

Regulatory Analysis Form

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(1) Agency
Environmental Protection

(2) I.D. Number (Governor's Office Use)
7-399

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INDEPENDENT REGULATORY REVIEW BOARD

(3) Short Title

Nonattainment New Source Review

(4) PA Code Cite
25 Pa. Code Chapters 121 and 127

(5) Agency Contacts & Telephone Numbers

Primary Contact: Marjorie Hughes, 783-8727

Secondary Contact: Michele Tate, 783-8727

(6) Type of Rulemaking (Check One)

- Proposed Rulemaking
 Final Order Adopting Regulation
 Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

- No
 Yes: By the Attorney General
 Yes: By the Governor

(8) Briefly explain the regulation in clear and non-technical language.

The final rulemaking amends the existing new source review (NSR) program to incorporate certain Federal provisions promulgated by the U.S. Environmental Protection Agency on December 31, 2002. 67 Fed. Reg. 80186. Nonattainment New Source Review is a federally mandated preconstruction permitting program that requires the installation of state-of-the-art air pollution controls on new and modified sources located at major facilities in nonattainment areas or located in an attainment or unclassifiable area which impacts a nonattainment area in excess of significance levels. The proposed revisions to Chapter 127, Subchapter E (relating to new source review) establish special permitting requirements which satisfy the provisions of §§ 172(c)(5), 173 and 182 of the federal Clean Air Act and regulations adopted thereunder for a new major facility or modifications at an existing major facility located in a nonattainment area or the NSR program requires the owner/operator of a new major facility, or modified existing major facility, to comply with the Lowest Achievable Emission Rate (LAER) requirements and obtain sufficient emission reduction credits (ERCs) to offset the proposed increase in emissions before the source can commence operation.

The final rulemaking includes an option for establishing a voluntary 10-year plantwide applicability limit (PAL) to allow facility owners and operators to manage emission increases without triggering a major NSR review. In addition, the regulation includes amendments to the existing emission reduction credit (ERC) program, which provides the emission offsets. The final regulation will be submitted to the U.S. Environmental Protection Agency (EPA) as a revision to the State Implementation Plan (SIP).

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

This final rulemaking is authorized under Section 5 of the Pennsylvania Air Pollution Control Act (35 P.S. § 4005). Section 5(a)(1) of the Air Pollution Control Act (APCA) (35 P.S. § 4005(a)(1)) grants the Environmental Quality Board the authority to adopt rules and regulations for the prevention, control, reduction and abatement of air pollution in the Commonwealth.

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

Yes. On December 31, 2002, the U.S. Environmental Protection Agency (EPA) published a final rule entitled "Prevention of Significant Deterioration and Nonattainment New Source Review: Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limits, Clean Units, and Pollution Control Projects." (67 Fed. Reg. 80186.) This rulemaking amends 40 CFR §§51.165, 51.166, and 52.21. The regulation requires that States submit revised SIP revisions containing the major elements of the December 2002 NSR rule or an "equivalency demonstration" by January 2, 2006. Therefore, Pennsylvania must adopt EPA's NSR rules, or provide a demonstration to the EPA that the existing or amended NSR Program is equivalent to the federal rule published on December 31, 2002. Since the Department has not submitted the SIP revision to EPA by the January 2, 2006, due date, EPA may choose to issue a "failure to submit finding" that would trigger an 18-month sanctions clock under Section 179 of the Clean Air Act. These sanctions would include the loss of federal highway funds and two-to-one emission offsets for new or modified major sources.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

The final amendments revise the existing NSR regulation and also incorporate certain changes required by the EPA. The amendments are reasonably necessary to achieve and maintain the National Ambient Air Quality Standards (NAAQS) including the eight-hour ozone and fine particulate standards. In addition, the imposition of sanctions under Section 179 of the CAA will be avoided if the rulemaking is promulgated expeditiously. The existing NSR program and final amendments allow for continued economic growth and development while addressing the air quality problem.

(12) State the public health, safety, environmental or general welfare risks associated with non-regulation.

Failure to amend the NSR program will result in the imposition of discretionary and mandatory federal sanctions including the loss of federal highway funds and two-to-one emission offsets for major new or modified stationary sources.

The EPA could also implement its regulations on sources in the Commonwealth should the Department fail to demonstrate that Pennsylvania's NSR regulations are equivalent to, or at least as stringent as, the federal rules.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

The citizens of the Commonwealth are the major benefactors of these regulatory provisions. This is a continuation of an existing air quality permitting program that assures that air emissions from major air pollution facilities are well controlled. These changes are reasonably necessary to achieve and maintain the NAAQS and to also demonstrate an equivalency with federal requirements.

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(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effect as completely as possible and approximate the number of people who will be adversely affected.)

It is not anticipated that any significant additional costs will be incurred by the owners and operators of affected facilities. These provisions mainly affect modifications to the same existing major source facilities that are affected by the existing regulation. The adoption of the PAL provisions provides flexibility for the owners and operators of major sources by allowing increases in emissions so long as the plantwide limit is not exceeded. Therefore, facility-wide emission increases would occur without triggering NSR.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

The final regulation will affect operators and owners of air contamination sources subject to the special permitting requirements of *25 Pa. Code* Chapter 127. There are approximately 700 major facility owner/operators.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

The Department has worked closely with its Air Quality Technical Advisory Committee (AQTAC) in the development of these regulations. On December 20, 2005, the Environmental Quality Board (EQB) approved the proposed amendments for publication and comments. The proposed amendments to Chapter 121 (relating to general provisions) and to the Chapter 127, Subchapter E, New Source Review regulation were published in the Pennsylvania Bulletin on April 29, 2006. The EQB held three public hearings. The public comment period for the proposed rulemaking was closed on July 31, 2006. The EQB received comments from 33 commentators. The Department staff met with the AQTAC on December 14, 2006 and on January 4, 2007 to discuss the final-form regulation. The Department received concurrence from AQTAC on the final-form regulation with two recommendations for changes. These recommended changes involved extending the time period for submittal of an ERC Registry application and reducing the aggregation period for emission increases that are not significant from 15 years to 10 years.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures, which may be required.

It is not anticipated that any significant additional costs will be incurred by the owners and operators of affected facilities. These amendments mainly affect the same existing major source facilities that are affected by the existing regulation that is being revised.

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures, which may be required.

The final regulations are expected to impose no additional direct costs on local governments. However, local government entities which own and operate major stationary sources subject to the NSR requirements as of January 1, 2005, are subject to a plan approval application fee of \$5,300 for plan approval applications requiring NSR review.

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(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting or consulting procedures, which may be required.

The Commonwealth should not incur significant increases in the costs of administering the NSR Program. To the extent that state government agencies are subject to the provisions of Chapter 127, Subchapter E, costs and savings would be minimal compared to existing costs.

(20) In the table below, provide an estimate of the fiscal savings and cost associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	0.00	0.00	0.00	0.00	0.00	0.00
Local Government	0.00	0.00	0.00	0.00	0.00	0.00
State Government	0.00	0.00	0.00	0.00	0.00	0.00
Total Savings	0.00	0.00	0.00	0.00	0.00	0.00
COSTS:	0.00	0.00	0.00	0.00	0.00	0.00
Regulated Community	0.00	0.00	0.00	0.00	0.00	0.00
Local Government	0.00	0.00	0.00	0.00	0.00	0.00
State Government	0.00	0.00	0.00	0.00	0.00	0.00
Total Costs	0.00	0.00	0.00	0.00	0.00	0.00
REVENUE LOSSES:						
Regulated Community	0.00	0.00	0.00	0.00	0.00	0.00
Local Government	0.00	0.00	0.00	0.00	0.00	0.00
State Government	0.00	0.00	0.00	0.00	0.00	0.00
Total Revenue Losses	0.00	0.00	0.00	0.00	0.00	0.00

(20a) Explain how the cost estimates listed above were derived.

Not applicable.

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(20b) Provide the past three-year expenditure history for programs affected by the regulation.

Program	FY-3	FY-2	FY-1	Current FY
Clean Air Fund – Major Emission Facilities	\$ 26,960,000	\$ 24,533,000	\$ 24,290,000	\$ 26,461,000

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

It is not anticipated that any significant additional costs will be incurred as a result of these regulatory revisions.

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

Because these regulatory changes are mandated under the federal Clean Air Act, non-regulatory options are not available.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

Certain regulatory schemes including Clean Unit Applicability Test and the Pollution Control Project Exclusion were considered and rejected because the U.S. Court of Appeals for the D.C. Circuit vacated the federal provisions in June 2005.

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(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

One of the provisions under the final amendments that is different between EPA's approach and the Commonwealth's approach relates to the owners or operators of new emission units added under an existing PAL will need to reduce or control emissions from new sources by using the best available technology for new sources, as required under section 6.6(c) of the APCA (35 P. S. § 4006.6(c)). However, BAT will not be required for sources modified after the PAL is established unless the cost of the modification "... exceeds 50% of the fixed capital costs that would be required to construct a comparable entirely new source..."

Another difference between EPA's approach and the Commonwealth's approach relates to the establishment of an emissions limit for a proposed project. This approach ensures that emissions from any modifications are practically enforceable.

The Department is retaining the de minimis aggregation requirement, which is a continuation of the existing NSR requirements. The final-form regulation also contains the de minimis provisions for the five-county southeast Pennsylvania ozone nonattainment area. The de minimis aggregation includes both increases and decreases for the 10-year period, allowing the facility owner or operator to take credit for any reductions that are permanent and enforceable while still being accountable for any increases that are also to continue.

The Department is retaining the existing provision in the definition of a major facility which accounts for fugitive emissions when determining the status of a major facility, rather than considering fugitive emissions for only the 28 source categories listed in the Federal definition.

Another provision in the final amendments that is more protective than EPA's approach is the provision regarding the generation and creation of emission reduction credits (ERCs). The provision requires the owner or operator of the facility to submit an ERC Registry Application to the Department within two years of the initiation of the emission reduction used to generate the ERCs. Another provision requires that emission reductions necessary to meet allowance-based programs may not be used to generate ERCs.

The Commonwealth is required to demonstrate attainment of the ozone NAAQS by the federally mandated 2010 deadline. Many of the above provisions exist in the current regulations and the Department has relied on these provisions to demonstrate attainment and maintenance of the NAAQS. These provisions are reasonable and necessary to assure that facilities do not emit pollutants that have not been accounted for in the existing attainment plan.

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(25) How does the regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

A number of states in the Ozone Transport Region are also currently amending their NSR programs. Many states including Delaware, Maryland, New Jersey, New York and Virginia have chosen to adopt a state-specific NSR regulation. Virginia has already finalized its own version of NSR. It is evident that Pennsylvania is not alone in its belief that the Federal NSR rule is inadequate to attain and maintain the National Ambient Air Quality Standards. West Virginia, a state outside of the Ozone Transport Region, has adopted the federal NSR provisions promulgated by EPA in December 2002

It is not anticipated that these regulations will place Pennsylvania at a competitive-disadvantage. On December 22, 2006, the Court of Appeals for the District of Columbia Circuit endorsed the Department's position in this case. See *South Coast Air Quality Management District v. EPA, et al.*, (No. 04-1200 consolidated with No. 04-1201 et al.) Specifically, the Court found that NSR is a control measure and to withdraw it from the SIP would constitute impermissible backsliding. As a result, in implementing the 8-hour ozone NAAQS, all control measures, including the applicability threshold and emission offset requirements for the 1-hour ozone NAAQS must remain in place.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

Yes. The final amendments revise the existing NSR requirements in *25 Pa. Code Chapter 127, Subchapter E* and will also add certain new provisions to this subchapter including plantwide applicability limit provisions.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

The Environmental Quality Board held three public hearings for the purpose of accepting comments on the proposed rulemaking. These hearings were held on June 6, 2006, June 13, 2006, and June 19, 2006, at the Southcentral Regional Office in Harrisburg, Southwest Regional Office in Pittsburgh, and Southeast Regional Office in Norristown, respectively.

(28) Will the regulation change existing reporting, recordkeeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

Yes. The regulation will require some additional reporting for up to 10 years in order to track emission increases from those sources subject to 10-year plantwide applicability limits. No forms have been developed at this time.

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(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

The final amendments do not include any special provisions because overall the rulemaking will provide greater environmental protection. Therefore, children, minorities, and the elderly will not be affected adversely by this rulemaking. Small businesses and farmers would only be affected by the rulemaking if they operate large stationary sources subject to the NSR applicability thresholds.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulation will be effective on the date of publication as a final rulemaking in the *Pennsylvania Bulletin*. The revisions to these major source special permitting requirements would become applicable to affected facilities at publication of the final regulation.

(31) Provide the schedule for continual review of the regulation.

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

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INDEPENDENT REGULATORY
REVIEW COMMISSION

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Copy below is hereby approved as to form and legality.
Attorney General

By: _____
(Deputy Attorney General)

DATE OF APPROVAL _____

Check if applicable
Copy not approved. Objections attached.

Copy below is hereby certified to be true and
correct copy of a document issued, prescribed or
promulgated by:

DEPARTMENT OF ENVIRONMENTAL
PROTECTION
ENVIRONMENTAL QUALITY BOARD

(AGENCY)

DOCUMENT/FISCAL NOTE NO. 7-399

DATE OF ADOPTION February 20, 2007

BY Kathleen A. McGinley
TITLE KATHLEEN A MCGINLEY
CHAIRPERSON

EXECUTIVE OFFICER CHAIRMAN OR SECRETARY

Copy below is hereby approved as to form and legality
Executive of Independent Agencies

BY Andrew C. Clark
Andrew C. Clark

DATE OF APPROVAL
MAR 5 2007
(Deputy General Counsel)
(~~Chief Counsel - Independent Agency~~)
(Strike inapplicable title)

Check if applicable. No Attorney General Approval
or objection within 30 days after submission.

NOTICE OF FINAL RULEMAKING

**DEPARTMENT OF ENVIRONMENTAL PROTECTION
ENVIRONMENTAL QUALITY BOARD**

Nonattainment New Source Review

25 Pa. Code Chapters 121 and 127



Notice of Final Rulemaking
Department of Environmental Protection
Environmental Quality Board
25 Pa. Code Chapters 121 and 127

Order

The Environmental Quality Board (Board) amends 25 Pa. Code Chapter 121, Section 121.1 (relating to definitions) and Chapter 127, Subchapter B (relating to plan approval requirements) Section 127.13 (relating to extensions), and Subchapter E (relating to New Source Review) Sections 201 – 217 as set forth in Annex A. This final-form regulation will be submitted to the U.S. Environmental Protection Agency as a revision to the Pennsylvania state implementation plan.

This order was adopted by the Board at its meeting of February 20, 2007.

A. Effective Date

These amendments will be effective upon publication in the *Pennsylvania Bulletin* as final-form rulemaking.

B. Contact Persons

For further information, contact John Slade, Chief, Division of Permits, Bureau of Air Quality, 12th Floor, Rachel Carson State Office Building, P.O. Box 8468, Harrisburg, PA 17105-8468, telephone: 717-787-4325, or Robert "Bo" Reiley, Assistant Counsel, Bureau of Regulatory Counsel, 9th floor, Rachel Carson State Office Building, P.O. Box 8464, Harrisburg, PA 17105-8464, telephone: 717-787-7060.

C. Statutory Authority

This action is being taken under the authority of section 5(a)(1) of the Air Pollution Control Act, 35 P.S. §4005(a)(1), which grants to the Board the authority to adopt regulations for the prevention, control, reduction, and abatement of air pollution in the Commonwealth.

D. Background and Summary

1. Federal Clean Air Act

The primary goal of the Clean Air Act ("CAA"), 42 U.S.C. §§7401 *et seq.*, is to ensure the attainment and maintenance of air quality under the National Ambient Air

Quality Standard ("NAAQS") requirements under Section 110 of the CAA. 42 U.S.C. § 7410. The NAAQS are set at a level designed to protect public health and the general welfare. 42 U.S.C. § 7409. Standards have been established for the following six pollutants: sulfur oxides ("SOx"), nitrogen oxides ("NOx"), particulate matter ("PM10" and "PM2.5"), carbon monoxide ("CO"), ozone ("O3"), and lead ("Pb").

Sections 107 and 110 of the CAA give each State primary responsibility for assuring that air quality within its borders is maintained at a level consistent with the NAAQS. 42 U.S.C. §§ 7407 and 7410. This responsibility is achieved through the establishment of source-specific requirements in state implementation plans ("SIPs") addressing the NAAQS.

A primary means of achieving the NAAQS is through the New Source Review ("NSR") program, which places preconstruction review and permitting requirements on certain new and modified sources of air pollution to protect public health and air quality. The nature of the requirements depends on whether the source is to be located in an area that attains, or does not attain, the NAAQS for the pollutant in question.

In enacting the CAA, Congress expressed a concern that the costs of retrofitting existing sources with state-of-the-art air pollution control technologies could be prohibitively expensive. Congress concluded that it would be more cost-effective to require high levels of technological performance at new and modified sources, because they have more flexibility as to the location and design of control equipment than do existing sources. As a result, new and modified sources are subject to more stringent levels of control, and hence more costly controls, under the CAA than existing sources.

There are two sets of regulatory requirements that subject new and modified sources to more stringent levels of control - the Prevention of Significant Deterioration ("PSD") under Title I, Part C, of the CAA, 42 U.S.C. §§ 7470-7479 and the nonattainment NSR requirements under Title I, Part D, of the CAA, 42 U.S.C. §§ 7501-7515, under the NSR preconstruction permitting program.

The NSR program subjects major new or "modified" sources of air pollution to preconstruction review and permitting requirements. The PSD program applies to sources that have the potential to emit at least 250 tons per year ("TPY") of a regulated pollutant, or at least 100 TPY of a regulated pollutant, if the source falls within a listed source category. 40 C.F.R. § 52.21(b)(1). SIPs must also contain provisions to prevent significant deterioration of air quality. 40 C.F.R. § 51.166.

The nonattainment NSR program applies to sources that have the potential to emit at least 100 TPY of a regulated nonattainment pollutant. 42 U.S.C. § 7602(j). These thresholds have been lowered for areas with more acute nonattainment problems - for instance, to 50 TPY for volatile organic compounds ("VOCs") and 100 TPY for NOx in moderate areas, to 50 TPY for VOCs and NOx in serious ozone nonattainment areas, to 25 TPY for VOCs and NOx for severe areas, and 10 TPY for VOCs and NOx for extreme areas. 42 U.S.C. § 7511a.

The purpose of the NSR program is to ensure that the proposed source meets all applicable air quality requirements before it is constructed. The nature of the NSR preconstruction requirements depends upon whether the source is to be located in an area that meets or fails to meet the applicable ambient air quality standards.

Major stationary sources located in attainment areas are subject to the PSD permit program. Before a person can construct a major source in an attainment area, that person must receive a permit under the PSD program. To receive that permit, a person must show that the proposed source will, among other things, comply with the ambient air quality levels designed to prevent air quality deterioration and will employ the "best available control technology" ("BACT") for each regulated pollutant. 42 U.S.C. § 7475.

Major stationary sources located in nonattainment areas are subject to the nonattainment NSR area permit program, which the states are responsible for implementing through their SIPs. Before a person can construct a major source in a nonattainment area, that person must receive a permit under the nonattainment permit program. To receive that permit, a person must show that the proposed source will, among other things, offset its potential to emit nonattainment pollutants by securing emission reductions from a nearby facility at a greater than 1:1 ratio and will employ the "lowest achievable emission rate" ("LAER") for each regulated pollutant. 42 U.S.C. § 7503.

2. NSR Reform at the Federal Level

In 1996, EPA issued a proposed NSR rule "to provide States with greater flexibility to customize their own regulations implementing the NSR program." 61 Fed. Reg. 38250, 38251 (July 23, 1996). The Agency also decided to ease the burden on industry of complying with NSR requirements by "significantly reduc[ing] the number and types of activities at sources that would otherwise be subject to major NSR under the existing NSR program regulations." *Id.* EPA estimated that the changes, if finalized, would result in approximately 50 percent fewer sources being subject to requirements under the PSD and nonattainment NSR provisions of the CAA. *Id.* at 38319. However, EPA explained that it would not allow environmental benefits to be sacrificed in order to relieve the alleged burden on industry. *Id.* at 38250.

Two years later, the Agency published a Notice of Availability ("NOA"), in which it presented its preliminary conclusions on certain aspects of the proposed rule and requested additional public comment. 63 Fed. Reg. 39857 (July 24, 1998). EPA concluded that several of the reforms proposed in 1996 required additional safeguards to protect the environment and ensure accountability on the part of industry. *Id.* at 39859-39862.

In June 2002, after completing a review of the NSR program directed by the President's National Energy Policy Development Group, EPA announced that it would finalize five elements of the proposed rule: (1) a revised methodology for determining

whether a change at a source will increase emissions significantly, and thereby be considered a "modification;" (2) a new way to determine the emissions baseline used in measuring whether a significant emission increase will occur; (3) a plantwide applicability limit ("PAL") permit that would allow a source to avoid triggering NSR requirements if it does not exceed an emissions cap; (4) an exclusion from NSR for any projects at a source designated as a "clean unit;" and (5) an exclusion from NSR for changes that are classified as pollution control projects.

On December 31, 2002, EPA published the NSR rule in the Federal Register, which finalized the above five elements. 67 Fed. Reg. 80186. For the PSD program, the NSR rule went into effect in Pennsylvania on March 3, 2003, because Pennsylvania automatically incorporates the federal PSD requirements by reference under 25 Pa. Code Chapter 127, Subchapter D. Since Pennsylvania does not incorporate the federal nonattainment NSR provisions by reference, this final rulemaking is to address revisions related to Pennsylvania's NSR program under 25 Pa. Code Chapter 127, Subchapter E, and will be submitted to EPA as a revision to the Pennsylvania SIP.

The final version of EPA's December 2002 rule contained neither the flexibility for States in implementing the rule provisions advertised in its proposed rule nor the additional accountability discussed in the NOA. Moreover, the regulations were likely to lead to increased air pollution, in turn causing harm to human health and the environment. To address these flaws, the Department, together with a number of other States, filed a petition for review in the D.C. Circuit Court of Appeals challenging the rule. See *New York et al. v. EPA*, (D.C. Cir.) (No. 02-1387 and consolidated cases).

On June 24, 2005, the Court of Appeals for the District of Columbia Circuit issued its opinion in *New York et al., v. EPA*, which addressed the challenges of the States and other petitioners to EPA's December 31, 2002, NSR regulations. *New York et al. v. EPA*, 413 F.3d 3, (D.C. Cir. 2005.) The Court upheld the NSR regulations in part, vacated them in part, and remanded them in part. The Court upheld EPA's revised methodology for calculating emissions increases, which determines whether those increases are significant thereby triggering the NSR requirements, by comparing pre-change actual emission levels to post-change projected actual emission levels or "actual-to-projected-actual" calculation methodology. The Court upheld EPA's ten-year "look-back" provision for calculating baseline emissions. This provision allows regulated entities to choose any two consecutive years in the preceding ten (five years for utilities) as their baseline. The Court also upheld EPA's newly prescribed use of the ten-year look-back period for purposes of determining baseline emissions levels and for measuring contemporaneous increases and decreases in the context of setting PALs. The Court also upheld EPA's "demand growth exclusion" which excludes from the calculation of emissions increases those increases not related to the change at the facility, but rather are attributable to growth in production as a response to increased product demand, which could have been accommodated by the facility before the change in question.

The Court vacated the clean unit exemption provision, on the grounds that the CAA requires any regulatory provision to evaluate emissions increases based on actual emissions, instead of potential or allowable emissions. This provision would have exempted an emissions unit from additional control technology if state-of-the-art controls based on an NSR review had been installed within the preceding ten years, or employed comparable state-of-the-art technology to comply with permit emission limits that would not violate other air quality requirements, even if any change in the emissions unit had increased the facility's net actual emissions.

The Court also vacated the pollution control project exclusion provision on the grounds that the CAA provided no authority to exempt modifications causing significant emissions increases of a pollutant, even if the modifications are implemented primarily to reduce emissions of other pollutants. This provision would have excluded projects from NSR review that reduced emissions of some pollutants, allowed increases in others, but had a net beneficial environmental effect.

In this same opinion, the Court remanded to EPA for further consideration its provision that exempted facility owners or operators from any recordkeeping requirements if they believed a change had no reasonable possibility of producing a significant emissions increase. The Court found that EPA had not adequately explained how it would be able to detect and enforce against facilities improperly employing this exemption without adequate records being available.

In addition to EPA's December 2002 NSR rule, the agency promulgated a number of other final rules that the Board addresses in this final rule related to when a facility is considered a major facility for the purposes of NSR. On April 30, 2004, EPA published two final rules related to the 8-hour ozone NAAQS. The first rule is entitled "Air Quality Designations and Classifications for the 8-Hour Ozone National Ambient Air Quality Standards: Early Action Compact Areas With Deferred Effective Dates." 69 Fed. Reg. 23858. Among other things, this rule designated Bucks, Chester, Delaware, Montgomery, and Philadelphia counties as moderate nonattainment with the 8-hour ozone NAAQS. *Id.* at 23931.

The second rule that EPA published on April 30, 2004, is entitled "Final Rule To Implement the 8-Hour Ozone National Ambient Air Quality Standard - Phase 1." 69 Fed. Reg. 23951. In that final action, EPA addressed certain implementation issues related to the eight-hour standard, including the nonattainment major NSR program mandated by Part D of Title I of the CAA. This rule, among other things, determined that the CAA does not compel EPA to retain the one-hour ozone NAAQS major NSR requirements in implementing the eight-hour ozone NAAQS because, it concluded, NSR is not a control measure. The Department viewed this rule and its conclusions as a violation of the CAA's anti-backsliding provisions, under Sections 172(e) and 193, 42 U.S.C. §§ 7502(e) and 7515. Therefore, Pennsylvania and a number of other States, on June 29, 2004, filed a joint petition for review challenging this rule in the Court of Appeals for the District of Columbia Circuit. *See Massachusetts v. EPA* (D.C. Cir.) (No. 04-1207). The Department believed this EPA final rule provided less air quality

protection than the previous regulatory requirements in at least two ways. First, it raised the tonnage thresholds defining major new and modified sources subject to NSR, which meant that fewer sources would be subject to NSR. Second, for those sources that trigger NSR, it reduced the ratio of emission offsets required, which meant that emissions would increase. On December 22, 2006, the Court of Appeals for the District of Columbia Circuit endorsed the Department's position in this case. *See South Coast Air Quality Management District v. EPA, et al.*, (No. 04-1200 consolidated with No. 04-1201 *et al.*) Specifically, the Court found that NSR is a control measure and to weaken its requirements under the SIP would constitute impermissible backsliding under the CAA. As a result, in implementing the eight-hour ozone NAAQS, all one-hour ozone NAAQS major NSR requirements, in Pennsylvania and in the five county Philadelphia area, will remain in place.

On August 3, 2005, EPA published a final rule entitled "Identification of Ozone Areas for Which the 1-Hour Standard Has Been Revoked and Technical Correction to Phase 1 Rule." 70 Fed. Reg. 44470. This rule codifies the revocation of the one-hour standard for those areas with effective eight-hour ozone designations. This rule revoked the one-hour ozone standard effective June 15, 2005, for all areas in Pennsylvania. *Id.* at 44477.

3. Final-form Rulemaking Changes in Response to NSR Reform

Since the Board has determined that not all of EPA's final NSR regulatory provisions are sufficiently protective of the air quality needs of this Commonwealth, the final-form rulemaking incorporates some, but not all of the changes, which survived judicial scrutiny in *New York et al., v. EPA.* Moreover, the Board has determined that to the extent any provisions of the final-form rulemaking are more stringent than those required under the CAA, they are necessary to achieve or maintain the NAAQS, and therefore permissible actions under Section 4.2(b)(1) of the APCA. 35 P.S. § 4004.2(b)(1). In addition, the final-form rulemaking is consistent with the Court's decision in the *South Coast Air Quality Management District* case and the anti-backsliding provisions of Sections 172(e) and Section 193 of the CAA, and Pennsylvania will retain the one-hour ozone NAAQS major NSR requirements in implementing the eight-hour ozone NAAQS.

One of the areas where the final amendments are different than EPA's approach is the "look back" provision for calculating baseline emissions. Under EPA's approach this provision allows regulated entities to choose any two consecutive years in the preceding ten as their baseline, and in the case of utilities, any consecutive two-year period within the preceding five years as their baseline, unless a different time period is more representative of normal operations. Under Pennsylvania's approach, in section 127.203a, all regulated entities operating in this Commonwealth may choose any consecutive 24-month period in the preceding five years as their baseline. However, the Department may allow the use of a different consecutive 24-month period with the last ten years upon a written determination that is more representative of normal source operations.

Another area where the final amendments are more protective than EPA's approach is the installation of emission controls on new emission units under an existing PAL. Under EPA's approach, the installation of emission controls on new emission units under an existing PAL is not necessary if a facility is able to continue to comply with its PAL. Under Pennsylvania's approach in section 127.218, the owners and operators of all new emission units added under an existing PAL will need to reduce or control emissions by using the "best available technology" ("BAT") as authorized under Section 6.6(c) of the APCA. 35 P.S. § 4006.6(c).

It should be noted that Pennsylvania has an existing regulatory provision similar to a PAL under Subchapter F (relating to operating permit requirements) at Section 127.448 (relating to emissions trading at facilities with federally enforceable emissions cap) where the owner or operator of a facility may trade increases and decreases in emissions between sources with federally enforceable emissions caps at a permitted facility. This existing regulatory provision will be used for state-only permits and shall not be treated as a de facto PAL permit or interpreted by the Department in any way to circumvent the NSR requirements.

Another area of difference between EPA's approach and Pennsylvania's approach relates to the treatment of projected actual emissions related to a project. Under EPA's approach owners or operators of a facility must track their projected actual emissions against the facility's post-change emissions for five years following resumption of regular operations. EPA presumes that any increases that occur after five years are not associated with the physical or operational changes. Under Pennsylvania's approach, set forth in under section 127.203a(a)(5)(iii)(A), the projected actual emissions for the regulated NSR pollutant must be incorporated into the required plan approval or operating permit as an emission limit. This approach ensures that emissions from any modifications are legally enforceable. Furthermore, consistent with federal requirements, under section 127.203a(a)(5)(iii)(B), the owner or operator must demonstrate compliance with the established total emission limit and for a period of five years, or ten years where there will be a capacity increase, must also demonstrate compliance with the projected actual emission increase which is due solely to the project.

In addition to the differences between EPA's and Pennsylvania's approaches to the general NSR rule provisions, the Board also finalized a provision where facilities located in Bucks, Chester, Delaware, Montgomery or Philadelphia counties that emit or have the potential to emit at least 25 TPY of VOCs or NOx will continue to be considered major facilities and will be subject to the requirements applicable to a major facility located in a "severe" nonattainment area of ozone. This means that any facility that was major for VOCs or NOx while the region was classified as "severe" nonattainment for the one-hour ozone standard will remain major for those pollutants while the region is classified as moderate nonattainment under the eight-hour ozone standard. Under EPA's approach these facilities are major, and therefore subject to NSR, only if they emit 50 TPY for VOCs and 100 TPY for NOx since the area is classified as moderate nonattainment with the eight-hour ozone standard. Moreover, under EPA's

approach, offset requirements change from 1:3 to 1:1.15, while under Pennsylvania's approach, the offset requirements would remain unchanged. As previously noted, the Court in the *South Coast Air Quality Management District* case has endorsed the Department's position that NSR is a control measure and to weaken its provisions under the SIP would constitute impermissible backsliding. Consequently, the finalized major source threshold and offset requirements are consistent with, and no more stringent than, the requirements under federal law. Moreover, since the eight-hour ozone standard is more stringent than the revoked one-hour ozone standard, and to ensure that the Philadelphia area achieves and maintains the NAAQS, the final amendment is reasonably necessary to ensure that these facilities emit no more VOCs and NO_x than previously allowed for attaining the 1-hour ozone standard.

As part of this final rulemaking, the Department has added the terms and definitions "commence" and "begin actual construction." The term "commence" is applied to the construction or modification of a facility where the owner or operator has all necessary plan approvals and has either begun or caused to begin a continuous program of actual on-site construction, or has entered into binding contractual arrangements to undertake a program of actual construction. While the term "begin actual construction" refers to, among other things, the initiation of physical on-site construction activities on an emissions unit that are of a permanent nature. These terms and definitions are in addition to the current definition and term under section 121.1 "construction" which applies to physical on-site construction only. Within the context of section 127.11 (relating to plan approval requirements) if a person wishes to lawfully construct, assemble, install or modify a stationary air contamination source in Pennsylvania they must apply for and receive a written plan approval from the Department. While the term "construct" is not defined under the APCA, the regulations at 25 Pa. Code § 121.1 define the term "construction" which is consistent with the term "begin actual construction." The provisions under section 27.11 do not use the term "commence." As these terms and definitions relate to section 27.11, a person would be in violation of the plan approval requirements if actual construction had taken place prior to receiving a written plan approval. Consequently, the Department does not consider whether a person has entered into binding contractual arrangements prior to receiving a written plan approval to determine compliance with section 127.11.

Within the context of section 127.13 (relating to extension) if construction, modification, or installation of an air contamination source is not commenced within 18 months of the issuance of a plan approval or there is more than an 18-month lapse in construction, modification, or installation a new plan approval is required, unless an extension is granted. As the terms "construction" and "commence" relate to section 127.13, a person would be in violation of this provision if neither actual on-site construction had begun nor binding contractual arrangements to undertake a program of actual construction had been entered into. Consequently, the Department does consider whether a person has entered into binding contractual arrangements to determine compliance with section 127.13.

As previously alluded to section 127.13(b) has been amended to provide that the Department may extend the 18-month period to construct, modify, or install an air contamination source under a valid plan approval upon a satisfactory showing that an extension is justified. This revision has been made to ensure consistency between the Pennsylvania program and the federal PSD requirements under 40 CFR Part 52. However, a project that does not commence construction, modification, or installation within the original 18-month period shall be reevaluated for BACT, LAER, and BAT. The Department will require this reevaluation to ensure that the previously established emission rates remain appropriate for the project. This reevaluation is consistent with federal guidance on this issue.

The Department worked with the Air Quality Advisory Board ("AQTAC") in the development of these regulations. AQTAC requested that the Department consider extending the deadline for the submission of ERC registry applications from one year to three years from the date of the initiation of the ERC generating emission reductions. AQTAC also requested that the Department consider decreasing the timeframe for the aggregation of the de minimus emission increases from 15 years to ten years. The Department has changed the submittal deadline to two years and has changed the aggregation period to ten years. At its January 4, 2007 meeting AQTAC recommended that the Board consider the final amendments at its February 20, 2007 meeting.

E. Summary of Final-Form Rulemaking

The final amendments add the following definitions of terms under section 121.1 (relating to definitions). The definitions include: "Actual emissions", "Actual PAL for a major facility", "Allowable emissions", "Baseline actual emissions", "Begin actual construction", "CEMS-Continuous emissions monitoring system", "CERMS-Continuous emissions rate monitoring system", "CPMS-Continuous parameter monitoring system", "Commence", "Creation", "Deactivation", "De minimis emission increase", "Electric utility steam generating unit", "Emissions unit", "Federally enforceable", "Fugitive emissions", "Generation", "Major facility", "Major modification", "Necessary preconstruction approvals or permits", "Net emissions increase", "PAL- Plantwide applicability limit", "PAL effective date", "PAL effective period", "PAL major emissions unit", "PAL major modification", "PAL permit", "PAL pollutant", "PEMS - Predictive emissions monitoring system", "Project", "Projected actual emissions", "Regulated NSR pollutant", "Secondary emissions", "Significant", "Significant emissions unit", "Significant net emissions increase", and "Small emissions unit".

New definitions of terms were added between proposed and final rulemaking. Those new definitions include - "Air contamination source", "BACT - Best available control technology", "creditable emissions reduction", "major NOx emitting facility", "major VOC emitting facility", "replacement unit", and "significant emissions increase". In addition to these changes between proposed and final rulemaking, the proposed section

127.201a. (relating to definitions) has been deleted and all definitions subject to this final rulemaking will remain under section 121.1.

In response to comments submitted by EPA, the Department has added the phrase “enforceable as a practical matter” after the term “federally enforceable” in certain definitions of certain terms like “allowable emissions.” A requirement is “legally enforceable” if the Department, EPA, or some authority has the right to enforce the restriction. Practical enforceability for a source-specific permit is attained if the permit provides for a technically-accurate limitation and the portions of the source subject to the limitation; the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and the method to determine compliance, including appropriate monitoring, recordkeeping, and reporting. *See* 67 Fed. Reg. 80191. Consequently, “enforceable as a practical matter” is achieved if a requirement is both legally and practically enforceable. *Id.*

Section 127.13 (relating to extensions) has been amended to provide that the Department may extend the 18-month period to construct, modify, or install an air contamination source under a valid plan approval upon a satisfactory showing that an extension is justified. This revision has been made to ensure consistency between the Pennsylvania program and the federal PSD requirements under 40 CFR Part 52. However, the Department shall reevaluate a project that does not commence construction, modification, or installation within the original 18-month period for BACT, LAER, and BAT to ensure that such emission rates remain appropriate for the project. This reevaluation is consistent with federal guidance on this issue.

Section 127.201 (relating to general requirements), which applies to an owner or operator of a facility where an emission increase that is significant would occur, is revised. An additional revision under this section provides that facilities located in Bucks, Chester, Delaware, Montgomery or Philadelphia counties that emit or have the potential to emit at least 25 TPY of VOCs or NO_x will be considered a major facility and shall be subject to the requirements applicable to a major facility located in a “severe” nonattainment area of ozone.

Section 127.201a (relating to measurements, abbreviations, and acronyms) adds measurements, abbreviations and acronyms. These include “BAT—Best available technology”; “CO—Carbon monoxide”; “lb—Pounds”; “µg/m³—Micrograms per cubic meter”; “mg/m³—Milligrams per cubic meter”; “O₂—Oxygen”; “SO_x—Sulfur oxides”; and “tpy—Tons per year”.

This section was revised between proposed and final rulemaking to delete “CO₂—Carbon dioxide”; “Hg—Mercury”; and “KWH—Kilowatt hour (based on electric generation”.

Section 127.202 (relating to effective date) was revised between proposed and final rulemaking to amend the effective date and to delete, among other things, PM_{2.5} and its precursors as pollutants.

Section 127.203 (relating to facilities subject to special permit requirements) is revised and applies to the construction of a new major facility or modification at an existing facility located in a nonattainment area or located in an attainment or unclassified area, which impacts a nonattainment area in excess of certain significance levels. This section also includes provisions that would apply to an owner or operator of a facility located in Bucks, Chester, Delaware, Montgomery or Philadelphia counties or an area classified as a serious or severe ozone nonattainment area. Additionally this section identifies when the NSR requirements apply and do not apply to owners and operators of facilities.

This section was revised between proposed and final rulemaking to clarify that if the aggregated emissions increase calculated using paragraph (b)(1)(ii) meets or exceeds the emission rate that is significant, only the emission offset requirements in section 127.205(3) apply to the aggregated emissions. In addition, minor editorial changes were also made to this section between proposed and final rulemaking.

Section 127.203a (relating to applicability determination) is revised and identifies the provisions to be used by the owner or operator of a facility during the plan approval application process for the construction of a new major facility or modification at an existing major facility in order to determine if the NSR requirements are applicable to that major facility. The revisions under this section include provisions to determine net emission increases, baseline actual emissions, and projected actual emissions.

This section was significantly revised between proposed and final rulemaking as to form, but not substance. This section still identifies the provisions to be used by the owner or operator of a facility during the plan approval application process, but these provisions have been clarified in response to comments on the readability of this section. Clarifications were also made to those provisions related to net emission increases, baseline actual emissions, and projected actual emissions. Nevertheless, the substance of the applicability determination remains the same. That is, as part of the plan approval application, the owner or operator of the facility shall calculate whether a significant emissions increase and a significant net emissions increase will occur as a result of a physical change or change in the method of operation. The owner or operator of the facility will use the procedures in paragraph (i) to calculate the emissions increase in a regulated NSR pollutant due to the project, and the procedures in paragraph (ii) to calculate the net emissions increase in a regulated NSR pollutant. A project is a major modification for a regulated NSR pollutant if it causes two types of emissions increases—a significant emissions increase and a significant net emissions increase. If the project causes a significant emissions increase, then the project is a major modification if it also results in a significant net emissions increase.

For instance, to determine emissions increases due to the project for existing units use section 127.203a(a)(1)(i)(A) where the emissions increases equals projected actual emissions minus baseline actual emissions. To determine emissions increases due to the project for new emissions units use section 127.203a(a)(1)(i)(B) where emissions

increases equal the potential to emit from each new emissions unit. Then compare the emissions increases due to the project with the applicable emissions rate listed in the definition of the term "significant" under section 121.1. If the emissions increase due to the project exceeds the applicable emissions rate then use the provisions of section 127.203a(a)(1)(ii) to calculate the net emissions increase. If the emissions increase due to the project does not exceed the listed applicable emissions rate then use the provisions of section 127.203a(a)(2) to calculate the net emissions increase.

Under section 127.203a(a)(1)(ii) a net emissions increase equals the increase in emissions due to the project, plus other increases in actual emissions occurring within the five-year period, minus other decreases in actual emissions occurring with the five-year period. Then compare the net emissions increases with the applicable emissions rate listed in the definition of the term "significant" under section 121.1. If the net emissions increase is equal to or exceeds the applicable emission rate that is significant, the proposal is subject to all of the requirements in section 127.205 (relating to special permit requirements.)

Under section 127.203a(a)(2) a net emissions increase equals the proposed de minimis emissions increase due to the project, plus other previously determined increases that occurred within ten years prior to the date of a complete plan approval application, minus other decreases in actual emissions that occurred within ten years prior to the date of a complete plan approval application. Then compare the aggregated net emissions increase with the applicable emissions rate listed in the definition of the term "significant." If the net emissions increase equals or exceeds the applicable emissions rate that is significant, only the emissions offset requirements in section 127.205(3) apply to the aggregated emissions. The proposed project is not subject to the LAER requirements.

It should be noted that the aggregation period under this section has been changed from 15 years to ten years. As a result, the proposed increases and decreases in emissions are aggregated with other increases and decreases, which occurred within ten years prior to the date of the submission of a complete plan approval application.

Under section 127.203a(a)(5), projected actual emissions is the maximum annual rate in TPY at which an existing emissions unit is projected to emit a regulated NSR pollutant in any of the five years following the date the unit resumes regular operations after the project, or in any of the ten years following that date, if the project involves increasing the emissions unit's design capacity or its potential to emit of that regulated NSR pollutant and full utilization of the unit would result in a significant emissions increase or a significant net emissions increase at the major facility.

Under section 127.203a(a)(5)(iii), if the projected actual emissions for a regulated NSR pollutant are in excess of the baseline actual emissions, among other things, the projected actual emissions for the regulated NSR pollutant must be incorporated into the required plan approval or operating permit as an emission limit.

Section 127.204 (relating to emissions subject to this subchapter) is revised to make minor clarifications to ensure that it is consistent with the other changes made to the subchapter. No additional changes were made to this section between proposed and final rulemaking.

Section 127.205 (relating to special permit requirements) is revised to add additional provisions as to when LAER applies to a proposed modification within the contemporaneous period of a proposed emission increase and when emission offsets are required for the entire net emission increase that occurred over the contemporaneous period.

This section was revised between proposed and final rulemaking. A new paragraph (7) was added to provide that the Department may determine that the BAT requirements of Chapter 127 are equivalent to BACT or LAER. This provision has been added to allow the Department the discretion to make this determination only when it has conducted a vigorous and documented BACT or LAER analysis that contains enough information to make a BAT determination. Consequently, the intent of this provision is not to allow the Department to automatically make this determination on each and every BACT or LAER analysis or to treat BACT or LAER as equivalent to BAT. No additional changes were made to this section between proposed and final rulemaking.

Section 127.206 (relating to ERC general requirements) is revised to make minor clarifications to ensure that it is consistent with the other proposed changes being made to the subchapter.

This section was revised between proposed and final rulemaking to provide that emission reductions occurring at a facility after January 1, 2002, but prior to the effective date of this regulation may be used to generate ERCs in accordance with this subchapter, if a complete ERC registry application is submitted to the Department within 12 months of the effective date of this regulation.

Section 127.207 (relating to creditable emissions decrease or ERC generation and creation) is revised to include that emission reductions necessary to meet best available technology and allowance-based programs required by the CAA or APCA may not be used to generate emission reduction credits or ERCs.

This section was revised between proposed and final rulemaking to provide that the ERC Registry application deadline may be extended to two years from the initiation of an emissions reduction used to generate ERCs if the owner or operator of the source or facility either submits to the Department a maintenance plan in accordance with section 127.11a (relating to reactivation of sources) of Subchapter 127, or a written request within one year of deactivation of the source or facility to request preservation of the emissions in the inventory. While the Department has always used the provisions of this section to determine creditable emissions decreases, the term "creditable emissions decrease" was added to make this clarification. Other minor clarifying changes were made to this section between proposed and final rulemaking.

Section 127.208 (relating to ERC use and transfer requirements) is revised to make minor clarifications to ensure that it is consistent with the other proposed changes being made to the subchapter.

This section was revised between proposed and final rulemaking to provide that an owner or operator of a facility that is subject to allowance-based programs may generate, create, transfer, and use ERCs in accordance with the requirements of Subchapter E and the applicable provisions in Chapter 145 (relating to interstate pollution transport reduction). Moreover, an owner or operator of a facility shall acquire ERCs for use as offsets from an ERC generating facility located within the same nonattainment area, except that the Department may allow the owner or operator to obtain ERCs generated in another nonattainment area if the other area has an equal or higher nonattainment classification than the area in which the facility is located and the emissions from the other area contribute to a violation of the NAAQS in the nonattainment area in which the facility is located.

Section 127.209 (relating to ERC registry system) is revised to make minor clarifications to ensure that it is consistent with the other proposed changes being made to the subchapter. Additional minor clarifying changes were made to this section between proposed and final rulemaking.

Section 127.210 (relating to offset ratios) is revised to make minor clarifications to ensure that it is consistent with the other proposed changes being made to the subchapter. No additional changes were made to this section between proposed and final rulemaking.

Section 127.211 (reserved) is deleted and reserved, and any remaining applicable provisions are moved to the newly finalized section 127.203a. No additional changes were made to this section between proposed and final rulemaking.

Section 127.212 (relating to portable facilities) is revised to include PM_{2.5} and its precursors as pollutants, and to make minor clarifications to ensure that it is consistent with the other final changes being made to the subchapter.

This section was revised between proposed and final rulemaking. All references to particulate matter, PM-10 precursors, PM-2.5 precursors, and PM-2.5 were deleted.

Section 127.213 (relating to construction and demolition) is revised to make minor clarifications to ensure that it is consistent with the other changes made to the subchapter. No additional changes were made to this section between proposed and final rulemaking.

Section 127.214 (reserved) is deleted and reserved. No additional changes were made to this section between proposed and final rulemaking.

Section 127.214a (relating to special provisions for advanced clean coal generation technology) is proposed to be added and to apply to an owner or operator of a project that uses advanced clean coal generation technology in a new electric utility steam generating unit or to retrofit or repower an existing electric utility steam generation unit. The qualifying electric utility steam generation unit will be deemed to meet the LAER control technology requirements of section 127.205 unless the Department determines that the performance requirements specified are less stringent than LAER.

This entire section was deleted between proposed and final rulemaking. As noted in the comment and response section of this order, EPA cannot, under any circumstance, approve any provision related to a presumptive LAER limit.

Section 127.215 (relating to reactivation) was modified between proposed and final rulemaking to provide that a facility, which is deactivated in accordance with subsection (a) of this section may create ERCs only if an ERC registry application is filed within two years of deactivation.

Section 127.217 (relating to clean air act titles III – V applicability) is revised to make minor clarifications to ensure that it is consistent with the other proposed changes being made to the subchapter. No additional changes were made to this section between proposed and final rulemaking.

Section 127.218 (relating to PALs) is added to include PALs. If a facility follows the provisions of this section and emissions are kept below a plantwide actual emissions cap then these regulations allow the facility to avoid the major NSR permitting process when making changes to the facility or individual emissions units. The PAL will impose an annual emissions limitation in tons per year for the entire major facility. Each PAL must regulate emissions of only one pollutant. Each PAL will have an effective period of ten years.

