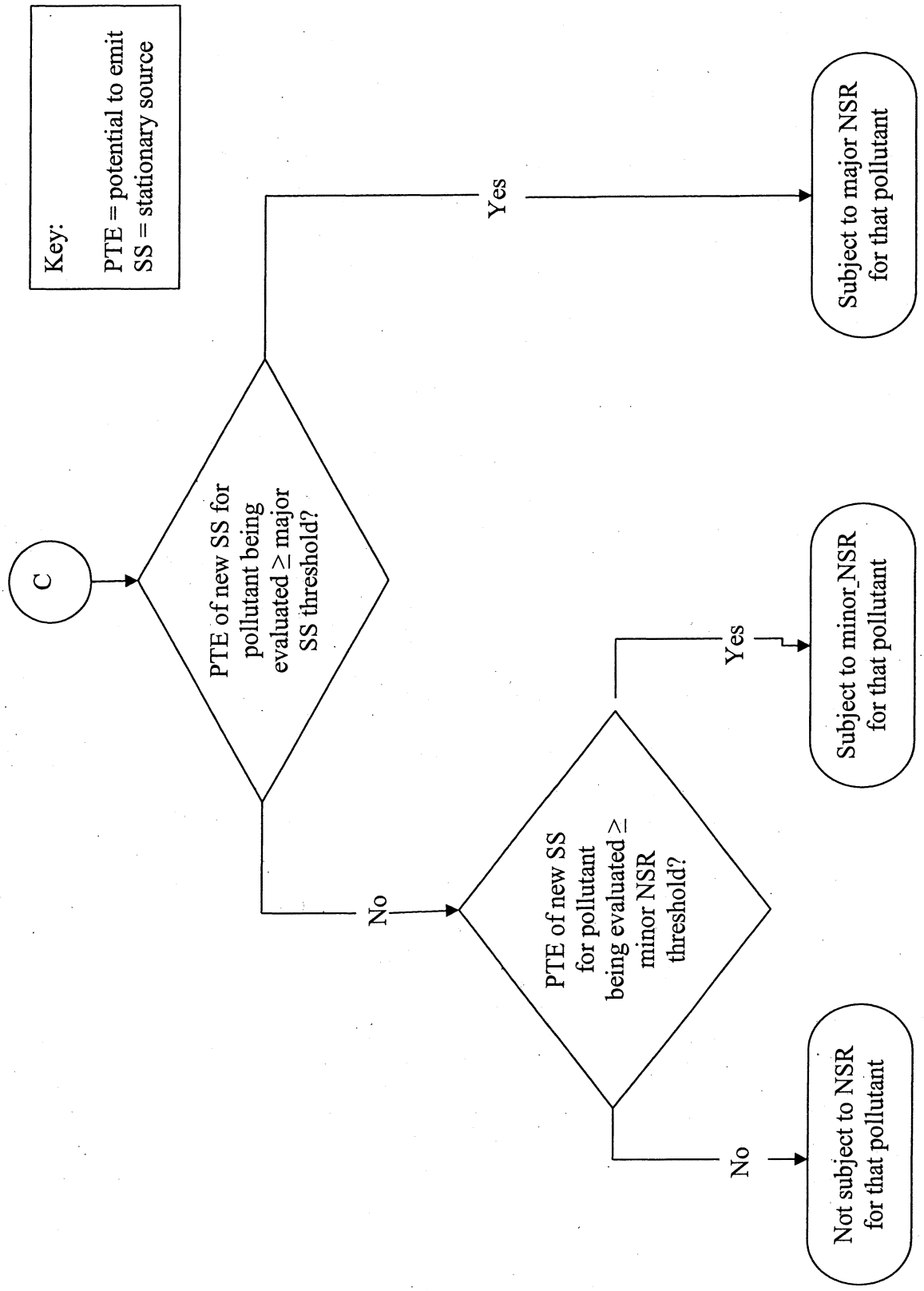
Flowchart 2 to §49.153 New SS in an Attainment or Unclassifiable Area



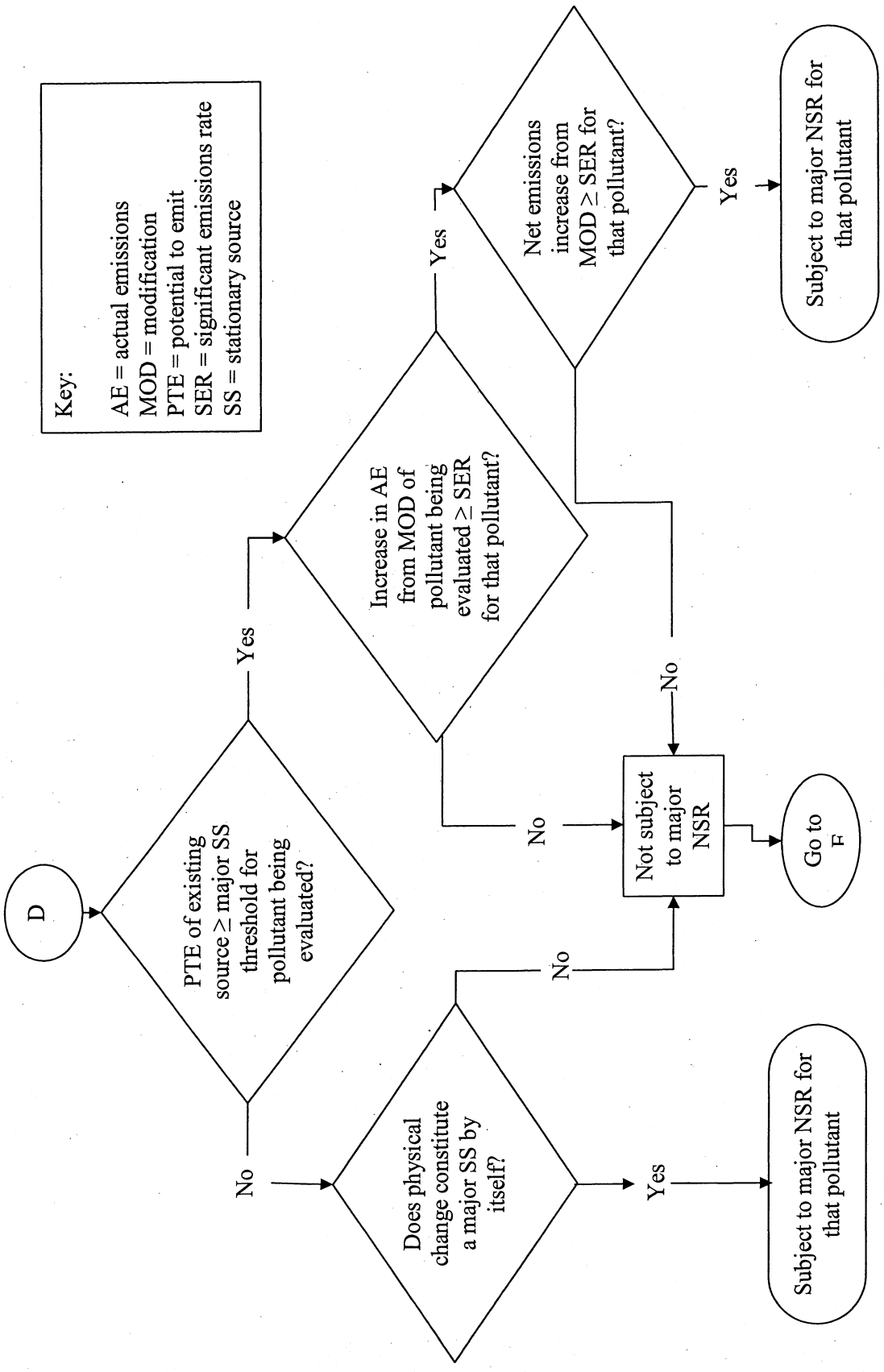
Flowchart 3 to §49.153. Modification at an Existing SS in an Attainment or Unclassifiable Area – Major NSR Applicability



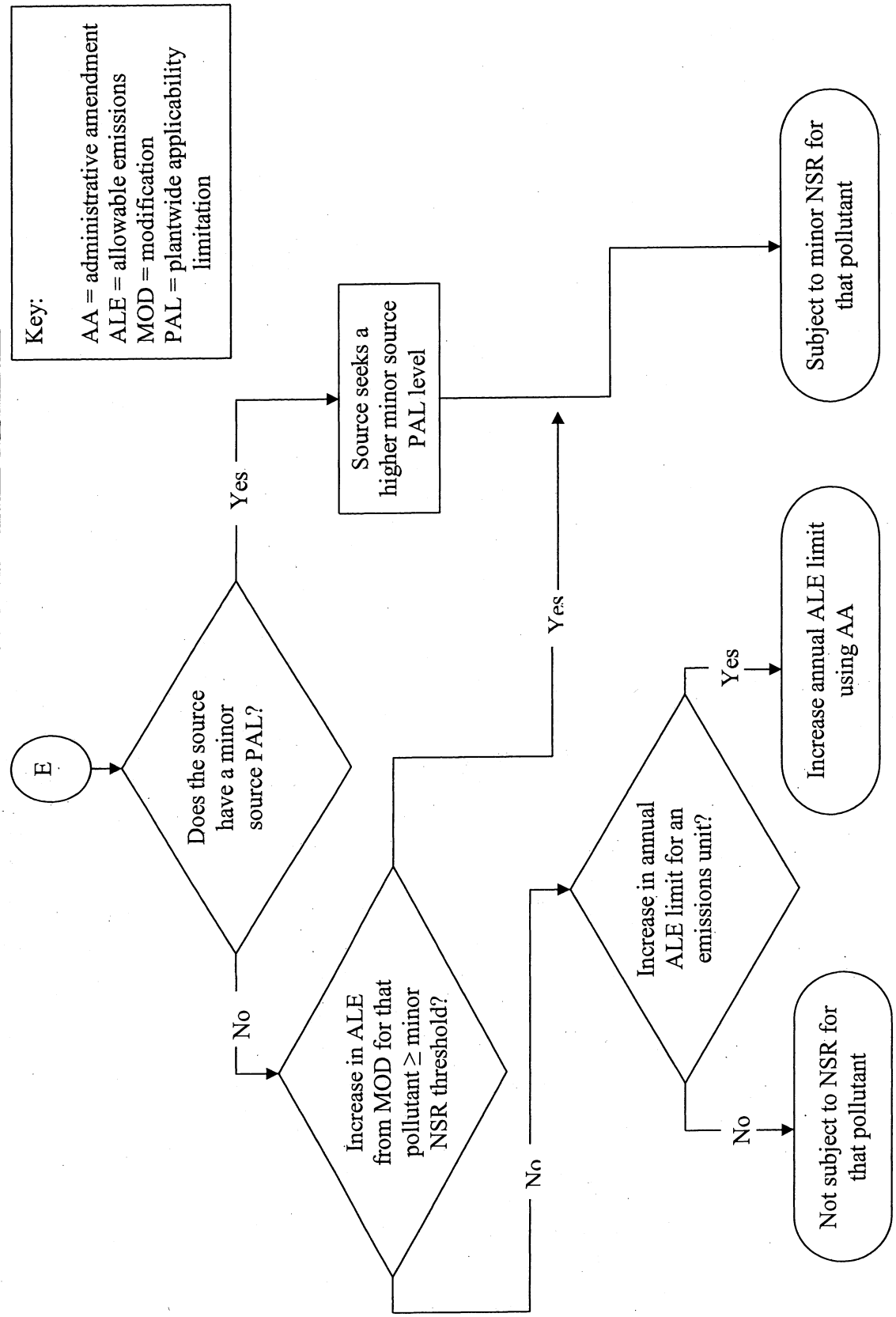
Flowchart 4 to §49.153. New SS in a Nonattainment Area