This section was revised between proposed and final rulemaking. For instance, in setting the ten-year actual PAL level under paragraph (f)(2), the owner or operator may use a different consecutive 24-month period for each different PAL pollutant. Similarly, in setting the ten-year actual PAL level under paragraph (f)(4) for newly constructed emission units on which actual construction began after the 24-month period, the emissions must be added to the PAL level in the amount equal to the potential to emit of the emission units. Moreover, only new units would be subject to a BAT review. In addition, minor editorial changes were also made to this section.

F. Comments and Responses

One commentator stated that the Board strikes the appropriate balance to the extent that the Board developed an NSR proposal that differs from the federal requirements. The Board agrees and believes that the final-form regulation strikes the proper balance between environmental protection and economic growth. A recent

decision by the U.S. Court of Appeals for the D.C. Circuit indicated that requirements in place for the one-hour ozone standard must be retained in accordance with the anti-backsliding provisions of section 172(e) of the Clean Air Act. Consequently, the one-hour NSR applicability thresholds (25 tpy for VOCs/NOx) and emission offset requirements for one-hour ozone nonattainment areas must continue to be imposed under federal law. The Court determined that NSR is a "control" measure— not a "growth measure."

Commentators believe that Pennsylvania should adopt the Federal NSR proposal to ensure that the state is not at a disadvantage to surrounding states. The Board does not believe that adoption of a state-specific NSR regulation will put Pennsylvania at an economic disadvantage. Many states in the Ozone Transport Region including Delaware, Maryland, New Jersey, New York and Virginia have chosen to adopt state-specific NSR regulations. It is evident that Pennsylvania is not alone in its belief that the Federal NSR rule is not adequate to protect its citizens. The final-form rulemaking will incorporate some, but not all, of the EPA's NSR program changes. The Board believes the final-form rulemaking strikes an appropriate balance that meets EPA's required NSR program elements while retaining important elements of the existing NSR program.

A commentator found that the term "significant emissions increase" is missing from Pennsylvania's definitions presumably because the State is not proposing a two-part applicability test as outlined in 40 CFR § 51.165(a)(2). Pennsylvania must offer information to EPA describing how a program that omits this minimum program element should be considered equivalent to the federal regulations. The Board agrees and has inserted this term into the regulations.

A commentator notes that Pennsylvania's definition of "allowable emissions" differs from the PAL-specific federal definition in that it does not reflect the use of potential-to-emit to define allowable emissions. The Federal definition is broader in scope than the State's definition. As noted in section 51.165(f)(2), the State's regulations must use the same definitions in the development of a PAL, therefore, EPA recommends that Pennsylvania revise its regulation to be consistent with the Federal definition of "allowable emissions". The Board agrees and has revised this term.

The commentators state that the proposed amendment moved many definitions from section 121.1 to section 127.201a. New definitions are also added to section 127.201a. It is quite convenient and efficient to have all the definitions relating to the air programs in one location, rather than having to switch back and forth looking for definitions through out the various chapters. The Board agrees and all definitions from the proposed section 127.201a have been moved to Chapter 121.1.

The commentators complain that the lbs/hr and lbs/day emissions rate triggers are burdensome if not impossible to estimate for some processes. Further, these triggers are in addition to the annual triggers that are specified in the federal program. The Board has determined that the retention of the hourly and daily applicability thresholds would require a complex analysis under actual to projected actual emissions test. Therefore, the

Board has removed lbs/hr and lbs/day requirements from the final form of the NSR regulation.

The EPA commented that the federal term "Stationary source and building, structure, facility or installation" corresponds with the Department's terms "facility" and "source." It would appear that the Department's definition of "facility" is more inclusive in terms of defining the boundary of a source because it does not require any demonstration that pollutant-emitting activities be linked by SIC code. However, the Department's definition of "source" implies that there have to be actual air contaminant emissions to be considered a "source," whereas the Federal definition of "stationary source" includes buildings, structures, facilities or installations that emit, or may emit, any air pollutant regulated by the CAA. The EPA recommends that the Department revise the regulations to include the Federal definitions of "stationary source" and "building, structure, facility or installation" so that these terms are consistently applied to both nonattainment NSR and PSD. Clarifying language in the Order to the rule is also recommended.

The Board disagrees about the suggested revisions. The Department has added the term "air contamination source" and its definition to 25 *Pa. Code* § 121.1 (relating to definitions). Modification of the definition, which is identical to the definition of the term "air contamination source" in Section 3 of the Air Pollution Control Act, to the form suggested by the EPA, would require amendment of the State law. The definition for the term "facility" already exists in § 121.1. This definition is used throughout the entire Title 25, Article III, Air Resources portion of the *Pennsylvania Code* and affects many other regulatory sections; therefore, the definition of the term "facility" will not be changed.

The EPA commented that the Department's definition of the term "allowable emissions" differs from the Plantwide Applicability Limit (PAL)-specific federal definition in that it does not reflect the use of potential-to-emit to define allowable emissions. The federal definition is broader in scope than the State's definition. As noted in 40 CFR § 51.165(f)(2), the State's regulations must use the same definitions in the development of a PAL, therefore the EPA recommends that the Board revise its regulation to be consistent with the Federal definition of the term "allowable emissions." The Board has revised the definition of the term "allowable emissions" and incorporated the clause "for purposes of the PAL requirements in § 127.218, the allowable emissions shall be calculated considering the emission limitations that are enforceable as a practical matter on the emissions unit's potential to emit."

Several commentators stated that the definition of "major modification" as written is imprecise. If conditions (A) and (B) or any combination thereof meet the criteria of the expression major modification, clarification is necessary. The Board agrees that the definition is meant to include both of these conditions under the federal NSR rule and has clarified the definition.

The commentators state that the proposed definition of the term "actual emissions" differs from the federal definition. The federal rule does not require a written determination for a more representative period. The Board has changed some of the wording of the definition of the term "actual emissions" to match that of the federal definition. The Board believes a written determination for a more representative period is required because the determination should be a public record. This public record will consist of that portion of the written plan approval or permit application where the owner or operator justified the use of the different consecutive 24-month time period and the written determination issued by the Department.

The EPA commented that the Department does not have a separate definition of the term "replacement unit" but does address replacement units under the term "emissions unit." In all cases, a replacement unit must be considered a new unit until it has operated for two years. Therefore, the State's regulations are inconsistent with one of the minimum required elements (replacement unit) identified in NSR reform and must offer information to the EPA describing how this provision should be considered equivalent to the federal regulations. The Board has revised the definition of "emissions unit" to be consistent with the federal definition and added the definition of the term "replacement unit."

All commentators stated that, for various reasons, the definition for "actual emissions" should not be limited to a "consecutive 2-year period" but to a "consecutive 24-month period" as per the federal NSR rule. The Board agrees that the EPA term of "consecutive 24-month period" is appropriate and will replace the proposed term of "2-year period".

Many commentators agree that the lb/hr and lb/day de minimis aggregation thresholds are burdensome and should be eliminated. EPA does not require de minimis aggregation, let alone on a lb/hr or lb/day basis. The Board agrees and has removed this provision from the final regulation.

The EPA commented that neither the Department's current or proposed regulations exclude fugitive emissions in determining applicability. It should be noted that the EPA's response to the Newmont Mining Petition for Reconsideration is to exclude fugitive emissions from applicability of NSR for all non-listed source categories. The Department needs to provide information explaining how its program is at least equivalent, in this respect, to the requirements of the federal program found at 40 CFR § 51.165(a)(4), relating to fugitive emissions. The Board believes the retention of fugitive emissions in this context is proper. Provisions for excluding fugitive emissions of criteria air pollutants for nonlisted sources do not exist in the Commonwealth's current NSR regulation. The Department has relied on the inclusion of fugitive emissions of criteria air pollutants from all sources to demonstrate attainment and maintenance of the Federally-mandated NAAQS. It is reasonable and necessary to continue to include fugitive emissions from all sources in the determination of applicability to assure that facilities do not emit pollutants that have not been accounted for in the existing attainment plan. It should also be noted that the requirement to include fugitive

emissions from all sources is being retained in accordance with the anti-backsliding provisions of Section 172 (e) of the CAA.

The Department's regulations proposed to lower the threshold for sources subject to NSR from 100 TPY to 70 TPY of PM-10. No justification for this decrease has been provided. The 100 TPY threshold should be retained. The federal definition of the term "major stationary source" in 40 CFR § 51.165(a)(1)(iv)(A) establishes a limit of 100 TPY, emitted or potential to emit, for any regulated pollutant, except in areas where the limit may be lower, as in 40 CFR § 51.165(a)(1)(iv)(A)(vi) for serious nonattainment areas: "70 tons per year of PM-10 in any serious nonattainment area for PM-10." The language for the term "major facility" in the final-form NSR regulation closely mirrors the federal language for this definition. A facility is a major facility for PM-10 if it emits or has the potential to emit 100 TPY of PM-10 unless the facility is in a serious nonattainment area, then the facility is major if it emits or has the potential to emit 70 TPY of PM-10. The Board has revised the NSR applicability test to incorporate a two-step test in the final-form NSR regulation.

The EPA commented that the definitions of the different ozone classifications in § 121.1 are no longer consistent with the design values under the 8-hr ozone standard. The Board has deleted the following terms and definitions from 25 Pa. Code § 121.1: "Extreme ozone nonattainment area," "Marginal ozone nonattainment area," "Moderate ozone nonattainment area", "Serious ozone nonattainment area" and "Severe ozone nonattainment area."

EPA believes that the definition of the term "PAL permit" includes state operating permits despite the fact that the federal regulations prohibit PALs from being established within such permits. The Board has deleted the phrase "state operating permits" from the definition of the term "PAL permit" in the final-form regulation.

The commentators stated that the five-year look-back period for determining the representative consecutive 24-month emissions baseline period is too restrictive. Many cited specific instances and examples where a five-year period would not have been representative. These commentators further state that ten years is much more representative for specific industrial or business cycles or even for the normal business cycle. The commentators indicated that the research done by the EPA to justify the federal NSR ten-year look-back period is adequate. They commented that some neighboring states are using the ten-year look-back period without undue burden on the state agency and that Pennsylvania already uses the ten-year look-back period in its existing PSD program. The proposed five-year look-back period will put Pennsylvania businesses at a disadvantage with these neighboring states' businesses. Further, the Department is requiring a 15-year look-back period for the de minimis aggregation portion of this proposed regulation, which serves to demonstrate that a ten-year look-back period is not too cumbersome. The commentators suggest the mandatory ten-year look-back but if the Board proceeds with a five-year look-back, the rule should provide for a mandatory five-year look-back period with the option to allow for another two-year period in the last ten years if such period is more representative of normal operations.

The Board disagrees that a five-year look-back period is always too restrictive and finds that under many circumstances a five-year look-back will be appropriate and environmentally beneficial. However, the Board agrees that there could be unusual circumstances where a ten-year look-back period for establishing the NSR continuous 24-month actual emissions baseline period will be appropriate. The 24-month period shall be from the preceding five years unless the owner can demonstrate to the satisfaction of the Department that a longer time frame is more representative. The Board has revised § 127.203a(a)(4)(i) of the final-form regulation to include the following language "baseline actual emissions are the average rate, in tpy, at which the unit emitted the regulated NSR pollutant during a consecutive 24-month period selected by the owner or the operator within the five-year period immediately prior to the date a complete plan approval application is received by the Department. The Department may approve the use of a different consecutive 24-month period within the last 10 years upon a written determination that it is more representative of normal source operation."

Many commentators stated that the Board should adopt the federal NSR regulatory language allowing for different 24-month emission baseline periods for each pollutant. They commented that different 24-month periods would be more representative of operations where complex business adjustments or shutdowns occurred. The Board agrees that there could be unusual circumstances where different 24-month periods for establishing the actual emissions baselines for different pollutants will be appropriate. The 24-month period for each pollutant shall be the same unless the owner or operator of the facility can demonstrate to the satisfaction of the Department that a different 24-month period would be more representative. The Department has revised § 127.203a(a)(4)(i)(D) of the final-form regulation to include the following language, "The same consecutive 24-month period shall be used for all regulated NSR pollutants unless the owner or operator demonstrates, in writing, to the Department that a different consecutive 24-month period is more appropriate and the Department approves, in writing, the different consecutive 24-month period for a regulated NSR pollutant or pollutants."

Several commentators stated that the proposed requirements which continue to treat the five county Philadelphia as severe, as it was under the one-hour ozone standard, will put the area at a competitive disadvantage to other areas, cause the need for additional expensive control equipment and result in the cancellation of projects intended for economic growth. The Board disagrees. First the U.S. Court of Appeals for the D.C. Circuit in *South Coast Air Quality Management District v. EPA, et al.*, (No. 04-1200 consolidated with No. 04-1201 *et al.*) found that NSR is a control measure and to withdraw it from the SIP would constitute impermissible backsliding. As a result, in implementing the eight-hour ozone NAAQS, all one-hour ozone NAAQS major NSR requirements, in Pennsylvania and in the five county Philadelphia area, will remain in place. Moreover, under the moderate rules if an existing facility makes a modification, the triggering NSR threshold is 40 TPY of VOC or NOx. Under the severe rules, it was 25 TPY. So, a major facility under the moderate rules can increase its NOx or VOC emissions an additional 15 TPY before NSR is applicable. There are approximately 200 major facilities in the five county area. Under the worst-case scenario, there could be an

additional 3,000 TPY of VOC and 3,000 TPY of NO_x emitted from these facilities before NSR can be applied under the moderate rule. Additionally, when facilities do trigger major NSR under the federal regulation the less stringent offset ratio of 1.15 to 1 instead of 1.3 to 1 applies. Under the EPA planning rules for SIPs, the Commonwealth would need to plan for this increase in emissions by finding offsetting decreases in emissions from other source categories.

Some commentators stated that the five-year look back period for determining the representative consecutive 24-month emissions baseline period is too restrictive. Many cited specific instances and examples where a five-year period would not have been representative. The Board agrees that under many circumstances the five-year look back period will be appropriate and environmentally beneficial. However, the Board also agrees that there could be unusual circumstances where a ten-year look-back period for establishing the NSR continuous 24-month actual emissions baseline period will be appropriate. The 24-month period shall be from the preceding five years unless the owner can demonstrate to the satisfaction of the Department that a longer time frame is more representative. Language indicating this has been added to the final-form regulation under section 127.203a.

A commentator stated that the proposed PM 2.5 major thresholds should be lowered from the proposed 100 and 15 TPY to 25 and 10 TPY, respectively. Industry commented that the proposed PM-2.5 requirements are premature and should not be addressed until EPA promulgates its regulation. EPA commented that it strongly advises the Department to wait until EPA promulgates the PM-2.5 implementation rule for NSR before adopting specific provisions for regulating PM-2.5 and its precursors under its nonattainment NSR program. As requested by EPA, the Board will wait until the federal PM_{2.5} rule is promulgated. Consequently, all language referring to PM-2.5 has been removed from the final regulation.

The commentators suggest that project emissions should be calculated, monitored and reported in terms of 12-month periods consistent with the established policy and guidance and the federal rule. The Board has followed the lead of EPA by designating the reporting requirement period as a calendar year basis from the language in the EPA's NSR rule pertaining to applicability procedures, under 40 CFR § 51.165(a)(6)(iii). The Board wishes to maintain the continuity between the final and federal regulation so the language in the subparagraph will not be changed.

The commentator suggested that the rule should allow for ERCs generated by a facility located adjacent to or within another facility, but not under common control with that facility (e.g., a portion of a facility sold to another entity) be considered a creditable decrease as an emission decrease. The Board disagrees. A net emissions increase calculation requires all increases and decreases in actual emissions at the major facility that are contemporaneous with the project and are otherwise creditable. The emission decreases used as a netting credit have to be generated at the same facility. ERCs generated at other facilities cannot be used by separate facilities for netting purposes, even if they are within a contemporaneous period.

Some commentators stated that the Board should allow the use of different 24-month emission baseline periods for each unit involved in a project as this would be more representative of varying and complex business conditions. The Board has proposed that the same 24-month period shall be used for all units involved in a project. This is in accordance with 40 CFR Part 51 § 51.165(a)(xxxv)(A)(3). Since the final rule must be at least as stringent as the federal regulation this stipulation will not be changed.

The commentators state that the proposed rule contains additional new recordkeeping and reporting requirements at § 127.203a(a)(7). Depending on the type of modification it may not be possible to separate the actual annual emissions into baseline actual emissions, emissions that could have been accommodated during the baseline period, unrelated emissions due to the demand growth, and emissions increase due to the project. The Board has not explained why it needs more data, or an additional report, from the same sources that are already required to file annual emission reports under Chapter 135. This requirement is redundant, burdensome and creates more unnecessary paperwork for the Department to review. This provision should be deleted. The Board disagrees. The revised paragraph (5) in 25 Pa. Code § 127.203a(a) is consistent with the language in 40 CFR § 51.165(a)(6)(i)(B). Since the final-form NSR regulation must be at least as stringent as the federal rule, recordkeeping and reporting requirements have not been revised in the final-form regulation.

Commentators find that a facility making improvements that are classified as BAT would apparently be prohibited from generating ERCs under the proposed rule. In practice this will prohibit many sources from conducting emissions netting. To allow for the generation of ERCs through the use of rules that are intended to safeguard the environment would defeat the purpose and effect of these rules. The Board agrees with this assessment and feels that allowing for the generation of ERCs through the enforcement of BAT would defeat the purpose of the BAT regulation that is to safeguard the environment at the state level. The Board will not allow for the generation of ERCs through the enforcement of BAT.

Some commentators stated that the proposed "advanced clean coal generation technology" is unfair because this provision is not available for other equally viable technologies that it supports. Another commentator stated that although this technology does not apply directly to them they support measures to encourage the use of clean coal technology. EPA informed the Department that, "EPA cannot, under any circumstance, approve this provision. LAER must be the more stringent of either: (1) a limit in a SIP for a class or category of source, or (2) an emissions limit that has been achieved in practice. A presumptive limit that is adopted as part of a regulation cannot be demonstrated to meet either of these qualifications." The Board has removed the clean coal generation technology provision as a result of EPA's concerns.

The commentator states that subsection 127.218(c)(2) refers to the public participation requirements in subsection 127.218(d), but the public participation requirement is actually discussed in subsection 127.218(e). The Board agrees and will change the reference to the appropriate subsection.

Another commentator finds that the requirement under section 127.218(g)(10) that any new source under a PAL must achieve BAT defeats the purpose of the PAL by eliminating the flexibility of a facility to allocate its allowable emissions among its sources. The Board disagrees. There are a number of provisions that provide for operational flexibilities. For example, section 127.14 (relating to exemptions) determines the conditions where new sources can be exempted from BAT. Exemptions can be determined from the existing list of sources or through the use of a request for determination. Many de minimis and trivial sources will be exempted through these provisions. Moreover, section 127.1 specifically states "New sources shall control the emission of air pollutants to the maximum extent, consistent with the best available technology as determined by the Department as of the date of issuance of the plan approval for the new source". Further, it is stated in section 127.12 subsection "(a) An application for approval shall: ... (5) Show that emissions from a new source will be the minimum attainable through the use of best available technology." Since these regulatory provisions remained unchanged BAT requirements for new sources remain in effect under section 127.218.

The commentators state that conformance with the 2002 EPA final rule requires that the Board also abandon any proposed changes to section 127.203a referencing the 1991 baseline period for any contemporaneous change evaluations under the NSR program. Creditable reductions generated at a site often stay with prior owners or are consumed in unrelated operations for facilities, or parts of facilities, which are sold to new operators. Therefore, tying NSR compliance to an arbitrary baseline from 15 years ago represents an unfair burden, especially since Board is silent on how to restate NSR baselines for facilities that are combined, divided, or sold.

On the advice of the Air Quality Technical Advisory Committee, the Board has revised the duration of the de minimis emissions aggregation period from 15 years as proposed to ten years in the final-form regulation. The de minimis aggregation requirement includes both increases and decreases for the previous ten-year period allowing for the facility to take credit for any reductions that are surplus, permanent and enforceable while still being accountable for any increases that are also to continue but have not previously been offset. Under the federal regulation and implementing memorandums, facilities may add several non related projects up to an emissions increase of 39.9 TPY or need only wait for 18 months to be able to propose continual 39.9 TPY increases per project without providing offsets and without having to account for any 39.9 TPY or less increases that occurred previous to the five-year period. Under the final rule, the owners/operators of facilities in the five-county area will be able to avoid major NSR by keeping emission increases under 25 TPY but will still have to account for all emission increases under 25 TPY that occurred within the last ten years but did not have offsets provided. For the rest of the Commonwealth, the owner/operators of facilities will be able to avoid major NSR by keeping emission increases under 40 TPY but will still have to account for all emission increases under 40 TPY that occurred within the last ten years but did not have offsets provided.

The commentators agree that emissions from start-ups, shutdowns, and malfunctions should not be treated differently under the definitions of "baseline actual emissions" and "projected future actual emissions." Others also specify that section 123.203a(a)(5) indicates that emissions from start-ups and shutdowns are to be included in the baseline actual emissions only if they are "authorized," while the projected future actual emissions include emissions from startups and shutdowns regardless if they are authorized. The proposed rule is different and apparently more stringent than the federal rule. The final-form regulation will not allow the use of emissions from malfunctions to be included in the baseline actual emissions because it is not representative of normal source operation. The Board has removed the word "authorized" from this language.

The EPA objected to the Department's definition of the term "plantwide applicability limit" in that it does not include the provision that the limit must be practically enforceable. Rather, the Department requires the limit to be legally enforceable. Practical enforceability is not the same as legal enforceability. For instance, every term and condition in a permit issued by the State is legally enforceable. However, it has long been recognized that for a limit to be practically enforceable for the purpose of effectively imposing a level of control on a unit or source, the limit must meet several criteria: it must be legally enforceable; there must be a short period of time over which compliance is to be determined; and the limit must include monitoring and/or recordkeeping to verify compliance. The EPA believes that this is a significant deviation from the Federal rule for which there is a minimum required program element. The Board agrees and has revised the definition of the term "plantwide applicability limit" to change the phrase "legally enforceable" to "enforceable as a practical matter."

The commentator supports this common sense provision for "demand growth" exclusion but requested clarification on the phrase "and that is unrelated to the particular project." Any emissions that could have been accommodated during the baseline period should inherently be excluded under the demand growth exclusion. The commentator requested an example of a situation wherein emissions could have been accommodated during the baseline period but cannot be excluded under the demand growth exclusion because the emissions are "related to the particular project."

The Board will refer the commentators to 67 Fed. Reg. 80202 and 80203, to the response to the comment, "7. Why Was the Demand Growth Exclusion Retained?" It is the Board's intent to include the EPA's demand growth provision in the final rulemaking. The Department closely mirrored the EPA's NSR regulatory language from 40 CFR § 51.165(a)(1)(xxviii)(A)(2) in the Board's revised § 127.203a(a)(5)(i)(C). The Board's interpretation and use of the EPA's regulatory language and commentary would be consistent. For example: 1) If an existing source before modification had the potential to emit 20% more of a regulated pollutant had the demand existed during the 24-month baseline chosen, but after the proposed modification has a projected actual emission rate of 40% more of the same regulated pollutant, then the projected actual emissions would be 140% of the baseline emissions. The emission increase would be the 140% level minus the "could have been accommodated" 20% and minus the original 100% actual baseline equaling a 20% emission increase. The new permit emission limit would be

140% of the baseline regardless of the new or modified unit's potential to emit which could be higher. The modification made to the emission unit in this example will not have altered the product or in any way created the demand growth. Another example would be: 2) A printing press can presently print in three colors and had the potential to accommodate a 20% higher level of actual emissions during the 24-month baseline period chosen had the demand existed, as in example 1. The owner wishes to modify the press to be able to print in four colors while increasing the unit output capacity and potential to emit and again as in example 1 the owner establishes a projected future actual emission level at 140% of the baseline which can be below the new potential. Here there is a 40% emission increase because the entire product demand growth could be attributable to the product alteration. The new permit emission limit would be 140% of the baseline as in example 1.

The EPA commented that the Department's definition of the term "PEMS – predictive emissions monitoring system" includes the language "All of the equipment necessary to monitor parameters including..." The EPA recommends using the phrase "including but not limited to" since the types of parameters listed in the State's definition clearly are not an exhaustive list of process or operational parameters. Alternatively, the text of the Order for the rule could clarify that such definitions are not interpreted to be exclusive.

The Board disagrees. The meaning of this definition has not been changed. The formatting convention of the Pennsylvania Legislative Reference Bureau does not allow the use of the phrase "but is not limited to" when listing items in a class. The word "including" is not interpreted to be exclusive and restricted to the list of items that follow the word "including." The phrase "but not limited to" is unnecessary and is to be avoided. It is also important to note that use of the phrase "shall include" in a definition does not exclude or limit things, which do not follow the phrase.

In *New York v. EPA*, 45 F.3d 3 (DC Cir. June 24, 2005), the DC Circuit court remanded EPA to either provide an acceptable explanation for its "reasonable possibility" standard or to devise an appropriately supported explanation. At this time, EPA has not responded to the remand and the reasonable possibility standard still exists in the Federal regulations. Pennsylvania, therefore, must provide information as to how the provisions in 127.203a(7) are equivalent to the requirements of 51.165(a)(6) of the Federal regulations.

The Board believes the calculation method for determining the projected actual emissions for both the Federal and the final-form regulation are equivalent. The final-form regulation projected actual emissions are reflective of the actual emissions level that the facility expects and are not adjusted. With the federal regulation, the projected actual emissions are reduced by the amount that could have been accommodated.

The commentators state that under the EPA's approach, facilities are only required to track emissions for a period of time following a modification. Pennsylvania is

proposing a very complicated approach which involves using the summation of "baseline actual emissions; emissions that could previously be accommodated prior to the proposed modification; and the projected actual emission increase due to the proposed project." These data would be used to determine compliance and tracked for five years (ten years if there is a capacity increase). In addition, facilities would be required to demonstrate compliance with the projected actual emission increase that is due solely to the project. These provisions are not only more stringent than the federal equivalent, but are confusing. The commentators recommend that the Board adopt the federal approach of recordkeeping and reporting to ensure that projects that do not trigger NSR do not in fact trigger NSR.

Most of the language in the revised § 127.203a(a) paragraph (5) duplicates the language used in the federal regulation as it pertains to demand growth and reporting requirements. The EPA stipulates that the owner will keep records for five years or for ten years if the project increases a unit's potential to emit. These records are to be reviewed annually by the local or State agencies to ensure that the projected actual emission increases as proposed are not exceeded for existing EGU projects. For non-EGU units the owner will report only if the projected emissions are exceeded. The Board has changed the regulatory language to more closely duplicate the federal language concerning reporting requirements in the final-form NSR regulation.

Most commentators agreed that projected actual emissions should not become permit restrictions. The EPA does not propose to limit a project's future emissions to the facility's projected actual emissions in a plan approval or permit. The EPA stipulates that the owner will keep records for five years or for ten years if the project increases a unit's potential to emit. These records are to be reviewed annually by the local or State agencies to ensure that the projected actual emission increases as proposed are not exceeded for existing EGU projects. For non-EGU units the owner will report only if the projected actual emissions are exceeded. If these emission rates are exceeded, the local or State agency or the EPA can then take whatever action they feel is necessary after an explanation by the owner or operator of a source. The Board does not agree that this approach would be beneficial to the environment, or the regulated community. Under the federal NSR regulation, when the ten-year record keeping requirements expire there will be no restrictions to prevent an owner from increasing a unit to its full potential usage at a possibly substandard emission rate that was granted initially. For the regulated community, the consequences of exceeding the projected actual emissions during the five- or ten-year reporting period are unknown to them under the new federal NSR regulation. The owner's explanation as required would be the determining factor of what the consequences at the federal level would be. In contrast, the Department's enforcement action would be based upon the proposed revised paragraph § 127.203a(a)(5) permit limit. The federal regulation allows for the possibility that members of the regulated community could knowingly or unknowingly exceed their projected actual emission limits for one year or beyond before discovery or disclosure, again with unknown consequences for the owner or the environment. The final-form NSR regulation eliminates any confusion about the consequences to the owner or the

environment that exist under the present federal NSR proposal when the projected actual emissions are exceeded.

After reviewing the proposed PAL provisions of the proposed rule, some commentators question whether Pennsylvania is committed to allowing PAL permits. They state that the PAL provisions in the proposed rule virtually remove any associated benefit of obtaining a PAL in Pennsylvania. The proposed five-year look-back for PALs will result in less operational flexibility, which is one of the key benefits that the PAL regulations offers. Business cycles can be much longer than five years, and a ten-year look-back will account for fluctuations in a company's emissions associated with its business cycle. A ten-year look-back is appropriate and representative. The proposed rulemaking is more restrictive than the federal requirements and ultimately harmful to the PAL program. PALs should have a ten-year term and be fixed rather than declining.

The actual PAL level for a major facility is based on the definition of "baseline actual emissions" and is also determined in accordance with § 127.203a(a)(4). The Board believes that under many situations the five-year look back period for calculating baseline actual emissions will be appropriate and environmentally beneficial. However, the Department agrees that there could be unusual circumstances where a ten-year look back period for establishing the NSR continuous 24-month actual emissions baseline period will be appropriate. The Board has revised the final-form regulation to include the following language "baseline actual emissions are the average rate, in tons per year, at which the unit emitted the regulated NSR pollutant during a consecutive 24-month period selected by the owner or the operator within the five-year period immediately prior to the year a complete plan approval application is received by the Department. The final-form regulation allows the use of a different consecutive 24-month period within the last 10 years upon a written determination that it is more representative of normal source operation."

The commentator states that it is not clear from the proposed rule as to how a PAL permit is to interact with existing plan approvals and/or operating permits. The Department intends to incorporate each PAL for each pollutant into the owner's Title V operating permit as suggested by the EPA in preamble for the Federal NSR regulation (67 Fed. Reg. 80213 and 80214). The EPA suggests that the PAL be incorporated into the Title V permit upon issuance if the Title V permit does not already exist. The EPA further suggested that owners and operators of facilities request incorporation of the PAL into already existing Title V permits during Title V renewal. Since the term for a Title V permit is five years and the term for the PAL is ten years, Title V renewal will not necessitate a PAL renewal the first time around. Each PAL for each pollutant will have its own expiration date that will have to be included in the Title V permit where the renewal dates are not concurrent.

G. Benefits, Costs and Compliance

Benefits

Overall, the citizens of this Commonwealth will benefit from these final amendments because they will result in improved air quality by reducing criteria pollutant emissions, recognize and encourage pollution prevention practices, and encourage new technologies and practices which reduce emissions.

Compliance Costs

These regulations will reduce the operating costs of industry through enhanced operational flexibility under plantwide applicability limits.

Compliance Assistance

The Department plans to educate and assist the public and regulated community with understanding any newly revised requirements and how to comply with them. This will be accomplished through the Department's ongoing Regional Compliance Assistance Program.

Paperwork Requirements

The proposed regulatory revisions will not increase the paperwork that is already generated during the normal course of business. However, the owner or operator of any facility that voluntarily elects a 10-year plantwide applicability limit must retain records for at least 10 years to document that the emission limit was not exceeded.

H. Pollution Prevention

The Federal Pollution Prevention Act of 1990 established a national policy that promotes pollution prevention as the preferred means for achieving state environmental protection goals. The Department encourages pollution prevention, which is the reduction or elimination of pollution at its source, through the substitution of environmentally-friendly materials, more efficient use of raw materials, and the incorporation of energy efficiency strategies. Pollution prevention practices can provide greater environmental protection with greater efficiency because they can result in significant cost savings to facilities that permanently achieve or move beyond compliance. This regulation has incorporated the following pollution prevention incentives. As a result of the NSR requirements a company has a significant incentive to minimize their emissions in order to avoid these additional regulatory requirements. If they are unable to avoid these requirement they must demonstrate the employment of the lowest achievable emission reduction with existing technology. These minimized emissions can be achieved through process modifications and do not have to come from add-on control equipment. Pollution prevention is one of the most cost effective means to eliminate costly add-on controls or to reduce the costs of running add-on controls.

I. Sunset Review

This regulation will be reviewed in accordance with the sunset review schedule published by the Department to determine whether the regulation effectively fulfills the goals for which it was intended.

J. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on June 16, 2006, the Department submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House and Senate Environmental Resources and Energy Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department considered the comments received from IRRC, the Committees, and the public.

Under section 5.1(d) of the Regulatory Review Act (71 P.S. §745.a(d)), on xxxx,xx, 2007, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the regulatory review act, IRRC met on xxxx, xx, 2007 and approved the final-form rulemaking.

K. Findings of the Board

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§1201 and 1202) and regulations promulgated thereunder at *1 Pennsylvania Code* §§7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposal published at 36 Pa. B. 1977 (April 29, 2006).
- (4) These regulations are necessary and appropriate for administration and enforcement of the authorizing acts identified in Section C of this order.

- (5) These regulations are necessary for the Commonwealth to achieve and maintain ambient air quality standards and to satisfy related Federal Clean Air Act requirements.
- (6) These regulations are necessary for the Commonwealth to avoid sanctions under the Federal Clean Air Act.
- (7) These regulations will be submitted to U.S. EPA as an amendment to the Pennsylvania SIP.

L. Order of the Board

The Board, acting under the authorizing statutes, orders that:

- (a) The regulations of the Department of Environmental Protection, 25 *Pennsylvania Code*, Chapters 121 and 127, are amended by amending sections 121.1 and 127.201-218 to read as set forth in Annex A.
- (b) The Chairperson of the Board shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General for review and approval as to legality and form, as required by law.
- (c) The Chairperson of the Board shall submit this order and Annex A to the Independent Regulatory Review Commission and the Senate and House Environmental Resources and Energy Committees as required by the Regulatory Review Act.
- (d) The Chairperson of the Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau, as required by law.
- (e) This order shall take effect immediately upon publication in the *Pennsylvania Bulletin*.

BY:

KATHLEEN A. MCGINTY
Chairperson
Environmental Quality Board

ENVIRONMENTAL QUALITY BOARD

[25 PA. CODE CHS. 121 AND 127]

Nonattainment New Source Review

Annex A

TITLE 25. ENVIRONMENTAL PROTECTION

PART I. DEPARTMENT OF ENVIRONMENTAL PROTECTION

Subpart C. PROTECTION OF NATURAL RESOURCES

ARTICLE III. AIR RESOURCES

CHAPTER 121. GENERAL PROVISIONS

§ 121.1. Definitions.

The definitions in section 3 of the act (35 P. S. § 4003) apply to this article. In addition, the following words and terms, when used in this article, have the following meanings, unless the context clearly indicates otherwise:

* * * * *

ACTUAL EMISSIONS--FOR PURPOSES OF 25 Pa. CODE CHAPTER 127, SUBCHAPTER E (RELATING TO NEW SOURCE REVIEW), THE ACTUAL RATE OF EMISSIONS OF A REGULATED NSR POLLUTANT FROM AN EMISSIONS UNIT SHALL BE DETERMINED IN ACCORDANCE WITH THE FOLLOWING PARAGRAPHS OF THIS DEFINITION. THIS DEFINITION SHALL NOT APPLY FOR CALCULATING WHETHER A SIGNIFICANT EMISSIONS INCREASE HAS OCCURRED, OR FOR ESTABLISHING A PAL UNDER § 127.218 (RELATING TO PALs). INSTEAD, THE DEFINITION OF THE TERMS PROJECTED ACTUAL EMISSIONS AND BASELINE ACTUAL EMISSIONS SHALL APPLY FOR THOSE PURPOSES. THIS DEFINITION SHALL NOT BE USED TO CALCULATE A BASELINE EMISSIONS RATE UNDER § 127.207(4) (RELATING TO ERC GENERATION AND CREATION).

(i) ACTUAL EMISSIONS AS OF A PARTICULAR DATE MUST EQUAL THE AVERAGE RATE, IN TPY, AT WHICH THE UNIT ACTUALLY EMITTED THE REGULATED NSR POLLUTANT DURING THE CONSECUTIVE 24-MONTH PERIOD WHICH IMMEDIATELY PRECEDED THE PARTICULAR DATE AND WHICH IS REPRESENTATIVE OF NORMAL SOURCE OPERATIONS. THE DEPARTMENT WILL AUTHORIZE THE USE

OF A DIFFERENT TIME PERIOD UPON A DETERMINATION THAT IT IS MORE REPRESENTATIVE OF NORMAL SOURCE OPERATION. ACTUAL EMISSIONS SHALL BE CALCULATED USING THE UNIT'S ACTUAL OPERATING HOURS, PRODUCTION RATES AND TYPES OF MATERIALS PROCESSED, STORED OR COMBUSTED DURING THE SELECTED TIME PERIOD.

(ii) FOR AN EMISSIONS UNIT THAT HAS NOT BEGUN NORMAL OPERATIONS ON THE PARTICULAR DATE, ACTUAL EMISSIONS EQUAL THE POTENTIAL TO EMIT OF THE UNIT ON THAT DATE.

ACTUAL PAL FOR A MAJOR FACILITY—A PAL BASED ON THE BASELINE ACTUAL EMISSIONS OF ALL EMISSIONS UNITS AT A MAJOR FACILITY THAT EMIT OR HAVE THE POTENTIAL TO EMIT THE PAL POLLUTANT.

* * * * *

AIR CONTAMINATION SOURCE—ANY PLACE, FACILITY OR EQUIPMENT, STATIONARY OR MOBILE, AT, FROM OR BY REASON OF WHICH THERE IS EMITTED INTO THE OUTDOOR ATMOSPHERE ANY AIR CONTAMINANT.

* * * * *

ALLOWABLE EMISSIONS—THE EMISSIONS RATE OF A FACILITY CALCULATED USING THE MAXIMUM RATED CAPACITY OF THE FACILITY UNLESS THE FACILITY IS SUBJECT TO FEDERALLY ENFORCEABLE LIMITS WHICH RESTRICT THE OPERATING RATE, OR HOURS OF OPERATION, OR BOTH, AND THE MOST STRINGENT OF THE FOLLOWING:

(i) THE APPLICABLE STANDARDS SET FORTH IN 40 CFR PART 60 (RELATING TO STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES) OR 40 CFR PART 61 (RELATING TO NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS).

(ii) AN APPLICABLE SIP EMISSIONS LIMITATION, INCLUDING THOSE WITH A FUTURE COMPLIANCE DATE.

(iii) THE EMISSIONS RATE SPECIFIED UNDER A REQUIREMENT OR CONDITION IN A PLAN APPROVAL OR OPERATING PERMIT THAT IS FEDERALLY ENFORCEABLE OR ENFORCEABLE AS A PRACTICAL MATTER, INCLUDING THOSE WITH A FUTURE COMPLIANCE DATE.

(iv) FOR PURPOSES OF THE PAL REQUIREMENTS IN § 127.218, THE ALLOWABLE EMISSIONS SHALL BE CALCULATED CONSIDERING THE

EMISSION LIMITATIONS THAT ARE ENFORCEABLE AS A PRACTICAL MATTER ON THE EMISSIONS UNIT'S POTENTIAL TO EMIT.

* * * * *

~~[BACT--Best Available Control Technology--An emissions limitation based on the maximum degree of reduction for each pollutant subject to regulation under the Clean Air Act emitted from or which results from a major emitting facility which the permitting authority, on a case-by-case basis, taking into account energy, environmental and economic impacts and other costs, determines is achievable for the facility through application of production processes and available methods, systems and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each pollutant. Application of BACT may not result in emissions of a pollutant which will exceed the emissions allowed by an applicable standard established under section 111 or 112 of the Clean Air Act (42 U.S.C.A. §§ 7411 and 7412). Emissions from a source utilizing clean fuels, or another means, to comply with BACT may not be allowed to increase above levels that would have been required under BACT as it existed prior to enactment of the Clean Air Act Amendments of 1990.]~~

BACT--BEST AVAILABLE CONTROL TECHNOLOGY--AN EMISSIONS LIMITATION (INCLUDING A VISIBLE EMISSIONS STANDARD) BASED ON THE MAXIMUM DEGREE OF REDUCTION FOR EACH REGULATED NSR POLLUTANT WHICH WOULD BE EMITTED FROM ANY PROPOSED MAJOR FACILITY OR MAJOR MODIFICATION WHICH THE DEPARTMENT, ON A CASE-BY-CASE BASIS, TAKING INTO ACCOUNT ENERGY, ENVIRONMENTAL AND ECONOMIC IMPACTS AND OTHER COSTS, DETERMINES IS ACHIEVABLE FOR THE FACILITY OR MODIFICATION THROUGH APPLICATION OF PRODUCTION PROCESSES OR AVAILABLE METHODS, SYSTEMS AND TECHNIQUES, INCLUDING FUEL CLEANING OR TREATMENT OR INNOVATIVE FUEL COMBUSTION TECHNIQUES FOR CONTROL OF THE POLLUTANT. IN NO EVENT SHALL APPLICATION OF BEST AVAILABLE CONTROL TECHNOLOGY RESULT IN EMISSIONS OF A POLLUTANT WHICH WOULD EXCEED THE EMISSIONS ALLOWED BY ANY APPLICABLE STANDARD UNDER 40 CFR PART 60 OR 61. IF THE DEPARTMENT DETERMINES THAT TECHNOLOGICAL OR ECONOMIC LIMITATIONS ON THE APPLICATION OF MEASUREMENT METHODOLOGY TO A PARTICULAR EMISSIONS UNIT WOULD MAKE THE IMPOSITION OF AN EMISSIONS STANDARD INFEASIBLE, A DESIGN, EQUIPMENT, WORK PRACTICE, OPERATIONAL STANDARD, OR COMBINATION THEREOF, MAY BE PRESCRIBED INSTEAD TO SATISFY THE REQUIREMENT FOR THE APPLICATION OF BACT. THE STANDARD SHALL, TO THE DEGREE POSSIBLE, SET FORTH THE EMISSIONS REDUCTION ACHIEVABLE BY IMPLEMENTATION OF THE DESIGN, EQUIPMENT, WORK PRACTICE OR OPERATION, AND SHALL PROVIDE FOR COMPLIANCE BY MEANS WHICH ACHIEVE EQUIVALENT RESULTS.

* * * * *

BASELINE ACTUAL EMISSIONS—THE RATE OF EMISSIONS, IN TPY, OF A REGULATED NSR POLLUTANT, AS DETERMINED IN ACCORDANCE WITH § 127.203a(a)(4) (RELATING TO APPLICABILITY DETERMINATION).

* * * * *

BEGIN ACTUAL CONSTRUCTION—INITIATION OF PHYSICAL ONSITE CONSTRUCTION ACTIVITIES ON AN EMISSIONS UNIT OR A FACILITY WHICH ARE OF A PERMANENT NATURE. THESE ACTIVITIES INCLUDE INSTALLATION OF BUILDING SUPPORTS AND FOUNDATIONS, LAYING OF UNDERGROUND PIPE WORK AND CONSTRUCTION OF PERMANENT STORAGE STRUCTURES. WITH RESPECT TO A CHANGE IN METHOD OF OPERATING, THIS TERM REFERS TO THOSE ONSITE ACTIVITIES OTHER THAN PREPARATORY ACTIVITIES WHICH MARK THE INITIATION OF THE CHANGE.

* * * * *

CEMS—CONTINUOUS EMISSIONS MONITORING SYSTEM— FOR PURPOSES OF 25 Pa. CODE CHAPTER 127, SUBCHAPTER E (RELATING TO NEW SOURCE REVIEW), ALL OF THE EQUIPMENT THAT MAY BE REQUIRED TO MEET THE DATA ACQUISITION AND AVAILABILITY REQUIREMENTS OF SUBCHAPTER E TO SAMPLE, CONDITION, ANALYZE AND PROVIDE A RECORD OF EMISSIONS ON A CONTINUOUS BASIS.

CERMS—CONTINUOUS EMISSIONS RATE MONITORING SYSTEM— FOR PURPOSES OF 25 Pa. CODE CHAPTER 127, SUBCHAPTER E (RELATING TO NEW SOURCE REVIEW), THE TOTAL EQUIPMENT REQUIRED FOR THE DETERMINATION AND RECORDING OF THE POLLUTANT MASS EMISSIONS RATE, IN TERMS OF MASS PER UNIT OF TIME.

* * * * *

CPMS—CONTINUOUS PARAMETER MONITORING SYSTEM—FOR PURPOSES OF 25 Pa. CODE CHAPTER 127, SUBCHAPTER E (RELATING TO NEW SOURCE REVIEW), ALL OF THE EQUIPMENT NECESSARY TO MEET THE DATA ACQUISITION AND AVAILABILITY REQUIREMENTS TO MONITOR PROCESS AND CONTROL DEVICE OPERATIONAL PARAMETERS (FOR EXAMPLE, CONTROL DEVICE SECONDARY VOLTAGES AND ELECTRIC CURRENTS), AND OTHER INFORMATION (FOR EXAMPLE, GAS FLOW RATE, O₂ OR CO₂ CONCENTRATIONS), AND TO RECORD AVERAGE OPERATIONAL PARAMETER VALUES ON A CONTINUOUS BASIS.

* * * * *

COMMENCE—AS APPLIED TO THE CONSTRUCTION, MODIFICATION, OR INSTALLATION OF AN AIR CONTAMINATION SOURCE OR FACILITY,

THE OWNER OR OPERATOR HAS ALL NECESSARY APPROVALS INCLUDING PLAN APPROVALS OR PERMITS AND HAS EITHER:

(i) BEGUN, OR CAUSED TO BEGIN, A CONTINUOUS PROGRAM OF ACTUAL ONSITE CONSTRUCTION OF THE FACILITY, TO BE COMPLETED WITHIN A REASONABLE TIME.

(ii) ENTERED INTO BINDING AGREEMENTS OR CONTRACTUAL OBLIGATIONS, WHICH CANNOT BE CANCELED OR MODIFIED WITHOUT SUBSTANTIAL LOSS TO THE OWNER OR OPERATOR, TO UNDERTAKE A PROGRAM OF ACTUAL CONSTRUCTION OF THE SOURCE TO BE COMPLETED WITHIN A REASONABLE TIME.

* * * * *

[*Creation*—The process of generating usable and tradable ERCs to be used to offset emissions. This process includes the following steps: application, documentation, quantification, verification and entry in the registry.]

CREATION—THE PROCESS OF GENERATING USABLE AND TRADABLE ERCS TO BE USED TO OFFSET EMISSIONS. THIS PROCESS INCLUDES THE FOLLOWING ELEMENTS:

(i) APPLICATION.

(ii) DOCUMENTATION.

(iii) QUANTIFICATION.

(iv) VERIFICATION.

(v) ENTRY INTO THE REGISTRY.

CREDITABLE EMISSIONS DECREASE—EMISSION CHANGES AT AN EXISTING MAJOR FACILITY AS DETERMINED IN ACCORDANCE WITH THE REQUIREMENTS OF § 127.203a(a)(3).

* * * * *

DEACTIVATION—CESSATION OF THE EMISSIONS OF AN AIR POLLUTANT FROM AIR CONTAMINATION SOURCE, EMISSIONS UNIT OR FACILITY.

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[*De minimis emission increase*—An increase in actual or potential emissions which is below the threshold limits specified in § 127.203 (relating to facilities subject to special permit requirements).]

DE MINIMIS EMISSIONS INCREASE--FOR PURPOSES OF 25 Pa. CODE CHAPTER 127, SUBCHAPTER E (RELATING TO NEW SOURCE REVIEW), AN INCREASE IN EMISSIONS CALCULATED IN ACCORDANCE WITH THE REQUIREMENTS OF § 127.203a(a)(1)(i) WHICH IS LESS THAN THE EMISSIONS RATE THAT IS SIGNIFICANT AS DEFINED IN THIS SECTION.

* * * * *

ELECTRIC UTILITY STEAM GENERATING UNIT--FOR PURPOSES OF THE NSR REQUIREMENTS IN 25 Pa. CODE CHAPTER 127, SUBCHAPTER E (RELATING TO NEW SOURCE REVIEW), A STEAM ELECTRIC GENERATING UNIT THAT IS CONSTRUCTED FOR THE PURPOSE OF SUPPLYING MORE THAN ONE-THIRD OF ITS POTENTIAL ELECTRIC OUTPUT CAPACITY AND MORE THAN 25 MW ELECTRICAL OUTPUT TO A UTILITY POWER DISTRIBUTION SYSTEM FOR SALE. STEAM SUPPLIED TO A STEAM DISTRIBUTION SYSTEM FOR THE PURPOSE OF PROVIDING STEAM TO A STEAM-ELECTRIC GENERATOR THAT WOULD PRODUCE ELECTRICAL ENERGY FOR SALE IS ALSO CONSIDERED IN DETERMINING THE ELECTRICAL ENERGY OUTPUT CAPACITY OF THE AFFECTED FACILITY.

* * * * *

EMISSIONS UNIT--FOR PURPOSES OF 25 Pa. CODE CHAPTER 127, SUBCHAPTER E (RELATING TO NEW SOURCE REVIEW), A PART OF A FACILITY THAT EMITS OR HAS THE POTENTIAL TO EMIT A REGULATED NSR POLLUTANT INCLUDING AN ELECTRIC UTILITY STEAM GENERATING UNIT AS DEFINED IN THIS SECTION. FOR THE PURPOSES OF NSR REQUIREMENTS, THERE ARE TWO TYPES OF EMISSIONS UNITS:

(i) A NEW EMISSIONS UNIT, WHICH IS OR WILL BE NEWLY CONSTRUCTED AND WHICH HAS EXISTED FOR LESS THAN 2 YEARS FROM THE DATE THE EMISSIONS UNIT FIRST OPERATED.

(ii) AN EXISTING EMISSIONS UNIT IS AN EMISSIONS UNIT THAT DOES NOT MEET THE REQUIREMENTS IN PARAGRAPH (i) OF THIS DEFINITION. A REPLACEMENT UNIT, AS DEFINED IN THIS SECTION, IS AN EXISTING EMISSIONS UNIT.

* * * * *

~~[Extreme ozone nonattainment area—A region with an ozone design value of 0.280 ppm and greater as designated by the Administrator of the EPA. A designation is based on data from the 3-year period of 1987—1989 and may not be changed until the region demonstrates attainment of the NAAQS in section 181 of the Clean Air Act (42 U.S.C.A. § 7511).]~~

* * * * *

FEDERALLY ENFORCEABLE--ALL LIMITATIONS AND CONDITIONS WHICH ARE ENFORCEABLE BY THE EPA, INCLUDING:

(i) THOSE REQUIREMENTS DEVELOPED UNDER 40 CFR PARTS 60 AND 61 (RELATING TO STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES; AND NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS).

(ii) THOSE REQUIREMENTS WITHIN AN APPLICABLE SIP.

(iii) PLAN APPROVAL OR OPERATING PERMIT REQUIREMENTS ESTABLISHED UNDER 40 CFR 52.21 (RELATING TO PREVENTION OF SIGNIFICANT DETERIORATION OF AIR QUALITY) OR UNDER REGULATIONS APPROVED UNDER 40 CFR PART 51, SUBPART I (RELATING TO REVIEW OF NEW SOURCES AND MODIFICATIONS), INCLUDING PLAN APPROVALS OR OPERATING PERMITS ISSUED UNDER AN EPA-APPROVED PROGRAM THAT IS INCORPORATED INTO THE SIP AND EXPRESSLY REQUIRES ADHERENCE TO A PERMIT ISSUED UNDER THE PROGRAM.

* * * * *

FUGITIVE EMISSIONS-- FOR PURPOSES OF 25 Pa. CODE CHAPTER 127, (RELATING TO CONSTRUCTION, MODIFICATION, REACTIVATION AND OPERATATION OF SOURCES), THOSE EMISSIONS WHICH COULD NOT REASONABLY PASS THROUGH A STACK, CHIMNEY, VENT OR OTHER FUNCTIONALLY EQUIVALENT OPENING.

* * * * *

[Generation--An action taken by a source or facility that results in the actual reduction of emissions.]

GENERATION--WITH RESPECT TO ERCs, AN ACTION TAKEN BY AN OWNER OR OPERATOR OF AN AIR CONTAMINATION SOURCE, EMISSIONS UNIT OR FACILITY THAT RESULTS IN THE ACTUAL REDUCTION OF EMISSIONS.

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MAJOR EMISSIONS UNIT-- FOR PURPOSES OF 25 Pa. CODE § 127.218, (RELATING TO PALs), AN EMISSIONS UNIT THAT EMITS OR HAS THE POTENTIAL TO EMIT THE PAL POLLUTANT IN AN AMOUNT THAT IS EQUAL TO OR GREATER THAN THE MAJOR FACILITY THRESHOLD AS DEFINED IN THIS SECTION FOR THE PAL POLLUTANT.

[*Major facility*--A facility which has the potential to emit a pollutant equal to or greater than an applicable annual emissions rate in § 127.203.]

MAJOR FACILITY--

(i) A FACILITY WHICH EMITS OR HAS THE POTENTIAL TO EMIT ONE HUNDRED TPY OR MORE OF A REGULATED NSR POLLUTANT, EXCEPT THAT LOWER EMISSIONS THRESHOLDS APPLY AS FOLLOWS:

(A) FIFTY TPY OF VOCs IN A SERIOUS NONATTAINMENT AREA FOR OZONE.

(B) FIFTY TPY OF VOCs IN AN AREA WITHIN AN OZONE TRANSPORT REGION EXCEPT FOR A SEVERE OR EXTREME NONATTAINMENT AREA FOR OZONE.

(C) TWENTY-FIVE TPY OF VOCs IN A SEVERE NONATTAINMENT AREA FOR OZONE.

(D) TEN TPY OF VOCs IN AN EXTREME NONATTAINMENT AREA FOR OZONE.

(E) SEVENTY TPY OF PM-10 IN A SERIOUS NONATTAINMENT AREA FOR PM-10.

(F) FIFTY TPY OF CO IN A SERIOUS NONATTAINMENT AREA FOR CO.

(ii) FOR THE PURPOSES OF APPLYING THE REQUIREMENTS OF SUBCHAPTER E TO THE OWNER OR OPERATOR OF A FACILITY LOCATED IN AN OZONE NONATTAINMENT AREA OR IN AN OZONE TRANSPORT REGION WHICH EMITS OR HAS THE POTENTIAL TO EMIT NO_x, AS FOLLOWS:

(A) ONE HUNDRED TPY OR MORE OF NO_x IN AN OZONE NONATTAINMENT AREA CLASSIFIED AS MARGINAL, BASIC OR MODERATE.

(B) ONE HUNDRED TPY OR MORE OF NO_x IN AN OZONE NONATTAINMENT AREA CLASSIFIED AS A TRANSITIONAL, SUBMARGINAL, OR INCOMPLETE OR NO DATA AREA, WHEN THE AREA IS LOCATED IN AN OZONE TRANSPORT REGION.

(C) ONE HUNDRED TPY OR MORE OF NO_x IN AN AREA DESIGNATED UNDER SECTION 107(D) OF THE CLEAN AIR ACT (42 U.S.C.A. § 7407(D)) AS ATTAINMENT OR UNCLASSIFIABLE FOR OZONE THAT IS LOCATED IN AN OZONE TRANSPORT REGION.

(D) FIFTY TPY OR MORE OF NO_x IN A SERIOUS NONATTAINMENT AREA FOR OZONE.

(E) TWENTY-FIVE TPY OR MORE OF NO_x IN A SEVERE NONATTAINMENT AREA FOR OZONE.

(F) TEN TPY OR MORE OF NO_x IN AN EXTREME NONATTAINMENT AREA FOR OZONE.

(iii) A PHYSICAL CHANGE THAT OCCURS AT A FACILITY WHICH DOES NOT EXCEED THE MAJOR FACILITY THRESHOLDS SPECIFIED IN SUBCHAPTER E IS CONSIDERED A MAJOR FACILITY IF THE CHANGE CONSTITUTES A MAJOR FACILITY BY ITSELF.

(iv) A FACILITY WHICH IS MAJOR FOR VOCs OR NO_x IS CONSIDERED MAJOR FOR OZONE.

(v) NOTWITHSTANDING THE PROVISIONS UNDER CLAUSES (i) and (ii), A FACILITY WHICH EMITS OR HAS THE POTENTIAL TO EMIT 25 TPY OR MORE OF NO_x OR VOC AND IS LOCATED IN BUCKS, CHESTER, DELAWARE, MONTGOMERY OR PHILADELPHIA COUNTIES.

[Major modification--

(i) A physical change or change in the method of operation of a major facility that would result in an increase in emissions equal to or exceeding an emission rate threshold or significance level specified in § 127.203.

(ii) A net emissions increase that is significant for VOCs or NO_x will be considered significant for ozone.

(iii) A physical change or change in the method of operation does not include:

(A) Routine maintenance, repair and replacement.

(B) The use of an alternative fuel or raw material by reason of any order under section 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (ESECA) (15 U.S.C.A. § 79(a) and (b)) (or any superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act (16 U.S.C.A. §§ 792--825r).

(C) The use of an alternative fuel by reason of an order or rule under section 125 of the Clean Air Act (42 U.S.C.A. § 7425).

(D) The use of an alternative fuel or raw material by a stationary source which meets one of the following conditions:

(I) The source was capable of accommodating before January 6, 1975, unless the change would be prohibited under an operating permit condition.

(II) The source is approved to use under an operating permit.

(E) An increase in the hours of operation or in the production rate, authorized under the conditions of an operating permit.

(F) Any change in ownership at a stationary source.

(G) The addition, replacement or use of a pollution control project at an existing source, unless the Department determines that the addition, replacement or use renders the source less environmentally beneficial, or except when the following apply:

(I) The Department has reason to believe that the pollution control project would result in a significant net increase in representative actual annual emission of any criteria pollutant, VOC or NO_x over levels used for that facility in the most recent air quality impact analysis in the area conducted for the purpose of Title I of the Clean Air Act, if any (42 U.S.C.A. §§ 7401--7515).

(II) The Department determines that the increase will cause or contribute to a violation of any National ambient air quality standard or PSD increment, or visibility limitation.

(H) The installation, operation, cessation or removal of a temporary clean coal technology demonstration project, if the project complies with the following:

(I) The SIP.

(II) Other requirements necessary to attain and maintain the National ambient air quality standards during the project and after it is terminated.

(I) The installation or operation of a permanent clean coal technology demonstration project that constitutes repowering, if the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the source. This exemption applies on a pollutant-by-pollutant basis.

(J) The reactivation of a very clean coal-fired electric utility system generating source.]

MAJOR MODIFICATION--

(i) A PHYSICAL CHANGE IN OR CHANGE IN THE METHOD OF OPERATION OF A MAJOR FACILITY THAT WOULD RESULT IN THE FOLLOWING:

(A) A SIGNIFICANT EMISSIONS INCREASE OF A REGULATED NSR POLLUTANT.

(B) A SIGNIFICANT NET EMISSIONS INCREASE OF THAT POLLUTANT FROM THE MAJOR FACILITY.

(ii) A PROPOSED DE MINIMIS INCREASE THAT WOULD RESULT IN A NET EMISSIONS INCREASE AS DETERMINED UNDER SUBCHAPTER E THAT MEETS OR EXCEEDS THE APPLICABLE EMISSIONS RATE THAT IS SIGNIFICANT.

(iii) A SIGNIFICANT EMISSIONS INCREASE FROM AN EMISSIONS UNIT OR A NET EMISSIONS INCREASE AT A MAJOR FACILITY THAT IS SIGNIFICANT FOR VOCS OR NO_x IS CONSIDERED SIGNIFICANT FOR OZONE.

(iv) A PHYSICAL CHANGE IN OR CHANGE IN THE METHOD OF OPERATION OF A MAJOR FACILITY DOES NOT INCLUDE:

(A) ROUTINE MAINTENANCE, REPAIR AND REPLACEMENT.

(B) THE USE OF AN ALTERNATIVE FUEL OR RAW MATERIAL BY REASON OF AN ORDER UNDER SECTION 2(a) AND (b) OF THE ENERGY SUPPLY AND ENVIRONMENTAL COORDINATION ACT OF 1974 (ESECA) (15 U.S.C.A. § 79(a) AND (b)) (OR SUPERSEDING LEGISLATION) OR BY REASON OF A NATURAL GAS CURTAILMENT PLAN UNDER THE FEDERAL POWER ACT (16 U.S.C.A. §§ 792--825r).

(C) THE USE OF AN ALTERNATIVE FUEL BY REASON OF AN ORDER OR RULE UNDER SECTION 125 OF THE CLEAN AIR ACT (42 U.S.C.A. § 7425).

(D) THE USE OF AN ALTERNATIVE FUEL AT A STEAM GENERATING UNIT TO THE EXTENT THAT THE FUEL IS GENERATED FROM MUNICIPAL SOLID WASTE.

(E) THE USE OF AN ALTERNATIVE FUEL OR RAW MATERIAL BY A FACILITY WHICH MEETS ONE OF THE FOLLOWING CONDITIONS:

(I) THE FACILITY WAS CAPABLE OF ACCOMMODATING THE FUEL BEFORE JANUARY 6, 1975, UNLESS THE CHANGE WOULD BE PROHIBITED UNDER A FEDERALLY ENFORCEABLE OPERATING PERMIT CONDITION.

(II) THE FACILITY IS APPROVED TO USE THE FUEL OR MATERIAL UNDER A FEDERALLY ENFORCEABLE OPERATING PERMIT.

(F) AN INCREASE IN THE HOURS OF OPERATION OR IN THE PRODUCTION RATE, UNLESS THE CHANGE IS PROHIBITED UNDER A CONDITION OF A FEDERALLY ENFORCEABLE PLAN APPROVAL OR AN OPERATING PERMIT.

(G) A CHANGE IN OWNERSHIP OF A FACILITY.

(v) THE TERM DOES NOT APPLY TO A PARTICULAR REGULATED NSR POLLUTANT WHEN THE MAJOR FACILITY IS COMPLYING WITH THE REQUIREMENTS UNDER § 127.218 (RELATING TO PALs). INSTEAD, THE DEFINITION OF PAL MAJOR MODIFICATION APPLIES.

Major NO_x emitting facility--A facility which emits or has the potential to emit NO_x from the processes located at the site or on contiguous properties under the common control of the same person at a rate greater than one of the following:

* * * * *

(v) ~~[25 tpy or more of NO_x]~~ TWENTY-FIVE TONS PER YEAR and is located in Bucks, Chester, Delaware, Montgomery or Philadelphia County.

Major VOC emitting facility--A facility which emits or has the potential to emit VOCs from processes located at the site or on contiguous properties under the common control of the same person at a rate greater than one of the following:

* * * * *

(iv) ~~[25 tpy or more of VOC]~~ TWENTY-FIVE TONS PER YEAR and is located in Bucks, Chester, Delaware, Montgomery or Philadelphia County.

* * * * *

~~*[Marginal ozone nonattainment area*—A region with an ozone design value greater than or equal to 0.121 but less than 0.138 ppm as designated by the Administrator of the EPA. A designation is based on data from the 3-year period of 1987—1989 and may not be changed until the region demonstrates attainment of the NAAQS except in accordance with section 181 of the Clean Air Act.]~~

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~~*[Moderate ozone nonattainment area*—A region with an ozone design value greater than or equal to 0.138 but less than 0.160 ppm as designated by the Administrator of the EPA. A designation is based on data from the 3-year period of 1987—1989 and may not be changed until the region demonstrates attainment of the NAAQS except in accordance with section 181 of the Clean Air Act.]~~

* * * * *

NECESSARY PRECONSTRUCTION APPROVALS OR PERMITS--THOSE PERMITS OR APPROVALS REQUIRED UNDER THE CLEAN AIR ACT OR THE ACT AND REGULATIONS ADOPTED UNDER THE ACTS, WHICH ARE PART OF THE APPLICABLE SIP.

NET EMISSIONS INCREASE--EMISSION CHANGES AT AN EXISTING MAJOR FACILITY AS DETERMINED IN ACCORDANCE WITH THE REQUIREMENTS OF § 127.203a(a)(1).

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PAL--PLANTWIDE APPLICABILITY LIMIT--AN EMISSIONS LIMIT EXPRESSED IN TPY, FOR A POLLUTANT AT A MAJOR FACILITY, THAT IS ENFORCEABLE AS A PRACTICAL MATTER AND ESTABLISHED FACILITY-WIDE IN ACCORDANCE WITH § 127.218.

PAL EFFECTIVE DATE--THE DATE OF ISSUANCE OF THE PAL PERMIT. THE PAL EFFECTIVE DATE FOR AN INCREASED PAL IS THE DATE AN EMISSIONS UNIT WHICH IS PART OF THE PAL MAJOR MODIFICATION BECOMES OPERATIONAL AND BEGINS TO EMIT THE PAL POLLUTANT.

PAL EFFECTIVE PERIOD--THE PERIOD BEGINNING WITH THE PAL EFFECTIVE DATE AND ENDING 10 YEARS LATER.

PAL MAJOR MODIFICATION--NOTWITHSTANDING THE DEFINITIONS UNDER THIS SECTION FOR MAJOR MODIFICATION AND NET EMISSIONS INCREASE, A PHYSICAL CHANGE IN OR CHANGE IN THE METHOD OF OPERATION OF THE FACILITY THAT CAUSES THE FACILITY TO EMIT THE PAL POLLUTANT AT A LEVEL EQUAL TO OR GREATER THAN THE PAL.

PAL PERMIT--THE PLAN APPROVAL, OPERATING PERMIT OR TITLE V PERMIT ISSUED BY THE DEPARTMENT THAT ESTABLISHES A PAL FOR A MAJOR FACILITY.

PAL POLLUTANT--THE POLLUTANT FOR WHICH A PAL IS ESTABLISHED FOR A MAJOR FACILITY.

PEMS--PREDICTIVE EMISSIONS MONITORING SYSTEM--FOR PURPOSES OF 25 Pa. CODE CHAPTER 127, SUBCHAPTER E (RELATING TO NEW SOURCE REVIEW), ALL OF THE EQUIPMENT NECESSARY TO MONITOR PROCESS AND CONTROL DEVICE OPERATIONAL PARAMETERS INCLUDING CONTROL DEVICE SECONDARY VOLTAGES AND ELECTRIC CURRENTS, OTHER INFORMATION INCLUDING GAS FLOW RATE, O₂ OR CO₂ CONCENTRATIONS, AND CALCULATE AND RECORD THE MASS EMISSIONS RATE IN TERMS OF MASS PER UNIT TIME, LIKE LB/HR, ON A CONTINUOUS BASIS.

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~~[PM-10 precursor—Particulate matter with any effective aerodynamic diameter which may result in the formation of PM-10.]~~

* * * * *

PROJECT—A PHYSICAL CHANGE IN OR CHANGE IN THE METHOD OF OPERATION OF AN EXISTING FACILITY, INCLUDING A NEW EMISSIONS UNIT.

PROJECTED ACTUAL EMISSIONS—THE MAXIMUM ANNUAL RATE IN TPY AT WHICH AN EXISTING EMISSIONS UNIT IS PROJECTED TO EMIT A REGULATED NSR POLLUTANT, AS DETERMINED IN ACCORDANCE WITH THE REQUIREMENTS OF § 127.203a(a)(5).

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REGULATED NSR POLLUTANT—

(i) NO_x OR VOCs.

(ii) A POLLUTANT FOR WHICH EPA HAS PROMULGATED A NAAQS.

(iii) A POLLUTANT THAT IS A CONSTITUENT OR PRECURSOR OF A POLLUTANT LISTED UNDER SUBPARAGRAPH (i) OR (ii), IF THE CONSTITUENT OR PRECURSOR POLLUTANT MAY ONLY BE REGULATED UNDER NSR AS PART OF REGULATION OF THE POLLUTANT LISTED UNDER SUBPARAGRAPH (i) OR (ii).

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REPLACEMENT UNIT—AN EMISSIONS UNIT FOR WHICH ALL THE CRITERIA LISTED IN SUBPARAGRAPHS (i) THROUGH (iv) OF THIS DEFINITION ARE MET. NO CREDITABLE EMISSION REDUCTIONS SHALL BE GENERATED FROM SHUTTING DOWN THE EXISTING EMISSIONS UNIT THAT IS REPLACED.

(i) THE EMISSIONS UNIT IS A RECONSTRUCTED UNIT IF THE FIXED CAPITAL COST OF THE NEW COMPONENTS EXCEEDS 50% OF THE FIXED CAPITAL COST THAT WOULD BE REQUIRED TO CONSTRUCT A COMPARABLE, ENTIRELY NEW EMISSIONS UNIT, OR THE EMISSIONS UNIT COMPLETELY TAKES THE PLACE OF AN EXISTING EMISSIONS UNIT.

(ii) THE EMISSIONS UNIT IS IDENTICAL TO OR FUNCTIONALLY EQUIVALENT TO THE REPLACED EMISSIONS UNIT.

(iii) THE REPLACEMENT UNIT DOES NOT ALTER THE BASIC DESIGN PARAMETERS OF THE PROCESS UNIT.

(iv) THE REPLACED EMISSIONS UNIT IS PERMANENTLY REMOVED FROM THE MAJOR FACILITY, OTHERWISE PERMANENTLY DISABLED, OR PERMANENTLY BARRED FROM OPERATION BY A PERMIT THAT IS ENFORCEABLE AS A PRACTICAL MATTER. IF THE REPLACED EMISSIONS UNIT IS BROUGHT BACK INTO OPERATION, IT SHALL CONSTITUTE A NEW EMISSIONS UNIT.

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[*Secondary emissions*—Emissions which occur as a result of the construction or operation of a major stationary source or major modification of a major stationary source, but do not come from the major stationary source or facility or major modification itself. The secondary emissions shall be specific, well defined, quantifiable and impact the same general area as the stationary source or modification which causes secondary emissions. The term includes emissions from an offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major stationary source or major modification. The term does not include emissions which come directly from a mobile source regulated under Title II of the Clean Air Act (42 U.S.C.A. §§ 7521–7589).]

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SECONDARY EMISSIONS—

(i) EMISSIONS WHICH OCCUR AS A RESULT OF THE CONSTRUCTION OR OPERATION OF A MAJOR FACILITY OR MAJOR MODIFICATION OF A MAJOR FACILITY, BUT DO NOT COME FROM THE MAJOR FACILITY OR MAJOR MODIFICATION ITSELF. THE SECONDARY EMISSIONS MUST BE SPECIFIC, WELL DEFINED, QUANTIFIABLE AND IMPACT THE SAME GENERAL AREA AS THE FACILITY OR MODIFICATION WHICH CAUSES THE SECONDARY EMISSIONS.

(ii) THE TERM INCLUDES EMISSIONS FROM AN OFFSITE SUPPORT FACILITY WHICH WOULD NOT BE CONSTRUCTED OR INCREASE ITS EMISSIONS EXCEPT AS A RESULT OF THE CONSTRUCTION OR OPERATION OF THE MAJOR FACILITY OR MAJOR MODIFICATION.

(iii) THE TERM DOES NOT INCLUDE EMISSIONS WHICH COME DIRECTLY FROM A MOBILE SOURCE REGULATED UNDER TITLE II OF THE CLEAN AIR ACT (42 U.S.C.A. §§ 7521--7589).

* * * * *

~~[Serious ozone nonattainment area—A region with an ozone design value greater than or equal to 0.160 but less than 0.180 ppm as designated by the Administrator of the EPA. A designation is based on data from the 3-year period of 1987—1989 and may not be changed until the region demonstrates attainment of the NAAQS except in accordance with section 181 of the Clean Air Act.]~~

~~[Severe ozone nonattainment area—A region with an ozone design value greater than or equal to 0.180 but less than 0.280 ppm as designated by the Administrator of the EPA. A designation is based on data from the 3-year period of 1987—1989 and may not be changed until the region demonstrates attainment of the NAAQS except in accordance with section 181 of the Clean Air Act.]~~

SIGNIFICANT—

(i) IN REFERENCE TO A NET EMISSIONS INCREASE OR THE POTENTIAL OF A FACILITY TO EMIT ONE OF THE FOLLOWING POLLUTANTS AT A RATE OF EMISSIONS THAT WOULD EQUAL OR EXCEED THE FOLLOWING EMISSIONS RATES EXCEPT AS SPECIFIED IN SUBPARAGRAPHS (ii)-(v):

<u>POLLUTANT</u>	<u>EMISSIONS RATE</u>
<u>CARBON MONOXIDE (CO):</u>	<u>100 TPY</u>
<u>NITROGEN OXIDES (NO_x):</u>	<u>40 TPY</u>
<u>SULFUR OXIDES (SO_x):</u>	<u>40 TPY</u>
<u>OZONE:</u>	<u>40 TPY OF VOCs OR NO_x</u>
<u>LEAD:</u>	<u>0.6 TPY</u>
<u>PM-10:</u>	<u>15 TPY</u>

(ii) THE EMISSIONS RATE THAT IS SIGNIFICANT FOR VOCs IN A SERIOUS OR SEVERE OZONE NONATTAINMENT AREA IS 25 TPY.

(iii) FOR PURPOSES OF APPLYING THE REQUIREMENTS OF 25 Pa. CODE CHAPTER 127, SUBCHAPTER E (RELATING TO NEW SOURCE REVIEW) TO THE OWNER OR OPERATOR OF MODIFICATIONS AT A MAJOR FACILITY LOCATED IN AN OZONE NONATTAINMENT AREA OR IN AN OZONE TRANSPORT REGION THAT EMITS OR HAS THE POTENTIAL TO EMIT NO_x, THE EMISSIONS RATE THAT IS SIGNIFICANT AND OTHER REQUIREMENTS FOR VOCs IN SUBPARAGRAPHS (i) AND (ii) SHALL APPLY TO NO_x EMISSIONS.

(iv) THE EMISSIONS RATE THAT IS SIGNIFICANT FOR CO IN A SERIOUS NONATTAINMENT AREA IS 50 TPY IF THE EPA HAS

DETERMINED THAT THE AFFECTED FACILITY CONTRIBUTES SIGNIFICANTLY TO CO LEVELS IN THAT AREA.

(v) THE EMISSIONS RATE THAT IS SIGNIFICANT FOR VOCs IN AN EXTREME NONATTAINMENT AREA FOR OZONE IS ANY AMOUNT ABOVE ZERO.

SIGNIFICANT EMISSIONS INCREASE-- FOR A REGULATED NSR POLLUTANT, AN INCREASE IN EMISSIONS THAT IS SIGNIFICANT AS DEFINED IN THIS SECTION FOR THAT POLLUTANT.

SIGNIFICANT EMISSIONS UNIT--FOR PURPOSES OF THE PAL REQUIREMENTS IN 25 Pa. CODE § 127.218 (RELATING TO PALs), AN EMISSIONS UNIT THAT EMITS OR HAS THE POTENTIAL TO EMIT A PAL POLLUTANT IN AN AMOUNT THAT IS EQUAL TO OR GREATER THAN THE EMISSIONS RATE THAT IS SIGNIFICANT AS DEFINED IN THIS SECTION OR IN THE CLEAN AIR ACT FOR THAT PAL POLLUTANT, WHICHEVER IS LOWER, BUT LESS THAN THE AMOUNT THAT WOULD QUALIFY THE UNIT AS A MAJOR FACILITY AS DEFINED IN THIS SECTION.

SIGNIFICANT NET EMISSIONS INCREASE--FOR A REGULATED NSR POLLUTANT, A NET EMISSIONS INCREASE THAT IS SIGNIFICANT AS DEFINED IN THIS SECTION.

* * * * *

SMALL EMISSIONS UNIT--FOR PURPOSES OF THE PAL REQUIREMENTS IN 25 Pa. CODE § 127.218 (RELATING TO PALs), AN EMISSIONS UNIT THAT EMITS OR HAS THE POTENTIAL TO EMIT THE PAL POLLUTANT IN AN AMOUNT LESS THAN THE EMISSIONS RATE THAT IS SIGNIFICANT FOR THAT PAL POLLUTANT AS DEFINED IN THIS SECTION OR IN THE CLEAN AIR ACT, WHICHEVER IS LOWER.

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CHAPTER 127. CONSTRUCTION, MODIFICATION, REACTIVATION AND OPERATION OF SOURCES

Subchapter B. PLAN APPROVAL REQUIREMENTS

§ 127.13. Extensions

* * * * *

(b) If the construction, modification, or installation is not commenced within 18 months of the issuance of the plan approval or if there is more than an 18-month lapse in construction, modification, or installation, a new plan approval application that meets the

requirements of this subchapter and Subchapters D and E (relating to prevention of significant deterioration of air quality; and new source review) shall be submitted. **THE DEPARTMENT MAY EXTEND THE 18-MONTH PERIOD UPON A SATISFACTORY SHOWING THAT AN EXTENSION IS JUSTIFIED.**

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Subchapter E. NEW SOURCE REVIEW

§ 127.201. General requirements.

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(c) The new source review requirements of this subchapter also apply to a facility located in an attainment area for ozone and within an ozone transport region that emits or has the potential to emit at least 50 ~~[tons per year]~~TPY of VOC or 100 ~~[tons per year]~~TPY of NO_x. A facility within either an unclassifiable/attainment area for ozone or within a marginal or incomplete data nonattainment area for ozone **or within a basic nonattainment area for ozone** and located within an ozone transport region will be considered a major [stationary] facility and shall be subject to the requirements applicable to a major [stationary] facility located in a moderate nonattainment area.

(d) The NSR requirements of this subchapter apply to an owner or operator of a facility at which a net emissions increase that is significant would occur as determined in accordance with § 127.203a (relating to applicability determination). If an emissions increase meets or exceeds the applicable emissions rate that is significant as defined in § [127.201a]121.1 (relating to definitions), the facility is subject to the permitting requirements under § 127.205 (relating to special permit requirements). An emissions increase subject to this subchapter must also be offset through the use of ERCs at the offset ratios specified in § 127.210 (relating to offset ratios). The generation, use, transfer and registration requirements for ERCs are listed in §§ 127.206--127.209.

(e) In the event of an inconsistency between this rule and any other rule promulgated by the Department, the inconsistency must be resolved by the application of the more stringent provision, term, condition, method or rule.

(f) A facility located in Bucks, Chester, Delaware, Montgomery or Philadelphia Counties that emits or has the potential to emit at least 25 tpy of VOC or NO_x will be considered a major facility and shall be subject to the requirements applicable to a major facility located in a severe nonattainment area for ozone.

[§ 127.201a. Definitions:

The definitions in section 3 of the act (35 P. S. § 4003) and Chapter 121 (relating to general provisions) apply to this subchapter unless otherwise indicated. In

addition, the following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

~~Actual emissions~~—The actual rate of emissions of a regulated NSR pollutant from an emissions unit, as determined in accordance with the following:

~~(i) Actual emissions as of a particular date must equal the average rate, in tons per year, at which the unit actually emitted the pollutant during the consecutive 2-year period which immediately precedes the particular date and which is representative of normal source operations. The Department will allow the use of a different time period upon a written determination that it is more representative of normal source operation. Actual emissions shall be calculated using the unit's actual operating hours, production rates and types of materials processed, stored or combusted during the selected time period.~~

~~(ii) For an emissions unit that has not begun normal operations on the particular date, actual emissions equal the potential to emit of the unit on that date.~~

~~Actual PAL for a major facility~~—A PAL based on the baseline actual emissions of all emissions units at a major facility that emit or have the potential to emit the PAL pollutant.

~~Allowable emissions~~—The emissions rate of a source calculated using the maximum rated capacity of the source unless the source is subject to Federally enforceable limits which restrict the operating rate, or hours of operation, or both, and the most stringent of the following:

~~(i) The applicable standards set forth in 40 CFR Part 60 or Part 61 (relating to standards of performance for new stationary sources; and National emission standards for hazardous air pollutants);~~

~~(ii) An applicable SIP emissions limitation, including those with a future compliance date;~~

~~(iii) The emissions rate specified under a requirement or permit condition that is Federally enforceable or enforceable as a practical matter, including those with a future compliance date.~~

~~Baseline actual emissions~~—The rate of emissions, in tpy, of a regulated NSR pollutant, as determined in accordance with § 127.203a(a)(5) (relating to applicability determination);

~~Begin actual construction~~—Initiation of physical onsite construction activities on an emissions unit which are of a permanent nature. These activities include installation of building supports and foundations, laying of underground pipe work and construction of permanent storage structures. With respect to a change in method of operating, this term refers to those onsite activities other than preparatory activities which mark the initiation of the change.

~~— **CEMS—Continuous emissions monitoring system—All of the equipment that may be required to meet the data acquisition and availability requirements of this subchapter, to sample, condition, analyze and provide a record of emissions on a continuous basis.**~~

~~— **CERMS—Continuous emissions rate monitoring system—The total equipment required for the determination and recording of the pollutant mass emissions rate, in terms of mass per unit of time.**~~

~~— **CPMS—Continuous parameter monitoring system—All of the equipment necessary to meet the data acquisition and availability requirements to monitor process and control device operational parameters including control device secondary voltages and electric currents, other information like gas flow rate and O₂ or CO₂ concentrations, and to record average operational parameter values on a continuous basis.**~~

~~— **Calendar year emissions—The rate of emissions of an NSR pollutant, in tpy, from an emissions unit during a calendar year.**~~

~~— **Commence construction—The owner or operator of a major facility has all necessary approvals or permits including plan approval and has either:**~~

~~— **(i) Begun, or caused to begin, a continuous program of actual onsite construction of the source, to be completed within a reasonable time.**~~

~~— **(ii) Entered into binding agreements or contractual obligations, which cannot be canceled or modified without substantial loss to the owner or operator, to undertake a program of actual construction of the source to be completed within a reasonable time.**~~

~~— **Creation—The process of generating usable and tradable ERCs to be used to offset emissions. This process includes the following elements:**~~

~~— **(i) Application.**~~

~~— **(ii) Documentation.**~~

~~— **(iii) Quantification.**~~

~~— **(iv) Verification.**~~

~~— **(v) Entry into the registry.**~~

~~— **Deactivation—Cessation of the emissions of an air pollutant from a unit or facility.**~~

~~— *De minimis emissions increase*—An increase in actual emissions or potential to emit which is less than the emissions rate that is significant as specified in this section.~~

~~— *Electric utility steam generating unit*—A steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW electrical output to a utility power distribution system for sale. Steam supplied to a steam distribution system for the purpose of providing steam to a steam electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility.~~

~~— *Emissions unit*—A part of a facility that emits or has the potential to emit a regulated NSR pollutant including an electric utility steam generating unit as defined in this section. For purposes of this subchapter, there are two types of emissions units:~~

~~(i) A new emissions unit, which is or will be newly constructed and which has existed for less than 2 years from the date the emissions unit first operated. An emissions unit which is constructed or installed for the purpose of replacing an existing unit, or an emissions unit which is relocated from another facility for the purpose of replacing an existing unit, is considered a new emissions unit at the time of replacement and until 2 years from the date the new unit commenced operation.~~

~~(ii) An existing emissions unit which is not a new emissions unit.~~

~~— *Federally enforceable*—All limitations and conditions which are legally enforceable by the EPA, including:~~

~~(i) Those requirements developed under 40 CFR Parts 60 and 61.~~

~~(ii) Those requirements within an applicable SIP.~~

~~(iii) Permit requirements established under 40 CFR 52.21 (relating to prevention of significant deterioration of air quality) or under regulations approved under 40 CFR Part 51, Subpart I (relating to review of new sources and modifications), including operating permits issued under an EPA-approved program that is incorporated into the SIP and expressly requires adherence to a permit issued under the program.~~

~~(iv) Permit requirements not designated as "State-only" in a Federal operating permit.~~

~~— *Fugitive emissions*—Those emissions which could not reasonably pass through a stack, chimney, vent or other functionally equivalent opening.~~

~~—Generation—With respect to emission reduction credits, an action taken by an owner or operator of a source or facility that results in the actual reduction of emissions.~~

~~—Major facility—~~

~~—(i) The term includes the following:~~

~~—(A) A facility which emits or has the potential to emit 100 tons per year or more of any regulated NSR pollutant subject to regulation under the Clean Air Act, except that lower emissions thresholds apply as follows:~~

~~—(I) Fifty tons per year of VOCs in a serious nonattainment area for ozone.~~

~~—(II) Fifty tons per year of VOCs in an area within an ozone transport region except for a severe or extreme nonattainment area for ozone.~~

~~—(III) Twenty-five tons per year of VOCs in a severe nonattainment area for ozone.~~

~~—(IV) Ten tons per year of VOCs in an extreme nonattainment area for ozone.~~

~~—(V) Seventy tons per year of PM-10 or, where applicable, 70 tons per year of a specific PM-10 precursor, in a serious nonattainment area for PM-10.~~

~~—(VI) Fifty tons per year of CO in a serious nonattainment area for CO.~~

~~—(B) For the purposes of applying the requirements of this subchapter to the owner or operator of a facility which emits or has the potential to emit NO_x located in an ozone nonattainment area or in an ozone transport region, as follows:~~

~~—(I) One hundred tons per year or more of NO_x in an ozone nonattainment area classified as marginal, basic or moderate.~~

~~—(II) One hundred tons per year or more of NO_x in an ozone nonattainment area classified as a transitional, submarginal, or incomplete or no data area, when the area is located in an ozone transport region.~~

~~—(III) One hundred tons per year or more of NO_x in an area designated under section 107(d) of the Clean Air Act (42 U.S.C.A. § 7407(d)) as attainment or unclassifiable for ozone that is located in an ozone transport region.~~

~~—(IV) Fifty tons per year or more of NO_x in a serious nonattainment area for ozone.~~

~~—(V) Twenty-five tons per year or more of NO_x in a severe nonattainment area for ozone.~~

~~(VI) Ten tons per year or more of NO_x in an extreme nonattainment area for ozone.~~

~~(C) A physical change that occurs at a facility which does not exceed the major facility thresholds specified in this subchapter is considered a major facility, if the change constitutes a major facility by itself.~~

~~(ii) A facility which is major for VOCs or NO_x is considered major for ozone.~~

~~(iii) A facility which emits, or has the potential to emit, 25 tpy or more of NO_x or VOC and is located in Bucks, Chester, Delaware, Montgomery or Philadelphia Counties.~~

~~Major modification—~~

~~(i) A physical change at or change in the method of operation of a major facility that results in:~~

~~(A) An increase in emissions of a regulated NSR pollutant equal to or exceeding the emissions rate that is significant as specified in this section.~~

~~(B) A significant net emissions increase of that pollutant from the major facility.~~

~~(ii) A significant emissions increase from an emissions unit or net emissions increase at a major facility that is significant for VOCs or NO_x is considered significant for ozone.~~

~~(iii) A physical change at or change in the method of operation of a major facility does not include:~~

~~(A) Routine maintenance, repair and replacement.~~

~~(B) The use of an alternative fuel or raw material by reason of an order under section 2(a) and (b) of the Energy Supply and Environmental Coordination Act of 1974 (ESECA) (15 U.S.C.A. § 79(a) and (b)) (or superseding legislation) or by reason of a natural gas curtailment plan under the Federal Power Act (16 U.S.C.A. §§ 792–825r).~~

~~(C) The use of an alternative fuel by reason of an order or rule under section 125 of the Clean Air Act (42 U.S.C.A. § 7425).~~

~~(D) The use of an alternative fuel or raw material by a facility which meets one of the following conditions:~~

~~(I) The source was capable of accommodating the fuel before January 6, 1975, unless the change would be prohibited under a Federally enforceable operating permit condition.~~

~~— (H) — The source is approved to use the fuel or material under a Federally-enforceable operating permit.~~

~~— (E) — An increase in the hours of operation or in the production rate, unless the change is prohibited under a condition of a Federally-enforceable plan approval or an operating permit.~~

~~— (F) — A change in ownership at a facility.~~

~~— (iv) — The term does not apply to a particular regulated NSR pollutant when the major facility is complying with the requirements under § 127.218 (relating to PALs). Instead, the definition of PAL major modification applies.~~

~~— Necessary preconstruction approvals or permits — Those permits or approvals required under the Clean Air Act or the act and its regulations, which are part of the applicable SIP.~~

~~— Net emissions increase — Emission changes at an existing major facility that result from a physical change or change in the method of operation as determined in accordance with § 127.203a(a)(4).~~

~~— PAL — Plantwide applicability limit — An emissions limit expressed in tpy, for a pollutant at a major facility, that is legally enforceable and established source-wide in accordance with § 127.218.~~

~~— PAL effective date — The date of issuance of the PAL permit. The PAL effective date for an increased PAL is the date an emissions unit which is part of the PAL major modification becomes operational and begins to emit the PAL pollutant.~~

~~— PAL effective period — The period beginning with the PAL effective date and ending 10 years later.~~

~~— PAL major emissions unit — An emissions unit that emits or has the potential to emit the PAL pollutant in an amount that is equal to or greater than the major facility threshold for the PAL pollutant.~~

~~— PAL major modification — Notwithstanding the definitions for major modification and net emissions increase under this section, a physical change at or change in the method of operation of the PAL facility that causes it to emit the PAL pollutant at a level equal to or greater than the PAL.~~

~~— PAL permit — The major or minor plan approval, the state operating permit or the Title V permit issued by the Department that establishes a PAL for a major facility.~~

~~— PAL pollutant — The pollutant for which a PAL is established at a major facility.~~

~~— PEMS— Predictive emissions monitoring system— All of the equipment necessary to monitor parameters including control device secondary voltages and electric currents, other information including gas flow rate and O₂ or CO₂ concentrations, and calculate and record the mass emissions rate in terms of mass per unit time, like lb/hr, on a continuous basis.~~

~~— Project— Physical change in or change in the method of operation of an existing facility, including a new emission unit.~~

~~— Projected actual emissions— The emission rates at which an existing emissions unit is projected to emit a regulated NSR pollutant, determined in accordance with § 127.203a(a)(6).~~

~~— Regulated NSR pollutant—~~

~~(i) NO_x or VOCs.~~

~~(ii) A pollutant for which a NAAQS has been promulgated.~~

~~(iii) A pollutant that is a constituent or precursor of a pollutant listed under subparagraph (i) or (ii), if the constituent or precursor pollutant may only be regulated under NSR as part of regulation of the pollutant listed under subparagraph (i) or (ii).~~

~~— Secondary emissions—~~

~~(i) Emissions which occur as a result of the construction or operation of a major facility or major modification of a major facility, but do not come from the major facility or major modification itself. The secondary emissions must be specific, well defined, quantifiable and impact the same general area as the facility or modification which causes the secondary emissions.~~

~~(ii) The term includes emissions from an offsite support facility which would not be constructed or increase its emissions except as a result of the construction or operation of the major facility or major modification.~~

~~(iii) The term does not include emissions which come directly from a mobile source regulated under Title II of the Clean Air Act (42 U.S.C.A. §§ 7521–7589).~~

~~— Significant—~~

~~(i) A net emissions increase or the potential of a facility to emit one of the following pollutants at a rate of emissions that would equal or exceed the following emissions rates except as specified in subparagraphs (ii)–(v):~~

~~— Pollutant Emissions Rate~~

~~— Carbon monoxide (CO): 100 tpy~~

~~— Nitrogen oxides (NO_x): 40 tpy or 100 lbs/hr or 1,000 lbs/day, whichever is more restrictive~~

~~— Sulfur oxides (SO_x): 40 tpy~~

~~— Ozone: 40 tpy of VOCs or 100 lbs/hr or 1,000 lbs/day, whichever is more restrictive~~

~~— Lead: 0.6 tpy~~

~~— PM10 or PM10 precursor: 15 tpy~~

~~— PM 2.5 or PM 2.5 precursor: 15 tpy~~

~~— (ii) The emissions rate that is significant for VOCs in a serious or severe ozone nonattainment area is 25 tpy or 100 lbs/hr or 1,000 lbs/day, whichever is more restrictive.~~

~~— (iii) For the purposes of applying the requirements of this subchapter to the owner or operator of modifications at major facilities located in an ozone nonattainment area or in an ozone transport region that emit or have the potential to emit NO_x, the emissions rate that is significant and other requirements for VOCs in subparagraphs (i) and (ii) apply to NO_x emissions.~~

~~— (iv) The emissions rate that is significant for CO in a serious nonattainment area is 50 tpy if the EPA has determined that the affected facility contributes significantly to CO levels in that area.~~

~~— (v) The emissions rate that is significant for VOCs in an extreme nonattainment area for ozone is any amount above zero.~~

~~— *Significant emissions unit*—An emissions unit that emits or has the potential to emit a PAL pollutant in an amount that is equal to or greater than the emissions rate that is significant as defined in this section or in the Clean Air Act for that PAL pollutant, whichever is lower, but less than the amount that would qualify the unit as a major facility as defined in this section.~~

~~— *Significant net emissions increase*—For a regulated NSR pollutant, a net emissions increase that is significant.~~

~~— *Small emissions unit*—An emissions unit that emits or has the potential to emit the PAL pollutant in an amount less than the emissions rate that is significant for that PAL pollutant as defined in this section or in the Clean Air Act, whichever is lower.]~~

~~[§ 127.201b.]§ 127.201a. Measurements, abbreviations and acronyms.~~

Measurements, abbreviations and acronyms used in this subchapter are defined as follows:

BAT--Best available technology

BACT--Best available control technology

CEMS--Continuous[-] emissions monitoring system

CERMS--Continuous emissions rate monitoring system

CPMS--Continuous parametric monitoring system

[CO₂--Carbon dioxide]

CO--Carbon monoxide

ERC--Emission reduction credit

[Hg--Mercury]

[KWH--Kilowatt hour (based on electric generation)]

LAER--Lowest achievable emission rate

MACT--Maximum achievable control technology

NSPS--New source performance standard

NSR--New source review

PEMS--Predictive emissions monitoring system

lb--Pounds

µg/m³--Micrograms per cubic meter

mg/m³--Milligrams per cubic meter

NO_x--Nitrogen oxides

O₂--Oxygen

PAL--Plantwide Applicability Limit

PM--Particulate matter

RACT--Reasonably available control technology

SO_x--Sulfur oxides

tpy--Tons per year

VOC--Volatile organic compound

§ 127.202. Effective date.

(a) The special permit requirements in this subchapter apply to **an owner or operator of a facility** ~~[submitting a complete plan approval application to]~~ **TO WHICH A PLAN APPROVAL WILL BE ISSUED BY** the Department after _____ **[January 15, 1994]** *[Editor's Note: The blank refers to the date of publication of the proposal].*

(b) For SO_x, ~~[particulate matter,]~~ **PM-10, ~~PM-10 precursors,~~ [PM-10] [PM-2.5 precursors, PM-2.5, lead and CO, this subchapter applies until a given nonattainment area is redesignated as an unclassifiable or attainment area. After a redesignation, special permit conditions remain effective until the Department approves a permit modification request and modifies the permit.**

§ 127.203. Facilities subject to special permit requirements.

[(a) This subchapter applies to a facility with the potential to emit 100 tons per year or more of one of the following pollutants and meeting the requirements for that pollutant:

(1) For PM-10, PM-10 precursors and particulate matter, either a new facility, or a modification to an existing facility including the addition of a new source at an existing facility, which when aggregated with the other emissions increases determined in accordance with § 127.211 (relating to applicability determination) results in an increase in the potential to emit PM-10, PM-10 precursors or particulate matter that would yield 15 tons per year of PM-10 or 25 tons per year of particulate matter, or 1,000 pounds per day, or 100 pounds per hour of PM-10 or particulate matter, or more, whichever is more restrictive, and which new facility or modification is located in one of the following:

(i) A nonattainment area.

(ii) An attainment or unclassifiable area which impacts a part of a nonattainment area in excess of the following significance levels:

Averaging Period Significance Levels

Annual	1.00 µg/m³
24-hour	5.00 µg/m³

(2) For sulfur oxides, either a new facility, or a modification to an existing facility including the addition of a new source at an existing facility, which when aggregated with the other emissions increases determined in accordance with § 127.211 results in an increase in the potential to emit of 40 tons per year, or 1,000 pounds per day, or 100 pounds per hour of SO_x, or more, whichever is more restrictive, and which new facility or modification is located in one of the following:

- (i) A nonattainment area.
- (ii) An attainment or unclassifiable area which impacts a nonattainment area in excess of the following significance levels:

Averaging Period Significance Levels

Annual	1.00 µg/m ³
24-hour	5.00 µg/m ³
3-hour	25.00 µg/m ³

(3) For carbon monoxide, either a new facility, or a modification to an existing facility, including the addition of a new source at an existing facility which, when aggregated with the other emissions increases determined in accordance with § 127.211, results in an increase in the potential to emit of 50 tons per year, 1,000 pounds per day or 100 pounds per hour of CO, or more, whichever is more restrictive, and which new facility or modification is located in one of the following:

- (i) A nonattainment area.
- (ii) An attainment or unclassifiable area which impacts a nonattainment area in excess of the following significance levels:

Averaging Period Significance Levels

8-hour	0.5 mg/m ³
1-hour	2.0 mg/m ³

(4) For lead, either a new facility, or a modification to an existing facility including the addition of a new source at an existing facility, which when aggregated with the other emissions increases determined in accordance with § 127.211, results in an increase in the potential to emit of 0.6 tons per year, 10 pounds per day or 1 pound per hour of lead, or more, whichever is more restrictive, and which new facility or modification is located in one of the following:

- (i) A nonattainment area.
- (ii) An attainment or unclassifiable area which impacts a nonattainment area in excess of the following significance level:

Averaging Period Significance Level

24-hour 0.1 µg/m³

(b) This subchapter applies to a VOC or NO_x facility located in or having an impact on one of the following areas and meeting the applicable requirements:

(1) For an area either classified at 40 CFR 81.339 (relating to Pennsylvania) as a moderate nonattainment area for ozone, or an area included in an ozone transport region established under section 184 of the Clean Air Act (42 U.S.C.A. § 7511c), which is either classified as a marginal or incomplete data nonattainment area for ozone or designated as an unclassifiable/attainment area for ozone, this subchapter applies to the following:

(i) A new facility with the potential to emit 100 tons or more per year of NO_x or 50 tons or more per year of VOCs.