Flowchart 5 to §49.153. Modification at an Existing SS in a Nonattainment Area – Major NSR Applicability



Flowchart 6 to §49.153. Modification at an Existing SS – Minor NSR Applicability



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§ 49.154 Permit application requirements.

This section applies to you if you are subject to this program under § 49.153(a)(1) for the construction of new minor sources or modifications at existing sources. (As an alternative, you may apply for a general permit under § 49.156 if an applicable general permit is available for your source type.) In addition, this section applies to you if you wish to establish a minor source PAL for your existing minor source (*See* § 49.153(a)(4)). *See* § 49.158(a) for synthetic minor permit application requirements.

(a) *What information must my permit application contain?* Paragraphs (a)(1) through (3) of this section govern the content of your application.

(1) *General provisions for permit applications.* The following provisions apply to permit applications under this program:

(i) The reviewing authority may develop permit application forms for your use.

(ii) The permit application need not contain information on the exempt emissions units and activities listed in § 49.153(c).

(iii) The permit application for a modification need only include information on the affected emissions units as defined in § 49.152(d).

(2) *Required permit application content.* Except as specified in paragraphs (a)(1)(ii) and (iii) of this section, you must include the information listed in paragraphs (a)(2)(i) through (ix) of this section in your application for a permit under this program. The reviewing authority may require additional information as needed to process the permit application.

(i) Identifying information, including your name and address (and plant name and address if different) and the name and telephone number of the plant manager/contact.

(ii) A description of your source's processes and products.

(iii) A list of all affected emissions units (with the exception of the exempt emissions units and activities listed in § 49.153(c)).

(iv) For each new emissions unit that is listed, the potential to emit of each regulated NSR pollutant in tpy (including fugitive emissions, to the extent that they are quantifiable), with supporting documentation. In your calculation of the potential to emit for an emissions unit, you must account for any proposed emission limitations.

(v) For each modified emissions unit and replacement unit that is listed, the allowable emissions of each regulated NSR pollutant in tpy both before and after the modification (including fugitive emissions, to the extent that they are quantifiable), with supporting documentation. For emissions units that do not have an allowable emissions limit prior to the modification, report the potential to emit. In your calculation of annual allowable emissions for an emissions unit after the modification, you must account for any proposed emission limitations.

(vi) The following information to the extent it is needed to determine or regulate emissions: fuels, fuel use, raw materials, production rates, and operating schedules.

(vii) Identification and description of any existing air pollution control equipment and compliance monitoring devices or activities.

(viii) Any existing limitations on source operation affecting emissions or any work practice standards, where applicable, for all NSR regulated pollutants at the source.

(ix) For each emission point associated with an affected emissions unit, provide stack or vent dimensions and flow information.

(3) *Optional permit application content.* At your option, you may propose the following:

(i) Emission limitations for each affected emissions unit, which may include pollution prevention techniques, air pollution control devices, design standards, equipment standards, work practices, operational standards, or a combination thereof. You may include an explanation of why you believe the proposed emission limitations to be appropriate.

(ii) A minor source PAL, which is a source-wide annual allowable emissions limit, for one or more of the regulated NSR pollutants emitted by your source.

(b) *How is my permit application determined to be complete?* Paragraphs (b)(1) through (3) of this section govern the completeness review of your permit application.

(1) An application for a permit under this program will be reviewed by the reviewing authority within 45 days of its receipt to determine whether the application contains all the information necessary for processing the application. You should contact the reviewing authority to find out the date of receipt of the application.

(2) If the reviewing authority determines that the application is not complete, it will request additional information from you as necessary to process the application. If the reviewing authority determines that the application is complete, it may notify you in writing. If you do not receive a request for additional information or a notice of complete application from the reviewing authority within 50 days of its receipt of your application, your application will be deemed complete.

(3) If, while processing an application that has been determined to be complete, the reviewing authority determines that additional information is necessary to evaluate or take final action on the application, it may request additional information from you and require your responses within a reasonable time period.

(c) *How will the reviewing authority determine the emission limitations that will be required in my permit?* After determining that your application is complete, the reviewing authority will conduct a case-by-case control technology review to determine the appropriate level of control, if any, necessary to assure that NAAQS are achieved, as well as the corresponding emission limitations for the affected emissions units at your source.

(1) In carrying out this case-by-case review, the reviewing authority will consider the following factors:

(i) Local air quality conditions.

(ii) Typical control technology or other emissions reduction measures used by similar sources in surrounding areas.

(iii) Anticipated economic growth in the area.

(iv) Cost-effective emission reduction alternatives.

(2) The reviewing authority must require an emission limit (*i.e.*, a limit on the quantity, rate, or concentration of emissions) for each affected emissions unit at your source for which such a limit is technically and economically feasible.

(3) The emission limitations required by the reviewing authority may consist of emission limits, pollution prevention techniques, design standards, equipment standards, work practice standards, operational standards, or any combination thereof.

(4) The emission limitations required by the reviewing authority must assure that each affected emissions unit will comply with all requirements of parts 60, 61, and 63 of this chapter that apply to the unit.

(5) The emission limitations required by the reviewing authority must not be affected in any manner by so much of a stack's height as exceeds good engineering practice or by any other dispersion technique, except as provided in § 51.118(b) of this chapter. If the reviewing authority proposes to issue a permit to a source based on a good engineering practice stack height that exceeds the height allowed by § 51.100(ii)(1) or (2) of this chapter, it

must notify the public of the availability of the demonstration study and must provide opportunity for a public hearing according to the requirements of § 49.157 for the draft permit.

(d) *When may the reviewing authority require an air quality impacts analysis (AQIA)?* Paragraphs (d)(1) through (3) of this section govern AQIA requirements under this program.

(1) In those rare instances where the reviewing authority has reason to be concerned that the construction of your minor source or modification would cause or contribute to a NAAQS or PSD increment violation, it may require you to conduct and submit an AQIA.

(2) If required, you must conduct the AQIA using the dispersion models and procedures of part 51, Appendix W of this chapter.

(3) If the AQIA reveals that construction of your source or modification would cause or contribute to a NAAQS or PSD increment violation, the reviewing authority must require you to reduce such impacts before it can issue you a permit.

§ 49.155 Permit requirements.

This section applies to your permit if you are subject to this program under § 49.153(a)(1) for construction of new minor sources or modifications at existing sources, unless you applied for a general permit under § 49.156 (where an applicable general permit is available for your source type). In addition, this section applies to your permit if you wish to establish a minor source PAL for your existing minor source (*See* § 49.153(a)(4))

(a) *What information must my permit include?* Your permit must include the requirements in paragraphs (a)(1) through (7) of this section.

(1) *General requirements.* The following elements must be included in your permit:

(i) The effective date of the permit and the date by which you must commence construction in order for your permit to remain valid (*i.e.*, 18 months after the permit effective date).

(ii) The emissions units subject to the permit and their associated emission limitations.

(iii) Monitoring, recordkeeping, reporting, and testing requirements to assure compliance with the emission limitations.

(2) *Emission limitations.* The permit must include the emission limitations determined by the reviewing authority under § 49.154(c) for each affected emissions unit. In addition, the permit must address limits on annual allowable emissions as set out in paragraphs (a)(2)(i) and (ii) of this section.

(i) *New minor sources.* For new minor sources, limits on annual allowable emissions in tpy must be included in the permit as follows:

(A) The reviewing authority may include minor source PALs for one or more regulated NSR pollutants, if you requested such PALs.

(B) Otherwise, the reviewing authority must include an annual allowable emissions limit for each affected emissions unit, for each regulated NSR pollutant emitted by the unit that is not subject to a minor source PAL.

(ii) *Existing minor sources.* For existing minor sources, limits on annual allowable emissions in tpy must be included in the permit as follows:

(A) The reviewing authority may include minor source PALs for one or more regulated NSR pollutants, if you requested such PALs.

(B) For a modification, the reviewing authority must include an annual allowable emissions limit for each affected emissions unit, for each regulated NSR pollutant emitted by the unit that is not subject to a minor source PAL.

(C) If you apply for a minor source PAL for one or more regulated NSR pollutants for your existing source at a time when you are not also proposing a modification, no annual allowable emissions limits are required for the regulated NSR pollutants that are not subject to a PAL.