(ii) A modification to an existing facility with the potential to emit 100 tons or more per year of NO_x or 50 tons or more per year of VOCs, or a new source at an existing facility resulting in an increase in the potential to emit either VOC or NO_x which, when aggregated with the other emissions increases determined in accordance with § 127.211, results in an increase of 40 tons per year, 1,000 pounds per day or 100 pounds per hour of VOC or NO_x, or more, whichever is more restrictive.

(2) For an area classified at 40 CFR 81.339 as a serious nonattainment area for ozone, this subchapter applies to the following:

(i) A new facility with the potential to emit 50 tons or more per year of NO_x or VOCs.

(ii) A modification to an existing facility with the potential to emit 50 tons or more per year of VOC or NO_x, or a new source at an existing facility resulting in an increase in the potential to emit either VOC or NO_x which, when aggregated with the other emissions increases determined in accordance with subsection (c)(1), results in an increase of 25 tons per year, 1,000 pounds per day or 100 pounds per hour of VOC or NO_x, or more, whichever is more restrictive.

(3) For an area classified at 40 CFR 81.339 as a severe nonattainment area for ozone, this subchapter applies to the following:

(i) A new facility with the potential to emit 25 tons or more per year of NO_x or VOCs.

(ii) A modification to an existing facility with the potential to emit 25 tons or more per year of NO_x or VOC, or a new source at an existing facility resulting in an increase in the potential to emit either VOC or NO_x which, when aggregated with the other emissions increases determined in accordance with subsection (c)(1),

results in an increase of 25 tons per year or 1,000 pounds per day or 100 pounds per hour of VOC or NO_x, or more, whichever is more restrictive.

(c) Special rules for modifications to VOC or NO_x facilities located in serious and severe nonattainment areas for ozone are as follows:

(1) The applicability requirements in § 127.211 apply except as provided by this subsection. A modification to an existing facility with the potential to emit 25 tons per year or more which results in an increase in the potential to emit VOC or NO_x may not be considered a de minimis increase. The requirements of this subchapter apply if the increase in potential to emit, when aggregated with the other net emission increases in potential to emit occurring over a consecutive 5-calendar-year period exceeds 25 tons per year or 1,000 pounds per day or 100 pounds per hour, whichever is more restrictive. The consecutive 5-calendar-year period for an increase that is not considered de minimis shall include the calendar year of the modification or addition which results in the emissions increase, and may not extend beyond either January 1, 1991, or the design year of the most recent attainment demonstration, whichever is later.

(2) For a facility with the potential to emit less than 100 tons per year of VOC or NO_x, when a modification results in an increase--other than a de minimis increase--in emissions of VOC or NO_x from a discrete operation, unit or other pollutant emitting activity at the facility, the increase shall be considered a modification unless the owner or operator elects to offset the increase by a greater reduction in emissions of VOC or NO_x from other operations, units or activities within the facility at an internal offset ratio of at least 1.3 to 1. If the owner or operator does not elect to offset at the required ratio, the change shall be considered a modification, but in the case of the modification, the BACT requirement shall be substituted for LAER. The facility shall comply with the applicable EPA requirements and shall also satisfy the Best Available Technology (BAT) requirement.

(3) For a facility with the potential to emit 100 tons per year or more of VOC or NO_x, when a modification at the facility results in an increase--other than a de minimis increase--in emissions of VOC or NO_x from a discrete operation, unit or other pollutant emitting activity at the facility, the increase shall be considered a modification unless the owner or operator elects to offset the increase by a greater reduction in emissions of VOC or NO_x from other operations, units or activities within the facility at an internal offset ratio of at least 1.3 to 1. If the owner or operator elects to offset at the required ratio, the LAER requirement does not apply. The facility shall comply with the applicable EPA requirements and shall also satisfy the BAT requirement.]

(a) This subchapter applies to the construction of a new major facility or modification at an existing major facility located in a nonattainment area, AN OZONE TRANSPORT REGION or [located in] an attainment or unclassifiable area which impacts a nonattainment area in excess of the following significance levels:

Pollutant	Averaging time				
	Annual	24 (hours)	8 (hours)	3 (hours)	1 (hours)
SO ₂	1.0 µg/m ³	5 µg/m ³	-	25 µg/m ³	-
PM ₁₀	1.0 µg/m ³	5 µg/m ³	-	-	-
CO	-	-	0.5 mg/m ³	-	2 mg/m ³
Lead	-	0.1 µg/m ³	-	-	-

(b) The following provisions apply to an owner or operator of a facility located in Bucks, Chester, Delaware, Montgomery or Philadelphia counties or an area classified as a serious or severe ozone nonattainment area:

(1) The applicability requirements in § 127.203a (relating to applicability determination) apply except as provided by this subsection. The requirements of this subchapter apply if the aggregated emissions DETERMINED ACCORDING TO SUBPARAGRAPH (i) OR (ii) OF THIS SUBSECTION exceed 25 tpy [or 1,000 pounds per day or 100 pounds per hour] of NO_x or VOCs[, whichever is more restrictive, as follows]:

(i) The PROPOSED increases AND DECREASES in emissions[, when] ARE aggregated with the other increases in net emissions occurring over a consecutive 5 calendar-year period, which includes the calendar year of the modification or addition which results in the emissions increase.

(ii) The PROPOSED increases and decreases in emissions [when] ARE aggregated with other increases and decreases [since January 1, 1991, or 15] WHICH OCCURRED WITHIN 10 years prior to the date of submission of A complete plan approval application[, whichever is later]. IF THE AGGREGATED EMISSIONS INCREASE CALCULATED USING THIS SUBPARAGRAPH MEETS OR EXCEEDS THE EMISSIONS RATE THAT IS SIGNIFICANT, ONLY THE EMISSIONS OFFSET REQUIREMENTS IN § 127.205(3) (RELATING TO SPECIAL PERMIT REQUIREMENTS) APPLY TO THE AGGREGATED EMISSIONS.

(2) An increase in emissions of VOCs or NO_x, other than a de minimis emission increase, from a discrete operation, unit or other pollutant emitting activity at a facility with a potential to emit of less than 100 tpy of VOCs or NO_x is considered a modification unless the owner or operator elects to offset the increase by a greater reduction in emissions of VOCs or NO_x from other operations, units or activities within the facility at an internal offset ratio of at least 1.3 to 1. If the owner or operator does not elect to offset at the required ratio, the increase is considered a modification and the BACT requirement is substituted for LAER. The owner or operator of the facility shall comply with all applicable requirements including the BAT requirement.

(3) An increase in emissions of VOCs or NO_x, other than a de minimis emission increase, from a discrete operation, unit or other pollutant emitting

activity at a facility with a potential to emit of 100 tpy or more is considered a modification unless the owner or operator elects to offset the increase by a greater reduction in emissions of VOCs or NO_x from other operations, units or activities within the facility at an internal offset ratio of at least 1.3 to 1. If the owner or operator elects to offset at the required ratio, the LAER requirement does not apply. The owner or operator of the facility shall comply with the applicable requirements including the BAT requirement.

(c) The NSR requirements of this subchapter apply to an owner or operator of:

(1) A facility at which the net emissions increase as determined under this subchapter meets or exceeds the applicable emissions rate that is significant. A decrease in a facility's emissions will not qualify as a decrease for purposes of this subchapter unless the [emission reduction credit] ERC provisions in § 127.207(1) and (3)--(7) (relating to ERC generation and creation) are met.

(2) A MAJOR facility SUBJECT TO THIS SUBCHAPTER which was deactivated for a period in excess of 1 year and is not in compliance with the reactivation requirements of § 127.215 (relating to reactivation).

(d) The requirements of this subchapter which apply to VOC emissions from major facilities and major modifications apply to NO_x emissions from major facilities and major modifications in an ozone transport region or an ozone nonattainment area classified as marginal, basic, moderate, serious, severe or extreme, except in areas which the EPA has determined that additional reductions of NO_x will not produce net air quality benefits.

(e) The following provisions apply to an owner or operator of a major facility subject to this subchapter:

(1) Approval to construct or modify an air contamination source or facility does not relieve an owner or operator of the responsibility to comply fully with applicable provisions of the SIP and other requirements under local, State or Federal law.

(2) If a particular source or modification becomes a major facility or major modification solely by virtue of a relaxation in an enforcement limitation which was established after August 7, 1980, on the capacity of the source or modification to emit a pollutant including a restriction on hours of operation, the requirements of this subchapter also apply to the source or modification as though construction had not yet commenced on the source or modification.

[(f) The requirements of this subchapter which apply to PM-10 emissions from major facilities and major modifications also apply to PM-10 precursor emissions from major facilities and major modifications, except if the EPA has determined that these sources do not contribute significantly to PM-10 levels which exceed the PM-10 ambient standards in the area.

~~(g)~~ The requirements of this subchapter which apply to PM-2.5 emissions from major facilities and major modifications also apply to PM-2.5 precursor emissions from major facilities and major modifications, except if the EPA or the Department has determined that these sources do not contribute significantly to PM-2.5 levels which exceed the PM-2.5 ambient standards in the area.]

~~(h)~~(f) The NSR requirements of this subchapter do not apply to an owner or operator of a major facility at which:

(1) A physical change or change in the method of operation still maintains its total facility-wide emissions below the PAL, meets the requirements in § 127.218 (relating to PALs) and complies with the PAL permit.

(2) A project results in a net emissions increase which does not meet or exceed the applicable emissions rate that is significant.

(3) A proposed de minimis increase results in a net emissions increase [since January 1, 1991, or 15]CALCULATED USING EMISSIONS INCREASES AND DECREASES WHICH OCCURRED WITHIN 10 years prior to the date of submission of a complete plan approval application[, whichever is later], which does not meet or exceed the emissions rate that is significant.

(4) [A-e]Construction of a new facility or a project at an existing major facility located in an attainment or unclassifiable area[, which] does not impact a nonattainment area for THE applicable pollutant in excess of the significance level specified IN § 127.203a.

§ 127.203a. Applicability determination.

(a) The Department will conduct an applicability determination during its review of a plan approval application for the construction of a new major facility or modification at an existing major facility under the following provisions:

(1) [As part of the plan approval application, the owner or operator of the facility shall calculate in accordance with the provisions under paragraphs (2) and (3) whether a net emissions increase that is significant as defined in § 127.201a (relating to definitions) will occur. The procedures for calculating whether a net emissions increase that is significant will occur at the major facility are contained in paragraph (4). If the project causes a net emissions increase that is significant, the project is a major modification for the regulated NSR pollutant.

(2) A net emissions increase of a regulated NSR pollutant for projects that involve existing emissions units is the sum of the differences between the projected actual emissions and the baseline actual emissions, as specified in paragraphs (5) and (6), for each existing emissions unit.

~~— (3) — A net emissions increase of a regulated NSR pollutant for projects that involve construction of new emissions units is the sum of the potentials to emit from each new emissions unit.~~

~~— (4) — The following procedures apply in determining the net emissions increase:~~

~~— (i) — For a regulated NSR pollutant emitted by a major facility, the amount by which the sum of the following exceeds zero:~~

~~— (A) — The increase in emissions from a particular physical change or change in the method of operation at a major facility as calculated under paragraph (6):~~

~~— (B) — Other increases and decreases in emissions at the major facility that are contemporaneous with the project and are otherwise creditable. Baseline actual emissions for calculating increases and decreases are determined as specified under paragraph (5):~~

~~— (ii) — For a proposed increase which equals or exceeds the emissions rate that is significant, an increase or decrease in emissions is contemporaneous with the increase from the project only if it occurs between the date 5 years before construction on the project commences and the date that construction on the project is complete.~~

~~— (iii) — For a proposed de minimis increase, an increase or decrease in emissions is contemporaneous with the increase from the project only if it occurs after January 1, 1991, or 15 years prior to the date of the Department's receipt of a complete plan approval application, whichever is later.~~

~~— (iv) — For a proposed de minimis increase in which the net emissions increase since January 1, 1991, or 15 years prior to the date of the Department's receipt of a complete plan approval application meets or exceeds the emissions rate that is significant, the emissions offset requirements in § 127.205(3) (relating to special permit requirements) apply only to the net emissions increase.~~

~~— (v) — For PM-2.5 and PM-2.5 precursors, an increase or decrease in emissions is contemporaneous with the increase from the project only if it occurs after April 5, 2005.~~

~~— (vi) — An increase or decrease in emissions is creditable as related to the applicability determination only if the Department has not relied on it in issuing a permit for the facility under this subchapter, for which permit is in effect when the increase in emissions from the project occurs.~~

~~— (vii) — An increase in emissions is creditable to the extent that the new level of emissions exceeds the old level of emissions for the contemporaneous change.~~

~~— (viii) — A decrease in emissions is creditable if the following conditions are met:~~

~~(A) The emissions reduction credit provisions in § 127.207(1) and (3)–(7) (relating to ERC generation and creation) have been complied with, and the decrease is Federally enforceable by the time construction begins on the project.~~

~~(B) The emissions decrease is such that when compared with the proposed emissions increase there is no significant change in the character of the emissions, including seasonal emission patterns, stack heights or hourly emission rates. A significant change in the character of the emissions means a change resulting in an increase in emissions equal to or greater than an emissions rate that is significant as specified under § 127.201a or an impact in excess of the significance levels as specified in § 127.203a.~~

~~(C) The emissions decrease represents approximately the same qualitative significance for public health and welfare as attributed to the proposed increase. This requirement is satisfied if the emissions rate that is significant is not exceeded.]~~

AS PART OF THE PLAN APPROVAL APPLICATION, THE OWNER OR OPERATOR OF THE FACILITY SHALL CALCULATE WHETHER A SIGNIFICANT EMISSIONS INCREASE AND A SIGNIFICANT NET EMISSIONS INCREASE WILL OCCUR AS A RESULT OF A PHYSICAL CHANGE OR CHANGE IN THE METHOD OF OPERATION. THE OWNER OR OPERATOR OF THE FACILITY WILL USE THE PROCEDURES IN PARAGRAPH (i) TO CALCULATE THE EMISSIONS INCREASE IN A REGULATED NSR POLLUTANT DUE TO THE PROJECT, AND THE PROCEDURES IN PARAGRAPH (ii) TO CALCULATE THE NET EMISSIONS INCREASE IN A REGULATED NSR POLLUTANT. A PROJECT IS A MAJOR MODIFICATION FOR A REGULATED NSR POLLUTANT IF IT CAUSES TWO TYPES OF EMISSIONS INCREASES—A SIGNIFICANT EMISSIONS INCREASE AND A SIGNIFICANT NET EMISSIONS INCREASE. IF THE PROJECT CAUSES A SIGNIFICANT EMISSIONS INCREASE, THEN THE PROJECT IS A MAJOR MODIFICATION IF IT ALSO RESULTS IN A SIGNIFICANT NET EMISSIONS INCREASE.

(i) THE EMISSIONS INCREASE IN A REGULATED NSR POLLUTANT DUE TO THE PROJECT WILL BE THE SUM OF THE FOLLOWING:

(A) FOR EXISTING EMISSIONS UNITS, AN EMISSIONS INCREASE OF A REGULATED NSR POLLUTANT IS THE DIFFERENCE BETWEEN THE PROJECTED ACTUAL EMISSIONS AND THE BASELINE ACTUAL EMISSIONS FOR EACH UNIT, AS DETERMINED IN PARAGRAPHS (4) AND (5). EXCLUDE, IN CALCULATING AN INCREASE IN EMISSIONS THAT RESULTS FROM THE PARTICULAR PROJECT, THAT PORTION OF THE UNIT'S EMISSIONS FOLLOWING COMPLETION OF THE PROJECT THAT EXISTING UNITS COULD HAVE ACCOMMODATED DURING THE CONSECUTIVE 24-MONTH PERIOD USED TO ESTABLISH THE BASELINE ACTUAL EMISSIONS AND THAT IS ALSO UNRELATED TO THE PARTICULAR PROJECT, INCLUDING ALL INCREASED UTILIZATION DUE TO PRODUCT DEMAND GROWTH AS SPECIFIED IN CLAUSE 5(i)(C).

(B) FOR NEW EMISSIONS UNITS, THE EMISSIONS INCREASE OF A REGULATED NSR POLLUTANT WILL BE THE POTENTIAL TO EMIT FROM EACH NEW EMISSIONS UNIT.

(ii) THE NET EMISSIONS INCREASE FOR A REGULATED NSR POLLUTANT EMITTED BY A MAJOR FACILITY WILL BE THE AMOUNT BY WHICH THE SUM OF THE FOLLOWING EXCEEDS ZERO:

(A) THE INCREASE IN EMISSIONS FROM A PHYSICAL CHANGE OR CHANGE IN THE METHOD OF OPERATION AT A MAJOR FACILITY AS CALCULATED UNDER SUBPARAGRAPH (i).

(B) OTHER INCREASES AND DECREASES IN ACTUAL EMISSIONS AT THE MAJOR FACILITY THAT ARE CONTEMPORANEOUS WITH THE PROJECT AND ARE OTHERWISE CREDITABLE.

(1) AN INCREASE OR DECREASE IN ACTUAL EMISSIONS IS CONTEMPORANEOUS WITH THE INCREASE FROM THE PARTICULAR CHANGE ONLY IF IT OCCURS BETWEEN THE DATE 5 YEARS BEFORE CONSTRUCTION ON THE PROJECT COMMENCES AND THE DATE THAT CONSTRUCTION ON THE PROJECT IS COMPLETED.

(II) BASELINE ACTUAL EMISSIONS FOR CALCULATING INCREASES ARE DETERMINED AS SPECIFIED UNDER PARAGRAPH (4), EXCEPT THAT CLAUSE (4)(i)(D) SHALL NOT APPLY.

(2) AS PART OF THE PLAN APPROVAL APPLICATION FOR A PROPOSED DE MINIMIS EMISSION INCREASE, THE OWNER OR OPERATOR OF THE FACILITY SHALL USE SUBPARAGRAPHS (i) AND (ii) TO CALCULATE THE NET EMISSIONS INCREASE. FOR A PROPOSED DE MINIMIS INCREASE IN WHICH THE NET EMISSIONS INCREASE CALCULATED USING PARAGRAPHS (i) AND (ii) MEETS OR EXCEEDS THE EMISSIONS RATE THAT IS SIGNIFICANT, ONLY THE EMISSIONS OFFSET REQUIREMENTS IN § 127.205(3) (RELATING TO SPECIAL PERMIT REQUIREMENTS) APPLY TO THE NET EMISSIONS INCREASE.

(i) THE NET EMISSIONS INCREASE IS THE SUM OF THE PROPOSED DE MINIMIS INCREASE DUE TO THE PROJECT AND THE PREVIOUSLY DETERMINED INCREASES IN POTENTIAL EMISSIONS OR ACTUAL EMISSIONS AND DECREASES IN ACTUAL EMISSIONS THAT ARE CONTEMPORANEOUS WITH THE PROJECT.

(ii) AN INCREASE OR DECREASE IS CONTEMPORANEOUS IF IT OCCURRED WITHIN 10 YEARS PRIOR TO THE DATE OF THE DEPARTMENT'S RECEIPT OF A COMPLETE PLAN APPROVAL APPLICATION.

(3) AN INCREASE OR A DECREASE IS CREDITABLE FOR APPLICABILITY DETERMINATION PURPOSES IF IT MEETS THE FOLLOWING CONDITIONS:

(i) THE DEPARTMENT HAS NOT RELIED ON IT IN ISSUING A PERMIT FOR THE FACILITY UNDER THIS SUBCHAPTER, FOR WHICH THE PERMIT IS IN EFFECT WHEN THE INCREASE IN EMISSIONS FROM THE PROJECT OCCURS.

(ii) THE INCREASE IS CREDITABLE TO THE EXTENT THAT THE NEW LEVEL OF EMISSIONS EXCEEDS THE OLD LEVEL OF EMISSIONS.

(iii) AN ACTUAL EMISSIONS DECREASE IS CREDITABLE IF THE FOLLOWING CONDITIONS ARE MET:

(A) THE ERC PROVISIONS IN § 127.207(1) AND (3)--(7) (RELATING TO ERC GENERATION AND CREATION) HAVE BEEN COMPLIED WITH, AND THE DECREASE IN EMISSIONS IS FEDERALLY ENFORCEABLE BY THE TIME CONSTRUCTION BEGINS ON THE PROJECT. THE PLAN APPROVAL FOR THE PROJECT WILL CONTAIN A PROVISION SPECIFYING THAT THE EMISSIONS DECREASE IS FEDERALLY ENFORCEABLE ON OR BEFORE THE CONSTRUCTION DATE.

(B) THE EMISSIONS DECREASE IS SUCH THAT WHEN COMPARED WITH THE PROPOSED EMISSIONS INCREASE THERE IS NO SIGNIFICANT CHANGE IN THE CHARACTER OF THE EMISSIONS, INCLUDING SEASONAL EMISSION PATTERNS, STACK HEIGHTS OR HOURLY EMISSION RATES.

(C) THE EMISSIONS DECREASE REPRESENTS APPROXIMATELY THE SAME QUALITATIVE SIGNIFICANCE FOR PUBLIC HEALTH AND WELFARE AS ATTRIBUTED TO THE PROPOSED INCREASE. THIS REQUIREMENT IS SATISFIED IF THE EMISSIONS RATE THAT IS SIGNIFICANT IS NOT EXCEEDED.

(D) An emissions decrease or an ERC generated at the facility may be used as a creditable decrease in a net emissions increase. THE USE OF THE ERCs IN APPLICABILITY DETERMINATIONS FOR NETTING PURPOSES IS LIMITED TO THE PERIOD SPECIFIED IN SUBSECTION (a)(1)(ii) AND (a)(2). A portion of an ERC generated at another facility, acquired by trade and incorporated in a plan approval for use at the facility, is not creditable as an emissions decrease.

(iv) AN ACTUAL OR POTENTIAL EMISSIONS INCREASE THAT RESULTS FROM A PHYSICAL CHANGE IN A FACILITY OCCURS WHEN THE EMISSIONS UNIT ON WHICH CONSTRUCTION OCCURRED BECOMES OPERATIONAL AND BEGINS TO EMIT A PARTICULAR POLLUTANT. A REPLACEMENT UNIT THAT REQUIRES SHAKEDOWN

BECOMES OPERATIONAL ONLY AFTER A REASONABLE SHAKEDOWN PERIOD, NOT TO EXCEED 180 DAYS.

[(5)](4) The following procedures apply in determining the baseline actual emissions FOR AN EXISTING EMISSIONS UNIT:

(i) For an existing emissions unit, BASELINE ACTUAL EMISSIONS ARE the average rate, in tpy, at which the unit emitted the regulated NSR pollutant during [the 2]A consecutive [calendar years] 24-MONTH PERIOD SELECTED BY THE OWNER OR THE OPERATOR WITHIN THE FIVE-YEAR PERIOD immediately prior to the [year]DATE a complete plan approval application is received by the Department. The Department may [allow]APPROVE the use of a different consecutive [2-year]24-MONTH period within the last [5]10 years upon a WRITTEN determination that it is more representative of normal [operations] SOURCE OPERATION.

(A) The average rate includes fugitive emissions to the extent quantifiable and [authorized] emissions associated with startups and shutdowns; the average rate does not include excess emissions including emissions associated with upsets or malfunctions.

(B) The average rate is adjusted downward to exclude noncompliant emissions that occurred while the source was operating above an emissions limitation that was legally enforceable during the consecutive [2-year]24-MONTH period.

(C) The average rate is adjusted downward to exclude emissions that would have exceeded an emissions limitation with which the facility must currently comply, had the facility been required to comply with the limitations during the consecutive [2-year]24-MONTH period. The baseline actual emissions is based on the emissions limitation in this subchapter or a permit limitation or other more stringent emissions limitation required by the Clean Air Act or the act, whichever is more restrictive.

(D) [When]FOR A REGULATED NSR POLLUTANT, WHEN a project involves multiple emissions units| or multiple regulated NSR pollutants, or both, [one|THE SAME consecutive [2-year]24-MONTH period must be used to determine the baseline actual emissions for| all pollutants and for all| the emissions units [affected by the project]BEING CHANGED. THE SAME CONSECUTIVE 24-MONTH PERIOD SHALL BE USED FOR ALL REGULATED NSR POLLUTANTS UNLESS THE OWNER OR OPERATOR DEMONSTRATES, IN WRITING, TO THE DEPARTMENT THAT A DIFFERENT CONSECUTIVE 24-MONTH PERIOD IS MORE APPROPRIATE AND THE DEPARTMENT APPROVES, IN WRITING, THE DIFFERENT CONSECUTIVE 24-MONTH PERIOD FOR A REGULATED NSR POLLUTANT OR POLLUTANTS.

(E) The average rate is not based on a consecutive [2-year]24-MONTH period for which there is inadequate information for:

(I) Determining annual emissions, in tpy.

(II) Adjusting this amount if required by clause (B) or clause (C).

(F) The average rate is not greater than the emissions previously [reported] SUBMITTED TO THE DEPARTMENT in the required emissions statement and for which applicable emission fees have been paid.

(ii) For a new emissions unit, the baseline actual emissions equal zero AND THEREAFTER, FOR ALL OTHER PURPOSES, SHALL EQUAL THE UNIT'S POTENTIAL TO EMIT.

(iii) The baseline actual emissions is determined by measurement, calculations or estimations in the order of the following preferences:

(A) Monitoring systems including:

(I) CEMS data interpolated to annual emissions using flow meters and conversion factors.

(II) PEMS approved, in writing, by the Department.

(B) Other measurements and calculations including:

(I) Stack measurement which generates emission estimates using stack test derived emission factors and throughput.

(II) A mass balance equation which includes the following elements:

(-a-) The amount of materials used per unit of time, determined through measurements [in the process] OF PARAMETERS REPRESENTING PROCESS CONDITIONS.

(-b-) The emissions per unit mass of material used, determined using mass balance techniques.

(-c-) The annual emissions, calculated using emissions per unit mass of material and amount of material used per unit of time.

(C) Emission factors, including generally recognized and accepted emission factors by EPA, such as USEPA "Compilation of Air Pollutant Emission Factors" (AP-42) or other emission factors accepted by the Department.

(D) Other calculations and measurements as approved by the Department.

{(6)}(5) PROJECTED ACTUAL EMISSIONS IS THE MAXIMUM ANNUAL RATE, IN TPY, AT WHICH AN EXISTING EMISSIONS UNIT IS PROJECTED TO EMIT A REGULATED NSR POLLUTANT IN ANY ONE OF THE FIVE YEARS (12 MONTH PERIOD) FOLLOWING THE DATE THE UNIT RESUMES REGULAR OPERATION AFTER THE PROJECT, OR IN ANY ONE OF THE 10

YEARS FOLLOWING THAT DATE, IF THE PROJECT INVOLVES INCREASING THE EMISSIONS UNIT'S DESIGN CAPACITY OR ITS POTENTIAL TO EMIT OF THAT REGULATED NSR POLLUTANT AND FULL UTILIZATION OF THE UNIT WOULD RESULT IN A SIGNIFICANT EMISSIONS INCREASE OR A SIGNIFICANT NET EMISSIONS INCREASE AT THE MAJOR FACILITY. The following procedures apply in determining the projected actual emissions of a regulated NSR pollutant for an emissions unit, before beginning actual construction on the project:

(i) The owner or operator of the major facility shall:

(A) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, the company's expected business activity and the company's highest projections of business activity, and the company's filings with the State or Federal regulatory authorities.

(B) Include fugitive emissions to the extent quantifiable, and emissions associated with startups[,] and shutdowns.

(C) Exclude, in calculating any increase in emissions that results from the particular project, that portion of the unit's emissions following completion of the project that existing units could have accommodated during the consecutive [2-year]24-MONTH period used to establish the baseline actual emissions and that is also unrelated to the particular project, including any increased utilization due to product demand growth.

(ii) In lieu of using the method set out in subparagraph (i), the owner or operator of the major facility may elect to use the emissions unit's potential to emit, in tpy.

(iii) If the projected actual emissions FOR A REGULATED NSR POLLUTANT are in excess of the baseline actual emissions, THE FOLLOWING APPLY: [they must be incorporated into the required plan approval or the operating permit as an emission limit. The emission limit shall be the sum of the following:

— (A) Baseline actual emissions.

— (B) The portion of the unit's emissions following completion of the project that existing units could have accommodated considering any process constraints in place during the consecutive 2-year period used to establish the baseline actual emissions and that is also unrelated to the particular project, including any increased utilization due to product demand growth.

— (C) Any emissions increase that results from the particular project.

(7) The following procedures apply for demonstrating compliance with the emission limit established under paragraph (6)(i):

(A) THE PROJECTED ACTUAL EMISSIONS FOR THE REGULATED NSR POLLUTANT MUST BE INCORPORATED INTO THE REQUIRED PLAN APPROVAL OR THE OPERATING PERMIT AS AN EMISSION LIMIT.

[(i)](B) The owner or operator shall monitor the emissions of [any]THE regulated NSR pollutant [that could increase as a result of the project and that is emitted by any emissions units identified for the project,]FOR WHICH A LIMIT IS ESTABLISHED IN PARAGRAPH 5(III)(A) and calculate and maintain a record of [these annual]emissions, in tpy on a calendar year basis, for 5 years following resumption of regular operations after the change, or for 10 years following resumption of regular operations after the change if the project increases the design capacity or potential to emit of that regulated NSR pollutant at the emissions unit.

[(ii)](C) The owner or operator shall record sufficient information to identify for all emission units in the approved project their total actual annual emissions and their actual annual emissions increase due to the project.

[(iii)](D) The owner or operator shall submit a report to the Department, within 60 days after the end of each calendar year, which contains the emissions data required by [subparagraph (i) and (ii)]CLAUSES (B) AND (C). This report must also contain a demonstration of how these emissions were determined if the determination was not by direct measurement with a Department-certified CEMS system.

(b) An owner or operator of a major facility with a PAL for a regulated NSR pollutant shall comply with the requirements under § 127.218 (relating to PALs).

§ 127.204. Emissions subject to this subchapter.

(a) In determining whether a **[facility]PROJECT** exceeds the **[emissions rates] emission rate that is significant** or the significance levels specified in § 127.203 (relating to facilities subject to special permit requirements), the potential **[emissions] to emit**, actual emissions and actual emissions increase shall be determined by aggregating the emissions or emissions increases from **[the facilities on]**contiguous or adjacent properties under the common control of a person or entity. This includes emissions resulting from the following: flue emissions, stack and additional fugitive emissions, material transfer, use of parking lots and paved and unpaved roads on the facility property, storage piles and other emission generating activities resulting from operation of the new or modified facility.

(b) Secondary emissions **[need] must** not be considered in determining whether a facility meets the requirements of **[§ 127.203] this subchapter**. If a facility is subject to **[§ 127.203] this subchapter** on the basis of the direct emissions from the facility, the conditions of § 127.205 (relating to special permit requirements) shall also be met for secondary emissions.

§ 127.205. Special permit requirements.

The Department will not issue a plan approval, or an operating permit, or allow continued operations under an existing permit or plan approval unless the applicant demonstrates that the following special requirements are met:

(1) A new or modified facility subject to this subchapter shall comply with LAER, except as provided in § 127.203a(a)[(4)(ii)(B)](2) (relating to applicability determination). [In cases where] When a facility is composed of several sources, only sources which are new or which are modified shall be required to implement LAER. In addition, LAER applies to the proposed modification which results in an increase in emissions and to subsequent or previous modifications which result in emissions increases that are directly related to and normally included in the project associated with the proposed modification and which occurred within the contemporaneous period of the proposed emissions increase.

* * * * *

(2) Each facility located within this Commonwealth which meets **[or exceeds the threshold limits contained in § 127.203 (relating to facilities subject to special permit requirements)] the requirements of and is subject to this subchapter**, which is owned or operated by the applicant, or by an entity controlling, controlled by or under common control with the applicant, and which is subject to emissions **[limitation] limitations** shall be in compliance, or on a schedule for compliance approved by the Department in a plan approval or permit, with the applicable emissions limitation and standards contained in this article. A responsible official of the applicant shall certify as to the facilities' compliance in writing on a form provided by the Department.

(3) Each modification to a facility which meets the requirements of and is subject to **[§ 127.203] this subchapter** shall offset, in accordance with §§ **127.203, 127.203a and 127.210 [and 127.211]** (relating to **FACILITIES SUBJECT TO SPECIAL PERMIT REQUIREMENTS; applicability determination; and offset ratios; and applicability determination**), the total of the net increase **[in potential to emit]. Emissions offsets shall be required for the entire net emissions increase which occurred over the contemporaneous period except to the extent that emissions offsets or other reductions were previously applied against emissions increases in an earlier applicability determination.**

(4) Each new facility which meets the requirements of and is subject to **[§ 127.203] this subchapter** shall offset the potential to emit of that facility with ERCs in accordance with § 127.210.

(5) For a new or modified facility **[with potential emissions exceeding significance levels or otherwise meeting the requirements of § 127.203] which meets the requirements of and is subject to this subchapter**, an analysis shall be conducted of alternative sites, sizes, production processes and environmental control techniques for the proposed facility, which demonstrates that the benefits of the proposed facility

significantly outweigh the environmental and social costs imposed within this Commonwealth as a result of its location, construction or modification.

* * * * *

(7) THE DEPARTMENT MAY DETERMINE THAT THE BEST AVAILABLE TECHNOLOGY REQUIREMENTS OF THIS CHAPTER ARE EQUIVALENT TO BACT OR LAER.

§ 127.206. ERC general requirements.

(a) Emissions reductions or ERCs banked prior to January 1, 1991, may not be used as ERCs for emission offsets or netting purposes. [ERCs generated prior to January 1, 1991, which meet the requirements of this subchapter for ERCs and are approved by the Department may be used in applicability determinations conducted in accordance with § 127.211 (relating to applicability determination) for netting purposes, if the ERCs are treated as new source growth and offset at the applicable ratio specified in § 127.210 (relating to offset ratios).]

* * * * *

(d) The Department may issue a plan approval for the construction of a new or modified facility which satisfies the offset requirements specified in § 127.205(3) and (4) (relating to special permit requirements) under the following conditions:

* * * * *

(2) The owner or operator of the proposed new or modified facility may not commence operation or increase emissions until the required emissions reductions are certified and registered [~~as ERCs~~] by the Department.

(e) ERCs generated by the overcontrol of emissions by an existing facility will not expire for use as offsets. The use of these ERCs in applicability determinations for netting purposes is limited to the period specified in [~~§ 127.211~~] § 127.203a(a)(4)(1) (relating to applicability determination).

(f) ERCs generated by the curtailment or shutdown of a facility which are not included in a plan approval and used as offsets will expire for use as offsets 10 years after the date the facility ceased emitting the ERC generating emissions. The use of these ERCs in applicability determinations for netting purposes is limited to the period specified in [~~§ 127.211~~] § 127.203a(a)(4)(1).

* * * * *

(i) ERCs may not be used to achieve compliance with RACT, MACT, BAT, NSPS, BACT, LAER or other emissions limitations required by the Clean Air Act or the act.

(j) ERCs may not be entered into the ERC registry until the emissions reduction generating the ERCs has been certified by the Department in accordance with the criteria for ERC generation and creation contained in § 127.207 (relating to ERC generation and creation)[, with the following qualifications:].

[(i) ERCs may not be generated for emissions in excess of those previously identified in required emission statements and for which applicable emission fees have been paid.]

(ii) Emissions reduction at a facility occurring after January 1, 1991, but prior to January 15, 1994 may be used to generate ERCs, if a complete ERC registry application is submitted to the Department by May 16, 1994.]

* * * * *

(l) ERCs may not be traded to facilities under different ownership until the emissions reduction generating the ERCs is made Federally enforceable. [A facility which is not subject to Title V permit requirements under the Clean Air Act will require EPA approval in the form of a SIP revision which incorporates the required permit modification reflecting the reduced emissions limitation of the generating facility.]

* * * * *

(n) ERCs transferred from one facility to another may not be transferred to a third party, **[except as provided in subsection (h)] unless the transfer of the ERCs is processed by the Department through the ERC registry system.**

* * * * *

(q) ERCs may not be generated for emissions in excess of those previously identified in required emission statements and for which applicable emission fees have been paid.

(r) EMISSION REDUCTIONS OCCURRING AT A FACILITY AFTER JANUARY 1, 2002, BUT PRIOR TO _____ [EDITOR'S NOTE: THE BLANK REFERS TO THE DATE OF PUBLICATION OF THE PROPOSAL] MAY BE USED TO GENERATE ERCs IN ACCORDANCE WITH THIS SUBCHAPTER, IF A COMPLETE ERC REGISTRY APPLICATION IS SUBMITTED TO THE DEPARTMENT BY _____ [EDITOR'S NOTE: THE BLANK REFERS TO THE DATE 12 MONTHS AFTER PUBLICATION OF THE PROPOSAL].

§ 127.207. CREDITABLE EMISSIONS DECREASE OR ERC generation and creation.

A CREDITABLE EMISSIONS DECREASE OR ERC generation and creation may occur under the following conditions:

(1) ~~[ERCs]~~ A CREDITABLE EMISSIONS DECREASE OR ERC ~~{shall}~~ [must] be surplus, permanent, quantified and Federally enforceable as follows:

(i) *Surplus.* ~~[ERCs]~~ A CREDITABLE EMISSIONS DECREASE OR ERC shall be included in the current emission inventory, and may not be required by or be used to meet past or current SIP, attainment demonstration, RFP, emissions limitation or compliance plans. ~~[Emission]~~ Emissions reductions necessary to meet NSPS, LAER, RACT, ~~[Best Available Technology (BAT)]~~ BAT, BACT, allowance-based programs and permit or plan approval emissions limitations or ~~[another]~~ other emissions limitations required by the Clean Air Act or the act may not be used to generate ERCs OR A CREDITABLE EMISSIONS DECREASE.

(ii) *Permanent.* ~~[ERCs]~~ A CREDITABLE EMISSIONS DECREASE OR ERC generated from emissions reductions which are Federally enforceable through an operating permit or a revision to the SIP and assured for the life of the corresponding increase, whether unlimited or limited in duration, are considered permanent. Emissions limitations and other restrictions imposed on a permit as a result of A CREDITABLE EMISSIONS DECREASE OR ERC generation shall be carried over into each successive permit issued to that facility. MERCs and other ERCs generated pursuant to an approved economic incentive program shall be permanent within the time frame specified by the program.

(iii) *Quantified.* ~~[ERCs]~~ A CREDITABLE EMISSIONS DECREASE OR ERC shall be quantified in a credible, workable and replicable method consistent with procedures promulgated by the Department and the EPA.

(iv) *Enforceable.* ~~[ERCs]~~ A CREDITABLE EMISSIONS DECREASE OR ERC shall be Federally enforceable emissions reductions, regulated by Federal or SIP emissions ~~[limitation]~~ limitations, such as a limit on potential to emit in the permit, and be generated from a plan approval, economic incentive program or permit limitation.

(2) ~~[For facilities subject to this subchapter,]~~ EXCEPT AS PROVIDED IN § 127.206(r) (RELATING TO ERC GENERAL REQUIREMENTS), an ERC registry application shall be submitted to the Department within 1 year of the initiation of an emissions reduction used to generate ERCs. THE ERC REGISTRY APPLICATION DEADLINE MAY BE EXTENDED TO 2 YEARS FROM THE INITIATION OF AN EMISSIONS REDUCTION USED TO GENERATE ERCs IF THE OWNER OR OPERATOR OF THE SOURCE OR FACILITY EITHER SUBMITS TO THE DEPARTMENT A MAINTENANCE PLAN IN ACCORDANCE WITH § 127.11a (RELATING TO REACTIVATION OF SOURCES) OF SUBCHAPTER B (RELATING TO PLAN APPROVAL REQUIREMENTS), OR A WRITTEN NOTICE WITHIN 1 YEAR OF DEACTIVATION OF THE SOURCE OR FACILITY TO REQUEST PRESERVATION OF THE EMISSIONS IN THE INVENTORY. [Facilities or sources not subject to this subchapter shall submit a registry application and receive Department approval prior to the occurrence of an emissions reduction.]

* * * * *

(4) In establishing the baseline used to calculate ~~[ERCs]~~ **A CREDITABLE EMISSIONS DECREASE OR ERC**, the Department will consider emission characteristics and operating conditions which include, at a minimum, the emission rate, capacity utilization, hours of operations and seasonal emission rate variations, in accordance with the following:

(i) The baseline emissions rate will be determined as follows:

(A) The average actual emissions or allowable emissions, whichever is lower, shall be calculated over the 2 calendar years immediately preceding the emissions reduction which generates the ~~[ERCs]~~ **CREDITABLE EMISSIONS DECREASE OR ERC**.

* * * * *

(5) Acceptable emissions reduction techniques, which an applicant may use to generate ERCs, are limited to the following:

* * * * *

(vi) ~~[For facilities or sources not subject to this subchapter]~~ **NOTWITHSTANDING THE REQUIREMENTS IN § 127.207(2)**, a MERC program, **AIRPORT EMISSION REDUCTION CREDITS PROGRAM** or another Economic Incentive Program which meets the requirements of this subchapter and which is approved by the EPA as a SIP revision.

(A) The program ~~[shall]~~ **must** comply with the following requirements:

* * * * *

(IV) ERCs shall be surplus to **emissions reductions achieved under** other Federal and State regulations relied upon in an applicable attainment plan or demonstration or credited in an RFP or milestone demonstration.

* * * * *

(7) The reduced emissions limitation of the new or modified permit of the source or facility generating the **CREDITABLE EMISSIONS DECREASE OR ERC** shall be continuously verified by Department, local air pollution control agency or other State approved compliance monitoring and reporting programs. Onsite inspections will be made to verify shutdowns. If equipment has not been dismantled or removed, the owner or operator shall on an annual basis certify **in writing** to the Department the continuance of the shutdown.

§ 127.208. ERC use and transfer requirements.

The use and transfer of ERCs shall meet the following conditions:

* * * * *

(2) The transferee shall secure approval to use the offsetting ERCs through a plan approval or an operating permit, which indicates the [Department] Department's approval of the ERC transfer and use. Upon the issuance of a plan approval or an operating permit, the ERCs are no longer subject to expiration under § 127.206(f) (relating to ERC general requirements) except as specified in § 127.206(g).

* * * * *

(9) [For a VOC or NO_x facility, the use and transfer of ERCs shall comply with the following:

(i) For the purpose of emissions offset transfers at VOC or NO_x facilities, the areas included within an ozone transport region established under section 184 of the Clean Air Act (42 U.S.C.A. § 7511c), which are designated in 40 CFR 81.339 (relating to Pennsylvania) as attainment [areas], nonattainment or unclassifiable areas for ozone, shall be treated as a single nonattainment area.

[(ii) A] (10) An owner or operator of a facility shall acquire ERCs for use as offsets from an ERC generating facility located within the same nonattainment area.

[(iii) An exception to the requirement of subparagraph (ii) may be granted to allow the acquisition of ERCs from a facility located outside the nonattainment area, but within either 2 days transport upwind or within 200 kilometers of the using facility, if the ERCs are obtained from another nonattainment area with an equal or higher classification and if the emissions from the other nonattainment area contribute to an NAAQS violation in the nonattainment area of the proposed facility. The facility shall demonstrate to the Department's satisfaction that the ERC generating facilities located in the nonattainment area were investigated and no suitable ERCs were available, and that the ERCs meet the 2-day transport upwind requirement.]

(11) AN OWNER OR OPERATOR OF A FACILITY SHALL ACQUIRE ERCs FOR USE AS OFFSETS FROM AN ERC GENERATING FACILITY LOCATED WITHIN THE SAME NONATTAINMENT AREA, EXCEPT THAT THE DEPARTMENT MAY ALLOW THE OWNER OR OPERATOR TO OBTAIN ERCs GENERATED IN ANOTHER NONATTAINMENT AREA IF THE FOLLOWING EXIST:

(A) THE OTHER AREA HAS AN EQUAL OR HIGHER NONATTAINMENT CLASSIFICATION THAN THE AREA IN WHICH THE FACILITY IS LOCATED.

(B) EMISSIONS FROM THE OTHER AREA CONTRIBUTE TO A VIOLATION OF THE NATIONAL AMBIENT AIR QUALITY STANDARD IN THE NONATTAINMENT AREA IN WHICH THE FACILITY IS LOCATED.

(12) AN OWNER OR OPERATOR OF A FACILITY THAT IS SUBJECT TO ALLOWANCE-BASED PROGRAMS IN THIS ARTICLE MAY GENERATE,

CREATE, TRANSFER AND USE ERCs IN ACCORDANCE WITH THE REQUIREMENTS OF THIS SUBCHAPTER AND APPLICABLE PROVISIONS IN CHAPTER 145 (RELATING TO INTERSTATE POLLUTION TRANSPORT REDUCTION).

§ 127.209. ERC registry system.

* * * * *

(c) As part of the new source review process, the Department will provide the EPA and the public with notice of A plan approval [applications] OR OPERATING PERMIT proposing to use ERCs.

(d) The Department will process each ERC registry application, permit modification and plan approval application, including those involving netting transactions, [~~which contain a change in allowable emission rates,~~] through the registry system to verify the information and to ensure that the requirements of §[-]§ 127.206—127.208 (relating to ERC general requirements; ERC generation and creation; and ERC use and transfer requirements) have been met, including the requirement that the required reductions have been made and certified before registry entries or changes are made.

(e) Registry operations and procedures are as follows:

(1) The registry will list the ERCs, and the Department will publish revisions to the list of registered ERCs available for trading purposes in the *Pennsylvania Bulletin* on a quarterly basis.

* * * * *

(4) Upon issuance of a plan approval OR OPERATING PERMIT allowing the use of ERCs entered in the registry, the following registry transactions will occur:

* * * * *

(ii) The registry will indicate the effective date, the quantity of [used] ERCs used, the originating generator and the ERC creation date, which is the date of actual or anticipated emissions reduction by the ERC generating facility.

§ 127.210. Offset ratios.

The emission offset ratios for ERC transactions subject to the requirements of this subchapter ~~[shall]~~ [must] be in an amount equal to or greater than the ratios specified in the following table:

Required Emission Reductions From Existing Sources	
	Flue Emissions Fugitive Emissions
<u>[Particulate Matter]</u> [PM-2.5] , PM-10 and SO _x	1.3:1 5:1

[Primary Nonattainment Areas	1.3:1	5:1]
[Secondary Nonattainment Areas	1.1:1	3:1]

* * * * *

§ 127.211. [Applicability determination] (Reserved).

[(a) An applicability determination will establish whether:

(1) A modification which results in an emissions rate increase or the emission of pollutants not previously emitted at an existing major facility for particulate matter, PM-10 precursors, PM-10, SO_x, CO or lead emissions, located in or impacting a nonattainment area for these criteria pollutants, is a major modification under § 127.203 (relating to facilities subject to special permit requirements) and is subject to the new source review requirements of this subchapter.

(2) A modification which results in an emissions rate increase or the emission of pollutants not previously emitted at an existing major facility of VOC or NO_x emissions, located in or impacting a moderate nonattainment area for ozone, or an area included within an ozone transport region and designated as either a marginal or incomplete data nonattainment area or as an unclassifiable/attainment area for ozone, is a major modification under § 127.203 and is subject to the new source review requirements of this subchapter.

(3) A modification which results in an emissions rate increase or the emission of pollutants not previously emitted at an existing major facility of VOC or NO_x emissions, located in or impacting a serious or severe nonattainment area for ozone is a major modification under § 127.203 and is subject to the new source review requirements of this subchapter, except as modified by the requirements in § 127.203(c).

(b) The Department will conduct an applicability determination during its review of a plan approval application for a proposed modification which results in an increase in allowable emissions to determine the amount of the net increase in accordance with the following:

(1) For a proposed de minimis increase the proposed increase will be summed with those emission increases and decreases occurring after January 1, 1991.

(2) For a proposed increase which equals or exceeds an emissions rate threshold or significance level specified in § 127.203, the proposed increase will be summed with those emissions increases and decreases that occurred within the contemporaneous period which begins 5 years before commencement of construction of the proposed modification and ends with the date that the emission increase from the modification occurs. Notwithstanding the requirement to begin the contemporaneous period 5 years before construction, the period may not begin

prior to January 1, 1991, or the design year of the most recent attainment demonstration, whichever is later.

(3) The following procedures will apply in determining the amount of emissions increases and decreases to be summed:

(i) If a facility's maximum allowable emissions rate has not been established, the rate will be calculated for purposes of the applicability determination.

(ii) The increase in potential to emit for each proposed modification or new source will be used to set an allowable emissions rate for the modified or new facility. The allowable rate increase will be treated as an increase in the maximum allowable emissions rate for the facility.

(iii) Other increases and decreases in allowable emission rates at a facility which occur within the applicable time period are creditable in accordance with the following:

(A) Increases in the allowable rates shall be factored into the facility maximum allowable emissions rate.

(B) A decrease in an allowable emissions rate is not creditable unless the following conditions are met:

(I) The emissions reduction credit provisions in § 127.207(1) and (3)–(7) (relating to ERC generation and creation) have been complied with, and the decrease is Federally enforceable by the time that actual construction begins on the modification. The plan approval for the modification will contain a provision specifying that the emissions decrease is Federally enforceable on or before the date of commencement of construction. The facility owner or operator shall certify in writing that the reductions were not relied on for a previous applicability determination or to generate ERCs.

(II) The emissions decrease is such that when compared with the proposed increase there is no significant change in the character of emissions, including seasonal emission patterns, stack heights or hourly emission rates. A significant change in the character of emissions means a change resulting in an increase in emissions equal to or greater than an emissions rate threshold or an impact in excess of a significance level as specified in § 127.203. For VOC and NO_x during the ozone season, the portion of the annual emissions rate threshold specified in § 127.203 which as a percentage occurs during the ozone season may not be exceeded.

(III) The emission decrease represents approximately the same qualitative significance for public health and welfare as attributed to the proposed increase. This requirement is satisfied if the emission rate thresholds and significance levels contained in § 127.203 are not exceeded.

(C) An emissions reduction or an ERC generated at the facility may be used as a creditable decrease in an applicability determination. A portion of an ERC generated at another facility, acquired by trade and incorporated in a plan approval for use at the facility will not be credited as an emissions decrease in an applicability determination.

(D) ERCs which the facility has generated and registered are not creditable as reductions in an applicability determination unless the ERCs are withdrawn from the registry.

(E) A creditable emissions decrease which occurred prior to January 1, 1991, or the design year of the most recent attainment demonstration, whichever is later, and within the contemporaneous period of the proposed increase will be treated as new source growth and discounted in accordance with the applicable nonattainment area ratio in § 127.210 (relating to offset ratios).

(iv) An emissions increase that results from a physical change at a facility occurs when the unit on which construction occurred becomes operational and begins to emit a criteria pollutant. A replacement unit that is allowed a shakedown period becomes operational at the end of the approved shakedown period, which may not exceed 180 days.

(c) The new source review requirements of this subchapter apply to:

(1) A facility at which the proposed emissions increase and the net increase in the facility maximum allowable emissions rate as determined under subsection (b) meet or exceed the applicable threshold limits in § 127.203. A decrease in a facility maximum allowable emissions rate will not qualify as a decrease for purposes of this section when a facility petitions for a decrease in its maximum allowable emissions rate through a permit restriction unless the conditions of subsection (b)(3)(iii) are met.

(2) A facility which was deactivated for a period in excess of 1 year and is not in compliance with the reactivation requirements of § 127.215 (relating to reactivation).

(3) A source which has netted out of new source review by applying emissions reduction or ERCs generated by another source at the facility, if the emissions reduction or ERC generating source subsequently increases its allowable emissions unless the facility generates sufficient additional emissions reductions or ERCs equal to the proposed increase at the ERC generating source.

(d) For a proposed emissions increase that is subject to the new source requirements under subsection (c), the requirements of § 127.205 (relating to special permit requirements) are applicable in the following manner:

(1) Emissions offsets shall be required for the entire net emissions increase which occurred over the contemporaneous period except to the extent that offsets or

other reductions were previously applied against increases in an earlier applicability determination.

(2) LAER applies to the proposed modification which results in an increase in emissions, and to subsequent or previous modifications which result in emissions increases that are directly related to and normally included in the project associated with the proposed modification and which occurred within the contemporaneous period of the proposed emissions increase.

(e) For a proposed de minimis increase in which the net emissions increase since January 1, 1991, meets or exceeds the threshold limits in § 127.203, only the emissions offset requirements in § 127.205(3) apply to the net emissions increase.

(f) The new source review requirements of this subchapter do not apply to:

(1) A facility at which a proposed major modification results in a net increase in the maximum allowable emission rate as determined under subsection (b) which does not meet or exceed the applicable threshold limits in § 127.203.

(2) A facility at which a proposed de minimis increase results in a net emissions increase since January 1, 1991, which as determined under subsection (b) does not meet or exceed the applicable threshold limits in § 127.203.]

§ 127.212. Portable facilities.

(a) [A] An owner or operator of a portable SO_x, [particulate matter,] [PM-10] [precursor] [precursors,]PM-10, [PM-2.5 precursors, PM-2.5,]lead or CO facility subject to this subchapter which will be relocated within 6 months of the commencement of operation to a location within an attainment area which does not have an impact on a nonattainment area at or above the significance levels contained in § 127.203 (relating to facilities subject to special permit requirements) shall be exempt from this subchapter. [A] An owner or operator of a facility which subsequently returns to a location where it is subject to this subchapter shall comply with this subchapter.

(b) [A] An owner or operator of a portable VOC or NO_x facility subject to this subchapter which will be relocated outside of this Commonwealth within 6 months of the commencement of operation shall be exempt from this subchapter. [A] An owner or operator of a facility which subsequently returns to a location in this Commonwealth where it is subject to this subchapter shall comply with this subchapter.

§ 127.213. Construction and demolition.

* * * * *

(b) Emissions from construction and demolition activities may not be considered under [§ 127.203 (relating to facilities subject to special permit requirements)] § 127.203a (relating to applicability determination).

§ 127.214. [Exemptions] (Reserved).

[The special permit requirements of this subchapter may be waived for modifications to an existing facility through a plan approval application which demonstrates to the satisfaction of the Department that:

- (1) The capital expenditure is being made with the primary purpose of achieving compliance with a new, more stringent regulation than was previously applicable, and will bring the facility into compliance with the new regulation.
- (2) The maximum allowable emissions from the facility itself or a discrete operation, unit or other pollutant emitting activity at the facility will not increase.]

[§ 127.214a. Special provisions for advanced clean coal generation technology:

~~— (a) This section applies to an owner or operator of a project that uses advanced clean coal generation technology in a new electric utility steam generating unit or to retrofit or repower an existing electric utility steam generation unit.~~

~~— (b) As used in this section, the term "advanced clean coal generation technology" means an electric utility steam generating unit uses an advanced clean coal generation technology if the following conditions are met:~~

~~— (1) The unit either:~~

~~— (i) Uses integrated gasification combined cycle technology;~~

~~— (ii) Has a design net heat rate of no more than 8530 Btu/KWH (at least 40% efficiency);~~

~~— (2) The vendor warrants that the unit is designed, at a minimum, to meet the following performance requirements:~~

<u>Pollutants</u>	<u>Emission Rate</u>	<u>Averaging Period</u>
<u>SO_x</u>	<u>99% removal</u>	<u>30-days rolling average</u>
<u>NO_x</u>	<u>0.5 lbs/MWH</u>	<u>30-days rolling average</u>
<u>CO</u>	<u>0.32 lbs/MWH</u>	<u>24-hour rolling average</u>
<u>PM-10</u>	<u>0.06 lbs/MWH</u>	<u>Average of three one-hour stack tests</u>
<u>VOC</u>	<u>0.01 lbs/MWH</u>	<u>Average of three one-hour stack tests</u>
<u>CO₂</u>	<u>1.76 lbs/KWH</u>	<u>12-month rolling average</u>

Hg 95% removal 12-month rolling average

~~(c) An owner or operator of a new, retrofitted or repowered electric utility steam generation unit that qualifies as advanced clean coal generation technology with a net emissions increase from the facility which meets or exceeds the applicable emissions rate that is significant shall be subject to this subchapter.~~

~~(d) The qualifying electric utility steam generation unit will be deemed to meet the LAER control technology requirements of § 127.205 (relating to special permit requirements) unless the Department determines that the performance requirements specified in subsection (b) are less stringent than LAER.~~

~~(e) The owner or operator of an electric utility steam generation unit meeting the requirements of this section shall offset the net emissions increase of a regulated NSR pollutant in accordance with the offset ratios specified in § 127.210 (relating to offset ratios).~~

~~(f) The Department will expedite the processing of a plan approval application for an electric steam generating unit that qualifies under this section.]~~

§ 127.215. Reactivation.

(a) A facility which has been out of operation or production for 1 year or more during the term of its operating permit may be reactivated within the term of its operating permit and will not be considered a new facility subject to this subchapter if the following conditions are satisfied:

(1) The permittee shall within 1 year of the deactivation submit **in writing** to the Department and implement a maintenance plan which includes the measures to be taken, including maintenance, upkeep, repair or rehabilitation procedures, which will enable the facility to be reactivated in accordance with the terms of the permit.

(2) The permittee shall submit a reactivation plan at least 30 days prior to the proposed date of reactivation. The reactivation plan ~~{shall}~~ **[must]** include sufficient measures to ensure that the facility will be reactivated in compliance with the permit requirements. The permittee may submit a reactivation plan to the Department at any time during the term of its operating permit. The reactivation plan may also be submitted to and approved **in writing** by the Department as part of the plan approval or permit application process.

(3) The permittee shall ~~[submit a notice to]~~ **notify** the Department **in writing** within 1 year of deactivation requesting preservation of the emissions in the inventory and indicating the intent to reactivate the facility.

(4) The permittee shall comply with the terms and conditions of the ~~[maintenance]~~ **[following]:**

(i) Maintenance plan while the facility is deactivated[, and shall comply with the terms and conditions of the reactivation].

(ii) Reactivation plan and the operating permit upon reactivation.

* * * * *

(b) The Department will approve or disapprove **in writing** the complete reactivation plan within 30 days of plan submission, unless additional time is required based on the size or complexity of the facility.

(c) For a facility which is deactivated in accordance with subsection (a), ERCs may be created only if an ERC registry application is filed within ~~[4]~~**2** year**S** of deactivation.

§ 127.217. Clean Air Act Titles III--V applicability.

Compliance with this subchapter does not relieve a source or facility from complying with Titles III--V of the Clean Air Act (42 U.S.C.A. §§ 7601--7627; 7641, 7642, 7651--7651o; and 7661--7661f) **applicable requirements of the act or regulations adopted under the act.**

§ 127.218. PALs.

(a) The following provisions govern an actual PAL for a major facility.

(1) The Department may approve the use of an actual PAL for any existing major facility if the PAL meets the requirements in this subsection AND SUBSECTIONS (b) through ~~subsection~~(n).

(2) The Department will not permit an actual PAL for VOC or NO_x for a major facility located in an extreme ozone nonattainment area.

(3) A physical change in or change in the method of operation of a major facility that maintains its total facility-wide emissions below the PAL level, meets the requirements in this subsection AND SUBSECTIONS (b) through ~~subsection~~(n) and complies with the PAL permit is not:

(i) A major modification for the PAL pollutant.

(ii) Subject to this subchapter.

(iii) Subject to § 127.203(e)(2) (relating to facilities subject to special permitting requirements).

(4) An owner or operator of a major facility shall continue to comply with applicable Federal or State requirements, emissions limitations and work practice requirements that were established prior to the PAL effective date.

(b) The owner or operator of a major facility shall submit the following information to the Department as part of the PAL application:

(1) A list of the emissions units at the facility designated as small, significant or major based on their potential to emit. The list must indicate which Federal or State applicable requirements, emissions limitations or work practices apply to each unit.

(2) Calculations and supporting documentation for the baseline actual emissions, which include emissions associated with operation of the unit, startups and shutdowns.

(3) The calculation procedures that the owner or operator of the major facility proposes to use to convert the monitoring system data to monthly emissions and annual emissions based on a 12-month rolling total for each month as required by subsection (m)(1).

(c) The Department may establish a PAL if the following requirements are met:

(1) The PAL ~~[must]~~SHALL impose an annual emissions limitation in tpy for the entire major facility. For each month during the PAL effective period after the first 12 months of establishing a PAL, the owner or operator of the major facility shall show that the sum of the monthly emissions from each emissions unit under the PAL for the previous 12 consecutive months, expressed as a 12-month rolling ~~[average]~~TOTAL, is less than the PAL. For each month during the first 11 months from the PAL effective date, the owner or operator of the major facility shall show that the sum of the preceding monthly emissions from the PAL effective date for each emissions unit under the PAL is less than the PAL.

(2) The PAL ~~[must]~~SHALL be established in a PAL permit that meets the public participation requirements in subsection ~~[(d)](e)~~.

(3) The PAL permit ~~[must]~~SHALL contain all the requirements of subsection (g).

(4) The PAL ~~[must]~~SHALL include fugitive emissions, to the extent quantifiable, from all emissions units that emit or have the potential to emit the PAL pollutant at the major facility.

(5) Each PAL ~~[must]~~SHALL regulate emissions of only one pollutant.

(6) Each PAL ~~[must]~~SHALL have a PAL effective period of 10 years.

(7) The owner or operator of a major facility issued a PAL permit shall comply with the monitoring, recordkeeping and reporting requirements provided in subsections (m)--(o) for each emissions unit under the PAL through the PAL effective period.

(d) At no time during or after the PAL effective period are emissions reductions of a PAL pollutant, which occur during the PAL effective period, creditable as decreases for purposes of offsets under this subchapter unless the level of the PAL is reduced by the amount of the emissions reductions and the reductions would be creditable in the absence of the PAL.

(e) A PAL for an existing major facility must be established or modified in accordance with the public notice procedures set forth under §§ 127.44, 127.424 and 127.521 (relating to public notice; public notice; and additional public participation provisions).

(f) Setting the 10-year actual PAL level must comply with the following:

(1) The actual PAL level for a major facility must be established as the sum of the baseline actual emissions of the PAL pollutant for each emissions unit at the facility plus an amount equal to the applicable emissions rate that is significant for the PAL pollutant or under the Clean Air Act, whichever is lower.

(2) When establishing the actual PAL level, for a PAL pollutant, one consecutive ~~[2-year]~~24-MONTH period must be used to determine the baseline actual emissions for all existing emissions units. HOWEVER, A DIFFERENT CONSECUTIVE 24-MONTH PERIOD MAY BE USED FOR EACH DIFFERENT PAL POLLUTANT.

(3) Emissions associated with units that were permanently shut down after this ~~[2-year]~~24-MONTH period must be subtracted from the PAL level.

(4) ~~[Emissions from units on which actual construction began after the 2-year period must be added to the PAL level in an amount equal to the actual emissions of the units.]~~FOR NEWLY CONSTRUCTED EMISSION UNITS, WHICH DO NOT INCLUDE MODIFICATIONS TO EXISTING UNITS, ON WHICH ACTUAL CONSTRUCTION BEGAN AFTER THE 24-MONTH PERIOD, INSTEAD OF ADDING THE BASELINE ACTUAL EMISSIONS AS SPECIFIED IN THIS PARAGRAPH, THE EMISSIONS MUST BE ADDED TO THE PAL LEVEL IN AN AMOUNT EQUAL TO THE POTENTIAL TO EMIT OF THE EMISSION UNITS.

(5) The Department will specify a reduced PAL level in tpy in the PAL permit to become effective on the future compliance date of any applicable Federal or State regulatory requirement that the Department is aware of prior to issuance of the PAL permit.

(g) At a minimum, the PAL permit [must]SHALL contain the following information:

(1) The PAL pollutant and the applicable facility-wide emissions limitation in tpy.

(2) The effective date and the expiration date.

(3) A requirement that if the owner or operator of a major facility applies to renew a PAL in accordance with subsection [(i)](k) before the end of the PAL effective period, the PAL permit does not expire at the end of the PAL effective period. The PAL permit remains in effect until the Department issues a revised PAL permit.

(4) A requirement that emission calculations for compliance purposes include emissions from startups, shutdowns and malfunctions.

(5) A requirement that, upon expiration of the PAL permit, the owner or operator of a major facility is subject to the requirements of subsection (j).

(6) The calculation procedures that the owner or operator of a major facility shall use to convert the monitoring system data to monthly emissions and annual emissions based on a 12-month rolling total for each month as required by subsection (n)(1).

(7) A requirement that the owner or operator of a major facility shall monitor all emissions units in accordance with subsection (m).

(8) A requirement that the owner or operator shall retain the records required under subsection (n) AND THAT THEY BE RETRIEVABLE onsite.

(9) A requirement that the owner or operator shall submit the reports required under subsection (o) by the required deadlines.

(10) A requirement that the emissions from a new source THAT REQUIRES A PLAN APPROVAL [must]SHALL be the minimum attainable through the use of [BAT] BEST AVAILABLE TECHNOLOGY. A PHYSICAL CHANGE OR CHANGE IN METHOD OF OPERATION AT AN EXISTING EMISSIONS UNIT SHALL NOT BE SUBJECT TO BEST AVAILABLE TECHNOLOGY REQUIREMENTS OF THIS CHAPTER UNLESS THE EMISSIONS UNIT IS MODIFIED SO THAT THE FIXED CAPITAL COST OF NEW COMPONENTS EXCEEDS 50% OF THE FIXED CAPITAL COST THAT WOULD BE REQUIRED TO CONSTRUCT A COMPARABLE ENTIRELY NEW EMISSIONS UNIT.

(11) Other requirements the Department deems necessary to implement and enforce the PAL.

- (h) The Department will specify a PAL effective period of 10 years.
- (i) The following requirements apply to reopening of the PAL permit:
- (1) During the PAL effective period, the Department will reopen the PAL permit to:
- (i) Correct typographical/calculation errors made in setting the PAL or reflect a more accurate determination of emissions used to establish the PAL.
- (ii) Reduce the PAL if the owner or operator of the major facility creates creditable emissions reductions for use as offsets under § 127.207 (relating to ERC generation or creation).
- (iii) Revise the PAL to reflect an increase in the PAL as provided under subsection (l).
- (2) The Department may reopen the PAL permit to reduce the PAL:
- (i) To reflect newly applicable Federal requirements with compliance dates after the PAL effective date.
- (ii) Consistent with a requirement that is enforceable as a practical matter and that the [State]DEPARTMENT may impose on the major facility consistent with all applicable requirements.
- (iii) If the Department determines that a reduction is necessary to avoid causing or contributing to:
- (A) A NAAQS or PSD increment violation.
- (B) An adverse impact on an air quality related value that has been identified for a Federal Class I area by a Federal land manager and for which information is available to the general public.
- (3) Except for the permit reopening paragraph (1)(i) for the correction of typographical/calculation errors that do not increase the PAL level, other reopening shall be carried out in accordance with the public participation requirements of subsection (e).
- (j) A PAL permit which is not renewed in accordance with the procedures in subsection (k) expires at the end of the PAL effective period and the following requirements apply:
- (1) The owner or operator of each emissions unit or each group of emissions units that existed under the PAL shall comply with an allowable emissions limitation under a revised permit established according to the following procedures:

(i) Within the time frame specified for PAL permit renewals in subsection (k)(2), the owner or operator of the major facility shall submit a proposed allowable emissions limitation for each emissions unit, or each group of emissions units if this distribution OF ALLOWABLE EMISSIONS is more appropriate as [decided] DETERMINED by the Department, by distributing the PAL allowable emissions for the major facility among each of the emissions units that existed under the PAL permit. If the PAL permit has not been adjusted for an applicable requirement that became effective during the PAL effective period, as required under subsection (k)(5), this distribution is made as if the PAL permit has been adjusted.

(ii) The Department will decide whether and how to distribute the PAL allowable emissions and issue a revised PAL permit incorporating allowable limits for each emissions unit or each group of emissions units.

(2) The owner or operator of each emissions unit or group of emissions units shall comply with the allowable emissions limitation on a 12-month rolling basis. The Department may approve the use of emissions monitoring systems other than CEMS, CERMS, PEMS or CPMS to demonstrate compliance with the allowable emissions limitation.

(3) Until the Department issues the revised PAL permit incorporating the allowable limits for each emissions unit or group of emissions units required under paragraph (1)(i), the owner or operator of the facility shall continue to comply with a facility-wide, multi-unit emissions cap equivalent to the level of the PAL emissions limitation.

(4) A physical change or change in the method of operation at the major facility is subject to this subchapter if the change meets the definition of major modification.

(5) The owner or operator of the major facility shall continue to comply with any State or Federal applicable requirements including BAT, BACT, RACT or NSPS that may have applied either during the PAL effective period or prior to the PAL effective period except for those emissions limitations that had been established under § 127.203(e)(2), but were eliminated by the PAL in accordance with the provisions in subsection (a)(3)(iii).

(k) The following requirements apply to renewal of a PAL:

(1) The Department will follow the procedures specified in subsection (e) in approving a request to renew a PAL permit for a major facility, and will provide both the proposed PAL level and a written rationale for the proposed PAL level to the public for review and comment in accordance with the APPLICABLE public notice requirements in §§ 127.44, 127.424 AND 127.521. During the public review, a person may propose a PAL level for the major facility for consideration by the Department.

(2) An owner or operator of a major facility shall submit a timely application to the Department to request renewal of a PAL permit. A timely application is one that is submitted at least 6 months, prior to, but not earlier than 18 months prior to the date of permit expiration. If the owner or operator of a major facility submits a complete application to renew the PAL permit within this time period, then the PAL continues to be effective until the revised permit with the renewed PAL is issued.

(3) The application to renew a PAL permit must contain the following information:

(i) The information required in subsection (b)(1)–(3).

(ii) A proposed PAL level.

(iii) The sum of the potentials to emit of the emissions units under the PAL.

(iv) Other information the owner or operator wishes the Department to consider in determining the appropriate level at which to renew the PAL.

(4) The Department will consider the options in subparagraphs (i) and (ii) in determining whether and how to adjust the PAL. In no case may the adjustment fail to comply with subparagraphs (iii) and (iv).

(i) If the emissions level calculated in accordance with subsection (f) is equal to or greater than 80% of the PAL level, the Department may renew the PAL at the same level without considering the factors set forth in subparagraph (ii).

(ii) The Department may set the PAL at a level that it determines to be more representative of the facility's baseline actual emissions or that it determines to be appropriate considering air quality needs, advances in control technology, anticipated economic growth in the area, desire to reward or encourage the facility's voluntary emissions reductions or other factors specifically identified by the Department in its written rationale.

(iii) If the potential to emit of the major facility is less than the PAL, the Department will adjust the PAL to a level no greater than the potential to emit of the facility.

(iv) The Department will not approve a renewed PAL level higher than the current PAL unless the major facility has complied with subsection (1).

(5) If the compliance date for a State or Federal requirement that applies to the facility occurs during the PAL effective period and the Department has not already adjusted for this requirement, the PAL must be adjusted at the time of the PAL permit renewal or Title V permit renewal, whichever occurs first.

(1) The following requirements apply to increasing a PAL during the PAL effective period:

(1) The Department may increase a PAL emissions limitation during the PAL effective period if the owner or operator of the major facility complies with the following:

(i) The owner or operator of the major facility shall submit a complete application to request an increase in the PAL limit for a PAL major modification. The application must identify the emissions units contributing to the increase in emissions that cause the major facility's emissions to equal or exceed its PAL.

(ii) The owner or operator of the major facility shall demonstrate that the sum of the baseline actual emissions of the small emissions units ASSUMING APPLICATION OF BEST AVAILABLE TECHNOLOGY, plus the sum of the baseline actual emissions of the significant and major emissions units assuming application of BACT equivalent controls, plus the sum of the allowable emissions of the new or modified emissions units exceeds the PAL. The level of control that would result from BEST AVAILABLE TECHNOLOGY OR BACT equivalent controls on each SMALL EMISSIONS UNIT, significant EMISSIONS UNIT or major emissions unit must be determined by conducting a new BEST AVAILABLE TECHNOLOGY OR BACT analysis at the time the application is submitted unless the emissions unit is currently required to comply with a BEST AVAILABLE TECHNOLOGY, BACT or LAER requirement that was established within the preceding 10 years. In this case, the assumed control level for that emissions unit is equal to the level of BEST AVAILABLE TECHNOLOGY, BACT or LAER with which that emissions unit must currently comply.

(iii) The owner or operator of the major facility shall obtain a major NSR permit for all emissions units identified in subparagraph (i), regardless of the magnitude of the emissions increase resulting from them. The owner or operator of these emissions units shall comply with the applicable emissions requirements of this subchapter, even if the units are subject to a PAL or continue to be subject to a PAL.

(iv) The PAL permit must require that the increased PAL level be effective on the day any emissions unit that is part of the PAL major modification becomes operational and begins to emit the PAL pollutant.

(2) The Department will calculate the new PAL as the sum of the allowable emissions for each modified or new emissions unit, plus the sum of the baseline actual emissions of the significant and major emissions units assuming application of BACT equivalent controls determined in accordance with paragraph (1)(ii), plus the sum of the baseline actual emissions of the small emissions units.

(3) The PAL permit must be revised to reflect the increased PAL level under the public notice requirements of subsection (e).

(m) The following monitoring requirements apply to an owner or operator subject to a PAL:

(1) Each PAL permit must contain enforceable requirements for the monitoring system to accurately determine plantwide emissions of the PAL pollutant in terms of mass per unit of time.

(2) The PAL monitoring system must employ one or more of the four general monitoring approaches meeting the minimum requirements in paragraph (5) and must be approved in writing by the Department.

(3) The owner or operator of the facility may also use an alternative monitoring approach that meets the requirements of paragraph (1), if approved in writing by the Department.

(4) Failure to use a monitoring system that meets the requirements of this section renders the PAL permit invalid.

(5) The following are acceptable general monitoring approaches when conducted in accordance with the minimum requirements in paragraphs (6)--(12):

(i) Mass balance calculations for activities using coatings or solvents.

(ii) CEMS.

(iii) CPMS or PEMS.

(iv) Emission factors.

(6) An owner or operator of a major facility using mass balance calculations to monitor PAL pollutant emissions from activities using coating or solvents shall meet the following requirements:

(i) Provide a demonstrated means of validating the published content of the PAL pollutant that is contained in or created by all materials used in or at the emissions unit.

(ii) Assume that the emissions unit emits all of the PAL pollutant that is contained in or created by any raw material or fuel used in or at the emissions unit, if it cannot otherwise be accounted for in the process.

(iii) If the vendor of a material or fuel used in or at the emissions unit publishes a range of pollutant content from the material, the owner or operator shall use the highest value of the range to calculate the PAL pollutant emissions unless the Department determines, in writing, that there is site-specific data or a site-specific monitoring program to support another content within the range.

(7) An owner or operator of a major facility using a CEMS to monitor PAL pollutant emissions shall meet the following requirements:

(i) The CEMS must comply with applicable Performance Specifications found in 40 CFR Part 60, Appendix B (relating to performance specifications).

(ii) The CEMS must sample, analyze and record data at least every 15 minutes while the emissions unit is operating.

(8) An owner or operator of a major facility using a CPMS or PEMS to monitor PAL pollutant emissions shall meet the following requirements:

(i) The CPMS or PEMS must be calibrated based on current site-specific data demonstrating a correlation between the monitored parameters and the PAL pollutant emissions across the range of operation of the emissions unit.

(ii) Each CPMS or PEMS must sample, analyze and record data at least every 15 minutes or other less frequent interval approved in writing by the Department, while the emissions unit is operating.

(9) An owner or operator of a major facility using emission factors to monitor PAL pollutant emissions shall:

(i) Adjust the emission factors to account for the degree of uncertainty or limitations in the development of the factors.

(ii) Operate the emissions unit within the designated range of use for the emission factor, if applicable.

(iii) Conduct validation testing to determine a site-specific emission factor within 6 months of PAL permit issuance, unless the Department determines, in writing, that testing is not required.

(10) An owner or operator of a facility shall record and report maximum potential emissions without considering enforceable emissions limitations or operational restrictions for an emissions unit during a period of time that there is no monitoring data, unless another method for determining emissions during these periods is specified in the PAL permit.

(11) If an owner or operator of an emissions unit cannot demonstrate a correlation between the monitored parameters and the PAL pollutant emissions rate at the operating points of the emissions unit, the Department will, at the time of permit issuance, either:

(i) Establish default values for determining compliance with the PAL permit based on the highest potential emissions reasonably estimated at the operating points.

(ii) Determine that operation of the emissions unit during operating conditions when there is no correlation between monitored parameters and the PAL pollutant emissions is a violation of the PAL permit.

(12) Data used to establish the PAL must be revalidated through performance testing or other scientifically valid means approved in writing by the Department. This testing must occur at least once every 5 years after issuance of the PAL permit.

(n) The following requirements apply to recordkeeping:

(1) The PAL permit must require an owner or operator to retain a copy of all records necessary to determine compliance with a requirement of this section and of the PAL, including a determination of the 12-month rolling total emissions for each emissions unit, for 5 years.

(2) The PAL permit must require an owner or operator to retain a copy of the following records for the duration of the PAL effective period and 5 years after the PAL permit expires:

(i) A copy of the PAL permit application and applications for revisions to the PAL permit.

(ii) Each annual certification of compliance required under Title V of the Clean Air Act (42 U.S.C.A. §§ 7661--7661f) and regulations adopted under the act and the data relied on in certifying the compliance.

(o) The following requirements apply to reporting and notification:

(1) The owner or operator of a major facility shall submit semiannual monitoring reports and prompt deviation reports to the Department in accordance with the Title V operating permit requirements of Chapter 127, Subchapters F and G (relating to operating permit requirements; and Title V operating permits).

(2) The semiannual reports must:

(i) Be submitted to the Department within 30 days of the end of each reporting period.

(ii) Contain the following information:

(A) The identification of the owner and operator and the permit number.

(B) Total annual emissions in tpy based on a 12-month rolling total for each month in the reporting period recorded in compliance with subsection (n)(1).

(C) Data relied upon, including the quality assurance or quality control data, in calculating the monthly and annual PAL pollutant emissions.

(D) A list of the emissions units modified or added to the major facility during the preceding 6-month period.

(E) The number, duration and cause of deviations or monitoring malfunctions, other than the time associated with zero and span calibration checks, and the corrective action taken.

(F) A notification of a shutdown of a monitoring system, whether the shutdown was permanent or temporary, the reason for the shutdown, the anticipated date that the monitoring system will be fully operational or replaced with another monitoring system, whether the emissions unit monitored by the monitoring system continued to operate, and the calculation of the emissions of the pollutant or the number determined by the method included in the permit under subsection (m)(10).

(G) A [~~compliance certification~~]STATEMENT signed by a responsible official of the company that owns or operates the facility CERTIFYING THE TRUTH, ACCURACY AND COMPLETENESS OF THE INFORMATION PROVIDED IN THE REPORT. [~~In addition to the certification requirements of this section, the certification must state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate and complete.~~]

(3) The reports of deviations and exceedances of the PAL requirements, including periods in which no monitoring is available, must:

(i) Be submitted to the Department promptly. A report submitted under Subchapter G (relating to Title V operation permits) satisfies this reporting requirement.

(ii) Contain the following information:

(A) The identification of the owner and operator and the permit number.

(B) The PAL requirement that experienced the deviation or that was exceeded.

(C) Emissions resulting from the deviation or the exceedance.

(D) A [~~compliance certification~~]STATEMENT signed by a responsible official of the company that owns or operates the facility CERTIFYING THE TRUTH, ACCURACY AND COMPLETENESS OF THE INFORMATION PROVIDED IN THE REPORT. [~~In addition to the certification requirements of this section, the certification must state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate and complete.~~]

(4) The owner or operator of a major facility shall submit to the Department the results of any revalidation test or method within 3 months after completion of the test or method.

(p) The Department may modify or supersede any PAL which was established prior to the date of approval of the PAL provisions by the EPA as a revision to the SIP.

Pennsylvania
***25 Pa. Code* Chapters 121 and 127:**
Nonattainment New Source Review
Revisions

Comment/Response Document

25 Pa. Code Chapters 121 & 127: Nonattainment New Source Review Amendments

On December 20, 2005, the Environmental Quality Board (EQB) approved the proposed amendments to Chapter 121 and Chapter 127, Subchapter E, New Source Review regulations for publication and comments. The proposed amendments to Chapter 121 and Chapter 127, Subchapter E were published in the *Pennsylvania Bulletin* on April 29, 2006. The EQB held three (3) public hearings. The public comment period for the proposed rulemaking closed on July 31, 2006. The EQB received comments from 33 commentators.

Three public hearings were held on the proposed rulemaking as follow:

June 6, 2006 Department of Environmental Protection
7 p.m. Rachel Carson State Office Building, Room 105
400 Market Street
Harrisburg, PA 17105

June 13, 2006 Department of Environmental Protection
1 p.m. Southwest Regional Office
Waterfront A and B Conference Rooms
400 Waterfront Drive
Pittsburgh, PA 15222.

June 19, 2006 Department of Environmental Protection
1 p.m. Delaware Room
Southeast Regional Office
2 East Main Street
Norristown, PA 19401

This document summarizes the written comments received during the public comment period. In addition, the comments received from the Independent Regulatory Review Commission are summarized and responses provided. Each comment is provided with the identifying commentator number for each commentator that made that comment. A list of the commentators including name, affiliation (if any), and location can be found in the commentator list in this document.

Nonattainment New Source Review Commentator List

1. Roger C. Westman
Manager, Air Quality Program
Allegheny County Health Department
Pittsburgh PA
2. Arthur E. Hall, Director
Environmental Affairs
Wheatland Tube Co.
Wheatland Div.
Wheatland PA
3. Pam Witmer, President
Pennsylvania Chemical Industry Council
Harrisburg PA
4. Sharon Roth
PA Chamber of Business and Industry
5. Luis A. Comas
Sunoco Environmental Services
Marcus Hook PA
6. Richard L. Smith, V.P.
Operations
Armstrong Cement & Supply Corp.
Cabot PA
7. Lenny Dupuis, Mgr.
Environmental Policy
Dominion
Glen Allen VA
8. Michael Gansner, Partner
Environmental Resources Management
Exton PA
9. Keith A. Schmidt
Reliant Energy
Canonsburg PA
10. M. Gary Helm, Sr.
Environmental Coordinator
Conectiv Energy
Newark DE

11. Peter Croteau, Corporate
EHS Mgr.
Osram Sylvania Inc.
Danvers MA
12. Hector Ybanez, Dir.
Environmental Affairs
Essroc Cement Corp.
13. Rich Raiders
Arkema
14. Marjorie Gail Twymon
FirstEnergy Corp.
Akron OH
15. Gary Koerber, P.E.
U.S. Navy, Mid-Atlantic Region
Norfolk VA
16. Douglas L. Biden, President
Electric Power Generation Association
Harrisburg PA
17. Al DePaoli
AES Beaver Valley, LLC
Monaca PA
18. Robert Glaspey
Smurfit-Stone Container Corporation
Phoenixville PA
19. Vince Martin
Lafarge North America - Northeast Region
Whitehall PA
20. Milind Bhatte, Ph.D.
Conoco Phillips - Trainer Refinery
Trainer PA
21. David C. Cannon, Jr.
Allegheny Energy
Greensburg PA

22. William O'Sullivan, P.E.
NJ Dept. of Environ. Protection, Air Quality
Trenton NJ
23. Terry R. Bossert
Post & Schell, P.C.
Harrisburg PA
24. Barbara McNees, Director
Southwestern Pennsylvania Growth Alliance
Pittsburgh PA
25. Amy E. Earley
Merck & Co., Inc., Manufacturing Div.
West Point PA
26. Ravi Kura
Tennessee Gas Pipeline Co.
Houston TX
27. Joseph Otis Minott
Clean Air Council
Philadelphia PA
28. Judith A. Katz
U.S. EPA, Region III
Philadelphia PA
29. Eli Brill
Waste Management, Eastern Group
Fairless Hills PA
30. Sean McGowan
Specialty Steel Industry of Pa.
Pittsburgh PA
31. Michael D. Fiorentino
Mid-Atlantic Environmental Law Center
Wilmington DE
32. Reed Wills
Duke Energy Generation Services
Chadds Ford PA

33. Fred J. Starheim, Ph.D.
FirstEnergy Corp.
Akron OH

34. Independent Regulatory Review Commission
14th Floor, Harristown 2
Harrisburg PA

Summary of Comments

General Comments

1) COMMENT: The Department strikes the appropriate balance to the extent that the Department developed a New Source Review (NSR) proposal that differs from the Federal requirements. (31)

RESPONSE: Thank you for your comment. The Department agrees.

2) COMMENT: The commentator stated that the purpose of the Clean Air Act, 42 U.S.C.A. § 7401, is to protect public health. The commentator has strongly opposed attempts by the United States Environmental Protection Agency (EPA) to weaken pollution reduction programs of the Clean Air Act (CAA) and has joined with other environmental groups to challenge in court some of the EPA's most outrageous attempts to eviscerate New Source Review (NSR). Overall the commentator believes that the regulatory changes proposed by the Department should be supported. The commentator would have preferred to see the EPA strengthen the provisions of NSR and Prevention of Significant Deterioration (PSD) rather than weaken them. But given what the EPA is supporting in terms of a weakened NSR, the commentator believes Pennsylvania's proposals should be supported. Even if the EPA believes that the Pennsylvania NSR proposals are more stringent than what the EPA is requiring, the Department is taking the right approach in protecting both public health and the need for continued economic development. Fortunately, the Clean Air Act specifically allows states to implement regulatory requirements that are more stringent than the EPA's. (31)

RESPONSE: The Department agrees that the proposed regulation is better than the Federal NSR regulation in both protecting public health and the environment and addressing the need for continued economic development in Pennsylvania. A recent decision by the U.S. Court of Appeals for the D.C. Circuit indicated that requirements in place for the one-hour ozone standard must be retained in accordance with the anti-backsliding provisions of Section 172(e) of the Clean Air Act. The Court determined that NSR is a "control" measure, not a "growth" measure. Consequently, the NSR applicability thresholds (25 tons per year for VOCs/NOx) and emission offset requirements for one-hour ozone nonattainment areas must continue to be imposed under Federal law.

3) COMMENT: Pennsylvania should adopt the Federal NSR proposal to ensure that the state is not at a disadvantage to surrounding states. (27)

RESPONSE: In light of recent court decisions, the Department cannot rely solely on the EPA to protect public health and the environment in this Commonwealth. The Department does not believe that adoption of a state-specific NSR regulation will put Pennsylvania at an economic disadvantage with the surrounding states. Many states in the Ozone Transport Region including Delaware, Maryland, New Jersey, New York and Virginia have chosen to adopt state-specific NSR regulations. It is evident that

Pennsylvania is not alone in its belief that the Federal NSR rule is not adequate to protect its citizens. The final-form regulation will incorporate some, but not all, of the EPA's NSR program changes and strikes an appropriate balance that meets the EPA's required NSR program elements while retaining important elements of the existing Pennsylvania NSR program.

4) COMMENT: Several commentators stated that problems arise with the multiple uses of the term "net emissions increase." The "net emissions increase" is to be determined in accordance with § 127.203a(a)(4) as stated in the definition in § 121.201 and repeated again in § 127.203a(a)(1). Following the sequence of § 127.203a(a)(1), however, one is referred immediately to subsection (4), never returns to (1), and never gets to apply the important step in the applicability process as presented in subsection (2). If one were to try to apply the important step in subsection (2) regardless, one finds a completely different and contrary "definition" of "net emission increase" from the procedure as described in (4). In other words, the term "net emission increase" is being used in § 127.203a for two different calculations to be applied over different time periods. (1, 10, 24, 25, 28, 34)

RESPONSE: The Department has made a number of corrections and clarifications to the final-form regulation to improve readability, based on numerous comments that were received concerning this proposal. The provisions of § 127.203a (relating to applicability determination) in the final-form regulation have been rewritten in order to clarify the regulatory language on net emission increases.

5) COMMENT: The commentators stated that the lb/hr and lb/day de minimis aggregation thresholds are burdensome and should be eliminated. The EPA does not require de minimis aggregation at all, let alone on a lb/hr or lb/day basis. Emissions could be easily overestimated since most sources do not operate 24 hrs/day. It does not appear that the Department has fully recognized the effects of the proposed implementation of the short-term nonattainment NSR triggers (i.e., lb/hr or lb/day) and the impact they would have under actual-to-projected actual (or actual-to-potential) applicability testing versus the previous potential-to-potential applicability testing for existing sources. In short, the Department's past implementation of these short-term NSR triggers has been arbitrary and without specific regulation or guidance. Following the course of this proposed regulation would undoubtedly lead to implementation difficulties that could significantly hamper economic growth in Pennsylvania. The EQB must show the value and need, as required by the Pennsylvania APCA, of maintaining these archaic averaging period triggers. (4, 6, 9, 10, 11, 12, 14, 16, 17, 19, 25, 33)

RESPONSE: The Department has determined that the retention of the hourly and daily applicability thresholds would require a complex analysis under the new actual-to-projected actual emissions test. Therefore, because hourly and daily applicability thresholds are not Federally-required program elements, the Department has removed the lbs/hr and lbs/day requirements from the final-form NSR regulation.

6) COMMENT: The EPA commented that the proposed regulations continue to define “significant” in terms of a change in the annual, daily or hourly emission rate of a nonattainment pollutant. This three-tiered applicability test is currently based only on changes in the potential-to-emit (PTE) of a unit, which, in most cases, is straightforward. The proposed regulations correctly require that applicability be based on a change in actual emissions. The Pennsylvania Department of Environmental Protection (DEP) needs to ensure that the regulations clearly describe how daily and hourly baseline actual and projected actual emissions are to be determined. (28)

RESPONSE: The Department has determined that the retention of the hourly and daily applicability thresholds would require a complex analysis under the new actual-to-projected actual emissions test. Therefore, because the hourly and daily applicability thresholds are not Federally-required program elements, the Department has removed the lbs/hr and lbs/day requirements from the final-form NSR regulation.

7) COMMENT: The commentator supports the Department’s proposed pounds per day and pounds per hour de minimis aggregation thresholds for various pollutants. The commentator approves of the Department’s requirement that the aggregation threshold be based on whichever measurement (that is, lbs/hr or lbs/day) is more restrictive, and approves of the special rules applying to modifications of VOC and NO_x facilities located in serious and severe nonattainment areas for ozone. (§ 127.203(c)(1)). These special rules offer a greater degree of protection for the Philadelphia area. (27)

RESPONSE: Thank you for your comment. The Department has determined that the retention of the hourly and daily applicability thresholds would require a complex analysis under the new actual-to-projected actual emissions test. Therefore, because the hourly and daily applicability thresholds are not Federally-required program elements, the Department has removed the lbs/hr and lbs/day requirements from the final-form NSR regulation. It should be noted that the special rules applicable to modifications of VOC and NO_x facilities located in the southeastern Pennsylvania area, previously a “severe” one-hour ozone nonattainment area, must remain in place in accordance with the anti-backsliding provisions of Section 172(e) of the CAA.

Section 121.1. Definitions.

8) COMMENT: The commentators stated that the proposed amendment moved many definitions from § 121.1 to § 127.201a. New definitions are also added to § 127.201a. It is quite convenient and efficient to have all of the definitions relating to the air programs in one location, rather than having to switch back and forth looking for definitions throughout the various chapters. Additionally, having all of the definitions in one place promotes consistency among all of the air quality chapters. Maintain § 121.1 as the repository of definitions and do not create a sub-repository in § 127.201a. (23, 34)

RESPONSE: The Department agrees. The definitions in the proposed 25 *Pa. Code* § 127.201a have been moved to 25 *Pa. Code* § 121.1.

Actual Emissions

9) COMMENT: The commentators state that the proposed definition of the term “actual emissions” differs from the Federal definition. The Federal rule does not require a written determination for a more representative period. (6, 11, 14, 33)

RESPONSE: The Department has changed some of the wording of the definition of the term “actual emissions” to match that of the Federal definition. The Department believes a written determination for a more representative period is required because the determination should be a public record. This public record will consist of that portion of the written plan approval or permit application where the owner or operator justified the use of the different consecutive 24-month time period and the written determination issued by the Department.

10) COMMENT: The EPA commented that the Department must outline where the definition of the term “actual emissions” in § 127.201a is meant to be applied. Second, it is a minimum required program element for the State to have a definition of the term “actual emissions” that is consistent with the Federal regulations for the purpose of modeling and calculation of offsets. Sections 127.203a(a)(5) and 127.207(4) outline how emission reduction credits are to be determined, but which definition of actual emissions is used to determine the amount of offsets a facility is required to obtain? For instance, in the Federal regulations, the owner or operator of a facility uses baseline actual emissions to determine whether or not NSR is triggered. However, for calculating the amount of offsets that must be obtained once NSR is triggered, the owner or operator of the facility must recalculate the emissions increase using the definition of “actual emissions.” The State must provide information demonstrating how the State’s regulation is consistent with the Federal definition of “actual emissions” where that term is used. (28)

RESPONSE: The Department has revised the definition of the term “actual emissions” to “mirror” the language used in the Federal definition. The Department has also added regulatory language to clarify where the definition of the term “actual emissions” applies in the applicability determination.

11) COMMENT: Several commentators stated, for various reasons, that the definition of the term “actual emissions” should not be limited to a “consecutive 2-year period” but to a “consecutive 24-month period” in accordance with the requirements of the Federal NSR rule. The EPA commented that the Department uses a two-year period to define actual emissions rather than a 24-month consecutive period. As with all variations to the NSR reform regulations, the Department must demonstrate how its regulation is equivalent to the Federal regulation. (3, 5, 9, 12, 16, 19, 21, 26, 28)

RESPONSE: The Department agrees that the EPA phrase, “consecutive 24-month period,” is appropriate and has revised the definition of the term “actual emissions” by changing the phrase “consecutive 2-year period” to “consecutive 24-month period” in the final-form rulemaking.

Air Contamination Source

12) COMMENT: The EPA commented that the Federal term "Stationary source and building, structure, facility or installation" corresponds with the Department's terms "facility" and "source," which are defined as:

Facility--An air contamination source or a combination of air contamination sources located on one or more contiguous or adjacent properties and which is owned or operated by the same person under common control.

Source--An air contamination source.

It would appear that the Department's definition of "facility" is more inclusive in terms of defining the boundary of a source because it does not require any demonstration that pollutant-emitting activities be linked by SIC code. However, the Department's definition of "source" implies that there have to be actual air contaminant emissions to be considered a "source," whereas the Federal definition of "stationary source" includes buildings, structures, facilities or installations that emit, or may emit, any air pollutant regulated by the Clean Air Act.

The EPA recommends that the Department revise the regulations to include the Federal definitions of "stationary source" and "building, structure, facility or installation" so that these terms are consistently applied to both nonattainment NSR and PSD. Clarifying language in the Preamble to the rule is also recommended. (28)

RESPONSE: The Department has added the term "air contamination source" and its definition to 25 Pa. Code § 121.1 (relating to definitions). Modification of the definition, which is identical to the definition of the term "air contamination source" in Section 3 of the Air Pollution Control Act, to the form suggested by the EPA, would require amendment of the State law. The definition for the term "facility" already exists in § 121.1. This definition is used throughout the entire Title 25, Article III, Air Resources portion of the *Pennsylvania Code* and affects many other regulatory sections; therefore, the definition of the term "facility" will not be changed.

Allowable Emissions

13) COMMENT: The EPA commented that the Department's definition of the term "allowable emissions" differs from the Plantwide Applicability Limit (PAL)-specific Federal definition in that it does not reflect the use of potential-to-emit to define allowable emissions. The Federal definition is broader in scope than the State's definition. As noted in 40 CFR 51.165(f)(2), the State's regulations must use the same definitions in the development of a PAL, therefore the EPA recommends that the Department revise its regulation to be consistent with the Federal definition of the term "allowable emissions." (28)

RESPONSE: The Department has revised the definition of the term “allowable emissions” and incorporated the clause “for purposes of the PAL requirements in § 127.218, the allowable emissions shall be calculated considering the emission limitations that are enforceable as a practical matter on the emissions unit’s potential to emit.”