(3) *Monitoring requirements.* The permit must include monitoring requirements sufficient to assure compliance with the emission limitations that apply to the affected emissions units at your source. The reviewing authority may require, as appropriate, any of the requirements in paragraphs (a)(3)(i) through (iii) of this section.

(i) Any emissions monitoring, including analysis procedures, test methods, periodic testing, instrumental monitoring, and non-instrumental monitoring. Such monitoring requirements shall assure use of test methods, units, averaging periods, and other statistical conventions consistent with the required emission limitations.

(ii) As necessary, requirements concerning the use, maintenance, and installation of monitoring equipment or methods.

(iii) If the permit includes a minor source PAL for a pollutant at your minor source, monitoring to determine the actual emissions from your source for each month and the total actual emissions for each 12-month period, rolled monthly, for that pollutant.

(4) *Recordkeeping requirements.* The permit must include recordkeeping requirements sufficient to assure compliance with the emission limitations and monitoring requirements, and must require the elements in paragraphs (a)(4)(i) and (ii) of this section.

(i) Records of required monitoring information that include the information in paragraphs (a)(4)(i)(A) through (F) of this section, as appropriate.

(A) The location, date, and time of sampling or measurements.

(B) The date(s) analyses were performed.

(C) The company or entity that performed the analyses.

(D) The analytical techniques or methods used.

(E) The results of such analyses.

(F) The operating conditions existing at the time of sampling or measurement.

(ii) Retention for 5 years of records of all required monitoring data and support information for the monitoring sample, measurement, report, or application. Support information may include all calibration and maintenance records, all original strip-chart recordings or digital records for continuous monitoring instrumentation, copies of all reports required by the permit, and for sources with a minor source PAL for a pollutant, the actual emissions determined for each month and the total actual emissions for each 12-month period, rolled monthly, for that pollutant.

(5) *Reporting requirements* The permit must include the reporting requirements in paragraphs (a)(5)(i) and (ii) of this section.

(i) Annual submittal of reports of monitoring required under paragraph (a)(3) of this section, including the type and frequency of monitoring, and a summary of results obtained by monitoring.

(ii) Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. Within the permit, the reviewing authority must define ''prompt'' in relation to the degree and type of deviation likely to occur and the applicable emission limitations.

(6) *Severability clause.* The permit must include a severability clause to ensure the continued validity of the other portions of the permit in the event of a challenge to a portion of the permit.

(7) *Additional provisions.* The permit must also contain provisions stating the requirements in paragraphs (a)(7)(i) through (vii) of this section.

(i) You, as the permittee, must comply with all conditions of your permit, including emission limitations that apply to the affected emissions units at your source. Noncompliance with any permit term or condition is a violation of the permit and may constitute a violation of the Act and is grounds for enforcement action and for a permit termination or revocation.

(ii) Your permitted source must not cause or contribute to a NAAQS violation or, in an attainment area, must not cause or contribute to a PSD increment violation.

(iii) It is not a defense for you, as the permittee, in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(iv) The permit may be revised, reopened, revoked and reissued, or terminated for cause. The filing of a request by you, as the permittee, for a permit revision, revocation and re-issuance, or termination, or of a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(v) The permit does not convey any property rights of any sort or any exclusive privilege.

(vi) You, as the permittee, shall furnish to the reviewing authority, within a reasonable time, any information that the reviewing authority may request in writing to determine whether cause exists for revising, revoking and reissuing, or terminating the permit or to determine compliance with the permit. For any such information claimed to be confidential, you must also submit a claim of confidentiality in accordance with part 2, subpart B of this chapter.

(vii) Inspection and entry provisions requiring that upon presentation of proper credentials, you, as the permittee, must allow a representative of the reviewing authority to:

(A) Enter upon your premises where a source is located or emissions-related activity is conducted, or where records are required to be kept under the conditions of the permit;

(B) Have access to and copy, at reasonable times, any records that are required to be kept under the conditions of the permit;

(C) Inspect, during normal business hours or while the source is in operation, any facilities, equipment (including monitoring and air pollution control equipment), practices, or operations regulated or required under the permit;

(D) Sample or monitor, at reasonable times, substances or parameters for the purpose of assuring compliance with the permit or other applicable requirements; and

(E) Record any inspection by use of written, electronic, magnetic and photographic media.

(b) *Can my permit become invalid?* Your permit becomes invalid if you do not commence construction within 18 months after the effective date of your permit, if you discontinue construction for a period of 18 months or more, or if you do not complete construction within a reasonable time. The reviewing authority may extend the 18-month period upon a satisfactory showing that an extension is justified. This provision does not apply to the time period between construction of the approved phases of a phased construction project; you must commence construction of each such phase within 18 months of the projected and approved commencement date.

§ 49.156 General permits.

This section applies to general permits for the purposes of complying with the preconstruction permitting requirements for sources of regulated NSR pollutants under this program.

(a) *What is a general permit?* A general permit is a preconstruction permit issued by a reviewing authority that may be applied to a number of similar emissions units or sources. The purpose of a general permit is to simplify the permit application and issuance process for similar facilities so that a reviewing authority's limited resources need not be expended for case-by-case permit development for such facilities. A general permit may be written to address a single emissions unit, a group of the same type of emissions units, or an entire minor source.

(b) *How will the reviewing authority issue general permits?* The reviewing authority will issue general permits as follows:

(1) A general permit may be issued for a category of emissions units or sources that are similar in nature, have substantially similar emissions, and would be subject to the same or substantially similar requirements governing operations, emissions, monitoring, reporting, and recordkeeping. ''Similar in nature'' refers to size, processes, and operating conditions.

(2) A general permit must be issued according to the requirements for public participation in § 49.157 and the requirements for final permit issuance and administrative and judicial review in § 49.159.

(3) Issuance of a general permit is considered final agency action with respect to all aspects of the general permit except its applicability to an individual source. The sole issue that may be appealed after an individual source is approved to construct under a general permit (*See* paragraph (e) of this section) is the applicability of the general permit to that particular source.

(c) *For what categories will general permits be issued?* (1) The reviewing authority will determine which categories of individual emissions units, groups of similar emissions units, or sources are appropriate for general permits in its area.

(2) General permits will be issued at the discretion of the reviewing authority. However, the following are some common categories of emissions units or sources for which general permits may be developed:

(i) Autobody repair shops.

(ii) Concrete batching plants.

(iii) Dry cleaners.

(iv) Gas stations.

(v) Gas distribution facilities.

(vi) General purpose internal combustion engines.

(vii) Hot mix asphalt facilities.

(viii) Heating units.

(ix) Nonmetallic mineral processing plants.

(x) Rock crushing facilities.

(xi) Surface coating operations.

(xii) Solvent cleaning operations.

(xiii) Graphic arts operations.

(xiv) Grain elevators.

(xv) Tank batteries in oil and gas production operations that are not part of a larger source.

(xvi) Small to medium compressor stations.

(xvii) Small to medium transmission stations.

(xviii) Dehydrators that are not a part of a larger source.

(xix) Compressor engines.

(d) *What should the general permit contain?* The general permit must contain the permit elements listed in § 49.155(a). In addition, the general permit must contain the information listed in paragraphs (d)(1) and (2) of this section. The reviewing authority may specify additional general permit terms and conditions.

(1) Identification of the specific category of emissions units or sources to which the general permit applies, including any criteria that your emissions units or source must meet to be eligible for coverage under the general permit.

(2) Information required to apply for coverage under a general permit including, but not limited to, the following:

(i) The name and mailing address of the reviewing authority to whom you must submit your application.

(ii) The procedure to obtain any standard application forms that the reviewing authority may have developed.

(iii) The information that you must provide to the reviewing authority in your application to demonstrate that you are eligible for coverage under the general permit.

(iv) Other application requirements deemed necessary by the reviewing authority.

(e) *How is my source issued a general permit?* (1) If your source qualifies for a general permit, you may apply to the reviewing authority for coverage under the general permit.

(2) The reviewing authority must act on your application for coverage under the general permit as expeditiously as possible, but it must notify you of the final decision within 90 days.

(3) Without repeating the public participation procedures required in § 49.157, the reviewing authority may grant or deny your request for approval to construct under a general permit. The reviewing authority must send you a letter approving or disapproving the request to construct under a general permit. Such a letter is a final permit action for purposes of judicial review (*See* § 49.159) only for the issue of whether your source qualifies for the general permit. You must post a prominent notice at your source of the letter of approval to construct under the general permit.

(4) If the reviewing authority has sent a letter approving the general permit for your source, you must comply with all conditions and terms of the general permit. You will be subject to enforcement action for failure to obtain a preconstruction permit if you construct the emissions unit(s) or source with general permit approval and your source is later determined not to qualify for the conditions and terms of the general permit.

(5) Any source covered under a letter approving the general permit may request to be excluded from the general permit by applying for a permit under § 49.154.

§ 49.157 Public participation requirements.

This section applies to the issuance of preconstruction permits, synthetic minor permits, and the initial issuance of general permits. It does not apply to decisions regarding whether a specific source is eligible for coverage under a general permit.

(a) *What permit information will be publicly available?* With the exception of any confidential information as defined in part 2, subpart B of this chapter, the reviewing authority must make available for public inspection the documents listed in paragraphs (a)(1) through (5) of this section. The reviewing authority must make such information available for public inspection at the appropriate EPA Regional Office and in at least one location in the area affected by the source, such as the tribal environmental office or a local library.

(1) All information submitted as part of an application for a permit.

(2) Any additional information requested by the reviewing authority.

(3) The reviewing authority's analysis of the application and any additional information submitted by the source, including (for preconstruction and general permits) the control technology review.

(4) For preconstruction and general permits, the reviewing authority's analysis of the effect of the construction of the minor source or modification on ambient air quality.

(5) A copy of the draft permit or the decision to deny the permit with the justification for denial.

(b) *How will the public be notified and participate?* (1) Before issuing a permit under this program, the reviewing authority must prepare a draft permit and must provide adequate public notice to ensure that the affected community and the general public have reasonable access to the application and draft permit information, as set out in paragraphs (b)(1)(i) and (ii) of this section The public notice must provide an opportunity for public comment and notice of a public hearing, if any, on the draft permit.

(i) The reviewing authority must mail a copy of the notice to you, the appropriate Indian governing body, and the tribal, State, and local air pollution authorities having jurisdiction in areas outside of the area of Indian country potentially impacted by the air pollution source.

(ii) Depending on such factors as the nature and size of your source, local air quality considerations, and the characteristics of the population in the affected area, the reviewing authority must use appropriate means of notification, such as those listed in paragraphs (b)(1)(ii)(A) through (E) of this section.

(A) The reviewing authority may mail or e-mail a copy of the notice to persons on a mailing list developed by the reviewing authority consisting of those persons who have requested to be placed on such a mailing list.

(B) The reviewing authority may post the notice on its Web site.

(C) The reviewing authority may publish the notice in a newspaper of general circulation in the area affected by the source. Where possible, the notice may also be published in a tribal newspaper or newsletter.

(D) The reviewing authority may provide copies of the notice for posting at one or more locations in the area affected by the source, such as Post Offices, trading posts, libraries, tribal environmental offices, community centers, or other gathering places in the community.

(E) The reviewing authority may employ other means of notification as appropriate.

(2) The notice required pursuant to paragraph (b)(1) of this section must include the following information at a minimum:

(i) Identifying information, including your name and address (and plant name and address if different) and the name and telephone number of the plant manager/contact.

(ii) The name and address of the reviewing authority processing the permit action;

(iii) For preconstruction permits (including general permits), the regulated NSR pollutants to be emitted, the affected emissions units, and the emission limitations for each affected emissions unit;

(iv) For preconstruction permits, the emissions change involved in the permit action;

(v) For synthetic minor permits, a description of the proposed limitation and its effect on the potential to emit of the source;

(vi) Instructions for requesting a public hearing;

(vii) The name, address, and telephone number of a contact person in the reviewing authority's office from whom additional information may be obtained;

(viii) Locations and times of availability of the information (listed in paragraph (a) of this section) for public inspection; and

(ix) A statement that any person may submit written comments, a written request for a public hearing, or both, on the draft permit action. The reviewing authority must provide a period of at least 30 days from the date of the public notice for comments, and for requests for a public hearing.

(c) *How will the public comment, and will there be a public hearing?* (1) Any person may submit written comments on the draft permit and may request a public hearing. These comments must raise any reasonably ascertainable issue

with supporting arguments by the close of the public comment period (including any public hearing). The reviewing authority must consider all comments in making the final decision. The reviewing authority must keep a record of the commenters and of the issues raised during the public participation process, and such records must be available to the public.

(2) The reviewing authority must extend the public comment period under paragraph (b) of this section to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

(3) A request for a public hearing must be in writing and must state the nature of the issues proposed to be raised at the hearing.

(4) The reviewing authority must hold a hearing whenever there is, on the basis of requests, a significant degree of public interest in a draft permit. The reviewing authority may also hold a public hearing at its discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision. The reviewing authority must provide notice of any public hearing at least 30 days prior to the date of the hearing. Public notice of the hearing may be concurrent with that of the draft permit, and the two notices may be combined. Reasonable limits may be set upon the time allowed for oral statements at the hearing.

(5) The reviewing authority must make a tape recording or written transcript of any hearing available to the public.

§ 49.158 Synthetic minor permits.

You may obtain a synthetic minor permit under this program to establish a synthetic minor source and/or a synthetic minor HAP source. Note that if you propose to construct or modify a synthetic minor source, you are also subject to the preconstruction permitting requirements in §§ 49.154 and 49.155.

(a) *What information must my synthetic minor permit application contain?* (1) Your application must include the following information:

(i) Identifying information, including your name and address (and plant name and address if different) and the name and telephone number of the plant manager/contact.

(ii) For each regulated NSR pollutant and/or HAP and for all emissions units to be covered by an emissions limitation, the following information:

(A) The proposed emission limitation and a description of its effect on actual emissions or the potential to emit. Proposed emission limitations must have a reasonably short averaging period, taking into consideration the operation of the source and the methods to be used for demonstrating compliance.

(B) Proposed testing, monitoring, recordkeeping, and reporting requirements to be used to demonstrate and assure compliance with the proposed limitation.

(C) A description of the production processes.

(D) Identification of the emissions units.

(E) Type and quantity of fuels and/or raw materials used.

(F) Description and estimated efficiency of air pollution control equipment under present or anticipated operating conditions.

(G) Estimates of the current actual emissions and current potential to emit, including all calculations for the estimates.

(H) Estimates of the allowable emissions and/or potential to emit that would result from compliance with the proposed limitation, including all calculations for the estimates.

(iii) Any other information specifically requested by the reviewing authority.

(2) Estimates of actual emissions must be based upon actual test data, or in the absence of such data, upon procedures acceptable to the reviewing authority. Any emission estimates submitted to the reviewing authority must be verifiable using currently accepted engineering criteria. The following procedures are generally acceptable for estimating emissions from air pollution sources:

(i) Source-specific emission tests;

(ii) Mass balance calculations;

(iii) Published, verifiable emission factors that are applicable to the source;

(iv) Other engineering calculations; or

(v) Other procedures to estimate emissions specifically approved by the reviewing authority.

(b) *What are the procedures for obtaining a synthetic minor permit?* (1) If you wish to obtain a synthetic minor permit under this program, you must submit a permit application to the reviewing authority. The application must contain the information specified in paragraph (a) of this section. If the reviewing authority has developed application forms for such permits, you must use those forms.

(2) Within 60 days after receipt of an application, the reviewing authority will determine if it contains the information specified in paragraph (a) of this section and, if so, will determine it complete for the purpose of preparing a draft synthetic minor permit. You should contact the reviewing authority to find out the date of receipt of the application.

(3) If the reviewing authority determines that the application is not complete, it will request additional information from you as necessary to process the application. If the reviewing authority determines that the application is complete, it may notify you in writing. If you do not receive a request for additional information or a notice of complete application from the reviewing authority within 65 days of its receipt of your application, your application will be deemed complete.

(4) The reviewing authority will prepare a draft synthetic minor permit that describes the proposed limitation and its effect on the potential to emit of the source.

(5) The reviewing authority must provide an opportunity for public participation and public comment on the draft synthetic minor permit as set out in § 49.157.

(6) After the close of the public comment period, the reviewing authority will review all comments received and prepare a final synthetic minor permit.

(7) The final synthetic minor permit will be issued and will be subject to administrative and judicial review as set out in § 49.159.

(c) *What are my responsibilities under this program for my existing synthetic minor source or synthetic minor HAP source?* If you have an existing synthetic minor source or synthetic minor HAP source, you are subject to either paragraph (c)(1) or paragraph (c)(2) of this section, as follows:

(1) If your synthetic minor status is established through a permit or other document that is enforceable as a practical matter, you do not need to do anything. You may use the mechanism established in this program according to the requirements of paragraphs (a) and (b) of this section to replace your existing synthetic minor permit when it expires.

(2) If you have achieved your existing synthetic minor status by maintaining your actual emissions at less than 50 percent of the relevant major source threshold, you must obtain a synthetic minor permit under this program according to the requirements of paragraphs (a) and (b) of this section. The following provisions apply:

(i) You must apply for a synthetic minor permit by [1 year and 60 days after publication of final rule], and you must respond in a timely manner to any requests from the reviewing authority for additional information.

(ii) Provided that you submit your application and any requested additional information as indicated in paragraph (c)(2)(i) of this section, your source will continue to be considered a synthetic minor source or synthetic minor HAP source (as applicable) until your synthetic minor permit under this program has been issued.

(iii) Should you fail to submit your application and any requested additional information as indicated in paragraph (c)(2)(i) of this section, your source will no longer be considered a synthetic minor source or synthetic minor HAP source (as applicable), and will immediately become subject to all requirements for major sources.

§ 49.159 Final permit issuance and administrative and judicial review.

(a) *How will final action occur, and when will my permit become effective?* After decision on a permit, the reviewing authority must notify you of the decision, in writing, and if the permit is denied, of the reasons for such denial. If the reviewing authority issues a final permit to you, it must make a copy of the permit available at all of the locations where the draft permit was made available. In addition, the reviewing authority must provide adequate public notice of the final permit decision to ensure that the affected community, general public, and any individuals who commented on the draft permit have reasonable access to the decision and supporting materials. A final permit becomes effective 30 days after permit issuance, unless:

(1) A later effective date is specified in the permit; or

(2) Review of the final permit is requested under paragraph (d) of this section (in which case the specific terms and conditions of the permit that may be the subject of the request for review must be stayed); or

(3) The reviewing authority may make the permit effective immediately upon issuance if no comments requested a change in the draft permit or a denial of the permit.

(b) *For how long will the reviewing authority retain my permit-related records?* The records, including any required applications for each draft and final permit or application for permit revision, must be kept by the reviewing authority for not less than 5 years.

(c) *What is the administrative record for each final permit?* (1) The reviewing authority must base final permit decisions on an administrative record consisting of:

(i) The application and any supporting data furnished by the applicant;

(ii) The draft permit or notice of intent to deny the application;

(iii) Other documents in the supporting files for the draft permit that were relied upon in the decisionmaking;

(iv) All comments received during the public comment period, including any extension or reopening;

(v) The tape or transcript of any hearing(s) held;

(vi) Any written material submitted at such a hearing;

(vii) Any new materials placed in the record as a result of the reviewing authority's evaluation of public comments;

(viii) The final permit; and

(ix) Other documents in the supporting files for the final permit that were relied upon in the decisionmaking.

(2) The additional documents required under paragraph (c)(1) of this section should be added to the record as soon as possible after their receipt or publication by the reviewing authority. The record must be complete on the date the final permit is issued.

(3) Material readily available or published materials that are generally available and that are included in the administrative record under the standards of paragraph (c)(1) of this section need not be physically included in the same file as the rest of the record as long as it is specifically referred to in the that file.