14) COMMENT: The commentators stated that the phrase “...hours of operation, or both, *and* [emphasis added] the most stringent of the following...,” as written in the definition of the term “allowable emissions” in § 127.201a, could be construed to impose 40 CFR Part 60, New Source Performance Standards (NSPS) or 40 CFR Part 61, National Emission Standards for Hazardous Air Pollutants (NESHAP) emission limits on otherwise unaffected units in the calculation of allowable emissions. Subpart (i) of the definition should be clarified so as not to subject previously unaffected units to NSPS or NESHAP standards. (9, 14, 16, 33)

RESPONSE: The Department used the same language as is used in the Federal NSR regulation for the definition of the term “allowable emissions,” so this definition has not been revised in the final-form regulation.

Applicability Determination

15) COMMENT: The EPA commented that the definition of the term “applicability determination” in the proposed *25 Pa. Code* § 127.201a would appear to be unnecessary. An applicability determination is actually a procedure that is established in § 127.203a. Another commentator stated that this term is in § 121.1 as an existing definition. If both it and the new § 127.203a are retained in the final-form rulemaking, then the existing definition should be amended to reference the new § 127.203a. (28, 34)

RESPONSE: The Department has moved the terms and definitions from the proposed *25 Pa. Code* § 127.201a into the existing *25 Pa. Code* § 121.1 (relating to definitions). The term “applicability determination” is defined in § 121.1 and has been used in *25 Pa. Code* Chapter 127, Subchapter E, so the existing definition of the term “applicability determination” will be retained.

Begin Actual Construction

16) COMMENT: The commentators noted that the definition of “begin actual construction” is proposed but never used in the regulation. (6, 11, 14, 28, 33, 34)

RESPONSE: The definition of the term “begin actual construction” will clarify when a construction activity commences. The Department has used the phrase “beginning actual construction” in *25 Pa. Code* § 127.203a(a)(5), which infers the definition of the term “begin actual construction.”

17) COMMENT: The EPA commented that the Federal definition of the term “begin actual construction” has the statement “...includes but is not limited to” in its description of the types of activities that could constitute “beginning actual construction.” This

clause is missing from the Department's definition of the term. The EPA recommends adding this phrase since the definition is not intended to be an exhaustive or exclusive list of activities that could be construed as beginning actual construction. The most important aspect of the definition is that it is intended to include activities of a permanent nature, which can go beyond the examples listed in the Federal and State definition. (28)

RESPONSE: The final-form regulation will not include the phrase "includes but is not limited to" in the definition of the term "begin actual construction." The formatting convention of the Pennsylvania Legislative Reference Bureau does not allow the use of the phrase "but is not limited to" when listing items in a class. The word "including" is not interpreted to be exclusive or restricted to the list of items that follow the word "including." The phrase "but not limited to" is unnecessary and is to be avoided.

Best Available Control Technology

18) COMMENT: The EPA commented that the Department's definition of the term "best available control technology (BACT)" states that BACT is "... the maximum degree of reduction for each pollutant...emitted from or which results from a major emitting facility...." This aspect of the definition varies considerably from the Federal definition that applies BACT to a proposed major stationary source or proposed major modification. The EPA's oversight of the Department's NSR program would seem to indicate that the Department implements BACT consistent with Federal rules, but it should be noted that a literal reading of the State's rule could yield a different result. The Department also omits the language "the alternative use of a design, equipment, work practice, operational standard, or combination thereof to implement BACT." This may unnecessarily restrict how BACT is to be applied. However, BACT is a PSD program element and for the purposes of PSD, the Department must implement the Federal rules that have been incorporated into the State's code at § 127.81. Therefore, for all practical purposes the State's rules are consistent with Federal requirements. For clarity purposes, however, the EPA recommends that the Department have consistent definitions for terms across program areas where there is no logical reason to define the terms differently. (28)

RESPONSE: The Department has revised the definition of the term "best available control technology" to be consistent with the Federal definition. The revision corrects the deficiencies noted in the comment.

De Minimis Emissions Increase

19) COMMENT: The commentators stated that § 127.201 contains the language, "an increase in actual emissions or potential to emit which is less than the emissions rate that is significant as specified in this section." Does this mean that a change by itself must be below the significance threshold to be considered de minimis, or rather that the *net* increase must be below this level? As written, NSR applicability would generally be based on the baseline actual emissions-to-projected actual emissions test, but in assessing applicability based on aggregation of less-than-significant increases under § 127.203a(a)(4), sources would also need to employ the old concepts of "actual

emissions" and "potential emissions" under the definition of the term "de minimis emissions increase." This approach is confusing and inconsistent. (6, 25)

RESPONSE: The definition of de minimis emissions increase has been revised to clarify that a change by itself that is less than significant would be a de minimis emissions increase. The new definition of de minimis emissions increase can be found in 25 Pa. Code § 121.1 and reads:

"De minimis emissions increase--For purposes of 25 Pa. Code Chapter 127, Subchapter E (relating to new source review), an increase in emissions calculated in accordance with the requirements of § 127.203a(a)(1)(i) which is less than the emissions rate that is significant as defined in this section."

Emissions Unit

20) COMMENT: The EPA commented that the Department does not have a separate definition of the term "replacement unit" but does address replacement units under the term "emissions unit." In all cases, a replacement unit must be considered a new unit until it has operated for two years. Therefore, the State's regulations are inconsistent with one of the minimum required elements (replacement unit) identified in NSR reform and must offer information to the EPA describing how this provision should be considered equivalent to the Federal regulations. (28)

RESPONSE: The Department has revised the definition of "emissions unit" to be consistent with the Federal definition and added the definition of the term "replacement unit."

Federally Enforceable

21) COMMENT: The EPA commented that the definition of the term "Federally enforceable" in the State's regulations is consistent with the Federal regulation through subsection (iii). Subsection (iv) stipulates that permit requirements designated as "State-only" in a Federal State operating permit are not Federally enforceable. This is fine but should it be limited to operating permits? Since plan approvals are incorporated automatically into Title V through an administrative amendment, when will the Department have the opportunity to make a "state-only" designation, if not through the plan approval? (28)

RESPONSE: The Department has revised the definition to be consistent with the Federal definition of the term "Federally enforceable." The Department has also removed the "state-only" stipulation.

Fugitive Emissions

22) COMMENT: The EPA commented that neither the Department's current or proposed regulations exclude fugitive emissions in determining applicability. It should be noted that the EPA's response to the Newmont Mining Petition for Reconsideration is to exclude fugitive emissions from applicability of NSR for all non-listed source categories. The Department needs to provide information explaining how its program is at least equivalent, in this respect, to the requirements of the Federal program found at 40 CFR 51.165(a)(4), relating to fugitive emissions. (28)

RESPONSE: Provisions for excluding fugitive emissions of criteria air pollutants for nonlisted sources do not exist in the Commonwealth's current NSR regulation. The Department has relied on the inclusion of fugitive emissions of criteria air pollutants from all sources to demonstrate attainment and maintenance of the Federally-mandated NAAQS. It is reasonable and necessary to continue to include fugitive emissions from all sources in the determination of applicability to assure that facilities do not emit pollutants that have not been accounted for in the existing attainment plan. It should also be noted that the requirement to include fugitive emissions from all sources is being retained in accordance with the anti-backsliding provisions of Section 172 (e) of the CAA.

Major Facility

23) COMMENT: It is clear under 40 CFR Part 51 and Part 52 that NSR review applies only to major stationary sources. However, in the proposed rule, the word "stationary" was deleted from the description of sources that are subject to the rule. The definition of facility in Chapter 121 should be amended to ensure that it only includes stationary sources. (5)

RESPONSE: As specified in 25 Pa. Code § 127.202 (relating to effective date), the special permit requirements in Subchapter E apply to the owner or operator of a facility which submits a complete plan approval application to the Department. The existing 25 Pa. Code Subchapter B (relating to plan approval requirements), § 127.14 (relating to exemptions), specifically exempts mobile sources, among others, from the plan approval requirements. Therefore, the NSR requirements apply to stationary sources and there is no need to add the suggested language to the definition of the term "major facility."

24) COMMENT: The commentators stated that the definition of the term "major facility" in the proposed rulemaking can be interpreted several different ways. For example, does the use of the term "physical change" exclude other changes that could be considered modifications? Also, does the phrase "which does not exceed the major facility thresholds specified in this subchapter" pertain to the facility at which the change occurs or to the change itself? (10, 25)

RESPONSE: The Department has revised the definition of the term "major facility" in the final-form NSR regulation to be consistent with the Federal definition of the term "major stationary source" in 40 CFR § 51.165(a)(1)(iv)(A). The Department is, however, retaining the existing stipulation in the definition of the term "major facility," which is to

include fugitive emissions from all sources when determining the status of a major facility, rather than considering fugitives for just the 28 source categories listed in the Federal definition. Provisions for excluding fugitive emissions of criteria air pollutants for nonlisted sources do not exist in the Commonwealth's current NSR regulation. The Department has relied on the inclusion of fugitive emissions of criteria air pollutants from all sources to demonstrate attainment and maintenance of the Federally-mandated NAAQS. It is reasonable and necessary to continue to include fugitive emissions from all sources in the determination of applicability to assure that facilities do not emit pollutants that have not been accounted for in the existing attainment plan. It should also be noted that the requirement to include fugitive emissions from all sources is being retained in accordance with the anti-backsliding provisions of Section 172 (e) of the CAA.

25) COMMENT: The EPA commented that the Federal definition of the term "major stationary source" corresponds to the Department's definition of the term "major facility." The State's definition is consistent as a practical matter in most respects except that the State includes fugitive emissions when determining the status of a facility rather than considering fugitives for just the 28 source categories listed in the Federal definition. The EPA pointed out that, in effect, the State's definition will be more inclusive.

The EPA recommended that subsection (i)(A) of the definition of the term "major facility" be revised to exclude the text "subject to regulation under the Clean Air Act" after the text "any regulated NSR pollutant." The term "any regulated pollutant" in the Federal rule is very narrowly defined in the context of the nonattainment NSR provisions, unlike the definition of the same term in the Federal PSD regulations. This was intentional. The purpose of nonattainment NSR is to regulate only those criteria pollutants for which an area is in nonattainment with the National Ambient Air Quality Standards (NAAQS). The Department's definition should exclude any other pollutants regulated under the Act. (28)

RESPONSE: The Department has revised the definition of the term "major facility" in the final-form NSR regulation to be consistent with the Federal definition of the term "major stationary source" in 40 CFR § 51.165(a)(1)(iv)(A). The phrase "subject to regulation under the Clean Air Act" has been removed from subsection (i)(A) of the definition of the term "major facility." The Department is, however, retaining the existing stipulation in the definition of the term "major facility," which is to include fugitive emissions from all sources when determining the status of a major facility, rather than considering fugitives for just the 28 source categories listed in the Federal definition. Provisions for excluding fugitive emissions of criteria air pollutants for nonlisted sources do not exist in the Commonwealth's current NSR regulation. The Department has relied on the inclusion of fugitive emissions of criteria air pollutants from all sources to demonstrate attainment and maintenance of the Federally-mandated NAAQS. It is reasonable and necessary to continue to include fugitive emissions from all sources in the determination of applicability to assure that facilities do not emit pollutants that have not been accounted for in the existing attainment plan. It should also be noted that the

requirement to include fugitive emissions from all sources is being retained in accordance with the anti-backsliding provisions of Section 172 (e) of the CAA.

26) COMMENT: The Department's regulations proposed to lower the threshold for sources subject to NSR from 100 tons per year to 70 tons per year of PM-10. No justification for this decrease has been provided. The 100 ton-per-year threshold should be retained. (12, 17, 29)

RESPONSE: The Federal definition of the term "major stationary source" in 40 CFR § 51.165(a)(1)(iv)(A) establishes a limit of 100 tons per year, emitted or potential to emit, for any regulated pollutant, except in areas where the limit may be lower, as in 40 CFR § 51.165(a)(1)(iv)(A)(vi) for serious nonattainment areas: "70 tons per year of PM-10 in any serious nonattainment area for PM-10." The language for the term "major facility" in the final-form NSR regulation closely mirrors the Federal language for this definition. A facility is a major facility for PM-10 if it emits or has the potential to emit 100 tons per year of PM-10 unless the facility is in a serious nonattainment area, then the facility is major if it emits or has the potential to emit 70 tons per year of PM-10. The Department has revised the NSR applicability test to incorporate a two-step test in the final-form NSR regulation.

27) COMMENT: The commentator stated that the existing definition for the term "major facility" in § 121.1 reads: "A facility which has the potential to emit a pollutant equal to or greater than an applicable annual emissions rate in § 127.203." The proposed definition of the term "major facility" contains over 15 subparagraphs or clauses containing substantive rules related to the definition. Substantive provisions in a definition are not enforceable. In the final-form regulation, the substantive provisions should be deleted from this definition and moved to another section that describes conditions applicable to a "major facility." An alternative would be to reference the corresponding item in the Federal regulations. (34)

RESPONSE: The Department has revised the definition of "major facility" in the final-form NSR regulation to be consistent with the Federal definition in 40 CFR § 51.165(a)(1)(iv)(A). This approach should address the commentator's concerns of differences between the State and Federal provisions. The Department is, however, retaining the existing stipulation in the definition of the term "major facility," which includes fugitive emissions from all sources when determining the status of a major facility, rather than considering fugitives for just the 28 source categories listed in the Federal definition.

Major Modification

28) COMMENT: The commentators stated that the definition of the term "major modification," as written, is imprecise. If conditions (i)(A) and (i)(B) or any combination thereof meet the criteria of the expression major modification, clarification is necessary. The terms "either/or" should be used if that is the intent of the regulation. The Federal rules specify that a 2-step process determines a major modification, there has to be an

emissions increase greater than the applicable threshold and a new emissions increase. The way it is written, this definition appears to preclude the use of netting. (9, 10, 16, 25)

The EPA commented that the Department's proposed regulations list two situations in which a modification will be considered major, similar to the Federal definition. However, the Federal definition requires both a significant increase **and** a significant net increase to trigger NSR. The Department's proposed regulations do not include the word "and." Therefore, the presumption is that if a source triggers either condition (i)(A) or (i)(B) of the definition of the term "major modification," then the physical change or change in the method of operation is a major modification. Not only is this inconsistent with the Federal regulations, it is inconsistent with the rest of the Department's regulation. Nowhere in Subchapter E is there a requirement to determine whether a significant increase will occur. The only real test of whether a major modification occurs in the Department's proposed regulation is whether there is a significant net emissions increase. The manner in which the Department is defining major modification is not consistent with the minimum program elements of NSR reform. The Department must provide a demonstration that this change in the definition of major modification is as stringent or more stringent than the Federal requirement. (28)

RESPONSE: The Department agrees that the definition of the term "major modification" is meant to require both of the conditions (i)(A) and (i)(B) to trigger NSR, in accordance with the requirements of the Federal NSR rule. The formatting conventions of the Pennsylvania Legislative Reference Bureau do not allow the use of "and" or "or" when listing conditions following a sentence that is otherwise complete. Each condition in the list must begin with a capital letter and end with a period. When the phrase "that would result in the following" is followed by a list of conditions, all conditions listed are applicable and required.

Ozone Classifications

29) COMMENT: The EPA commented that the definitions of the different ozone classifications in § 121.1 are no longer consistent with the design values under the 8-hr ozone standard. (28)

RESPONSE: The Department has deleted the following terms and definitions from 25 Pa. Code § 121.1: "Extreme ozone nonattainment area," "Marginal ozone nonattainment area," "Moderate ozone nonattainment area," "Serious ozone nonattainment area" and "Severe ozone nonattainment area."

PAL - Plantwide Applicability Limit

30) COMMENT: The EPA objected to the Department's definition of the term "plantwide applicability limit" in that it does not include the provision that the limit must be practically enforceable. Rather, the Department requires the limit to be legally enforceable. Practical enforceability is not the same as legal enforceability. For instance, every term and condition in a permit issued by the State is legally enforceable. However,

it has long been recognized that for a limit to be practically enforceable for the purpose of effectively imposing a level of control on a unit or source, the limit must meet several criteria:

- It must be legally enforceable.
- There must be a short period of time over which compliance is to be determined.
- The limit must include monitoring and/or recordkeeping to verify compliance.

The EPA believes that this is a significant deviation from the Federal rule for which there is a minimum required program element. The Department must either revise the definition of this term or provide a demonstration that its program, in this aspect, is equivalent to the Federal program for PALs. (28)

RESPONSE: The Department agrees and has revised the definition of the term "plantwide applicability limit" to change the phrase "legally enforceable" to "enforceable as a practical matter."

PAL Permit

31) COMMENT: The definition of the term "PAL permit" includes state operating permits despite the fact that the EPA regulations prohibit PALs from being established within such permits. (25)

RESPONSE: The Department has deleted the phrase "state operating permits" from the definition of the term "PAL permit" in the final-form regulation.

PM-10 Precursor

32) COMMENT: The EPA commented that the definition of the term "PM-10 precursor" is not correct. First, the EPA is responsible for establishing regulated precursors under § 302(g) of the CAA and, as yet, no precursors have been identified. Second, if the EPA determines in the future to regulate PM-10 precursors, they may be regulated as something other than particulate, e.g. gases that may form or contribute to the formation of particulates in the atmosphere. (28)

RESPONSE: The Department has deleted the requirements related to PM-10 precursors and the definition of the term "PM-10 precursor" from the final-form regulation.

Predictive Emissions Monitoring System

33) COMMENT: The EPA commented that the Department's definition of the term "PEMS – predictive emissions monitoring system" includes the language "All of the equipment necessary to monitor parameters including..." The EPA recommends using the phrase "including but not limited to" since the types of parameters listed in the State's definition clearly are not an exhaustive list of process or operational parameters.

Alternatively, the text of the Preamble for the rule could clarify that such definitions are not interpreted to be exclusive. (28)

RESPONSE: The meaning of this definition has not been changed. "The formatting convention of the Pennsylvania Legislative Reference Bureau does not allow the use of the phrase "but is not limited to" when listing items in a class. The word "including" is not interpreted to be exclusive and restricted to the list of items that follow the word "including." The phrase "but not limited to" is unnecessary and is to be avoided. It is also important to note that use of the phrase "shall include" in a definition does not exclude or limit things which do not follow the phrase.

Projected Actual Emissions

34) COMMENT: The term "projected actual emissions" is not clearly defined in § 127.201a or in the referenced citation (§ 127.203a(a)(6)) within the definition. (10, 25)

RESPONSE: The Department has revised the definition of the term "projected actual emissions" and also clarified § 127.203a(a)(5) in the final-form regulation. In the final-form regulation, projected actual emissions is defined as, "The maximum annual rate in tons per year at which an existing emissions unit is projected to emit a regulated NSR pollutant, as determined in accordance with the requirements of § 127.203a(a)(5)."

Regulated NSR Pollutant

35) COMMENT: Some commentators indicated that there is a lack of clarity in paragraph (iii) of the definition of the term "regulated NSR pollutant" pertaining to constituent or precursor pollutants of the definition of the term "regulated NSR pollutant." The term "regulated NSR pollutant" is defined to include "precursors" of any pollutant for which a NAAQS has been established. The scope of such "precursors" should be clarified, particularly with respect to PM-2.5. (6, 10)

One commentator noted that the EPA proposed rules regarding PM-2.5 implementation in which it proposed that ammonia not be regulated as a precursor. See 70 FR 65999 (November 1, 2005). The commentator suggests that the EQB either adopt the proposed Federal view of PM-2.5 precursors or wait until the final PM-2.5 implementation rule is promulgated before attempting to regulate PM-2.5 and PM-2.5 precursors. (25)

The EPA commented that Subsection 51.165(a)(1)(xxxvii)(C) of the Federal definition states that "regulated NSR pollutant" means "(a)ny pollutant that is a constituent or precursor of a general pollutant ... provided that a constituent or precursor pollutant may only be regulated under NSR as part of regulation of the general pollutant." The State's proposed text states that a regulated NSR pollutant is "A pollutant that is a constituent or precursor ... if the constituent or precursor pollutant may only be regulated under NSR as part of regulation of the pollutant." It appears that the intent is to mirror the Federal meaning, but the EPA suggests either adopting the Federal text or revising the sentence so that it is clear that a constituent or precursor is regulated under NSR only if the

constituent or precursor is part of the regulation of the pollutant listed under subparagraphs (i) or (ii) of the definition. (28)

RESPONSE: The Department has revised the language in the definition of the term “regulated NSR pollutant” to be consistent with the definition of the term in EPA’s definition in 40 CFR § 51.165(a)(1)(xxxvii). The Department has removed language relating to PM-2.5 and PM-10 precursors from the final-form regulation until the EPA finalizes the nonattainment requirements for PM-2.5.

Significant Emissions Increase

36) COMMENT: The EPA commented that the term “significant emissions increase” is missing from the Department’s definitions, presumably because the State is not proposing a two-part applicability test as outlined in 40 CFR 51.165(a)(2). The Department must offer information to the EPA describing how a program that omits this minimum program element should be considered equivalent to the Federal regulations. (28)

RESPONSE: The Department has added the term and definition of “significant emissions increase” to 25 *Pa. Code* § 121.1 in the final-form regulation.

37) COMMENT: The commentator stated that the Board should clarify the NSR regulations concerning the relationship of major stationary source status for PM-10 emissions and significant net emission increases for other nonattainment pollutants. In particular, since numerous additional sources may be regarded as major stationary sources for PM-10 based upon new designations of nonattainment within Pennsylvania, it becomes increasingly important for the Board to clarify that a source that qualifies as a major stationary source of a specific pollutant (for example, PM-10) triggers NSR applicability if the source undertakes a modification that results in a significant net emission increase of the same pollutant (that is, PM-10). By contrast, a facility that qualifies as a major stationary source of PM-10 emissions, but not a major stationary source of VOCs or NO_x, and is located in a moderate ozone nonattainment area, would not trigger NSR applicability for ozone due to a projected emission increase of VOCs of 45 tons per year. (29)

RESPONSE: According to the EPA, a new source will be subject to nonattainment area preconstruction review requirements only if it will emit, or will have the potential to emit, in major amounts a criteria pollutant for which the area has been designated nonattainment. Nonattainment requirements only apply if a modification results in a significant increase of a pollutant for which the source is major and for which the area is designated nonattainment. Therefore, a facility which is located in a moderate ozone nonattainment area and which qualifies as a major stationary source of PM-10 emissions, but not as a major stationary source of VOCs or NO_x, would not trigger NSR applicability for ozone.

Section 127.201. General Requirements.

38) COMMENT: Pennsylvania's NSR regulations are already substantially more stringent than the Federal program with respect to control of particulate matter emissions because Pennsylvania's program requires consideration of fugitive emissions from all source categories in evaluating NSR applicability. By contrast, under the Federal NSR program, only sources within a limited listing of source categories must include fugitive emissions in evaluating whether the facility qualifies as a major stationary source of PM-10.

It is virtually impossible to accurately measure fugitive particulate emissions associated with most source types. Therefore, the owners and operators of facilities typically rely upon highly conservative emission factors for projecting particulate matter emission rates. By all accounts, these highly conservative emission factors almost certainly substantially over-state actual particulate matter emissions from regulated sources. Should the Board substantially reduce the major source threshold for PM-10, as identified in the Proposed NSR Regulation, many proposed sources which do not cause significant particulate matter emissions will inappropriately be made subject to NSR.

Moreover, the Department's regulations and permitting philosophy already impose upon Pennsylvania sources specific requirements to minimize fugitive particulate emissions. These requirements apply regardless of NSR applicability. For this reason, the application of NSR to numerous additional sources (based upon conservative estimations using emission factors and a reduced major source threshold) will not have material environmental benefit. Instead, these facilities will endure a substantially delayed permit review process due to NSR applicability and a significant increase in costs to acquire emission reduction credits.

Once classified as a major stationary source, a facility will be subjected to NSR review for each modification that results in a projected emission increase -- potentially using the Board's objectionable proposed methods, as addressed above -- of as little as 15 tons per year. Because the Department requires fugitive emissions to be considered in this analysis, and such emission increases are calculated through the use of conservative emission factors, many facilities will be made subject to NSR merely because of fugitive emissions of particulate matter, including those simply associated with construction activity. (29)

RESPONSE: The provision for excluding fugitive emissions for nonlisted sources does not exist in the current regulation. The Department has relied on the inclusion of fugitive emissions from all source types to demonstrate attainment and maintenance of the NAAQS. The EPA has designated some areas of Pennsylvania as nonattainment for fine particulate matter (PM-2.5). The EPA made these designations based upon ambient measurements and medical evidence that indicates that exposure to these measured levels of PM-2.5 is unhealthy. The Department will wait until the EPA promulgates the final rulemaking for implementation of final-form PM-2.5 NSR. In the interim, as requested by the EPA, the Department will use the PM-10 nonattainment major NSR program as

the surrogate for PM-2.5 NSR. Under guidance issued by the EPA any facility whose particulate emissions are predominantly coarse particulate matter that range in size between PM-10 and PM-2.5 may quantify the PM-2.5 fraction. This can be accomplished by using multiple test methods or other methods that can be shown to produce reliable data. Finally, the EPA guidance states "If the source demonstrates that it is not a major stationary source for PM-2.5, then the nonattainment major NSR provisions for PM-2.5 need not be applied to the source. Conversely, if a source is major for PM-10 and does not quantify its PM-2.5 emissions, then States should presume that the source is major for PM-2.5 and subject it to the surrogate PM-2.5 nonattainment major NSR program if it constructs a major stationary source or undergoes a major modification."

Section 127.201b

39) COMMENT: The commentator finds the need for or purpose of § 127.201b unclear. It provides information for acronyms but does not define any terms. Terms including BAT, BACT, ERC, LAER and MACT are listed but there is no indication of where they are defined. Section 127.201b should reference the definitions in § 121.1 or from other sources as applicable. Some terms, such as "continuous parametric monitoring system" and "continuous emissions rate monitoring system" are already defined in § 127.201a, and it is not necessary to repeat them in this section. (34)

RESPONSE: Section 127.201b was included in the proposed rulemaking as a reference for the numerous acronyms and abbreviations used in Subchapter E. Definitions for certain terms were included in proposed § 127.201a. Proposed § 127.201a has been deleted in the final-form NSR regulation and the terms and definitions moved to § 121.1 (relating to definitions). The proposed § 127.201b has been revised to § 127.201a in the final-form NSR regulation. The Federal definition of MACT has been adopted by reference in Section 6.6 of the Air Pollution control Act and 25 *Pa. Code*, Chapter 124 (relating to national emission standards for hazardous air pollutants). BAT, BACT, ERC, LAER and other NSR-related terms are defined in § 121.1.

Section 127.201(c)

40) COMMENT: The commentators stated that in accordance with the requirements of § 127.201(c), a facility within a basic nonattainment area for ozone will now be considered a major facility and subject to the requirements applicable to a major stationary facility located in a moderate nonattainment area. These commentators ask what is the basis for this more stringent requirement, and state that the Federal rules are adequate protection for the NAAQS. (14, 33)

RESPONSE: The Clean Air Act Section 184(b)(2) specifically states, "For purposes of this section (Sec. 184. Control of Interstate Ozone Air Pollution) any source that emits or has the potential to emit at least 50 tons per year of volatile organic compounds shall be considered a major stationary source and subject to the requirements which would be applicable to major stationary sources if the area were classified as a Moderate

nonattainment area.” Therefore, a facility that emits or has the potential to emit at least 50 tons per year of VOCs within either an unclassified/attainment area for ozone or within a marginal or incomplete data or basic nonattainment area for ozone and located within an ozone transport region shall be considered a major facility and shall be treated as if it is located in a moderate nonattainment area for ozone. This requirement applies Statewide because the entire Commonwealth is included in the Northeast Ozone Transport Region.

Note: On December 22, 2006, the U.S. Court of Appeals for the D.C. Circuit vacated the Phase 1 Eight-Hour Ozone Implementation Rule and remanded the rule to EPA. The court invalidated EPA’s classification scheme for “basic” nonattainment areas...those areas with eight-hour ozone design values greater than 0.08 ppm and one-hour ozone design values greater than 0.012 ppm. Consequently, “basic” areas must be reclassified and will be subject to the Subpart 2 requirements of the CAA instead of the Part 1 requirements. The Court also held that measures in place for one-hour ozone nonattainment areas should be retained in accordance with the anti-backsliding provisions of Section 172(e) of the CAA. SIP-approved contingency measures for one-hour ozone nonattainment areas “...must remain in place even after transitioning from the one-hour standard...”

Section 127.201(f)

41) COMMENT: Several commentators stated that the proposed requirements which continue to treat the 5-county Philadelphia area as severe ozone nonattainment, as it was under the one-hour ozone standard, will put the area at a competitive disadvantage to other areas, cause the need for additional expensive control equipment and result in the cancellation of projects intended for economic growth. Additionally, the Department is proposing to keep the severe area offset ratio of 1.3 to 1 instead of adopting the moderate area offset ratio of 1.15 to 1. These commentators stated that the EPA’s designation of the area as moderate under the eight-hour ozone standard should be adopted to ensure a level playing field for the entire State and region. Further, the Department is adopting a more stringent air quality standard than the EPA for the pollutant ozone without providing justification, including modeling. Some suggested that the Department should instead, as accommodated for in the Federal Clean Air Act (CAA), ask the EPA to redesignate the 5-county Philadelphia ozone nonattainment area from moderate to severe thereby ensuring that the Department’s and the EPA’s requirements would be quite similar instead of conflicting. (3, 4, 5, 6, 7, 8, 10, 12, 13, 14, 18, 20, 25, 26, 29, 33, 34)

RESPONSE: Under the one-hour ozone National Ambient Air Quality Standard (NAAQS), the 5-county Philadelphia area was designated as a severe nonattainment area for ozone. A major source in a severe nonattainment area for ozone is defined as a stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 25 tons per year of VOC or NOx. As a result, many facility owners/operators requested permit restrictions that limited the facility to emitting less than 25 tons per year (synthetic minors).

In 1997, the EPA adopted a new eight-hour ozone NAAQS. The Philadelphia-Wilmington-Atlantic City nonattainment area was designated as a moderate nonattainment area for the eight-hour ozone standard in 2004. A major stationary source located in a moderate area is defined as one emitting or having the potential to emit 50 tons per year or more of VOC or 100 tons per year of NOx. With the reclassification of the ozone attainment area, a facility owner may increase emissions to these new levels without offsetting these emission increases.

The Department, as a co-petitioner in *South Coast Air Quality Management District v. EPA*, (No. 04-1200), challenged the EPA's eight-hour ozone implementation rule which allowed the very backsliding that the Department's proposal related to the 25-ton limitation is trying to prevent. On December 22, 2006, the U.S. Court of Appeals for the D.C. Circuit held that NSR is a "control" measure—not a "growth" measure. The Court vacated the Phase 1 Eight-Hour Ozone Implementation Rule and remanded the rule to the EPA. The Court also held that measures in place for one-hour ozone nonattainment areas should be retained in accordance with the anti-backsliding provisions of Section 172(e) of the CAA. SIP-approved contingency measures for one-hour ozone nonattainment areas "...must remain in place even after transitioning from the one-hour standard...." Consequently, the requirements for one-hour ozone nonattainment areas must remain in place in accordance with the anti-backsliding requirements of the Federal Clean Air Act.

42) COMMENT: The commentators agree that the Department should ensure that the proposed requirements should be at least as stringent as those presently in effect in order to avoid backsliding in the 5-county area and to maintain at least the same rate of progress towards achieving attainment of the new eight-hour ozone standard. They state that this is necessary because the 5-county area continues to chronically exceed safe ozone levels. (22, 27, 31)

RESPONSE: The Department, as a co-petitioner in *South Coast Air Quality Management District v. EPA*, (No. 04-1200), challenged EPA's eight-hour ozone implementation rule which allowed the very backsliding that the Department's proposal related to the 25-ton limitation is trying to prevent. On December 22, 2006, the U.S. Court of Appeals for the D.C. Circuit held that NSR is a "control" measure, not a "growth" measure. Consequently, the requirements for one-hour ozone nonattainment areas must remain in place in accordance with the anti-backsliding requirements of the Federal Clean Air Act.

Sections 127.203(f) and (g) and 127.202(b)

43) COMMENT: A commentator stated that the proposed PM-2.5 major thresholds should be lowered from the proposed 100 and 15 tons per year to 25 and 10 tons per year respectively. (22)

RESPONSE: The language regulating PM-2.5 has been removed from the final-form regulation. As requested by the EPA, the Department will wait until the EPA promulgates the Federal PM-2.5 NSR rule.

44) COMMENT: The commentators indicated that the proposed PM-2.5 requirements are premature and should not be addressed until the EPA promulgates their regulation. (4, 6, 9, 10, 11, 12, 14, 16, 17, 19, 25, 30, 33)

The EPA commented that it strongly advises the Department to wait until the EPA promulgates the PM-2.5 implementation rule for NSR before adopting specific provisions for regulating PM-2.5 and its precursors under the nonattainment NSR program. Under 40 CFR 51.165(a)(1)(xxxvii), the EPA is not authorized to regulate PM-2.5 under NSR until the Federal implementation rule is adopted. Therefore, the EPA may be prohibited from approving as a SIP revision those portions of the Department's regulations that treat PM-2.5 and its precursors as regulated NSR pollutants. States may currently rely on the EPA's transition guidance to regulate PM-2.5 emissions for NSR. (28)

RESPONSE: As requested by the EPA, the Department will propose requirements for fine particulates after the EPA promulgates the Federal PM-2.5 NSR requirements. Consequently, the provisions concerning the implementation of PM-2.5 requirements have been removed from this final-form regulation.

Section 127.203. Facilities Subject to Special Permit Requirements.

45) COMMENT: The EPA commented that subsections 127.203(b)(1)(i) and (ii) are not complete sentences. The EPA suggests that the wording in (i) and (ii) be revised so that the last sentence of (b)(1) and (i) and (ii) read as follows:

"The requirements of this subchapter apply if the aggregated emissions exceed 25 tons per year or 1,000 pounds per day or 100 pounds per hour of NO_x or VOCs, whichever is more restrictive, **and**

- (i) the increase in emissions is aggregated with other increases in net emissions that occur over a; **or**
- (ii) the increases and decreases are aggregated with other increases and decreases..."

Another commentator stated that § 127.203(b)(1) is confusing. The provisions of § 127.203(b)(1) apparently apply to de minimis increases only, but the rule is vague. The commentator strongly suggested that this provision be re-worded to clarify the requirement. (25, 28)

RESPONSE: The Department has revised the language at 25 *Pa. Code* § 127.203(b) in the final-form regulation to clarify the applicability requirements for facilities located in Bucks, Chester, Delaware, Montgomery or Philadelphia counties or an area classified as a serious or severe ozone nonattainment area, based on the comments received on the proposed rulemaking. The formatting conventions of the Pennsylvania Legislative Reference Bureau do not allow the use of "and" or "or" when listing conditions following a sentence that is otherwise complete. Each condition in the list must begin with a capital letter and end with a period. For clarity in this instance the Department has revised § 127.203(b)(1) of the final-form regulation to read: "The requirements of this subchapter apply if the aggregated emissions determined according to subparagraph (i)

OR (ii) of this subsection exceed 25 tpy of NOx or VOCs.” The Department has also removed the pounds per day and pounds per hour references from § 127.203(b)(1) of the final-form regulation.

46) COMMENT: Subsection 127.203(h)(4) in the proposed regulation is not a complete sentence. This can be remedied by revising it to read: (4) Construction of a new facility... does not impact ...”.

RESPONSE: The Department has revised this sentence and it can now be found in subsection 127.203(f)(4) of the final-form regulation. The revised sentence states: “The NSR requirements of this subchapter do not apply to an owner or operator of a major facility at which construction of a new facility or a project at an existing major facility located in an attainment or unclassifiable area does not impact a nonattainment area for the applicable pollutant in excess of the significance level specified § 127.203a.”

Section 127.203(c)(2)

47) COMMENT: Subsection 127.203(c)(2) should be revised to clarify its applicability. As written, it applies the NSR requirements to a facility which was deactivated for a period in excess of 1 year. The commentators suggest two clarifications. First, NSR should only apply to a “major facility” and not non-major facilities. Second, NSR should apply only upon reactivation of the major facility. The literal language suggests that NSR applies to a deactivated facility even if it never reactivates. (6, 11)

RESPONSE: The Department agrees and the language has been changed in the final-form NSR regulation to indicate that this requirement is triggered only upon reactivation and only for major facilities.

Section 127.203(e)(2)

48) COMMENT: This section refers to “relaxation of an enforcement limitation,” but should read “relaxation of an enforceable limitation.” (6, 25)

RESPONSE: The language in this section, which is consistent with the requirements in 40 CFR 51.165(a)(5)(ii), will be retained in the final-form NSR regulation.

Section 127.203a. Applicability Determination.

49) COMMENT: The commentator stated that the proposed NSR regulation is likely to prevent construction of many worthwhile projects, including those that provide environmental benefits. Of specific relevance to the commentator’s facility operations, we continually look for opportunities to pursue renewable energy projects for efficient and environmentally protective management of energy-rich landfill gas collected from our facilities. The Department has actively endorsed such renewable energy projects as consistent with the Commonwealth’s goal of pursuing innovative, environmentally

protective alternative energy generating opportunities. See A Primer for the Commonwealth of Pennsylvania for Developing Landfill Gas Utilization, (DEP Document No. 2500-BK-DEP3172) (August/2004) ("Landfill Gas Primer"). Moreover, these projects are recognized internationally as providing substantial net benefit in the context of avoiding greenhouse gas emissions.

Under the Department's current NSR regulations, this facility can pursue these valuable renewable energy projects without the additional cost and time-delay inherent in NSR applicability, by ensuring that these projects will result in no increase in permitted emission rates. Specifically, to the extent that collected landfill gas is currently managed at our facilities using other combustion technology, such as enclosed flares, this facility ensures that the allowable emissions from proposed renewable energy technology will not exceed the permitted emission rates imposed on the existing combustion devices. In this regard, this facility is enabled to pursue renewable energy projects in a cost-effective manner, which yields net environmental benefits relative to existing landfill gas combustion operations.

The same result is typically achieved under the Federal NSR program through the changes resulting from NSR Reform. These renewable energy technologies will not result in a significant net emission increase in actual emissions of regulated pollutants, and therefore will not be rendered subject to NSR under a true actual-to-future actual emission test.

However, under the Board's proposed NSR regulation, this facility will likely determine not to pursue many renewable energy projects because of the likely application, and associated scheduling and economic implications, of NSR applicability. Typically, a landfill experiences variations in landfill gas generation rates depending upon the age of the landfill, the waste disposal rate and other factors. At various stages in the life of the landfill, emission increases result from the expected increase in landfill gas generation rate, and is fully accounted for, projected and authorized by applicable permit terms. However, a comparison between past actual and projected emission rates yield, in some cases, a significant increase, not as a result of the modification, but rather because of the expected increase in landfill gas generation that has already been accounted for through applicable permit limits. Under the Board's approach, this facility must translate its projected actual emission rate for the renewable energy project into a permitted limit. This facility cannot accept a substantially reduced permit limit to avoid NSR applicability merely to pursue a voluntary renewable energy project while there remains a reasonable possibility that the landfill gas generation rate for the facility may increase in the future.
(29)

RESPONSE: The final-form NSR regulation is consistent with the Federal NSR rule for a significant emissions increase from a project. If the owner or operator of the facility triggers NSR requirements by a de minimis emissions increase, only the offsets need to be provided and the project is not subject to the lowest achievable emission rate requirement. Therefore, the Department does not believe that the final-form regulation is likely to prevent construction of renewable energy projects.

50) COMMENT: The commentators state this provision would subject all new emissions units to nonattainment NSR. There is no incentive for facilities to reduce emissions (by installation of controls or permanent retirements) from existing sources. (9, 14, 16, 33)

RESPONSE: As mandated in 40 CFR § 51.165(a)(xxxv)(C), applicability procedures for projects that only involve the construction of a new emissions unit require that the emissions baseline actual emissions shall equal zero and thereafter for all other purposes shall equal the unit's potential-to-emit. Since the final-form NSR regulation must be at least as stringent or more stringent than the Federal regulation, this paragraph has not been removed. There are incentives for the owners and operators of facilities to reduce emissions from existing sources. The facilities can generate emissions reduction credits (ERCs) and the owners or operators of the facilities can trade or sell the ERCs to the owners or operators of other facilities under the provisions of §§ 127.206--127.210.

Section 127.203a(a)(1)(iii)

51) COMMENT: The commentators state that the proposed rule does not define when an emissions increase occurs. Also, the proposal considers an emissions unit as "new" for 2 years from the date the new unit was first operated. However, many new, reconstructed or modified units do not reach normal capacity until after a reasonable shakedown period. Appendix S to Part 51, Emission Offset Interpretative Ruling, Section II (A)(6)(vi), indicates that "Any replacement unit that requires shakedown becomes operational only after a reasonable shakedown period, not to exceed 180 days." Moreover, a shakedown period is included in many plan approvals. The rule should include provisions allowing a shakedown period (with extensions if needed), instead of counting from the time the unit was first operated. To avoid the risk of having new regulations apply to an existing 2-year-old unit (actually, more than 2 years may have elapsed from the time a unit is purchased and installed), the rule should clearly indicate that this applies only to the NSR-affected process. (3, 4, 5, 12, 17, 19)

The EPA commented that the Department's proposed regulations do not define exactly when an emission increase occurs nor do they provide for a shakedown period as required in 40 CFR 51.165(a)(1)(vi)(F). (28)

RESPONSE: The definition of the term "emissions unit" in the final-form regulation closely matches the EPA's definition from 40 CFR Part 51.165(a)(1)(vii). The Department agrees that a unit is not considered to be operational until after a reasonable shakedown period not to exceed 180 days, in accordance with the requirements of 40 CFR § 51.165(a)(1)(vi)(F) (relating to net emissions increase). The Department has added language to the final-form regulation addressing the shakedown period as it applies to the net emissions increase and describes when an emission increase occurs in revised 25 Pa. Code § 127.203a(a)(1)(ii).

Section 127.203a(a)(3)

52) COMMENT: The commentator states that the exclusion under 40 CFR § 52.31(b)(48)(ii)(a) for limits established by a MACT should be included in the final rule. (5)

RESPONSE: The Department reserves the right to use MACT reductions for planning purposes in accordance with the requirements of 40 CFR § 51.165(a)(1)(xxxv)(B)(3). The exclusion has not been added to the final-form regulation.

Section 127.203a(a)(4)

53) COMMENT: The commentators stated that the 5-year look-back period for determining the representative consecutive 24-month emissions baseline period is too restrictive. Many cited specific instances and examples where a 5-year period would not have been representative. These commentators further state that 10 years is much more representative for specific industrial or business cycles or even for the normal business cycle. The commentators indicated that the research done by the EPA to justify the Federal NSR 10-year look-back period is adequate. They commented that some neighboring states are using the 10-year look-back period without undue burden on the state agency and that Pennsylvania already uses the 10-year look-back period in its existing PSD program. The proposed 5-year look-back period will put Pennsylvania businesses at a disadvantage with these neighboring states' businesses. Further, the Department is requiring a 15-year look-back period for the de minimis aggregation portion of this proposed regulation, which serves to demonstrate that a 10-year look-back period is not too cumbersome. The commentators suggest the mandatory 10-year look-back but if the Board proceeds with a 5-year look-back, the rule should provide for a mandatory 5-year look-back period with the option to allow for another 2-year period in the last 10 years if such period is more representative of normal operations. (3, 4, 5, 6, 7, 8, 9, 11, 12, 13, 14, 16, 17, 18, 19, 20, 21, 24, 25, 26, 29, 30, 33, 34)

The EPA commented that proposed § 127.201a(a)(5)(i) varies significantly from the Federal minimum requirement for establishing the baseline period. According to the Federal regulation, EGUs are able to choose any 24-consecutive month period within the previous five years, and for all other existing units, a period within the last ten years to establish baseline actual emissions. In addition, EGUs may consider a different time period that is determined to be more representative of normal source operations. Furthermore, the Federal regulation allows non-EGU facilities to use a 10-year look-back period that must be adjusted for noncompliance and current limitations and emission obligations. The Department must provide information to the EPA describing how a deviation from this program element should be considered equivalent to the Federal regulations. (28)

RESPONSE: The Department disagrees that a 5-year look-back period is always too restrictive and finds that under many circumstances a 5-year look-back will be appropriate and environmentally beneficial. However, the Department agrees that there could be unusual circumstances where a 10-year look-back period for establishing the

NSR continuous 24-month actual emissions baseline period will be appropriate. The 24-month period shall be from the preceding 5 years unless the owner can demonstrate to the satisfaction of the Department that a longer time frame is more representative. The Department has revised § 127.203a(a)(4)(i) of the final-form regulation to include the following language "baseline actual emissions are the average rate, in tpy, at which the unit emitted the regulated NSR pollutant during a consecutive 24-month period selected by the owner or the operator within the five-year period immediately prior to the date a complete plan approval application is received by the Department. The Department may approve the use of a different consecutive 24-month period within the last 10 years upon a written determination that it is more representative of normal source operation."

54) COMMENT: Other commentators stated that the proposed 5-year look-back period is appropriate because a 10-year period will not allow for consideration of technological advances, regulatory changes and changes in ambient air quality that occurred over such an extended period. The commentators further stated that a 10-year look-back period will allow sources to escape otherwise applicable NSR provisions that would protect health and the environment and would enhance the ability of the Department to demonstrate needed attainment status. (22, 27, 31)

RESPONSE: The Department agrees that under many circumstances the 5-year look-back period will be appropriate and environmentally beneficial. However, the Department agrees that there could be unusual circumstances where a 10-year look-back period for establishing the NSR continuous 24-month actual emissions baseline period will be appropriate. The 24-month period shall be from the preceding 5 years unless the owner can demonstrate to the satisfaction of the Department that a longer time frame is more representative. The Department has revised § 127.203a(a)(4)(i) of the final-form regulation to include the following language "baseline actual emissions are the average rate, in tpy, at which the unit emitted the regulated NSR pollutant during a consecutive 24-month period selected by the owner or the operator within the five-year period immediately prior to the date a complete plan approval application is received by the Department. The Department may approve the use of a different consecutive 24-month period within the last 10 years upon a written determination that it is more representative of normal source operation."

55) COMMENT: Many commentators stated that the Department should adopt the Federal NSR regulatory language allowing for different 24-month emission baseline periods for each pollutant. They commented that different 24-month periods would be more representative of operations where complex business adjustments or shutdowns occurred. (4, 5, 10, 12, 13, 14, 17, 18, 19, 25, 26, 28, 33)

The EPA commented that proposed § 127.203a(a)(5)(i)(D) requires that the same baseline period be used for all pollutants and for all units associated with a project. The Federal minimum program elements require the same baseline period for all emission units associated with a project but different baselines can be used for different pollutants. The Department must provide information to the EPA describing how a deviation from this program element should be considered equivalent to the Federal regulations. (28)

RESPONSE: The Department agrees that there could be unusual circumstances where different 24-month periods for establishing the actual emissions baselines for different pollutants will be appropriate. The 24-month period for each pollutant shall be the same unless the owner or operator of the facility can demonstrate to the satisfaction of the Department that a different 24-month period would be more representative. The Department has revised § 127.203a(a)(4)(i)(D) of the final-form regulation to include the following language, "The same consecutive 24-month period shall be used for all regulated NSR pollutants unless the owner or operator demonstrates, in writing, to the Department that a different consecutive 24-month period is more appropriate and the Department approves, in writing, the different consecutive 24-month period for a regulated NSR pollutant or pollutants."

56) COMMENT: The commentators stated that the Department's proposal requiring the same 24-month period be used for all pollutants is appropriate because it would prevent facilities from essentially picking and choosing baseline periods where certain pollutant emissions were the highest. (22, 27)

RESPONSE: The Department agrees that there could be circumstances where the owners or operators of facilities will pick the most convenient emissions period for each pollutant without regard for representative business conditions. However, the Department also agrees that there could be unusual circumstances where different 24-month periods for establishing the actual emissions baselines for different pollutants will be appropriate. The 24-month period for each pollutant shall be the same unless the owner or operator of the facility can demonstrate to the satisfaction of the Department that a different 24-month period would be more representative. The Department has revised § 127.203a(a)(4)(i)(D) of the final-form regulations to include the following language "The same consecutive 24-month period shall be used for all regulated NSR pollutants unless the owner or operator demonstrates, in writing, to the Department that a different consecutive 24-month period is more appropriate and the Department approves, in writing, the different consecutive 24-month period for a regulated NSR pollutant or pollutants."