(d) *Can permit decisions be appealed?* Permit decisions may be appealed according to the following provisions:

(1) The Administrator delegates authority to the Environmental Appeals Board (the Board) to issue final decisions in permit appeals filed under this program, including informal appeals of denials of requests for modification, revocation and re-issuance, or termination of permits under paragraph (e)(2) of this section. An appeal directed to the Administrator, rather than to the Board, will be forwarded to the Board for consideration. This delegation does not preclude the Board from referring an appeal or a motion under this program to the Administrator when the Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Board, all parties shall be so notified and the provisions of this program referring to the Board shall be interpreted as referring to the Administrator.

(2) Within 30 days after a final permit decision has been issued, any person who filed comments on the draft permit or participated in the public hearing may petition the Board to review any condition of the permit decision. Any person who failed to file comments and failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent that the changes from the draft to the final permit or other new grounds were not reasonably foreseeable during the public comment period on the draft permit. The 30-day period within which a person may request review under this section begins when the reviewing authority has fulfilled the notice requirements for the final permit decision, unless a later date is specified in that notice.

(3) The petition must include a statement of the reasons supporting the review, including a demonstration that any issues identified were raised during the public comment period (including any public hearing) to the extent required by these regulations, unless the petitioner demonstrates that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period, and, when appropriate, a showing that the condition in question is based on:

(i) A finding of fact or conclusion of law that is clearly erroneous; or

(ii) An exercise of discretion or an important policy consideration that the Board should, in its discretion, review.

(4) The Board may also decide on its own initiative to review any condition of any permit issued under this program.

(5) Within a reasonable time following the filing of the petition for review, the Board must issue an order either granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. If the Board grants review in response to requests under paragraph (d)(2) or (4) of this section, public notice must be given as provided in §49.157(b). Public notice must set forth a briefing schedule for the appeal and must state that any interested person may file an amicus brief. If the Board denies review, the permit applicant and the person(s) requesting review must be notified through means that are adequate to assure reasonable access to the decision, which may include mailing a notice to each.

(6) A petition to the Board under paragraph (d)(2) of this section is, under 42 U.S.C. 307(b), a prerequisite to seeking judicial review of the final agency action.

(7) For purposes of judicial review, final agency action occurs when a final permit is issued or denied by the reviewing authority and agency review procedures are exhausted. A final

permit decision must be issued by the reviewing authority:

(i) When the Board issues notice to the parties that review has been denied;

(ii) When the Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(8) Motions to reconsider a final order must be filed within 10 days after service of the final order. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision must be directed to, and decided by, the Board. Motions for reconsideration directed to the Administrator, rather than to the Board, will be forwarded to the Board for consideration, except in cases in which the Board has deferred to the Administrator and the Administrator has issued the final order. A motion for reconsideration must not stay the effective date of the final order unless specifically so ordered by the Board.

(9) For purposes of this section, time periods are computed as follows:

(i) Any time period scheduled to begin on the occurrence of an act or event must begin on the day after the act or event.

(ii) Any time period scheduled to begin before the occurrence of an act or event must be computed so that the period ends on the day before the act or event, except as otherwise provided.

(iii) If the final day of any time period falls on a weekend or legal holiday, the time period must be extended to the next working day.

(iv) Whenever a party or interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days must be added to the prescribed time.

(e) *Can my permit be reopened?* Your permit can be reopened according to the following procedures:

(1) Any person (including the permittee) may petition the reviewing authority to reopen a permit for cause, and the reviewing authority may commence a permit reopening on its own initiative. The reviewing authority may not reopen a permit for cause unless it contains a material mistake or fails to assure compliance with applicable requirements. All requests must be in writing and must contain reasons supporting the request.

(2) If the reviewing authority decides the request is not justified, the reviewing authority must send the requestor a brief written response giving a reason for the decision. Denials of requests for revision, revocation and re-issuance, or termination are not subject to public notice, comment, or hearings. Denials by the reviewing authority may be informally appealed to the Board by a letter briefly setting forth the relevant facts. The Board may direct the reviewing authority to begin revision, revocation and re-issuance, or termination proceedings under paragraph (e)(3) of this section. The appeal must be considered denied if the Board takes no action within 60 days after receiving it. This informal appeal is, under 42 U.S.C. 307, a prerequisite to seeking judicial review of EPA action in denying a request for revision, revocation and re-issuance, or termination.

(3) If the reviewing authority decides the request is justified and that cause exists to revise, revoke and reissue or terminate a permit, it shall initiate proceedings to reopen the permit.

(f) *What is an administrative permit revision?* The following provisions govern administrative permit revisions.

(1) An administrative permit revision is a permit revision that makes any of the following changes:

(i) Corrects typographical errors.

(ii) Identifies a change in the name, address, or phone number of any person identified in the permit, or provides a similar minor administrative change at the source.

(iii) Requires more frequent monitoring or reporting by the permittee.

(iv) Allows for a change in ownership or operational control of a source where the reviewing authority determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittee has been submitted to the reviewing authority.

(v) Establishes an increase in an emissions unit's annual allowable emissions limit for a regulated NSR pollutant, when the action that necessitates such increase is not otherwise subject to review under major NSR or under this program.

(vi) Incorporates any other type of change that the reviewing authority has determined to be similar to those in paragraphs (f)(1)(i) through (v) of this section.

(2) An administrative permit revision is not subject to the permit application, issuance, public participation, or administrative and judicial review requirements of this program.

§ 49.160 Administration and delegation of the minor NSR program in Indian country.

(a) *Who administers a minor NSR program in Indian country?* (1) If the Administrator has approved a TIP that includes a minor NSR program for sources in Indian country that meets the requirements of section 110(a)(2)(C) of the Act and §§51.160 through 51.164 of this chapter, the tribe is the reviewing authority and will administer the approved minor NSR program under tribal law.

(2) If the Administrator has not approved an implementation plan, the Administrator may delegate the authority to assist EPA with administration of portions of this Federal minor NSR program implemented under Federal authority to a tribal agency upon request, in accordance with the provisions of paragraph (b) of this section. If the tribal agency has been granted such delegation, it will have the authority to assist EPA according to paragraph (b) of this section.

(3) If the Administrator has not approved an implementation plan or granted delegation to a tribal agency, the Administrator is the reviewing authority and will directly administer all aspects of this Federal minor NSR program in Indian country under Federal authority.

(b) *Delegation of administration of the Federal minor NSR program to tribes.* This paragraph (b) establishes the process by which the Administrator may delegate authority to a tribal agency, with or without signature authority, to assist EPA with administration of portions of this Federal minor NSR program, in accordance with the provisions in paragraphs (b)(1) through (8) of this section. Any Federal requirements under this program that are administered by the delegate tribal agency will be subject to enforcement by EPA under Federal law. This section provides for administrative delegation of the Federal minor NSR program and does not affect the eligibility criteria under § 49.6 for treatment in the same manner as a State.

(1) *Information to be included in the Administrative Delegation Request.* In order to be delegated authority to assist EPA with administration of this FIP permit program for sources, the tribal agency must submit a request to the Administrator that:

(i) Identifies the specific provisions for which delegation is requested;

(ii) Identifies the Indian Reservation or other areas of Indian country for which delegation is requested;

(iii) Includes a statement by the applicant's legal counsel (or equivalent official) that includes the following information:

(A) A statement that the applicant is a tribe recognized by the Secretary of the Interior;

(B) A descriptive statement that is consistent with the type of information described in § 49.7(a)(2) demonstrating that the applicant is currently carrying out substantial governmental duties and powers over a defined area; and

(C) A description of the laws of the tribe that provide adequate authority to administer the Federal rules and provisions for which delegation is requested; and

(iv) Demonstrates that the tribal agency has the technical capability and adequate resources to administer the FIP provisions for which the delegation is requested.

(2) *Delegation of Partial Administrative Authority Agreement.* A Delegation of Partial Administrative Authority Agreement (Agreement) will set forth the terms and conditions of the delegation, will specify the provisions that the delegate tribal agency will be authorized to implement on behalf of EPA, and will be entered into by the Administrator and the delegate tribal agency. The Agreement will become effective upon the date that both the Administrator and the delegate tribal agency have signed the Agreement or as otherwise stated in the Agreement. Once the delegation becomes effective, the delegate tribal agency will be responsible, to the extent specified in the Agreement, for assisting EPA with administration of the provisions of the Federal minor NSR program that are subject to the Agreement.

(3) *Publication of notice of the Agreement.* The Administrator will publish a notice in the **Federal Register** informing the public of any Agreement for a particular area of Indian country. The Administrator also will publish the notice in a newspaper of general circulation in the area affected by the delegation. In addition, the Administrator will mail a copy of the notice to persons on a mailing list developed by the Administrator consisting of those persons who have requested to be placed on such a mailing list.

(4) *Revision or revocation of an Agreement.* An Agreement may be modified, amended, or revoked, in part or in whole, by the Administrator after consultation with the delegate tribal agency.

(5) *Transmission of information to the Administrator.* When administration of a portion of the Federal minor NSR program in Indian country that includes receipt of permit application materials and preparation of draft permits has been delegated in accordance with the provisions of this section, the delegate tribal agency must provide to the Administrator a copy of each permit application (including any application for permit revision) and each draft permit. The applicant may be required by the delegate tribal agency to provide a copy of the permit application directly to the Administrator. With the Administrator's consent, the delegate tribal agency may submit to the Administrator a permit application summary form and any relevant portion of the permit application, in place of the complete permit application. To the extent practicable, the preceding information should be provided in electronic format as requested by the Administrator.

(6) *Waiver of information transmission requirements.* The Administrator may waive the requirements of paragraph (b)(5) of this section for any category of sources (including any class, type, or size within such category) by transmitting the waiver in writing to the delegate tribal agency.

(7) *Retention of records.* Where a delegate tribal agency prepares draft or final permits or receives applications for permit revisions on behalf of EPA, the records for each draft and final permit or application for permit revision must be kept by the delegate tribal agency for a period not less than 5 years. The delegate tribal agency must also submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the delegate tribal agency is implementing and administering the delegated program in compliance with the requirements of the Act and of this program.

(8) *Delegation of signature authority.* To receive delegation of signature authority, the legal statement submitted by the tribal agency pursuant to paragraph (b)(1) of this section must certify that no applicable provision of tribal law requires that a minor NSR permit be issued after a certain time if the delegate tribal agency has failed to take action on the application (or includes any other similar provision providing for default issuance of a permit).

(c) *Are there any non-delegable elements of the Federal minor NSR program in Indian country?* The following authorities cannot be delegated outside of EPA:

(1) The Administrator's authority to object to the issuance of a minor NSR permit.

(2) The Administrator's authority to enforce, revoke, or terminate permits issued pursuant to this program.

(d) *How will EPA transition its authority to an approved minor NSR program?* (1) The Administrator will suspend the issuance of minor NSR permits under this program promptly upon publication of notice of approval of an implementation plan with a minor NSR permit program for that area.

(2) The Administrator may retain jurisdiction over the permits for which the administrative or judicial review process is not complete and will address this issue in the notice of program approval.

(3) After approval of a program for issuing minor NSR permits and the suspension of issuance of minor NSR permits by the Administrator, the Administrator will continue to administer minor NSR permits until permits are issued under the approved implementation plan program.

§§ 49.161–49.165 [Reserved]

3. Subpart C of Part 49 is amended by adding an undesignated center heading and §§ 49.166 through 49.173, and adding and reserving §§ 49.174 and 49.175 to read as follows:

Federal Major New Source Review Program for Nonattainment Areas in Indian Country

§ 49.166 Program overview.

(a) *What constitutes the Federal major new source review (NSR) program for nonattainment areas in Indian country?* As set forth in this Federal Implementation Plan (FIP), the Federal major NSR program for nonattainment areas in Indian country (or ''program'') consists of §§ 49.166 through 49.175.

(b) *What is the purpose of this program?* This program has the following purposes:

(1) It establishes a preconstruction permitting program for new major stationary sources and major modifications at existing major stationary sources located in nonattainment areas in Indian country to meet the requirements of part D of title I of the Act.

(2) It requires that major stationary sources subject to this program comply with the provisions and requirements of part 51, appendix S of this chapter (appendix S). Additionally, it sets forth the criteria and procedures in appendix S that the reviewing authority (as defined in § 49.167) will use to approve permits under this program. Note that for the purposes of this program, the

term ''SIP'' as used in appendix S means any EPA-approved implementation plan, including a Tribal Implementation Plan (TIP). While some of the important provisions of appendix S are paraphrased in various paragraphs of this program to highlight them, the provisions of appendix S govern.

(3) It also sets forth procedures for appealing a permit issued under this program as provided in § 49.172.

(c) *When and where does this program apply?* (1) The provisions of this program apply to new major stationary sources and major modifications at existing major stationary sources located in nonattainment areas in Indian country where there is no EPA-approved nonattainment major NSR program beginning on [date 60 days from date of publication of final rule]. The provisions of this program apply only to stationary sources and modifications that are major for the regulated NSR pollutant(s) for which the area is designated nonattainment.

(2) The provisions of this program cease to apply in an area covered by an EPA-approved implementation plan on the date that our approval of that plan becomes effective, provided that the plan includes provisions that comply with the requirements of part D of title I of the Act and § 51.165 of this chapter for the construction of new major stationary sources and major modifications at existing major stationary sources in nonattainment areas.

(d) *What general provisions apply under this program?* The following general provisions apply to you as an owner/operator of a stationary source:

(1) If you propose to construct a new major stationary source or a major modification at an existing major stationary source in a nonattainment area in Indian country, you must obtain a major NSR permit under this program before beginning actual construction. If you commence construction after the effective date of this program without applying for and receiving a permit pursuant to this program, you will be subject to appropriate enforcement action.

(2) If you do not construct or operate your source or modification in accordance with the terms of your major NSR permit issued under this program, you will be subject to appropriate enforcement action.

(3) Issuance of a permit under this program does not relieve you of the responsibility to comply fully with applicable provisions of any EPA-approved implementation plan or FIP and any other requirements under applicable law.

(4) Nothing in this program prevents a tribe from administering a major NSR permit program with more stringent requirements in an approved TIP.

§ 49.167 Definitions.

For the purposes of this program, the definitions in paragraph II.A of appendix S to part 51 of this chapter apply, unless otherwise stated. The following definitions also apply to this program:

Allowable emissions means ''allowable emissions'' as defined in paragraph II.A.11 of appendix S to part 51 of this chapter, except that the allowable emissions for any emissions unit are calculated considering any emission limitations that are enforceable as a practical matter on the emissions unit's potential to emit.

Enforceable as a practical matter means that an emission limitation or other standard is both legally and practically enforceable as follows:

(1) An emission limitation or other standard is ''legally enforceable'' if the reviewing authority has the right to enforce it.

(2) Practical enforceability for an emission limitation or for other standards (design standards, equipment standards, work practices, operational standards, pollution prevention techniques) in a permit for a stationary source is achieved if the permit's provisions specify:

(i) A limitation or standard and the emissions units or activities at the stationary source subject to the limitation or standard;

(ii) The time period for the limitation or standard (*e.g.*, hourly, daily, monthly, and/or annual limits such as rolling annual limits); and

(iii) The method to determine compliance, including appropriate monitoring, recordkeeping, reporting, and testing.

(3) For rules and general permits that apply to categories of stationary sources, practicable enforceability additionally requires that the provisions:

(i) Identify the types or categories of sources that are covered by the rule or general permit;

(ii) Where coverage is optional, provide for notice to the reviewing authority of the source's election to be covered by the rule or general permit; and

(iii) Specify the enforcement consequences relevant to the rule or general permit.

Environmental Appeals Board means the Board within the EPA described in § 1.25(e) of this chapter.

Indian country, as defined in 18 U.S.C. 1151, means the following:

(1) All land within the limits of any Indian reservation under the jurisdiction of the United States government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation;[2]

(2) All dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a State; and

(3) All Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

Indian governing body means the governing body of any tribe, band, or group of Indians subject to the jurisdiction of the United States and recognized by the United States as possessing power of self-government.

Regulated NSR pollutant, for purposes of this program, means the following:

(1) Nitrogen oxides or any volatile organic compounds;

(2) Any pollutant for which a national ambient air quality standard has been promulgated; or

(3) Any pollutant that is a constituent or precursor of a general pollutant listed under paragraphs (1) or (2) of this definition, provided that a constituent or precursor pollutant may only be regulated under NSR as part of regulation of the general pollutant.

Reviewing authority means the Administrator and may mean an Indian tribe in cases where a tribal agency is assisting EPA with administration of the program through a delegation under § 49.173.

Synthetic minor HAP source means a stationary source that otherwise has the potential to emit HAPs in amounts that are at or above those for major sources of HAP in § 63.2 of this chapter, but that has taken a restriction such that its potential to emit is less than such amounts for major sources. Such restrictions must be enforceable as a practical matter.

Synthetic minor source means a stationary source that otherwise has the potential to emit regulated NSR pollutants in amounts that are at or above those for major stationary sources in appendix S to part 51 of this chapter, but that has taken a restriction such that its potential to emit is less than such

[2] Under this definition, EPA treats as reservations trust lands validly set aside for the use of a tribe even if the trust lands have not been formally designated as a reservation.

amounts for major stationary sources. Such restrictions must be enforceable as a practical matter. The term ''synthetic minor source'' applies independently for each regulated NSR pollutant that the stationary source has the potential to emit.

§ 49.168 Does this program apply to me?

(a) In a nonattainment area in Indian country, the requirements of this program apply to you under either of the following circumstances:

(1) If you propose to construct a new major stationary source (as defined in paragraph II.A.4 of appendix S to part 51 of this chapter) of the nonattainment pollutant.

(2) If you propose to construct a major modification at your existing major stationary source (as defined in paragraph II.A.5 of appendix S to part 51 of this chapter), where your source is a major stationary source of the nonattainment pollutant and the proposed modification is a major modification for the nonattainment pollutant.

(b) If you own or operate a major stationary source with a State-issued nonattainment major NSR permit, you must apply to convert such permit to a Federal permit under this program by [date 1 year and 60 days from date of publication of final rule]. In this case, you would not be subject to any additional requirements under this program.

(c) If you propose to establish a synthetic minor source or synthetic minor HAP source, or to construct a minor modification at your major stationary source, you will have to comply with the requirements of the Federal minor NSR program in Indian country at §§49.51 through 49.165 or other EPA-approved minor NSR program, as applicable.

§ 49.169 Permit approval criteria.

(a) *What are the general criteria for permit approval?* The general review criteria for permits are provided in paragraph II.B of appendix S to part 51 of this chapter. In summary, that paragraph basically requires the reviewing authority to ensure that the proposed new major stationary source or major modification would meet all applicable emission requirements in the EPA-approved implementation plan or FIP, any applicable NSPS in part 60 of this chapter, and any applicable NESHAP in part 61 or part 63 of this chapter, before a permit can be issued.

(b) *What are the program-specific criteria for permit approval?* The approval criteria or conditions for obtaining a major NSR permit for major stationary sources and major modifications locating in nonattainment areas are given in paragraph IV.A of appendix S to part 51 of this chapter. In summary, these are the following:

(1) The lowest achievable emission rate (LAER) requirement for any NSR pollutant subject to this program.

(2) Certification that all existing major stationary sources owned or operated by you in the same State as the proposed source or modification are in compliance or under a compliance schedule.

(3) Emissions reductions (offsets) requirement for any source or modification subject to this program.

(4) A demonstration that the emission offsets will provide a net air quality benefit in the affected area.

§ 49.170 Emission offset requirement exemption.