Section 127.203a(a)(4)(viii)(D) revised to 127.203a(a)(3)(iii)(D)

57) COMMENT: The commentator suggested that the rule should allow for ERCs generated by a facility located adjacent or within another facility, but not under common control with that facility (e.g., a portion of a facility sold to another entity) to be considered a creditable decrease as an emission decrease. (5)

RESPONSE: A net emissions increase calculation requires all increases and decreases in actual emissions at the major facility that are contemporaneous with the project and are otherwise creditable. The emission decreases used as a netting credit have to be generated at the same facility. ERCs generated at other facilities cannot be used by separate facilities for netting purposes, even if they are within a contemporaneous period.

Section 127.203a(a)(4)(iii) revised to 127.203a(a)(2)(ii)

58) COMMENT: The commentators state that conformance with the 2002 final NSR rule requires that the EQB also abandon any proposed changes to § 127.203a referencing the 1991 baseline period for any contemporaneous change evaluations under the NSR program. Creditable reductions generated at a site often stay with prior owners or are consumed in unrelated operations for facilities, or parts of facilities, which are sold to new operators. Therefore, tying NSR compliance to an arbitrary baseline from 15 years ago represents an unfair burden, especially since the EQB is silent on how to restate NSR baselines for facilities that are combined, divided, or sold.

De minimis aggregation should be limited to projects that are inextricably related during the 5-year contemporaneous period. Increasing the period during which a source is required to aggregate de minimis emissions at three times the current EPA level is grossly unfair. Where does this huge increase come from? Where are the numbers to justify this tripling of the current standard? Blanket de minimis aggregation over a 15-year window is repressive. De minimis aggregation should be limited to a 5-year contemporaneous period and only required in the case of similar projects.

The Pennsylvania rules should not provide for aggregation of less than significant emission increases. The impact of the Pennsylvania aggregation rule is to force Pennsylvania industry to obtain major source construction permits under the PSD and NSR program for minor changes that are not regulated as major modifications by Federal law, or the laws of Ohio, West Virginia, Maryland, New Jersey, Delaware or New York. Requiring a major source construction permit or PSD permit results in extra costs to Pennsylvania businesses in the process of modernizing their plants, in the form of: (a) additional engineering work and air modeling analysis for permit applications, (b) additional permit fees, (c) extra costs to purchase Emission Reduction Credits (ERCs), (d) the risk of State or Federal enforcement actions, and (e) third party permit appeals that would not occur in neighboring states. These costs make Pennsylvania less competitive.

The 1996 Regulatory Basics Program Report by the DEP agrees that § 211(b) 1 is stricter than Federal law. In the June 1996 DEP response to comments on the RBI reports, the DEP stated, "the PADEP will revise the 'de minimis increase' provision in a manner consistent with Federal regulations." The EPA has indicated that it will be promulgating a rulemaking on aggregation. At the very least, the EQB should await the Federal rulemaking before it addresses aggregation. (4, 5, 6, 8, 9, 11, 12, 13, 14, 16, 17, 18, 19, 24, 29, 33)

RESPONSE: On December 22, 2006, the U.S. Court of Appeals for the D.C. Circuit vacated the Phase 1 Eight-Hour Ozone Implementation Rule and remanded the rule to the EPA. In accordance with the anti-backsliding provisions of Section 172(e) of the Clean Air Act control measures in place for one-hour ozone nonattainment areas including the 5-county Philadelphia area must remain in place. Contrary to the EPA's position, NSR is a "control" measure— not a "growth measure." The Department's requirement for de minimis aggregation is a continuation of the NSR requirements as specified in the

existing 25 Pa. Code § 127.211(b) that covers the entire State except for the 5-county Philadelphia area. Under the OTC CAIR Plus Initiative, modeling and planning is being conducted in order to be able to demonstrate Federally required NAAQS attainment status for ozone by the Federally-mandated 2010 deadline for certain areas. The present ozone modeling indicates that even with the planned, additional reduction strategies developed to date, the attainment status will be difficult to demonstrate or achieve for the 5-county Philadelphia area. If additional emissions that occurred during the previous 10-year period are allowed to accumulate in the 5-county area without offsets, then there will be the need for additional area-specific emission reduction plans in order to find offsetting reductions to be able to demonstrate attainment by the 2010 deadline for certain counties. Should de-minimis aggregation be removed from the planning scheme then the State runs the risk of the additional unplanned for emissions affecting future ambient measurements which are projected to be close to acceptable, at best. In addition, several requests to redesignate areas within the State as attainment for ozone are either being developed or already have been submitted to the EPA by the Department. The Department does not wish to jeopardize the success of these various SIP demonstrations by allowing the negative affects of the additional emissions that will occur should the de-minimis aggregation requirement be removed from the final version of the regulation.

On the advice of the Air Quality Technical Advisory Committee, the Department has revised the duration of the de minimis emissions aggregation period from 15 years as proposed to 10 years in the final-form regulation. The de minimis aggregation requirement includes both increases and decreases for the previous 10-year period allowing for the facility to take credit for any reductions that are surplus, permanent and enforceable while still being accountable for any increases that are also to continue but have not previously been offset. Under the Federal regulation and implementing memorandums, facilities may add several non related projects up to an emissions increase of 39.9 tons per year or need only wait for 18 months to be able to propose continual 39.9 ton per year increases per project without providing offsets and without having to account for any 39.9 ton per year or less increases that occurred previous to the 5-year period. Under the Department's proposal, the owners/operators of facilities in the 5-county area will be able to avoid major NSR by keeping emission increases under 25 tons per year but will still have to account for all emission increases under 25 tons per year that occurred within the last 10 years but did not have offsets provided. For the rest of the State, the owner/operators of facilities will be able to avoid major NSR by keeping emission increases under 40 tons per year but will still have to account for all emission increases under 40 tons per year that occurred within the last 10 years but did not have offsets provided.

The Department is only aware of the EPA's proposed "de-bottlenecking" regulation which addresses the specific issues concerning past permitting actions that may have already been allowed for all or some of a proposed project's emissions increases. This proposed Federal regulation does not address de minimis aggregation as suggested.

Please see the response to Comment 57 regarding the Department's position concerning ERCs (Emission Reduction Credits) for facilities that have had ownership changes.

Section 127.203a(a)(4)(v)

59) COMMENT: At § 127.203a(a)(4)(v) netting of fine particulate precursors can occur only after April 5, 2005 (the date the designations were final). The DEP does not explain how this date was selected, and it seems to us it is possible a source could have reduced precursor emissions such as NO_x and SO_x before this date. The DEP has allowed banking of NO_x and SO_x reductions as ERCs prior to this date. Why cannot these reductions be counted against a future increase? Does the DEP intend there should be no offsets available to allow future modifications under the fine particulate standard? (24)

RESPONSE: Provisions applicable to PM-2.5 have been removed from the final-form regulation. At the request of the EPA, the Department will wait until the EPA promulgates NSR requirements for PM-2.5 nonattainment areas.

Section 127.203a(a)(5)

60) COMMENT: Some commentators stated that the Department should allow the use of different 24-month emission baseline periods for each unit involved in a project as this would be more representative of varying and complex business conditions. (4, 5, 10, 12, 13, 14, 17, 22, 25, 27, 33)

RESPONSE: The final-form NSR regulation requires that the same 24-month period shall be used for all units involved in a project. This is in accordance with 40 CFR Part 51 Section 51.165(a)(xxxv)(A)(3). Since the Department's proposal must be at least as stringent as the Federal regulation this stipulation has not been changed.

Section 127.203a(a)(5) revised to 127.203a(a)(4)

61) COMMENT: The EPA commented: Subsection (5)(i)(F) requires baseline actual emissions to be less than the emissions previously reported in the "...required emissions statement for which applicable fees have been paid." This is a significant deviation from the Federal minimum program requirements in that it does not allow baseline emissions to be greater than "previously reported" emissions. The term "previously reported" is not defined and can be construed as the most recently reported emissions statement required by Chapter 135. The DEP must either provide clarification that this provision does not inherently limit the full use of baseline actual emissions or revise the provision to reflect the method by which baseline actual emissions are determined.

Subsection (5)(ii) states that baseline emissions for a new emissions unit are zero. This is inconsistent with the Federal minimum program elements for PALs that is described in more detail later in these comments. It is, however, consistent with the Federal methodology for calculating increases associated with new units constructed during the contemporaneous time period. (28)

RESPONSE: The Department has rewritten this entire section including the referenced subsection and has included the suggested modifications in the final-form regulation.

62) COMMENT: For permit or plan approval applications submitted before the proposed regulation is final but not issued before the proposed regulation is finalized: If netting numbers need to be revised is there a window after final publication to make adjustments or is it the expectation that upon final publication that any necessary changes will be incorporated immediately? (25)

RESPONSE: The final-form regulation now indicates that any applications that have not yet received plan approval by the date of final publication of this regulation will then be subject to the new provisions of this regulation.

63) COMMENT: The commentators agree that emissions from start-ups, shutdowns, and malfunctions should not be treated differently under the definitions of "baseline actual emissions" and "projected future actual emissions." Others also specify that § 123.203a(a)(5) indicates that emissions from start-ups and shutdowns are to be included in the baseline actual emissions only if they are "authorized," while the projected future actual emissions include emissions from startups and shutdowns regardless if they are authorized. The proposed rule is different and apparently more stringent than the Federal rule. (5,6, 11, 14, 33)

RESPONSE: The final-form regulation will not allow the use of emissions from malfunctions to be included in the baseline actual emissions because it is not representative of normal source operation. The Department has removed the word "authorized" from this language.

Section 127.203a(a)(6)(C)

64) COMMENT: To avoid the risk of having new regulations apply to an existing 2-year-old unit (actually, more than 2 years may have elapsed from the time a unit is purchased and installed), the rule should clearly indicate that this applies only to the NSR-affected process. (4, 5, 12, 17)

RESPONSE: The Department has added language in the final-form regulation stipulating that the shakedown period applies to replacement units and has modified the definition of replacement unit to match the Federal definition.

Section 127.203a(a)(6) revised to 127.203a(a)(5)(i)(C)

65) COMMENT: The commentators state that it is not clear how emissions that existing units could have accommodated are to be determined. The rule should qualify how these emissions are to be determined. Is this a historical/proven value not to exceed the approved potential emissions? If the process constraint is in an upstream or downstream unit, and the unit itself does not need to be modified, could the emissions

that could have been accommodated be still included the analysis? Are emissions to be estimated in lb/hr, TPD, TPY, or as defined in the permit?

Another commented that subsection (a)(6)(i)(C) provides for the "demand growth" exclusion. The commentator supports this common sense provision but requested clarification on the phrase "and that is unrelated to the particular project." Any emissions that could have been accommodated during the baseline period should inherently be excluded under the demand growth exclusion. The commentator requested an example of a situation wherein emissions could have been accommodated during the baseline period but cannot be excluded under the demand growth exclusion because the emissions are "related to the particular project." (5, 6, 18, 20, 27, 29)

RESPONSE: The Department will refer the commentators to 67 FR 80202 and 80203, to the response to the comment, "7. Why Was the Demand Growth Exclusion Retained?" It is the Department's intent to include the EPA's demand growth provision in the final rulemaking. The Department closely mirrored the EPA's NSR regulatory language from 40 CFR § 51.165(a)(1)(xxviii)(A)(2) in the Department's revised § 127.203a(a)(5)(i)(C). The Department's interpretation and use of the EPA's regulatory language and commentary would be consistent. For example: 1) If an existing source before modification had the potential to emit 20% more of a regulated pollutant had the demand existed during the 24-month baseline chosen, but after the proposed modification has a projected actual emission rate of 40% more of the same regulated pollutant, then the projected actual emissions would be 140% of the baseline emissions. The emission increase would be the 140% level minus the "could have been accommodated" 20% and minus the original 100% actual baseline equaling a 20% emission increase. The new permit emission limit would be 140% of the baseline regardless of the new or modified unit's potential to emit which could be higher. The modification made to the emission unit in this example will not have altered the product or in any way created the demand growth. Another example would be: 2) A printing press can presently print in 3 colors and had the potential to accommodate a 20% higher level of actual emissions during the 24-month baseline period chosen had the demand existed, as in example 1. The owner wishes to modify the press to be able to print in 4 colors while increasing the unit output capacity and potential to emit and again as in example 1 the owner establishes a projected future actual emission level at 140% of the baseline which can be below the new potential. Here there is a 40% emission increase because the entire product demand growth could be attributable to the product alteration. The new permit emission limit would be 140% of the baseline as in example 1.

Section 127.203a(a)(6) and (7) revised to 127.203a(a)(5)

66) COMMENT: The commentators state that under the EPA's approach, facilities are only required to track emissions for a period of time following a modification. Pennsylvania is proposing a very complicated approach which involves using the summation of "baseline actual emissions; emissions that could previously be accommodated prior to the proposed modification; and the projected actual emission increase due to the proposed project." These data would be used to determine

compliance and tracked for five years (ten years if there is a capacity increase). In addition, facilities would be required to demonstrate compliance with the projected actual emission increase that is due solely to the project. These provisions are not only more stringent than the Federal equivalent, but are confusing. The commentators recommend that the EQB adopt the Federal approach of recordkeeping and reporting to ensure that projects that do not trigger NSR do not in fact trigger NSR.

One commentator also remarks that the provisions regarding the establishment of an emissions limit ((see §§ 127.203a (a)(6) and (7)) are not only more stringent than Federal equivalent but are confusing. The Federal approach of record keeping and reporting is sufficient to ensure compliance. If the EQB proceeds with an emission limit approach, the commentator suggests that §§ 127.203a(a)(6) and (7) should be clarified. First, it is unclear whether the emission limit must be established prior to beginning actual construction on the project. The commentator opposes any procedural requirements (e.g., obtaining a plan approval) that would delay projects and hamper operational flexibility. Second, the numerical limit that would be established based on the regulations is unclear. It appears to be equivalent to the pre-change "potential-to-emit" (PTE) plus any increase in the PTE attributable to the project. (9, 11, 14, 33)

RESPONSE: Most of the language in the revised § 127.203a(a) paragraph (5) duplicates the language used in the Federal regulation as it pertains to demand growth and reporting requirements. The EPA stipulates that the owner will keep records for 5 years or for 10 years if the project increases a unit's potential to emit. These records are to be reviewed annually by the local or State agencies to ensure that the projected actual emission increases as proposed are not exceeded for existing EGU projects. For non-EGU units the owner will report only if the projected emissions are exceeded. The Department has changed the regulatory language to more closely duplicate the Federal language concerning reporting requirements in the final-form NSR regulation. It is the responsibility of the facility to project their future actual emissions rate based upon their own assessment of future demand growth when the facility chooses not to use the emission unit's potential option. This projected future actual emission level will then become the permit limit under the final-form regulation. Also under the final-form regulation, the emissions that could have been accommodated will not be removed from the projected actual emissions level but will instead be removed from the calculated emission increases from the project. Please see the response to Comment 65 above regarding the establishment of the permit limit and emissions that could have been accommodated. The Federal regulation and the Pennsylvania's final-form regulation stipulate that for a new emissions unit the future actual emissions will equal the unit's potential to emit. This stipulation could only be avoided if the owner accepts a reduced enforceable emission limit as a permit condition, which was the requirement under the previous NSR regulation.

67) COMMENT: Most commentators agreed that projected actual emissions should not become permit restrictions. The commentators state that if these provisions are retained §§ 127.203a(a)(6) and (7) should be revised to better specify the procedural requirements

for establishing the emission limit, including any timing constraints. The regulations reference incorporation of an emissions limit into "the required plan approval or the operating permit." The language suggests that a plan approval is required. The reference to operating permit suggests that the new emission limit may be incorporated into an operating permit. These provisions should be crafted to minimize any delays associated with establishing the new limit.

Furthermore, the commentators expressed concern with the formula used to establish the emissions limit. The commentators state that they interpreted that the language requires the new limit to be set at the PTE of the emission unit plus the "emissions increase that results from the particular project." The commentators suggested that the EQB provide examples or better explain these provisions.

The commentators request that this provision be removed to allow self-analysis, monitoring and reporting consistent with established policy and guidance as per the Federal rule. The approach reflected in the current language of the Proposed NSR Regulation is likely to meaningfully restrict economic growth, investment in production efficiencies and modernization of equipment designed to enable a facility to increase business activity without causing any associated significant net emission increase. (6, 7, 8, 9, 10, 11, 14, 16, 18, 25, 26, 29, 33)

RESPONSE: The Department has included the EPA's demand growth provision in its final-form NSR regulation. Most of the language in § 127.203a(a) revised paragraph (5) of the final rulemaking duplicates the language used in the Federal regulation as it pertains to demand growth. The final-form NSR regulation requires a permit limit for an existing emission unit to be set at a level chosen by the facility to represent their projected actual emissions, which includes the emissions associated with the product demand growth. The EPA does not propose to limit a project's future emissions to the facility's projected actual emissions in a plan approval or permit. The EPA stipulates that the owner will keep records for 5 years or for 10 years if the project increases a unit's potential to emit. These records are to be reviewed annually by the local or State agencies to ensure that the projected actual emission increases as proposed are not exceeded for existing EGU projects. For non-EGU units the owner will report only if the projected actual emissions are exceeded. If these emission rates are exceeded, the local or State agency or the EPA can then take whatever action they feel is necessary after an explanation by the owner or operator of a source. The Department does not agree that this approach would be beneficial to the environment, the regulated community or the Department. Under the Federal NSR regulation, when the 10-year record keeping requirements expire there will be no restrictions to prevent an owner from increasing a unit to its full potential usage at a possibly substandard emission rate that was granted initially. For the regulated community, the consequences of exceeding the projected actual emissions during the 5- or 10-year reporting period are unknown to them under the new Federal NSR regulation. The owner's explanation as required would be the determining factor of what the consequences at the Federal level would be. In contrast, the Department's enforcement action would be based upon the proposed revised paragraph § 127.203a(a)(5) permit limit. The Federal regulation allows for the possibility

that members of the regulated community could knowingly or unknowingly exceed their projected actual emission limits for one year or beyond before discovery or disclosure, again with unknown consequences for the owner or the environment. The final-form NSR regulation eliminates any confusion about the consequences to the owner or the environment that exist under the present Federal NSR proposal when the projected actual emissions are exceeded.

68) COMMENT: The commentator voiced support for the establishment of a legally enforceable emissions limit for the modification. The commentator stated that the EPA's use of future actual emissions in the netting analysis is not enforceable, protective, or practical. Its uncertainty also puts sources in jeopardy of unanticipated future violations. (22)

RESPONSE: The final-form NSR regulation includes the EPA's demand growth provision. Most of the language in the revised paragraph (5) of § 127.203a(a) duplicates the language used in the Federal regulation as it pertains to demand growth. As per the Federal NSR language, a new emissions unit's emissions increase will be its potential to emit. Revised paragraph (5) denotes the difference between Pennsylvania's final-form NSR regulation and the EPA's rule. The final-form NSR regulation requires the permit limit for existing emission units to be set at a level chosen by the facility to represent their projected actual emissions, which includes the emissions associated with the product demand growth. The EPA does not propose to limit a project's future emissions to the facility's projected actual emissions in a plan approval or permit. The EPA stipulates that the owner will keep records for 5 years or for 10 years if the project increases a unit's potential to emit. These records are to be reviewed annually by the local or State agencies to ensure that the projected actual emission increases as proposed are not exceeded for existing EGU projects. For non-EGU units, the owner will report only if the projected actual emissions are exceeded. If these emission rates are exceeded, the local or State agency or the EPA can then take whatever action is necessary after an explanation by the owner or operator of a source. The Department does not agree that this approach would be beneficial to the environment, the regulated community or the Department. Under the Federal NSR regulation, when the 10-year record keeping requirements expire there will be no restrictions to prevent an owner from increasing a unit to its full potential usage at an emission rate significantly in excess of the limits that would have been imposed as LAER when the source was constructed or modified. For the regulated community, the consequences of exceeding the projected actual emissions during the 5- or 10-year reporting period are unknown to them under the new Federal NSR regulation. The owner's explanation as required would be the determining factor of what the consequences at the Federal level would be. In contrast, the Department's enforcement action would be based upon the proposed revised § 127.203a(a)(5) permit limit. The Federal regulation allows for the possibility that members of the regulated community could knowingly or unknowingly exceed their projected actual emission limits for one year or beyond before discovery or disclosure, again with unknown consequences for the owner or the environment. The final-form NSR regulation eliminates any confusion about the consequences to the owner or the environment that

exist under the present Federal NSR proposal when the projected actual emissions are exceeded.

Section 127.203a(a)(7)

69) COMMENT: The EPA commented: For 40 CFR 51.165(a)(6) Reasonable possibility. In New York v. EPA, 45 F.3d 3 (DC Cir. June 24, 2005), the D.C. Circuit court remanded the EPA to either provide an acceptable explanation for its “reasonable possibility” standard or to devise an appropriately supported explanation. At this time, the EPA has not responded to the remand and the reasonable possibility standard still exists in the Federal regulations. The DEP, therefore, must provide information as to how the provisions in § 127.203a(7) are equivalent to the requirements of § 51.165(a)(6) of the Federal regulations in at least two respects: the requirement for a facility to take a limit that reflects projected actual emissions whenever projected actual emissions exceed baseline actual emission; and the requirement for a facility to take a limit regardless of whether there is the possibility that a modification at a facility will be a major modification, that is, that the modification has the potential to cause an emissions increase or a net emissions increase that is significant. (28)

RESPONSE: The calculation method for determining the projected actual emissions for both the Federal and the final-form regulation are equivalent. The final-form regulation projected actual emissions are reflective of the actual emissions level that the facility expects and are not adjusted. With the Federal regulation, the projected actual emissions are reduced by the amount that could have been accommodated. This “could have been accommodated” amount will have to be added to the Federal projected actual emissions when the determination is made as to whether or not the facility’s real actual emission level has exceeded its allowed level. Under the Federal regulation, if the projected actual level is exceeded, an explanation from the facility is expected and future enforcement action is to be determined by the EPA and the Department. The Federal regulation does not define what type of action that the EPA may take or when they may take it. Under the Federal regulation, the Department’s action would be the same as if a permit limit has been exceeded. This is in accordance with existing *25 Pa. Code* §§ 127.25 and 127.444. Under the final-form regulation, the permit limit is clear and defined. Since the Department’s action will be equivalent under either version of the regulation, the Department will set the projected actual emissions as the permit limit and has eliminated any confusion about the occurrence and consequence of exceeding this limit as is required of the Department.

Section 127.203a(a)(7) revised to 127.203a(a)(5)(iii)(B), (C) and (D)

70) COMMENT: The commentators state that the proposed rule contains additional new recordkeeping and reporting requirements at § 127.203a(a)(7). Depending on the type of modification it may not be possible to separate the actual annual emissions into baseline actual emissions, emissions that could have been accommodated during the baseline period, unrelated emissions due to the demand growth, and emissions increase due to the project. The DEP has not explained why it needs more data, or an additional

report, from the same sources that are already required to file Annual Emission Reports under Chapter 135. This requirement is redundant, burdensome and creates more unnecessary paperwork for the DEP to review. This provision should be deleted. (14, 24, 26, 33)

RESPONSE: The revised paragraph (5) in 25 Pa. Code § 127.203a(a) is consistent with the language in 40 CFR § 51.165(a)(6)(i)(B). Since the final-form NSR regulation must be at least as stringent as the Federal rule, recordkeeping and reporting requirements have not been revised in the final-form regulation.

Section 127.203a(a)(7) revised to 127.203a(a)(5)(iii)

71) COMMENT: The commentators point out that the reference to paragraph (6)(i) in § 127.203a(a)(7) should probably be to paragraph (6)(iii). (11, 14, 33)

RESPONSE: The Department agrees and has made the appropriate revisions in the final-form regulation.

Section 127.203a(a)(7)(i) revised to 127.203a(a)(5)(iii)(B)

72) COMMENT: The commentators suggest that project emissions should be calculated, monitored and reported in terms of 12-month periods consistent with the established policy and guidance and the Federal rule. A requirement to report emissions in terms of calendar years is inconsistent with the intent to monitor project emissions for the contemporaneous period directly following the Project's initial operation. Monitoring and reporting of monthly emissions is not problematic for affected sources.

The commentators remark that reporting requirements should be established as the 12-month period following the project's commencement of operation. (9, 16)

RESPONSE: The Department has followed the lead of the EPA by requiring the reporting on a calendar year basis. This approach is consistent with the requirement in 40 CFR § 51.165(a)(6)(iii). Therefore, the proposed language is being retained in the final rulemaking.

Section 127.205. Special Permit Requirements.

Section 127.205(1)

73) COMMENT: The regulatory quote in paragraph § 127.205 seems to be incorrect. (5)

RESPONSE: The Department agrees. The referenced subparagraph in § 127.205 should have been § 127.203a(a)(4)(iv) and this reference has been corrected to revised § 127.203a(a)(2) in the final-form regulation.

74) COMMENT: The commentators request clarification on § 127.205(1) relating to LAER requirements and how LAER applies in the aggregation context. The proposed rule requires a modified facility subject to NSR to comply with LAER "except as provided in § 127.203a(a)(4)(ii)(B)." The cited section does not exist. Most commentators believe that the appropriate cross-reference may be § 127.203a(a)(4)(iv). One commentator stated that the correct reference may be to §127.203(b)(2) and §127.203(b)(3).

While § 127.203a(a)(4)(iv) itself needs to be clarified, one commentator believes that the intent is to require "de minimis" projects to be aggregated and the entire "net" increase be offset once the aggregated smaller projects trigger the significance threshold. However, LAER need not be applied to any "de minimis" or less than significant project. If the aggregation concept is retained, the LAER applicability provisions need to be clarified. (3, 4, 6, 11, 12, 14, 25, 26, 33)

The EPA commented that the second sentence of revised paragraph (3) states that emission offsets shall be required for the entire net emissions increase over the contemporaneous time period except for emission increases that were offset in earlier applicability determinations. However, this scenario isn't really possible unless a facility attempts to circumvent NSR. This may need additional clarification. (28)

RESPONSE: The Department agrees that LAER does not apply when a proposed de minimis emissions increase occurs in which the net emissions increase during the contemporaneous time period exceeds the applicable emission rate that is significant. Only the emissions offset requirements in § 127.205(3) (relating to special permit requirements) apply to the aggregated emissions. Again, the entire net emissions increase must be offset, except to the extent that emissions reductions or ERCs were previously applied against any increases in an earlier applicability determination. Under the Federal regulation, without de minimis aggregation there would be no scenario where there were offsets in earlier applicability determinations that would not need to be offset under a present applicability determination. Under the final-form regulation requiring de minimis aggregation, this scenario can occur. The language of 25 Pa. Code § 127.203a describing significant emissions increases and significant net emissions increases has been clarified in the final-form regulation.

Section 127.206. ERC General Requirements.

Sections 127.206(d)(2) and 127.203a(a)(4)(viii)(A) revised to 127.203a(a)(3)(iii)

75) COMMENT: At § 127.203a(a)(4)(viii)(A), a decrease is creditable only if an ERC application is filed. The DEP's past practice has been to consider any reduction, whether or not an ERC application was filed. Companies intending to use reductions as offsets against future increases may not wish to file the additional paperwork for an ERC application. The DEP has been notoriously slow in processing ERC applications, and it seems the result will be an increase in minor paperwork the DEP does not want to process. This provision seems designed to delay action on permits.

This proposed rule changes the time the ERCs must be secured from the date the new facility begins operating [under the current rule at § 127.206(d)(2), continued unchanged] to the date construction begins [under the new proposed language at § 127.203a(a)(4)(viii)(A)]. The DEP should provide an explanation of the rationale for these contradictory provisions. Obtaining the ERCs earlier consumes cash earlier in the construction process and adds to the cost of the project.

The DEP has failed to provide an explanation for any of these changes, which have no discernable impact on air pollution but will make it more expensive to permit and build new plants or plant modifications. (24)

RESPONSE: The reductions, which are involved in the netting transaction, need to be processed through the ERC registry system to prevent the same emissions reduction from being used more than once. This procedure will not delay the issuance of a plan approval since these emission reductions do not need to be certified unless the generator requests it. The Department's intent is, for example: if an owner intends to shut down an existing source at the beginning of operation and to provide creditable emissions reductions for the construction of a new source, then this condition must be demonstrated in the plan approval for the new source which is needed before actual construction begins. The ERC Registry application will have to be submitted to enable issuance of the plan approval. The reductions would not need to occur until the date that the proposed new source begins operation. The language in the proposal has been adjusted to clarify this. If a facility is certain that emission reductions meet the conditions of *25 Pa. Code* § 127.207 of being surplus, permanent, quantified and enforceable and all other conditions regarding ERC generation and creation and is again certain that the emission reductions will be used internally in applicability determinations as creditable emissions reductions for NSR netting purposes during the 5-year contemporaneous look back period, then an ERC application need not be filed within one year. This also applies to the de minimis look back period for aggregation netting purposes. If, after evaluation of the 5-year contemporaneous look back period, it is discovered that emission offsets are required, internal creditable emissions reductions that occurred before the 5-year contemporaneous look back period that were not registered as ERCs within one year of their creation would not be available as offsets. If an owner does not register their creditable emission reductions within two years of their creation then these reductions can no longer be registered, certified and sold through the ERC registry system. Only registered ERCs, whether obtained internally or externally, can be used as offsets and these ERCs must be registered within two years of the activity that generated the emission reductions.

Section 127.207. ERC Generation and Creation.

Section 127.207(1)(i)

76) COMMENT: The commentators observed that the proposed rule adds a restriction that emission reductions necessary to meet allowance-based programs may not be used to generate emission reduction credits (ERCs). In a market-based system that uses an emissions cap and allowances to maintain the cap, the facility is not required to reduce emissions through a permit limit. Rather, it is left up to the source to choose whether or not it will operate within its allotment or will purchase allowances to cover emissions in excess of its allocated allowances. Therefore, any reduction in actual emissions that an allowance-affected source makes by taking a new, enforceable permit limit should be creditable as either an emission offset or a reduction for netting purposes.

One commentator asked if the final NSR will exclude all reductions undertaken in response to allowance-based programs from eligibility for the creation of ERCs, or if ERCs can be created for emission reductions that exceed the underlying emission rate goals of the allowance-based program.

The EPA commented that it recommends that the DEP reconsider the provision in § 127.207(1)(i) stating that emission reductions necessary to meet allowance-based programs may not be used to generate ERCs. In a market-based system that uses an emissions cap and allowances to maintain the cap, the facility is not required to reduce emissions through a permit limit. Rather, it is left up to the owner or operator of a source to choose whether or not it will operate within its allocation or will purchase allowances to cover emissions in excess of its allocated allowances. Therefore, the EPA believes that any reduction in actual emissions that an owner or operator of an allowance-affected source makes by taking a new, enforceable permit limit should be creditable as either an emission offset or a reduction for netting purposes. (10, 25, 28)

RESPONSE: The Department disagrees that emission reductions used to meet allowance-based programs should be eligible for use as ERCs. The provisions of § 127.207(1)(i) ensure that double counting of the same emissions reductions will not occur. In the absence of this provision, the owner or operator a major facility could generate ERCs and sell them to the owners or operators of other facilities even though these same decreases are actually required to meet requirements of an allowance-based program such as the Clean Air Interstate Rule (CAIR). This could result in double counting of emission reductions since the owner or operator of the major facility would be able to sell ERCs to other facilities and also simultaneously use decreases to satisfy the allowance-based program. This defeats the purpose of CAIR or any other allowance-based program. The final-form regulation allows for ERCs to be generated as in the following example: an allowance-based program requires an existing source to lower its actual emissions from a present level of 2000 tons per year to 1500 tons per year. The facility complies by installing a control device and subsequently lowers the source's emission level to an enforceable 1000 tons per year emission limit. The facility can now claim the 500 tons per year of controlled emissions, which is the difference between the required 1500 and actual 1000 tons per year that were not required by the allowance program, as an ERC provided that the provisions of 25 Pa. Code § 127.207 are met.

77) **COMMENT:** A facility making improvements that are classified as best available technology (BAT) would apparently be prohibited from generating ERCs per the proposed rule. In practice this will prohibit many sources from conducting emissions netting. Not to mention, the historic determination of BAT in the Department is frequently arbitrary meaning that even within the Department the regulation cannot be applied consistently with the Commonwealth. This provision should be removed from the proposed rulemaking. To counteract past practices by the Department, we also request the Department to clarify that BAT only applies to new sources, and not to existing or modified sources, based on the controlling definitions contained in § 121.1. (4, 12)

RESPONSE: It is the policy of the EPA that any emissions reductions that occur because of the implementation of Federal rules such as RACT and BACT cannot be used to generate ERCs. To allow for the generation of ERCs through the use of rules that are intended to safeguard the environment would defeat the purpose and effect of these rules. The Department agrees with this assessment and feels that allowing for the generation of ERCs through the enforcement of BAT would defeat the purpose of the BAT regulation that is to safeguard the environment at the State level. The final-form regulation does not allow for the generation of ERCs through the implementation of required BAT.

Sections 127.11a, 127.215, 127.207(2)

78) **COMMENT:** One commentator stated that §§ 127.11a and 127.215 require a shutdown source which may restart to file a "maintenance plan" within one year of the last date of operation. If the maintenance plan and reactivation plan are not filed by the deadline, an attempt to restart the plant is treated as new construction, through the full Plan Approval and NSR/PSD process. This is costly, time consuming, and is a serious impediment to restarting a manufacturing plant.

The ERC rules at § 127.207(2) require an application to bank emission credits also be filed within one year of the last date of operation. There is no Federal requirement for maintenance plans or ERC applications within a year, and the commentator has not found another state adjacent to Pennsylvania with similar requirements for maintenance plans or ERC applications. The DEP has agreed the one-year filing deadline is arbitrary and imposed for the administrative convenience, not for air quality benefits.

If a deadline for maintenance plans and ERC applications is necessary for any legitimate regulatory function the respective deadlines should be deleted or changed to three years from last operation. If market events dictate a plant with a maintenance plan will not restart, it should be allowed to convert to an ERC application and allow another facility the chance to use the offsets. The Commonwealth's interest in creating manufacturing jobs should encourage plants that have banked ERCs to be able to convert to maintenance plans, restart facilities and create jobs.

EPA commented regarding ERCs Requirements for New Criteria Pollutants: The Department's regulations require emission reductions to be registered within one year of

generation in order to qualify as an ERC. Many facilities that have shut down or implemented over-control strategies in the past for NOx and VOCs may have also generated incidental reductions in PM-10, PM-2.5 and SO2. The latter could have been creditable ERCs had they been registered along with the NOx and VOC reductions. However, prior to the PM-2.5 designations in April 2005, reductions in PM-10, -2.5 and SO2 had no regulatory or economic purpose, leading to a missed opportunity to create ERCs for these pollutants. EPA strongly encourages DEP to consider revising its regulations for qualifying and registering ERCs so that reductions that may have been generated in the past can be accommodated in generating ERCs for PM-10, PM-2.5 and SO2. (24, 28)

RESPONSE: The Department has revised the language at § 127.207(2) to specify that an ERC registry application must be submitted to the Department within one year of the initiation of an emissions reduction used to generate ERCs. The ERC Registry application deadline may be extended to two years from the initiation of an emissions reduction used to generate ERCs if the owner or operator of the source or facility either submits to the Department a maintenance plan in accordance with § 127.11a (relating to reactivation of sources), or a written notice within one year of deactivation of the source or facility to request preservation of the emissions in the inventory.

In addition, the final-form regulation includes a one-year extension for the owner or operator of a facility that has generated emission reductions for a criteria pollutant after January 1, 2002, and missed the opportunity to submit an ERC Registry application, to submit the ERC Registry application.

79) COMMENT: The EPA commented: 40 CFR 51.165(a)(3) Offsets. The Department's regulations do not have all of the Federal elements required for generating and using emission offsets. Of particular note are the revisions EPA made through the Phase II 8-hr ozone implementation rule that revised the requirements for generating emission reductions from shutdown units. The EPA recommends that the DEP review the most current Federal requirements to ensure that the State's provisions are complete and consistent. (28)

RESPONSE: The EPA's final rule to implement the eight-hour ozone standard specifies that the emission reductions achieved by shutting down an existing emission unit or curtailing production or operating hours may be generally credited for offsets if the shutdown or curtailment occurred after the last day of the base year for the SIP. It further specifies that a reviewing authority may choose to consider a prior shutdown or curtailment to have occurred after the last day of the base year if the projected emissions inventory used to develop the attainment demonstration explicitly includes the emissions for such previously shutdown or curtailed emissions units.

The final-form NSR regulation requires the owner or operator of the facility to submit an ERC Registry Application to the Department within two years of the initiation of the emission reduction used to generate the ERCs. Therefore, all new ERC Registry Applications will be approved after the base year for the SIP (generally 2002 calendar

year). The Department has been including the emissions approved under previously approved ERCs into the SIP emissions inventory. Further, the final-form regulation includes a provision for a one-year amnesty period for the owner or operator of facilities, which have generated emission reductions for all criteria pollutants after January 1, 2002, and have missed the opportunity, to submit ERC Registry applications. This amendment ensures that the reductions will be approved after the base year for the SIP planning purpose.

Proposed Section 127.214a. Special Provisions for Advanced Clean Coal Generation Technology.

80) COMMENT: Some commentators stated that the proposed “advanced clean coal generation technology” is unfair because this provision is not available for other equally viable technologies that it supports. Another commentator stated that although this technology does not apply directly to them they support measures to encourage the use of clean coal technology.

A commentator stated that his company’s primary interest in this proposed regulation relates to the company’s interest in retrofitting an existing power plant with Integrated Gasification Combined Cycle (IGCC) technology and consequently our comments are restricted solely to § 127.214a — Special provisions for advanced clean coal generation technology. They strongly support the Department’s efforts to encourage clean coal generation technology by providing a regulatory definition of LAER and by offering expedited permitting. Our concern is that some of the parameters used to establish LAER might be unachievable, particularly in a retrofit scenario. The commentators general comment was that the Board should ensure that these standards should not be set so tightly as to preclude environmentally beneficial clean coal projects from achieving the benefits intended by this regulation, and that in setting these standards the Department should be mindful of realistic limits for retrofits as they may differ from new unit capabilities.

The EPA commented that the EPA cannot, under any circumstance, approve this provision. LAER must be the more stringent of either: (1) a limit in a SIP for a class or category of source, or (2) an emissions limit that has been achieved in practice. A presumptive limit that is adopted as part of a regulation cannot be demonstrated to meet either of these qualifications.

Notwithstanding the above, the EPA has a number of concerns with the concepts DEP has pursued in proposing this provision. First, the proposed regulation sets a presumptive level of control for LAER without any sunset provision. (The EPA does not consider the proposed rule’s provision allowing the DEP to determine that the performance standards are less stringent than LAER to be a sunset provision). Over time LAER can change dramatically as control technology improves and it is inevitable that the performance standards in 127.214a(b) will become outdated. Even in the existing State and Federal NSR regulations, a permit issued to a source that requires a LAER level of control becomes invalid if the source does not commence construction within 18 months, for the

sole purpose of making the source re-evaluate LAER. Therefore, the EPA could not approve a regulation that sets a performance standard as LAER indefinitely into the future.

Second, LAER is required to be an emissions limit. The presumptive LAER performance standards in the proposed rule are not required to be imposed as emission limitations. Rather they set minimum performance specifications for sources to be eligible to these special provisions. That said, however, even if they were required to be emission limitations, some of the standards are practically unenforceable and some fail to set short-term emission standards or limits. For instance, the performance standard for VOC is expressed as the average of three one-hour stack tests. This standard does not mandate a continuous level of control, it is practically unenforceable as an emissions limit, and it does not qualify as a LAER limit. Either these specifications must be changed or another section must be added establishing emission limitations that the facility must accept as part of the permit for the project.

The EPA has not analyzed the proposed performance standards with respect to their technical merit, that is, whether or not they would actually qualify as the lowest achievable emission rate for this class or category of source at this time.

Finally, the EPA has concerns regarding any commitment, such as in § 127.214a(f) that provides that the processing of the plan approval application for a certain category of sources will be expedited. This is unapprovable unless it is clear that any permit issued to a source that would construct or modify a qualified unit would have to undergo all of the administrative procedures outlined in 40 CFR Part 51, including requirements for Class I areas. (3, 18, 28, 32)

RESPONSE: The Department appreciates your comment. The EPA informed the Department that, "The EPA cannot, under any circumstance, approve this provision. LAER must be the more stringent of either: (1) a limit in a SIP for a class or category of source, or (2) an emissions limit that has been achieved in practice. A presumptive limit that is adopted as part of a regulation cannot be demonstrated to meet either of these qualifications." The proposed § 127.214a, relating to special provisions for advanced clean coal generation technology, has been deleted from the final-form regulation because of the concerns raised by the EPA.

Section 127.214a(b)(2)

81) COMMENT: Change "the vendor warrants" to "the applicant warrants." (32)

RESPONSE: Section 127.214a has been deleted from the final-form regulation.

Section 127.214a(b)(2)

82) COMMENT: The commentator supports establishing limits based on electrical output since they promote efficiencies of generation. However, the regulation is not clear

as to whether the limits are based on gross or net generation. Since IGCC has a relatively high parasitic load, defining these limits as based on gross generation would help to promote these clean coal technologies. (32)

RESPONSE: Section 127.214a has been deleted from the final-form regulation.

Section 127.214a(b)(2)

83) COMMENT: A commentator stated: Proposed emission limits under the advanced clean coal technology provision The commentator generally favors energy sources other than coal. There is no such thing as “clean coal.” The commentator believes that pollution-free renewable energy sources are the smartest choice for Pennsylvania. Insofar as new coal-powered electric generating units are developed, however, these units should be required to use the cleanest technologies available. The commentator generally supports the Department’s use of expedited processing of plan approval applications for electric generation units employing so-called “advanced clean coal generation technology,” but recommends the use of stronger performance requirements than those currently proposed. Existing applications in states like Illinois and Kentucky for new integrated gasification combined cycle (IGCC) plants that utilize Selexol/SCR emission control technologies indicate that those technologies achieve much lower levels of sulfur dioxide and nitrogen oxides than those IGCC plants utilizing Amine/Diluent Injection. Based on these existing applications, the commentator recommends mandating the following emission rates before allowing a unit to receive expedited processing:

Pollutant	Emission Rate
SO ₂	0.015 lbs/MMBtu
NO _x	0.025 lbs/MMBtu
CO	0.04 lbs/MMBtu
PM-10	0.007 lbs/MMBtu
VOC	0.006 lbs/MMBtu
Hg	0.2 x 10 ⁻⁶ lbs/MMBtu

The Department’s proposed emission limits for SO₂ and Hg are not stringent enough in that they specify only a percentage of the respective pollutants to be removed rather than a specific quantity. As for the Department’s emissions rates for NO_x, CO, PM-10, and VOC, the commentator notes that these rates are higher than those the commentator has recommended. After converting these limits from lbs/MWH to lbs/MMBtu, the Department’s emissions limits are as follows: NO_x—146 lbs/MMBtu; CO—.093 lbs/MMBtu; PM-10—.017 lbs/MMBtu; VOC—.002 lbs/MMBtu. The limits for NO_x,

CO, and PM-10 are obviously higher than those recommended by the Clean Air Council, and the Council urges the Department to select the lower emissions limits.

The commentator further indicates that the Department should set an emission rate for carbon dioxide that is more stringent than that which can be met with the simple efficiency improvements achieved by utilizing IGCC. The Department's proposal lacks any mention of carbon capture and sequestration (CCS) technologies. In addition to including stronger carbon emission rate requirements, the Department should also require applicants to demonstrate that their new units are at least "carbon ready." The commentator defines a "carbon ready" unit as one that can be retrofitted for CCS within ten years after becoming operational and can still be economical to operate. For instance, applicants should be required to leave physical space for such CCS retrofits in their unit designs and to at least investigate and report on the availability of those potential geological formations for carbon sequestration within 200 miles of the facility.

Another commentator stated that the proposed regulation contains a PM-10 limit of 0.06 lb/MWhr. While this may be achievable on filterable particulate the difficulty in establishing a very tight limit including condensables is that it makes it very difficult to get a control equipment manufacturer to guarantee an emission level since there is no easy way to correct excess condensable emissions. The Department of Environmental Protection (DEP) has limited data on PM-10 from traditional coal fired boilers and we suspect they have very little data on IGCC condensable emissions. Recent permit limits for CFB boilers issued by DEP have been as high as 0.012 lb/MMBTU filterable and 0.05 lb/MMBTU total. Assuming a net heat rate of 8530, this would equate to a filterable limit of 0.1 lb/MWh filterable and 0.4 lb/MWh total. The commentator encourages the Board to ensure that the limits that are chosen are achievable and that projects do not fail simply because levels are chosen which equipment vendors will not guarantee. (27, 32)

RESPONSE: The Department appreciates your comment; however, in response to the EPA's comments (see Comment 80), § 127.214a has been deleted from the final-form regulation.

Section 127.218. PALs.

Section 127.218(a)

84) COMMENT: In § 127.218(1), "Applicability", the proposed new regulation establishes a Plantwide Applicability Limit (PAL) for nonattainment New Source Review (NSR) pollutants. How will these changes affect existing major sources currently operating under a Federally Enforceable Emission Cap in accordance with § 127.448? Which regulation will apply? (15)

RESPONSE: Section 127.218 specifies that the Department may modify or supersede a PAL that was established prior to the date of approval of the PAL provisions by the EPA as a revision to the SIP. Therefore, the Department may revise an existing PAL permit or

Federally Enforceable Emission Cap issued in accordance with § 127.448 to comply with the new regulation if necessary.

Section 127.218(c)(1)

85) COMMENT: The DEP lists basic elements for authorizing a PAL. The first issue is that this provision fails to include the requirement for imposing a limit that is practically enforceable. Unfortunately, the State's regulations also carry through an error from the Federal rule in that it expresses the PAL as the sum of the previous 12 months yet calls this a 12-month rolling average. A PAL limit does not allow emissions to be averaged. They must be the sum of emissions over a 12-month period. The DEP may want to take the opportunity to make this clear. Referring to § 127.218(c)(1), this provision fails to include the requirement for imposing a limit that is practically enforceable. The State's regulations also carry through an error from the Federal rule in that it expresses the PAL as the sum of the previous 12 months yet calls this a 12-month rolling average, when a PAL limit does not allow emissions to be averaged. They must be the sum of emissions over a 12-month period. (28)

RESPONSE: The Department has changed the language at § 127.218(c)(1) to reflect that the PAL is the sum of the previous 12 months instead of a 12-month rolling average.

Section 127.218(c)(2)

86) COMMENT: The commentator states that subsection 127.218(c)(2) refers to the public participation requirements in subsection 127.218(d), but the public participation requirement is actually discussed in subsection 127.218(e). (34)

RESPONSE: The Department agrees and has changed the reference to the appropriate subsection in the final-form regulation.

Section 128.218(f)

87) COMMENT: Commentators stated that § 127.218(5)(iv), "Setting the ten-year actual PAL level," states that "emissions from units on which actual construction began after the two-year baseline period must be added to the PAL level in an amount equal to the *actual* emissions of the units." How will actual emissions be defined for units that have not yet operated at the time of permit submittal? 40 CFR § 52.21(a)(6) states that emissions from units on which construction began after the two-year baseline period must be added to the PAL level in an amount equal to the potential-to-emit of the units. The commentators recommend revising the proposed regulation to allow that the "*permitted potential emissions*" of units on which actual construction began after the two-year baseline period to be added to the PAL level.

The EPA commented that the Federal rule requires emissions from such units to be added at their potential-to-emit. The Department's rule states these emissions are to be added in an amount equal to the actual emissions of the unit. Presumably, this refers back to the

definition of "actual emissions" in § 127.201a. This term relates actual emissions to a period which "immediately precedes the particular date and which is representative of normal source operations." How is "the particular date" to be defined in the context of the PAL? Is it the date of the application of the PAL? If the DEP wishes to retain this requirement, the EPA suggests that the PAL provision clearly state what the "particular date" should be. Notwithstanding this comment, this is a significant deviation from the Federal rules for setting a PAL. As a Federal minimum requirement, the DEP will have to provide information demonstrating that its program, in this aspect, is equivalent to the Federal program for PALs.