An Indian governing body may seek an exemption from the emission offset requirement (*See* § 49.169(b)(3)) for major stationary sources and major modifications subject to this program that are located within the tribe(s Indian country pursuant to the following options:

(a) *Section 173(a)(1)(B) Economic Development Zone (EDZ) option.* Under section 173(a)(1)(B) of the Act, major stationary sources and major modifications subject to this program may be exempted from the offset requirement if they are located in a zone targeted for economic development by the Administrator, in consultation with the Department of Housing and Urban Development (HUD). Under the EDZ option, the Administrator would waive the offset requirement for such sources and modifications, provided that:

(1) The new major stationary source or major modification is located in a geographical area which meets the criteria for an EDZ, and the Administrator has approved a request from a tribe and declared the area an EDZ; and

(2) The State/tribe demonstrates that the new permitted emissions are consistent with the achievement of reasonable further progress pursuant to section 172(c)(4) of the Act, and will not interfere with attainment of the applicable NAAQS by the applicable attainment date.

(b) *Appendix S, paragraph VI option.* Pursuant to paragraph VI of appendix S to part 51 of this chapter, for a new major stationary source or major modification locating in a nonattainment area for which the attainment date has not yet passed, such source or modification would be exempt from all requirements of this program, including the offset requirement, provided all the following conditions are met:

(1) The new major stationary source or major modification complies with any applicable EPA-approved implementation plan or FIP emission limitations.

(2) The new major stationary source or major modification will not interfere with the attainment date for a regulated NSR pollutant.

(3) The Administrator has determined that conditions specified in paragraphs (b)(1) and (2) of this section are satisfied and such determination is published in the **Federal Register**.

§ 49.171 Public participation requirements.

(a) *What permit information will be publicly available?* With the exception of any confidential information as defined in part 2, subpart B of this chapter, the reviewing authority must make available for public inspection the documents listed in paragraphs (a)(1) through (4) of this section. The reviewing authority must make such information available for public inspection at the appropriate EPA Regional Office and in at least one location in the area affected by the stationary source, such as the tribal environmental office or a local library.

(1) All information submitted as part of an application for a permit.

(2) Any additional information requested by the reviewing authority.

(3) The reviewing authority's analysis of the application and any additional information submitted by you, including the LAER analysis and, where applicable, the analysis of your emissions reductions (offsets) and your demonstration of a net air quality benefit in the affected area.

(4) A copy of the draft permit or the decision to deny the permit with the justification for denial.

(b) *How will the public be notified and participate?* (1) Before issuing a permit under this program, the reviewing authority must prepare a draft permit and must provide adequate public notice to ensure that the affected community and the general public have reasonable access to the application and draft permit information, as set out in paragraphs (b)(1)(i) and (ii) of this section. The public notice must provide an opportunity for public comment and notice of a public hearing, if any, on the draft permit.

(i) The reviewing authority must mail a copy of the notice to you, the appropriate Indian governing body, and the tribal, State, and local air pollution authorities having jurisdiction in areas outside of the area of Indian country

potentially impacted by the air pollution source.

(ii) Depending on such factors as the nature and size of your stationary source, local air quality considerations, and the characteristics of the population in the affected area, the reviewing authority must use appropriate means of notification, such as those listed in paragraphs (b)(1)(ii)(A) through (E) of this section.

(A) The reviewing authority may mail or e-mail a copy of the notice to persons on a mailing list developed by the reviewing authority consisting of those persons who have requested to be placed on such a mailing list.

(B) The reviewing authority may post the notice on its Web site.

(C) The reviewing authority may publish the notice in a newspaper of general circulation in the area affected by the source. Where possible, the notice may also be published in a tribal newspaper or newsletter.

(D) The reviewing authority may provide copies of the notice for posting at one or more locations in the area affected by the source, such as Post Offices, trading posts, libraries, tribal environmental offices, community centers, or other gathering places in the community.

(E) The reviewing authority may employ other means of notification as appropriate.

(2) The notice required pursuant to paragraph (b)(1) of this section must include the following information at a minimum:

(i) Identifying information, including your name and address (and plant name and address if different) and the name and telephone number of the plant manager/contact.

(ii) The name and address of the reviewing authority processing the permit action;

(iii) The regulated NSR pollutants to be emitted, the affected emissions units, and the emission limitations for each affected emissions unit;

(iv) The emissions change involved in the permit action;

(v) Instructions for requesting a public hearing;

(vi) The name, address, and telephone number of a contact person in the reviewing authority's office from whom additional information may be obtained;

(vii) Locations and times of availability of the information (listed in paragraph (a) of this section) for public inspection; and

(viii) A statement that any person may submit written comments, a written request for a public hearing, or both, on the draft permit action. The reviewing authority must provide a period of at least 30 days from the date of the public notice for comments, and for requests for a public hearing.

(c) *How will the public comment, and will there be a public hearing?* (1) Any person may submit written comments on the draft permit and may request a public hearing. These comments must raise any reasonably ascertainable issue with supporting arguments by the close of the public comment period (including any public hearing). The reviewing authority must consider all comments in making the final decision. The reviewing authority must keep a record of the commenters and of the issues raised during the public participation process, and such records must be available to the public.

(2) The reviewing authority must extend the public comment period under paragraph (b) of this section to the close of any public hearing under this section. The hearing officer may also extend the comment period by so stating at the hearing.

(3) A request for a public hearing must be in writing and must state the nature of the issues proposed to be raised at the hearing.

(4) The reviewing authority must hold a hearing whenever there is, on the basis of requests, a significant degree of public interest in a draft permit. The reviewing authority may also hold a public hearing at its discretion, whenever, for instance, such a hearing might clarify one or more issues involved in the permit decision. The reviewing authority must provide notice of any public hearing at least 30 days prior to the date of the hearing. Public notice of the hearing may be concurrent with that of the draft permit, and the two notices may be combined. Reasonable limits may be set upon the time allowed for oral statements at the hearing.

(5) The reviewing authority must make a tape recording or written transcript of any hearing available to the public.

§ 49.172 Final permit issuance and administrative and judicial review.

(a) *How will final action occur, and when will my permit become effective?* After decision on a permit, the reviewing authority must notify you of the decision, in writing, and if the permit is denied, of the reasons for such denial. If the reviewing authority issues a final permit to you, it must make a copy of the permit available at any location where the draft permit was made available. In addition, the reviewing authority must provide adequate public notice of the final permit decision to ensure that the affected community, general public, and any individuals who commented on the draft permit have reasonable access to the decision and supporting materials. A final permit becomes effective 30 days after permit issuance, unless:

(1) A later effective date is specified in the permit; or

(2) Review of the final permit is requested under paragraph (d) of this section (in which case the specific terms and conditions of the permit that may be the subject of the request for review must be stayed); or

(3) The draft permit was subjected to a public comment period and no comments requested a change in the draft permit or a denial of the permit, in which case the reviewing authority may make the permit effective immediately upon issuance.

(b) *For how long will the reviewing authority retain my permit-related records?* The records, including any required applications for each draft and final permit or application for permit revision, must be kept by the reviewing authority for not less than 5 years.

(c) *What is the administrative record for each final permit?* (1) The reviewing authority must base final permit decisions on an administrative record consisting of:

(i) All comments received during any public comment period, including any extension or reopening;

(ii) The tape or transcript of any hearing(s) held;

(iii) Any written material submitted at such a hearing;

(iv) Any new materials placed in the record as a result of the reviewing authority's evaluation of public comments;

(v) Other documents in the supporting files for the permit that were relied upon in the decisionmaking;

(vi) The final permit;

(vii) The application and any supporting data furnished by the applicant;

(viii) The draft permit or notice of intent to deny the application or to terminate the permit; and

(ix) Other documents in the supporting files for the draft permit that were relied upon in the decisionmaking.

(2) The additional documents required under paragraph (c)(1) of this section should be added to the record as soon as possible after their receipt or publication by the reviewing authority. The record must be complete on the date the final permit is issued.

(3) Material readily available or published materials that are generally available and that are included in the administrative record under the standards of paragraph (c)(1) of this

section need not be physically included in the same file as the rest of the record as long as it is specifically referred to in that file.

(d) *Can permit decisions be appealed?* Permit decisions may be appealed according to the following provisions:

(1) The Administrator delegates authority to the Environmental Appeals Board (the Board) to issue final decisions in permit appeals filed under this program, including informal appeals of denials of requests for modification, revocation and re-issuance, or termination of permits under paragraph (e)(2) of this section. An appeal directed to the Administrator, rather than to the Board, will be forwarded to the Board for consideration. This delegation does not preclude the Board from referring an appeal or a motion under this program to the Administrator when the Board, in its discretion, deems it appropriate to do so. When an appeal or motion is referred to the Administrator by the Board, all parties shall be so notified and the provisions of this program referring to the Board shall be interpreted as referring to the Administrator.

(2) Within 30 days after a final permit decision has been issued, any person who filed comments on the draft permit or participated in the public hearing may petition the Board to review any condition of the permit decision. Any person who failed to file comments and failed to participate in the public hearing on the draft permit may petition for administrative review only to the extent that the changes from the draft to the final permit or other new grounds were not reasonably foreseeable during the public comment period on the draft permit. The 30-day period within which a person may request review under this section begins when the reviewing authority has fulfilled the notice requirements for the final permit decision, unless a later date is specified in that notice.

(3) The petition must include a statement of the reasons supporting the review, including a demonstration that any issues identified were raised during the public comment period (including any public hearing) to the extent required by these regulations, unless the petitioner demonstrates that it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period, and, when appropriate, a showing that the condition in question is based on:

(i) A finding of fact or conclusion of law that is clearly erroneous; or

(ii) An exercise of discretion or an important policy consideration that the Board should, in its discretion, review.

(4) The Board may also decide on its own initiative to review any condition of any permit issued under this program.

(5) Within a reasonable time following the filing of the petition for review, the Board must issue an order either granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action. If the Board grants review in response to requests under paragraph (d)(2) or (4) of this section, public notice must be given as provided in § 49.171(b). Public notice must set forth a briefing schedule for the appeal and must state that any interested person may file an amicus brief. If the Board denies review, the permit applicant and the person(s) requesting review must be notified through means that are adequate to assure reasonable access to the decision, which may include mailing a notice to each.

(6) A petition to the Board under paragraph (d)(2) of this section is, under 42 U.S.C. 307(b), a prerequisite to seeking judicial review of the final agency action.

(7) For purposes of judicial review, final agency action occurs when a final permit is issued or denied by the reviewing authority and agency review procedures are exhausted. A final permit decision must be issued by the reviewing authority:

(i) When the Board issues notice to the parties that review has been denied;

(ii) When the Board issues a decision on the merits of the appeal and the decision does not include a remand of the proceedings; or

(iii) Upon the completion of remand proceedings if the proceedings are remanded, unless the Board's remand order specifically provides that appeal of the remand decision will be required to exhaust administrative remedies.

(8) Notice of any final agency action on a permit shall promptly be published in the **Federal Register**.

(9) Motions to reconsider a final order must be filed within 10 days after service of the final order. Every such motion must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors. Motions for reconsideration under this provision must be directed to, and decided by, the Board. Motions for reconsideration directed to the Administrator, rather than to the Board, will be forwarded to the Board for consideration, except in cases in which the Board has deferred to the Administrator and the Administrator has issued the final order. A motion for reconsideration must not stay the effective date of the final order unless specifically so ordered by the Board.

(10) For purposes of this section, time periods are computed as follows:

(i) Any time period scheduled to begin on the occurrence of an act or event must begin on the day after the act or event.

(ii) Any time period scheduled to begin before the occurrence of an act or event must be computed so that the period ends on the day before the act or event, except as otherwise provided.

(iii) If the final day of any time period falls on a weekend or legal holiday, the time period must be extended to the next working day.

(iv) Whenever a party or interested person has the right or is required to act within a prescribed period after the service of notice or other paper upon him or her by mail, 3 days must be added to the prescribed time.

(e) *Can my permit be reopened?* Your permit can be reopened according to the following procedures:

(1) Any person (including the permittee) may petition the reviewing authority to reopen a permit for cause, and the reviewing authority may commence a permit reopening on its own initiative. The reviewing authority may not reopen a permit for cause unless it contains a material mistake or fails to assure compliance with applicable requirements. All requests must be in writing and must contain reasons supporting the request.

(2) If the reviewing authority decides the request is not justified, the reviewing authority must send the requestor a brief written response giving a reason for the decision. Denials of requests for revision, revocation and re-issuance, or termination are not subject to public notice, comment, or hearings. Denials by the reviewing authority may be informally appealed to the Board by a letter briefly setting forth the relevant facts. The Board may direct the reviewing authority to begin revision, revocation and re-issuance, or termination proceedings under paragraph (e)(3) of this section. The appeal must be considered denied if the Board takes no action within 60 days after receiving it. This informal appeal is, under 42 U.S.C. 307, a prerequisite to seeking judicial review of EPA action in denying a request for revision, revocation and re-issuance, or termination.

(3) If the reviewing authority decides the request is justified and that cause exists to revise, revoke and reissue or

terminate a permit, it shall initiate proceedings to reopen the permit.

§ 49.173 Administration and delegation of the nonattainment major NSR program in Indian country.

(a) *Who administers a nonattainment major NSR Program in Indian Country?* (1) If the Administrator has approved a TIP that includes a major NSR program for stationary sources in nonattainment areas of Indian country that meets the requirements of part D of title I of the Act and § 51.165 of this chapter, the tribe is the reviewing authority and will administer the approved major NSR program under tribal law.

(2) If the Administrator has not approved an implementation plan, the Administrator may delegate the authority to assist EPA with administration of portions of this Federal nonattainment major NSR program implemented under Federal authority to a tribal agency upon request, in accordance with the provisions of paragraph (b) of this section. If the tribal agency has been granted such delegation, it will have the authority to assist EPA according to paragraph (b) of this section.

(3) If the Administrator has not approved an implementation plan or granted delegation to a tribal agency, the Administrator is the reviewing authority and will directly administer all aspects of this Federal nonattainment major NSR program in Indian country under Federal authority.

(b) *Delegation of administration of the Federal nonattainment major NSR program to tribes.* This paragraph (b) establishes the process by which the Administrator may delegate authority to a tribal agency, with or without signature authority, to assist EPA with administration of portions of this Federal nonattainment major NSR program, in accordance with the provisions in paragraphs (b)(1) through (8) of this section. Any Federal requirements under this program that are administered by the delegate tribal agency will be subject to enforcement by EPA under Federal law. This section provides for administrative delegation of the Federal nonattainment major NSR program and does not affect the eligibility criteria under § 49.6 for treatment in the same manner as a State.

(1) *Information to be included in the Administrative Delegation Request.* In order to be delegated authority to assist EPA with administration of this FIP permit program for stationary sources, the tribal agency must submit a request to the Administrator that:

(i) Identifies the specific provisions for which delegation is requested;

(ii) Identifies the Indian Reservation or other areas of Indian country for which delegation is requested;

(iii) Includes a statement by the applicant's legal counsel (or equivalent official) that includes the following information:

(A) A statement that the applicant is a tribe recognized by the Secretary of the Interior;

(B) A descriptive statement that is consistent with the type of information described in § 49.7(a)(2) demonstrating that the applicant is currently carrying out substantial governmental duties and powers over a defined area; and

(C) A description of the laws of the tribe that provide adequate authority to administer the Federal rules and provisions for which delegation is requested; and

(iv) Demonstrates that the tribal agency has the technical capability and adequate resources to administer the FIP provisions for which the delegation is requested.

(2) *Delegation of Partial Administrative Authority Agreement.* A Delegation of Partial Administrative Authority Agreement (Agreement) will set forth the terms and conditions of the delegation, will specify the provisions that the delegate tribal agency will be authorized to implement on behalf of EPA, and will be entered into by the Administrator and the delegate tribal agency. The Agreement will become effective upon the date that both the Administrator and the delegate tribal agency have signed the Agreement or as otherwise stated in the Agreement. Once the delegation becomes effective, the delegate tribal agency will be responsible, to the extent specified in the Agreement, for assisting EPA with administration of the provisions of the Federal nonattainment major NSR program that are subject to the Agreement.

(3) *Publication of notice of the Agreement.* The Administrator will publish a notice in the **Federal Register** informing the public of any Agreement for a particular area of Indian country. The Administrator also will publish the notice in a newspaper of general circulation in the area affected by the delegation. In addition, the Administrator will mail a copy of the notice to persons on a mailing list developed by the Administrator consisting of those persons who have requested to be placed on such a mailing list.

(4) *Revision or revocation of an Agreement.* An Agreement may be modified, amended, or revoked, in part or in whole, by the Administrator after consultation with the delegate tribal agency.

(5) *Transmission of information to the Administrator.* When administration of a portion of the Federal nonattainment major NSR program in Indian country that includes receipt of permit application materials and preparation of draft permits has been delegated in accordance with the provisions of this section, the delegate tribal agency must provide to the Administrator a copy of each permit application (including any application for permit revision) and each draft permit. The applicant may be required by the delegate tribal agency to provide a copy of the permit application directly to the Administrator. With the Administrator's consent, the delegate tribal agency may submit to the Administrator a permit application summary form and any relevant portion of the permit application, in place of the complete permit application. To the extent practicable, the preceding information should be provided in electronic format as requested by the Administrator.

(6) *Waiver of information transmission requirements.* The Administrator may waive the requirements of paragraph (b)(5) of this section for any category of stationary sources (including any class, type, or size within such category) by transmitting the waiver in writing to the delegate tribal agency.

(7) *Retention of records.* Where a delegate tribal agency prepares draft or final permits or receives applications for permit revisions on behalf of EPA, the records for each draft and final permit or application for permit revision must be kept by the delegate tribal agency for a period not less than 5 years. The delegate tribal agency must also submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the delegate tribal agency is implementing and administering the delegated program in compliance with the requirements of the Act and of this program.

(8) *Delegation of signature authority.* To receive delegation of signature authority, the legal statement submitted by the tribal agency pursuant to paragraph (b)(1) of this section must certify that no applicable provision of tribal law requires that a major NSR permit be issued after a certain time if the delegate tribal agency has failed to take action on the application (or includes any other similar provision providing for default issuance of a permit).

(c) *Are there any non-delegable elements of the Federal nonattainment major NSR program in Indian country?*

The following authorities cannot be delegated outside of EPA:

(1) The Administrator's authority to object to the issuance of a major NSR permit.

(2) The Administrator's authority to enforce, revoke, or terminate permits issued pursuant to this program.

(d) *How will EPA transition its authority to an approved nonattainment major NSR program?* (1) The Administrator will suspend the issuance of nonattainment major NSR permits under this program promptly upon publication of notice of approval of an implementation plan with a major NSR permit program for nonattainment areas.

(2) The Administrator may retain jurisdiction over the permits for which the administrative or judicial review process is not complete and will address this issue in the notice of program approval.

(3) After approval of a program for issuing nonattainment major NSR permits and the suspension of issuance of nonattainment major NSR permits by the Administrator, the Administrator will continue to administer nonattainment major NSR permits until permits are issued under the approved implementation plan program.

§§ 49.174–49.175 [Reserved]

PART 51—[AMENDED]

4. The authority citation for part 51 continues to read as follows:

Authority: 23 U.S.C. 101; 42 U.S.C. 7401–7671q.

Appendix S to Part 51—[Amended]

5. Appendix S to Part 51 is amended by revising paragraph II.B to read as follows:

Appendix S to Part 51—Emission Offset Interpretative Ruling

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II. * * *

B. *Review of all sources for emission limitation compliance.* The reviewing authority must examine each proposed major new source and proposed major modification [1] to determine if such a source will meet all applicable emission requirements in the SIP, any applicable new source performance standard in 40 CFR part 60, or any national emission standard for hazardous air pollutants in 40 CFR part 61 or part 63. If the reviewing authority determines that the proposed major new source cannot meet the applicable emission requirements, the permit to construct must be denied.

* * * * *

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[1] Hereafter the term *source* will be used to denote both any source and any modification.