The commentators support the Federal approach (10-year look-back). However, if the EQB deviates from the Federal approach, the most commonsense approach to NSR would be to base it on potential-to-emit (PTE) as the current rules are. Changes to a facility that do not increase the PTE do not "result in" an emissions increase. This test is easy to understand and easily implemented. The commentators would support a PAL based on the facility-wide PTE. In such a system, the PAL limit would change if a new emission limit was promulgated that changed the PTE of a source. As indicated with respect to the Federal program, noncompliance with a PAL should implicate NSR and its requirements. However, it should be recognized that a one-time exceedance may be explainable in contrast to continued exceedance of PAL limits. (6, 15, 28)

RESPONSE: As defined in 40 CFR § 51.165(f)(2)(i), PALs are based on baseline actual emissions from the 24-month period chosen as the baseline. Section 51.165(f)(6)(ii) stipulates that for newly constructed units on which actual construction began after the 24-month period, the emissions must be added to the PAL level in an amount equal to the potential to emit of the units. The Department has incorporated the language of § 51.165(f)(6)(ii) into the final-form regulation.

The EPA has not promulgated PAL provisions based on the potential to emit; therefore the final-form regulation does not authorize PALs based on the facility-wide PTE.

88) COMMENT: After reviewing the proposed PAL provisions of the proposed rule, some commentators question whether the DEP is committed to allowing PAL permits. They state that the PAL provisions in the proposed rule virtually remove any associated benefit of obtaining a PAL in Pennsylvania. The proposed five-year look-back for PALs will result in less operational flexibility, which is one of the key benefits that the PAL regulations offers. Business cycles can be much longer than five years, and a ten-year look-back will account for fluctuations in a company's emissions associated with its business cycle. A ten-year look-back is appropriate and representative. The proposed rulemaking is more restrictive than the Federal requirements and ultimately harmful to the PAL program. PALs should have a 10-year term and be fixed rather than declining.

In contrast, one commentator supports the Department's proposal that all regulated entities may choose any two consecutive years in the preceding five as their Plantwide Applicability Limits (PALs). By limiting the baseline period to five years, the possibility that NSR will be triggered is rightly increased. The more limited baseline period for a

PAL will ensure tighter air pollution controls as well as provide an incentive for facilities to keep abreast of new developments in pollution control technology. Allowing a facility to choose its own two consecutive year look-back provides the regulated entity the autonomy it needs to allow for sufficient flexibility in facility operations. (2, 4, 11, 12, 17, 18, 19, 20, 25, 27, 30)

RESPONSE: The actual PAL level for a major facility is based on the definition of "baseline actual emissions" and is also determined in accordance with § 127.203a(a)(4). The Department believes that under many situations the 5-year look back period for calculating baseline actual emissions will be appropriate and environmentally beneficial. However, the Department agrees that there could be unusual circumstances where a 10-year look back period for establishing the NSR continuous 24-month actual emissions baseline period will be appropriate. The Department has revised the final-form regulation to include the following language "baseline actual emissions are the average rate, in tons per year, at which the unit emitted the regulated NSR pollutant during a consecutive 24-month period selected by the owner or the operator within the five-year period immediately prior to the year a complete plan approval application is received by the Department. The final-form regulation allows the use of a different consecutive 24-month period within the last 10 years upon a written determination that it is more representative of normal source operation."

Section 127.218(f)(4)

89) COMMENT: The commentators stated that units constructed after the 2-year PAL baseline period are added to the PAL at a rate equal to *the* actual emissions of the unit. The Federal rules provide for adding to the PAL for such units at a rate equal to *the* potential-to-emit. Section 127.218(f)(4) should be revised by changing "actual emissions" to "potential emissions." One commentator believes that to the extent PALs are established they should be based upon actual emissions.

The EPA commented that in addition to the above omission in subsection (f), the DEP's rule deviates from the Federal rule with respect to addressing new units constructed after the baseline period. The Federal rule requires emissions from such units to be added at their potential-to-emit. The DEP's rule states these emissions are to be added in an amount equal to the actual emissions of the unit. Presumably, this refers back to the definition of "actual emissions" in § 127.201a. This term relates actual emissions to a period which "immediately precedes the particular date and which is representative of normal source operations." How is "the particular date" to be defined in the context of the PAL? Is it the date of the application of the PAL? If the DEP wishes to retain this requirement, the EPA suggests that the PAL provision clearly state what the "particular date" should be. Notwithstanding this comment, this is a significant deviation from the Federal rules for setting a PAL. As a Federal minimum requirement, the DEP will have to provide information demonstrating that its program, in this aspect, is equivalent to the Federal program for PALs. (5, 11, 25, 28, 31)

RESPONSE: As defined in 40 CFR § 51.165(f)(2)(i), PALs are based on actual emissions from the 24-month period chosen as the baseline. Section 51.165(f)(6)(ii) stipulates that for newly constructed units on which actual construction began after the 24-month period, the emissions must be added to the PAL level in an amount equal to the potential-to-emit of the units. The Department has incorporated the language of § 51.165(f)(6)(ii) into the final-form regulation.

Section 127.218(g)(8)

90) COMMENT: The Department should allow for electronic recordkeeping. (5)

RESPONSE: The Department has added language to § 127.218(g)(8) of the final-form regulation that will allow for the required data to be retrievable onsite.

Sections 127.218(g)(10)

91) COMMENT: The commentators stated that the requirement under § 127.218(g)(10) that any new source under a PAL must achieve BAT defeats the purpose of the PAL by eliminating the flexibility of a facility to allocate its allowable emissions among its sources. Section 127.218(6)(x) requires that all PAL permits must include a requirement that the emissions from a new source will be the minimum attainable through the use of BAT. Does this mean that even de minimis and trivial new sources must demonstrate BAT? A facility should be able to operate under its PAL without the need for Department approval of every new emission source. At the very least, there should be no Department review required as long as the new source's emissions do not exceed the thresholds for a major modification. If new sources are required to apply BAT, and arguably to go through the plan approval process, the flexibility supposedly provided by a PAL is greatly diminished. In order to make a PAL useful, the rules must exempt changes made under a PAL from control technology requirements as well as permitting/plan approval requirements. In the current global economy, the ability of a business to immediately respond to changing business conditions is critical to its ultimate success, and even continued viability. Compare, for example, the New York Department of Environmental Conservation's Title V Permit issued to Delphi Automotive Systems LLC at pages 34-37, Condition 28 (available for viewing at:

<http://www.dec.state.ny.us/website/dardata/boss/afs/permits/929090001800498.pdf>) (allowing for addition or replacement of spray booths, coating equipment, degreasers, braze furnaces, etc. so long as resulting emissions do not exceed PAL limit and meet other pre-specified criteria). The environmental benefit of the BAT requirement is not evident.

The commentators also pointed out that according to Section 6.6(c) of the APCA, the DEP is authorized, but not required, to demand that new sources demonstrate in the plan approval application that the source will reduce or control emissions of air pollutants, including hazardous air pollutants, by using the best available technology. There are safeguards in a PAL permit that discourage installing lesser technologies when

constructing a new source. The PAL itself sets a capped emission limit that cannot be exceeded. A PAL may also include a percentage reduction that must be achieved upon the expiration of a 10-year period. These safeguards, and not prescriptive technologies, are more than adequate to address emission concerns, and do not remove the operational flexibility that should be available under a PAL. As the EPA stated, "...the added flexibility provided under a PAL will facilitate your ability to respond rapidly to changing market conditions while enhancing the environmental protection afforded under the program." 67 FR 80186, 80189 (December 31, 2002). If new sources are required to apply BAT, and arguably to go through the plan approval process, the flexibility provided by a PAL is greatly diminished.

The EPA commented: § 127.218(g)(10) states "emissions from a *new source* must be the minimum attainable through the use of BAT." Although the EPA recognizes that BAT has been a fundamental part of what, in other states, would be characterized as Pennsylvania's minor NSR program, the Federal PAL program is a minimum required program element. Therefore, the DEP must provide a demonstration that the State's rules are equivalent to the Federal rules with respect to the flexibility and stringency of PAL rules. (2, 3, 4, 5, 6, 8, 11, 12, 17, 20, 27, 28, 29, 34)

RESPONSE: As stated in *25 Pa. Code* § 127.1, regarding ambient air quality, "New sources shall control the emission of air pollutants to the maximum extent, consistent with the best available technology as determined by the Department as of the date of issuance of the plan approval for the new source." Further, it is stated in *25 Pa. Code* § 127.12(a), "An application for approval shall: ...paragraph (5) Show that emissions from a new source will be the minimum attainable through the use of best available technology." The final-form regulation language at § 127.218 was added for clarification. The BAT requirement in question applies only to the single pollutant covered by the PAL, other pollutants' BAT requirements would still have to be determined at the issuance of a plan approval as per §§ 127.1 and 127.12(a)(5). Therefore, flexibilities or responding quickly to a market demand would not be an issue.

The Department is taking a number of steps to provide operational flexibilities. Title 25 *Pa. Code* § 127.14 (relating to exemptions) determines the conditions where new sources can be exempted from best available technology (BAT). Exemptions can be determined from the existing list of sources or through the use of a request for determination. Many de minimis and trivial sources will be exempted through these provisions. If an exemption cannot be granted, then the Department has available, as described in *25 Pa. Code* § 127.611, a number of General Plan Approvals and Operating Permits which will greatly alleviate the burden of determining the latest in best available technology.

Further, the Department is required by the Federal Clean Air Act (CAA) Sections 182 and 172 to, at a minimum, maintain Reasonably Available Control Technology (RACT) provisions in a nonattainment area. As part of the Northeast Ozone Transport Region, the entire state is treated as if in nonattainment for ozone. Therefore, at a minimum RACT applies to any proposed source that emits NOx or VOC. The Department has demonstrated to the EPA that its BAT requirements are better than or equivalent to the

CAA RACT requirements; therefore there is no need to evaluate RACT requirements for sources installed after 1995 under the eight-hour ozone standards.

Removing the BAT requirements for new sources under a PAL could defeat the purpose of CAIR or any other regulatory requirements such as NSPS, MACT, RACT or state requirements. For example, the owner or operator of an electric generating unit (EGU) could install selective catalytic reduction (SCR) technology and flue gas desulfurization (FGD) to reduce NO_x and sulfur oxides (SO_x) to comply with Clean Air Interstate Rule (CAIR) requirements. The EGU owner or operator could then install several uncontrolled sources and increase emissions up to the amount of the decreases generated from the installation of the SCR and FGD that was installed to comply with the CAIR requirements. This would defeat the purpose of CAIR and also public participation because the public cannot comment regarding the installation of SO_x and NO_x pollutant emitting sources. If all of the EGUs were to apply for PAL permits and could install new sources without implementing BAT, air quality would be at the same level and we would never achieve an attainment status.

The Department has revised the provision under § 127.218(g)(10) to specify that the BAT will not be required for sources modified after the PAL permit is established unless the cost of the modification "... exceeds 50% of the fixed capital costs that would be required to construct a comparable entirely new source...." However, the owners or operators of new sources which are installed under the PAL permit need to satisfy the BAT requirements of § 127.12(a)(5).

Section 127.218(h)

92) COMMENT: After reviewing the proposed plantwide applicability limit (PAL) provisions of the draft rule, the commentators question whether the DEP is committed to allowing PAL permits. The PAL provisions in the proposed rule virtually remove any associated benefit of obtaining a PAL in Pennsylvania. The rule imposes several restrictions that go well beyond the Federal regulations and that will have the effect of seriously discouraging sources from utilizing this form of flexible permitting. For example, retaining all previous emission limitations in the PAL permit (§ 127.218(a)(4)).

PALs should have a 10-year term and be fixed rather than declining. PALs should be based on actual emissions and not potential emissions. The DEP should have the option of not reopening a PAL permit if emission limits change during the 10-year term of the permit.

The commentators support a final NSR rule that follows the Federal model for establishing PAL permits. By discouraging sources from utilizing PALs, the DEP is turning its back on potential emission reductions as well as the opportunity to provide needed flexibility to industry in southeastern Pennsylvania.

Other commentators state that the PAL should have a 5-year term and that modest declines should be added upon renewal. (25, 27, 31)

RESPONSE: As stipulated in 40 CFR § 51.165(f)(1)(iv), a major stationary source (Commonwealth facility) shall continue to comply with all applicable Federal or State requirements, emission limitations and work place requirements that were established prior to the effective date of the PAL. The final-form regulation must be at least as stringent as the Federal rule. The Department has changed the language at 25 Pa. Code § 127.218(i)(2)(iii) to match the “discretion” of 40 CFR § 61.165(f)(8)(ii) for reopening of a PAL. The final-form regulation includes a 10-year PAL term to be consistent with 40 CFR § 61.165(f)(4)(F). The PAL emission limit would be lowered in accordance with the requirement in 40 CFR § 61.165(f)(8)(B). The final-form regulation bases the PAL emission limit upon actual emissions and has changed the language to indicate that new or not yet operating emission units are to be added to the PAL at their potential-to-emit in accordance with the Federal regulation.

Section 127.218(i)

93) COMMENT: The commentator stated that, as to re-openers for regulatory tightening of emission limits at certain sources within the facility, it is imperative that these be required by the PAL provisions unless a period of perhaps 18 months or less remains in the PAL permit. Even during that interim period, no other sources at the facility should be allowed to consume the incremental differences between the new emission limit and its predecessor unless the other source’s increase is de minimis. (31)

RESPONSE: The language in 25 Pa. Code § 127.218(i), subparagraphs (1)(ii) and (iii), closely mirrors the language in the Federal regulation concerning the reasons that a PAL permit may be reopened to reduce a PAL emission level. The Department’s obligations as described by this language are adequate and this language has not been changed.

Section 127.218(j)(5)

94) COMMENT: The EPA commented: § 127.218(j)(5) addresses certain requirements for PAL permits that are not renewed. The EPA suggests that clarification be added by revising the phrase as follows: “...except for those emissions limitations that had been established under § 127.203(e)(2), but were eliminated by the PAL in accordance with the provisions in 127.218(a)(3)(iii).” (28)

RESPONSE: The Department has added the suggested language in the final-form regulation.

Sections 127.218(k)

95) COMMENT: For § 127.218(9)(iv)(B) what criteria will the Department use to set the PAL level upon renewal if the facility fails to meet the 80% level stated in § 127.218(9)(iv)(A)? (15)

RESPONSE: The provisions at *25 Pa. Code* § 127.218(k)(4), subparagraphs (i) through (iv), closely resemble the language used in the Federal NSR rule, 40 CFR § 51.165(f)(10)(iv), for PAL adjustment. While Federal paragraph (A) specifies that the Department may renew the PAL at its present level if the calculated baseline actual emissions are equal to or greater than 80% of the present PAL level, Federal paragraph (B) provides the criteria for setting the PAL at a different level. This Federal language is replicated in *25 Pa. Code* § 127.218(k)(4)(ii) and (iii). The new emission level shall be no greater than the potential to emit of the facility. The new emission level will be at a level that the Department determines to be more representative of the facility's baseline actual emission level and other factors specifically identified by the Department in its written rationale. This written rationale will then be available to the public and the EPA for review and comment after which the renewed PAL emission level would be determined.

Section 127.218(k)(4)(ii)

96) COMMENT: The commentator states that it is not clear from the proposed rule as to how a PAL permit is to interact with existing plan approvals and/or operating permits. It sounds like it is to be a separate permit with possibly different effective and expiration dates from existing permits. Does a 10-year PAL permit replace a 5-year Title V or State-only permit? Does a PAL permit eliminate emission limits on specific emission units/sources imposed by a Title V or State-only permit? At the time of permit renewal, the PAL could be reviewed and either extended or modified.

The commentator also proclaims that the language under § 127.218(k)(4)(ii) regarding adjustment of the PAL unilaterally by the Department during permit renewal is much too vague and invites arbitrary actions. The commentator suggests the PAL should only be adjusted as a result of regulation changes or SIP changes that have undergone full public comment and review. (2)

RESPONSE:

Section 127.218(m)—(o)

97) COMMENT: The commentators state that separate PAL permits for each pollutant only serve to increase the likelihood of conflicts with existing permit requirements and unnecessarily increase recordkeeping and reporting requirements. It would seem more reasonable to allow a single permit to accommodate multiple pollutants with separate monitoring conditions for each affected pollutant. Additionally, the regulation should allow for the ability to include the NSR PAL and the Prevention of Significant Deterioration (PSD) PAL, established in accordance with 40 CFR 52.21(a), on a single permit.

The EPA commented that the DEP's requirements for setting a PAL in § 127.218(f) are silent with respect to the actual emissions baseline to be used when a facility wishes to have a PAL for more than one pollutant. Therefore, the State's proposed regulations are incomplete with respect to the Federal PAL requirements. (2, 15, 28)

RESPONSE: Each PAL must regulate emissions of only one pollutant. This provision is derived from 40 CFR § 51.165(f)(4)(E). The final-form regulation must be at least as stringent as the Federal regulation. It is the intent of the Department to incorporate each PAL for each pollutant into the Title V operating permit together with other Federal requirements that apply. The Department has added language to the final-form regulation indicating that a different consecutive 24-month period may be used for each PAL pollutant. Please also see the response to Comment 96 of this document, which addresses the issue of coordination of Title V and PAL reporting requirements.

Section 127.218(o)

98) COMMENT: One commentator stated that the enforcement consequences of noncompliance with a PAL should be the same as for noncompliance with a conventional permit. Another commentator stated that the enforcement consequences for noncompliance must be significant. Given that multiple changes at a facility, including some that would have triggered NSR in the absence of a PAL, may have occurred before a change to a source (unit) actually exceeds the PAL, the question arises as to what must be done. The source exceeding the PAL may be a relatively small, low emitting source. It is not sufficient for that source to undergo NSR. The larger, more complex sources which previously conducted major modifications but did not trip the PAL must also undergo NSR. (25, 31)

RESPONSE: The language in *25 Pa. Code* § 127.218(o) concerning enforcement of the PAL closely mirrors the language of the Federal PAL requirements at 40 CFR § 51.165(f)(14). This language has not been changed in the final-form regulation.

Subsections 127.218(n) and (o)

99) COMMENT: Industry commented that PAL record keeping and reporting provisions (subsections 127.218(n) and (o)) should be deleted and/or coordinated with the Title V record keeping and reporting provisions. The requirements for semi-annual reports and annual compliance certifications are duplicative of the Title V reporting requirements and arguably inconsistent (for example, deadlines for submitting semi-annual reports). It is suggested that the Title V record keeping and reporting requirements are adequate to ensure that noncompliance situations are appropriately reported to the DEP.

The EPA commented that the Department's rules on PAL reporting conflict with the Federal reporting requirements for PALs and with their relationship to the Title V program. The Federal PAL rules have three levels of reporting that correspond to Title V

reporting. With respect to the Federal PAL semi-annual report, § 51.165(f)(14)(i)(G) states that the semi-annual report must include "...A signed statement by the responsible official (as defined by the applicable requirement title V operating permit program) certifying the truth, accuracy, and completeness of the information provided in the report." The corresponding subsection 127.218(o)(2)(ii)(G) of the Department's proposed regulations requires that a compliance certification be submitted with the semi-annual report. This may have been a mistake and it is suggested that the wording be revised to replace the term "compliance certification" with the term "semi-annual report" or refer to the appropriate citation for the semi-annual report in the Title V program. If this wording is intentional, it means that PAL facilities must submit semi-annual compliance certifications that are normally required only on an annual basis. The same possible error is made in subsection 127.218(o)(3)(ii)(D) regarding prompt reporting of deviations, which is the third level of reporting. The way that the Department's provision is written, a PAL facility must submit a compliance certification every time it experiences and reports a deviation. If this is the intended effect of the rule, it would go far beyond Federal rules with respect to PAL reporting. (11, 28)

RESPONSE: The preamble to the Federal rule in 67 FR 80214 states "...The terms and conditions of an approved PAL become Title V applicable requirements that will be placed in your Title V permit. Therefore, the reports required under Title V may meet the requirements of the PAL rule, so long as the minimum requirements listed in the regulations are met." The language at the Federal preamble answers the question "What is the process for incorporating conditions of the PAL into your title V operating permit?" The Department intends to follow the guidance of the EPA and allow for the submission of required Title V reports to fulfill the requirements for submission of required PAL reports where the Title V reporting requirements are adequate and the parameters for incorporating the PAL into the Title V permit have been met. The Department has changed the regulatory language from "compliance certification" to "semi-annual report" as suggested.

Pennsylvania Air Pollution Control Act.

100) COMMENT: The commentator provided these three examples of areas, including the look back period, provisions for the 5-county Philadelphia ozone nonattainment area and BAT requirements under a PAL, where the proposed regulation is more stringent than the Federal rules. The commentator expressed two concerns regarding these three examples and all the areas where the proposed regulation exceeds Federal regulations adopted under the Clean Air Act.

First, the statutory directive to not exceed the standards of the Clean Air Act is repeated throughout §§ 4.2(a), (b) and (c) of the APCA as follows:

(a) In implementing the requirements of § 109 of the Clean Air Act, the board may adopt, by regulation, only those control measures or other requirements which are reasonably required, in accordance with the Clean Air Act deadlines, to achieve and maintain the ambient air quality standards or to satisfy related Clean Air Act

requirements, unless otherwise specifically authorized or required by this act or specifically required by the Clean Air Act.

(b) Control measures or other requirements adopted under subsection (a) of this section shall be no more stringent than those required by the Clean Air Act unless authorized or required by this act or specifically required by the Clean Air Act. This requirement shall not apply if the board determines that it is reasonably necessary for a control measure or other requirement to exceed minimum Clean Air Act requirements in order for the Commonwealth:

- (1) To achieve or maintain ambient air quality standards;
- (2) To satisfy related Clean Air Act requirements as they specifically relate to the Commonwealth;
- (3) To prevent an assessment or imposition of Clean Air Act sanctions; or
- (4) To comply with a final decree of a Federal court.

(c) The board may not by regulation adopt an ambient air quality standard for a specific pollutant which is more stringent than the air quality standard which the EPA has adopted for the specific pollutant pursuant to § 109 of the Clean Air Act (42 U.S.C.A. § 74090).

The statutory directive appears to be clear. The air quality standards, rules and procedures of the Commonwealth should be consistent with the Federal standards and regulations.

Second, the discretion afforded to the EQB to exceed Federal requirements is limited. Given the precision and primacy of the statutory directive, there is an obligation to explain how and why exceeding the Federal regulations was determined to be "reasonably necessary." Therefore, the EQB must justify each exception to the statutory directive. The preamble does not contain sufficient information. For each point in the proposed regulation where a State provision is more stringent than its Federal counterpart, the EQB must fully explain and document the evidence and findings for each determination that exceeding Federal rules is reasonable and necessary. This information needs to accompany the final-form regulation for each exception that is retained. (34)

RESPONSE: A number of the provisions referenced in this comment are continuations of the existing program that the Environmental Quality Board already determined was necessary in order to attain and maintain ambient air quality standards. Where the Department has included provisions in this final-form regulation that differ from the Federal provisions, the provisions were included in order to bring areas of Pennsylvania that are in nonattainment for an ambient air quality standard into attainment and will be necessary to maintain the standard once it is achieved.

Section 6.6(c) of the Pennsylvania Air Pollution Control Act authorizes the Department to require that new sources demonstrate in the plan approval application that the source will reduce or control emissions of air pollutants, including hazardous air pollutants, by using the best available technology. The Department has revised the provision under § 127.218(g)(10) of the final-form regulation to specify that BAT will not be required for

sources modified after the PAL permit is established unless the cost of the modification "... exceeds 50% of the fixed capital costs that would be required to construct a comparable entirely new source...." However, the owners or operators of new sources which are installed under the PAL permit need to satisfy the BAT requirements of § 127.12(a)(5).

The Department, in conjunction with the OTC (Ozone Transport Commission), is conducting modeling and planning activities for the purpose of demonstrating attainment of the eight-hour ozone NAAQS (National Ambient Air Quality Standards) by 2010, as Federally required. The current modeling and planning that has been done indicates that additional measures are needed for Pennsylvania to be able to demonstrate attainment for the 5-county Philadelphia ozone nonattainment area. These activities assume levels of control that would be achieved with the continuing implementation of the existing NSR regulation. The requirements in the final-form regulation related to de minimis aggregation are a continuation of the existing NSR requirements as specified in existing *25 Pa. Code* § 127.211(b) that cover the entire state except for the 5-county Philadelphia area. The de minimis aggregation includes both increases and decreases for the 10-year period allowing for the facility to take credit for any reductions that are permanent and enforceable while still being accountable for any increases that are also to continue. Under the Federal regulation, facilities need only wait for 18 months to be able to propose continual 39.9 ton per year increases per project without providing offsets and without having to account for any 39.9 ton per year or less increases that occurred previous to the 5-year period. Under the final-form regulation, owners and operators of facilities in the 5-county Philadelphia ozone nonattainment area will be able to avoid major NSR by keeping emission increases under 25 tons per year. These owners and operators will, however, still have to account for all emission increases under 25 tons per year that occurred within the last 15 years for which offsets were not provided. The owners and operators of facilities in the rest of Pennsylvania will be able to avoid major NSR by keeping emission increases under 40 tons per year. These owners and operators will still have to account for all emission increases under 40 tons per year that occurred within the last 15 years but did not have offsets provided. If additional emissions that occurred during the previous 15-year period are allowed to accumulate in the 5-county Philadelphia ozone nonattainment area, then there will likely be the need for additional area-specific plans to achieve emissions reductions in order to demonstrate attainment by the 2010 Federal deadline.

Under the one-hour ozone National Ambient Air Quality Standard (NAAQS), the 5-county Southeast Pennsylvania region was designated as a severe nonattainment area for ozone. A major source located in a severe nonattainment area for ozone is a stationary source or group of sources located within a contiguous area and under common control that emits, or has the potential to emit, at least 25 tons per year of VOC or NOx. As a result, many facility owners/operators requested permit restrictions that limited the facility to emit less than 25 tons per year (synthetic minors).

In 1997, EPA adopted a new eight-hour ozone standard. The Philadelphia-Wilmington-Atlantic City nonattainment area was designated as a moderate nonattainment area for the

eight-hour ozone standard in 2004. A major stationary source located in a moderate area is defined as emitting or having the potential to emit 50 tons per year or more of VOC or 100 tons per year of NOx. With the reclassification of the ozone attainment area, a facility owner may increase emissions to these new levels without offsetting these emission increases.

The Department, as a co-petitioner in *South Coast Air Quality Management District v. EPA*, (No. 04-1200), challenged the EPA's eight-hour ozone implementation rule which allowed the very backsliding that the Department's proposal related to the 25-ton limitation is trying to prevent. On December 22, 2006, the U.S. Court of Appeals for the D.C. Circuit held that NSR is a "control" measure. Consequently, the requirements for one-hour ozone nonattainment areas must remain in place in accordance with the anti-backsliding requirements of the Federal Clean Air Act.

The final-form regulation requires that the facility's projected actual emissions be established as a permit limit. The calculated emission increase for both the Federal and the Department's regulations will be equivalent. The projected actual emissions are reflective of the actual emissions level that the facility expects and are not adjusted. With the Federal regulation the projected actual emissions are reduced by the amount that could have been accommodated. This "could have been accommodated" amount will have to be added to the Federal projected actual emissions when the determination is made as to whether or not the facility's real actual emission level has exceeded its projected or allowed level. Under the Federal regulation, if the projected actual level is exceeded, an explanation from the facility is expected and future enforcement action is to be determined by the EPA and the Department. The Federal regulation does not define what type of action that the EPA may take or when they may take it. Under the Federal regulation, the Department's action would be the same as if a permit limit has been exceeded. This is in accordance with *25 Pa. Code §§ 127.25 and 127.444*. Under the final-form regulation the permit limit is clear and defined. Since the Department's action will be equivalent under either version of the regulation, the Department has defined the projected actual emissions as the permit limit and has eliminated any confusion about the occurrence and consequence of exceeding this limit as required of the Department. As explained in the Department's response previously, the Department is now conducting the difficult effort of finding the reductions necessary to enable the Commonwealth to demonstrate attainment of the NAAQS for ozone in certain areas by the Federally required 2010 deadline. Since the provision for disregarding fugitive emissions from nonlisted sources does not exist in the current regulation, the Department does not wish to allow and subsequently plan for offsetting these new emissions that are presently being offset and have not been accounted for in the existing attainment plan.

The Department does not agree that the Federal NSR rule will sufficiently protect our Commonwealth. The final-form regulation incorporates some, but not all, of the changes which survived judicial scrutiny in *New York et al., v. EPA*, since the Board has determined that not all of the EPA's final NSR regulatory provisions are sufficiently protective of the air quality needs of this Commonwealth. In addition, this final-form regulation is consistent with the Commonwealth's litigation position in *Massachusetts et*

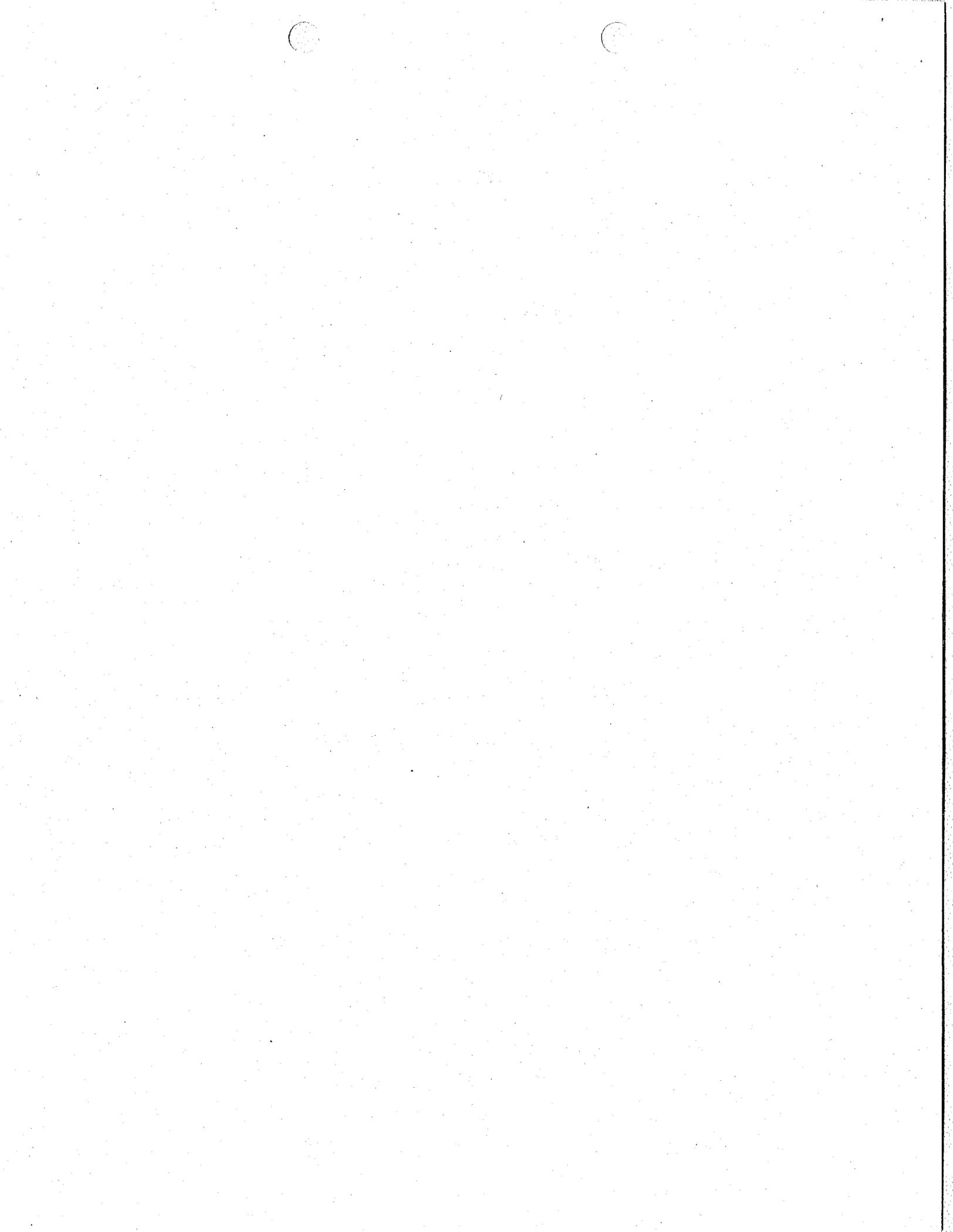
al., v. EPA, that under the anti-backsliding provisions of Sections 172(e) and 193 of the CAA (42 U.S.C.A. §§ 7502(e) and 7515), the EPA is required to retain the major NSR requirement of the one-hour ozone NAAQS in implementing the eight-hour ozone NAAQS.

Furthermore, the Department does not believe that adoption of a state-specific NSR regulation will put Pennsylvania at an economic disadvantage. Many states in the Ozone Transport Region, including Delaware, Maryland, New Jersey, New York and Virginia, have chosen to adopt a state-specific NSR regulation. It is evident that Pennsylvania is not alone in its belief that the Federal NSR rule is inadequate. Most importantly, the Court of Appeals for the D.C. Circuit has recently held that measures in place for one-hour ozone nonattainment areas will continue to apply in accordance with the anti-backsliding provisions of the Federal Clean Air Act.



Pennsylvania
***25 Pa. Code* Chapters 121 and 127:**
Nonattainment New Source Review
Revisions

One-Page Summaries



ARMSTRONG CEMENT & SUPPLY- ONE PAGE SUMMARY OF COMMENTS

The EQB should simply adopt the federal NSR rules by incorporating them by reference. The EQB should not develop rules that differ significantly, if at all, from the federal program.

The EQB exceeds its authority by promulgating NSR rules that are more stringent than the federal rules. In order to invoke the exception from the "no more stringent" provision in the Air Pollution Control Act, the EQB must make a technical demonstration that the more stringent rules are necessary to achieve and maintain the NAAQS. A self-serving declaration in the preamble is insufficient evidence.

Armstrong Cement supports the federal approach which provides for a 10-year look-back period for determining baseline actual emissions. However, if the EQB does not adopt the federal approach, the EQB should adopt a 5-year look back with allowance that another 2-year period out of the last 10 years be used if such period is more representative of normal source operations.

The short-term triggers (100 lb/hr and 1,000 lbs/day thresholds in the definition of "significant" for NOx and VOCs) should be deleted. There is no basis or reason to retain these triggers.

the Pennsylvania rules should not provide for aggregation of less than significant emission increases. The USEPA has indicated that it will be promulgating a rulemaking on aggregation. At the very least, the EQB should await the federal rulemaking before it addresses aggregation.

In order to make a PAL useful, the rules must exempt changes made under a PAL from control technology requirements (e.g., BAT) as well as permitting/plan approval requirements.

Armstrong Cement suggest that the EQB either adopt the proposed federal view of PM2.5 precursors or wait until the final PM2.5 implementation rule is promulgated before attempting to regulate PM2.5 and PM2.5 precursors under NSR.

Armstrong Cement requests an example of a situation wherein emissions could have been accommodated during the baseline period but cannot be excluded under the demand growth exclusion because the emissions are "related to the particular project."



RELIANT ENERGY COMMENTS TO PROPOSED NNSR RULEMAKING

Reliant strongly encourages the Environmental Quality Board (EQB) to revise Subchapter E NNSR regulations by adopting the federal Non-attainment New Source Review (NNSR) regulations in their entirety.

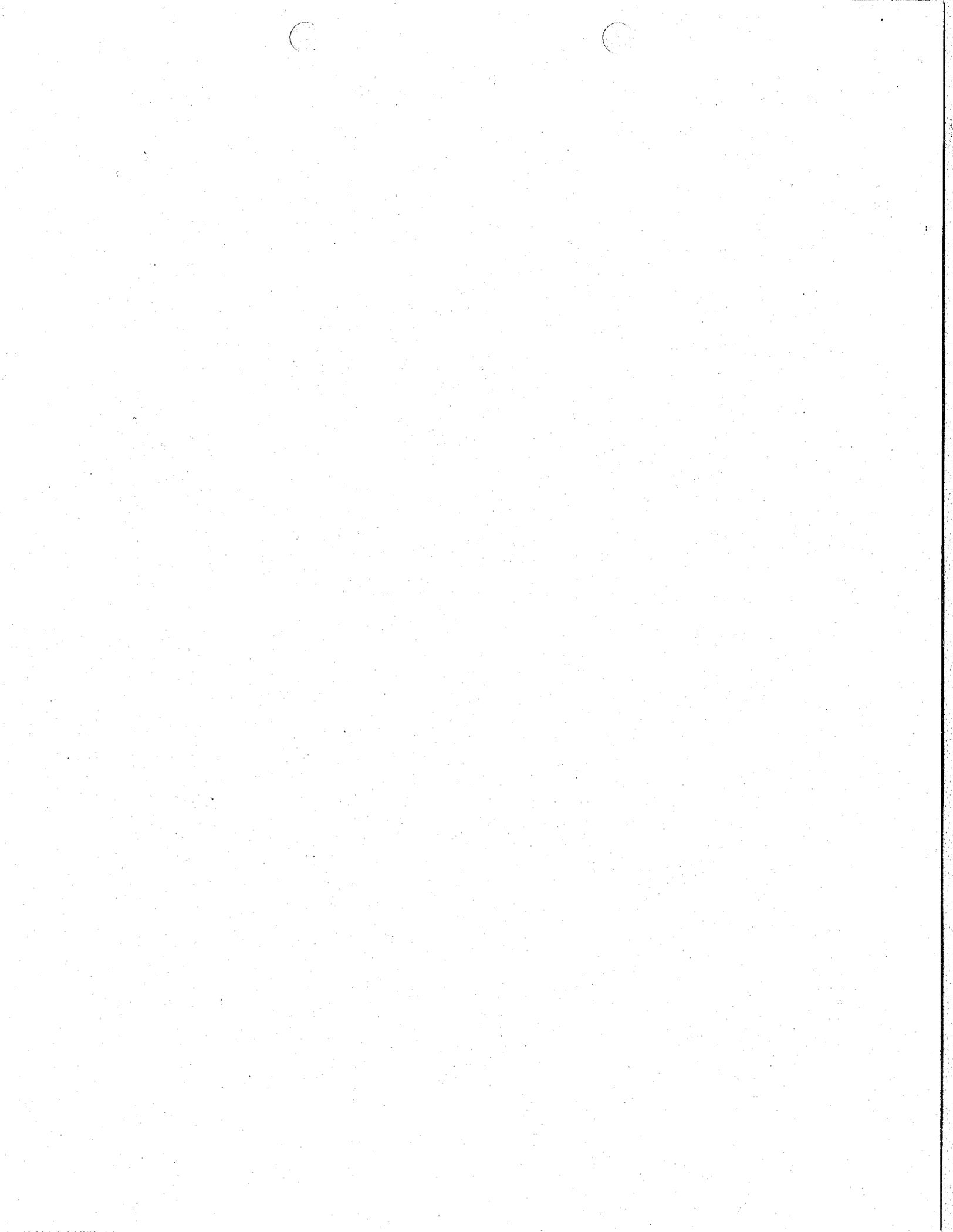
This approach ensures consistency with both the federal NNSR rule and Pa Code Title 25 Subchapter D, which implements the Prevention of Significant Deterioration (PSD) attainment New Source Review through incorporation by reference. Any changes to the federal rule necessitated by legislative or judicial actions are transparent, enacted immediately, and not subject to Pennsylvania regulatory development and State Implementation Plan (SIP) revision requirements. Further, that action prevents unnecessarily complex and unnecessarily stringent regulations from disadvantaging Pennsylvania based facilities by adding costs and burdens which are simply not present under other states regulations which have adopted the federal programs for New Source Review (NSR). These additional costs could result in companies deciding not to invest in facilities located in Pennsylvania.

Importantly, the Pa Air Pollution Control Act (APCA) requires that, "*(b) Control measures or other requirements adopted under subsection (a) of this section shall be no more stringent than those required by the Clean Air Act unless authorized or required by this act or specifically required by the Clean Air Act.*" The Pennsylvania Department of Environmental Protection (PaDEP or Department) has not provided an adequate demonstration of need to require an NNSR regulation that is more stringent than the federal rule. Historical precedent is not a demonstration of need.

The proposed rulemaking, while attempting to maintain a historical state regulation,, is more stringent, more complex, more confusing and subject to more diverse interpretation at the regional office level. The revised NNSR is very different from the historical regulation it is being proposed to replace and does nothing to simplify what is, in many cases, a confusing and convoluted applicability test (§127.203a).

The preamble to the proposed rule points out several instances where the proposed rule is more stringent than the federal rule und will likely result in less emissions and the requirement to install additional controls due to increased occurrences of NSR applicability. This presumption is flawed. Many practical projects that trigger NSR will simply not be pursued. This includes modernization and efficiency improvements at existing sources that are necessary to maintain economically viable production units. When these projects are abandoned, the subject production, or improvement project, will likely shift to another, out of state, facility where the improvement project is not subject to a more stringent state-specific non-attainment NSR regulation. Reliant further suggests that these costs should be shown as economic losses to the Commonwealth. The preamble to the proposed rulemaking ignores these costs and shows the only compliance cost as, "*This proposed rulemaking will reduce the operating costs of industry through enhanced operational flexibility under PALs.*" It is disingenuous and economically flawed for the EQB to ignore the economic consequences of this proposed rule.

Incorporating the federal regulations by reference effectively removes a competitive disadvantage from the Pennsylvania Code.



EPGA COMMENTS TO PROPOSED NNSR RULEMAKING (One-Page Summary)

EPGA strongly encourages the Environmental Quality Board (EQB) to revise Subchapter E NNSR regulations by adopting the federal Non-attainment New Source Review (NNSR) regulations in their entirety.

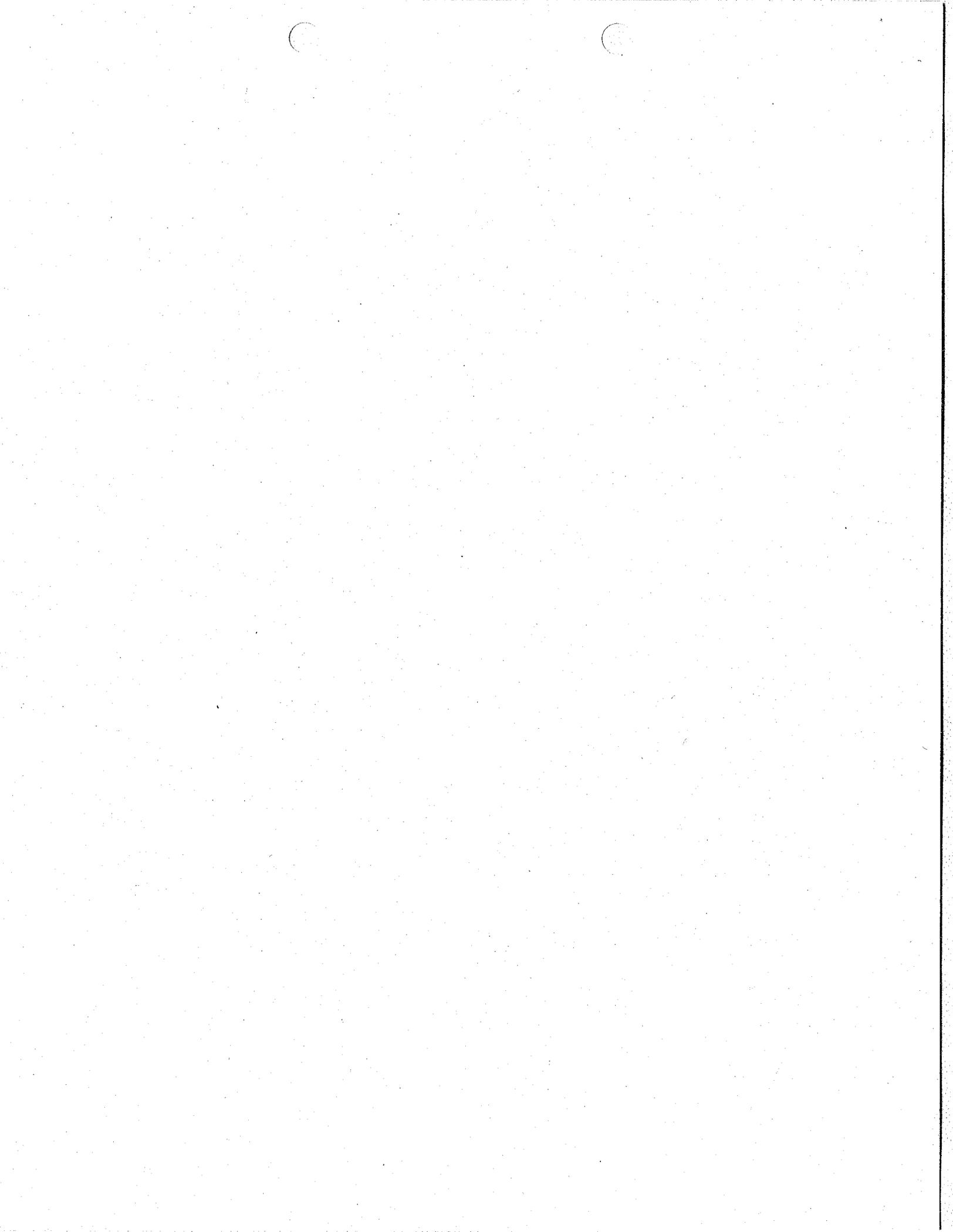
This approach ensures consistency with both the federal NNSR rule and Pa Code Title 25 Subchapter D, which implements the Prevention of Significant Deterioration (PSD) attainment New Source Review through incorporation by reference. Any changes to the federal rule necessitated by legislative or judicial actions are transparent, enacted immediately, and not subject to Pennsylvania regulatory development and State Implementation Plan (SIP) revision requirements. Further, that action prevents unnecessarily complex and unnecessarily stringent regulations from disadvantaging Pennsylvania based facilities by adding costs and burdens which are not present under other states' regulations which have adopted the federal programs for New Source Review (NSR). These additional costs could result in companies deciding not to invest in facilities located in Pennsylvania.

The Pa Air Pollution Control Act (APCA) requires that, "*(b) Control measures or other requirements adopted under subsection (a) of this section shall be no more stringent than those required by the Clean Air Act unless authorized or required by this act or specifically required by the Clean Air Act.*" The Pennsylvania Department of Environmental Protection (PaDEP or Department) has not provided an adequate demonstration of need to require an NNSR regulation that is more stringent than the federal rule. Historical precedent is not a demonstration of need.

The proposed rulemaking, while attempting to maintain a historical state regulation, is more stringent, more complex, more confusing and subject to more diverse interpretation at the regional office level. The revised NNSR is very different from the historical regulation it is being proposed to replace and does nothing to simplify what is, in many cases, a confusing and convoluted applicability test (§127.203a).

The preamble to the proposed rule points out several instances where the proposed rule is more stringent than the federal rule and will likely result in less emissions and the requirement to install additional controls due to increased occurrences of NSR applicability. This presumption is flawed. Many practical projects that trigger NSR will simply not be pursued. This includes modernization and efficiency improvements at existing sources that are necessary to maintain economically viable production units. When these projects are abandoned, the subject production, or improvement projects, will likely shift to other, out of state, facilities where the improvement projects are not subject to more stringent state-specific non-attainment NSR regulations. EPGA further suggests that these costs should be shown as economic losses to the Commonwealth. The preamble to the proposed rulemaking ignores these costs and shows the only compliance cost as, "*This proposed rulemaking will reduce the operating costs of industry through enhanced operational flexibility under PALs.*" It is disingenuous and economically flawed for the EQB to ignore the very real economic consequences of this proposed rule.

Incorporating the federal regulations by reference effectively removes an unnecessary competitive disadvantage from the Pennsylvania Code.



**Southwestern Pennsylvania Growth Alliance
Summary of Comments
Nonattainment New Source Review
July 2006**

Creating a competitive disadvantage for southwestern Pennsylvania employers

The PADEP has not substantiated its premise that the proposed rules will reduce air pollution to any noticeable extent, but the proposal does increase the burden on industry by requiring duplicative reports, changing some longstanding practices without explanation, and forcing many plant improvements into a costly and time consuming permit process not faced by employers in other states (e.g., Ohio and West Virginia).

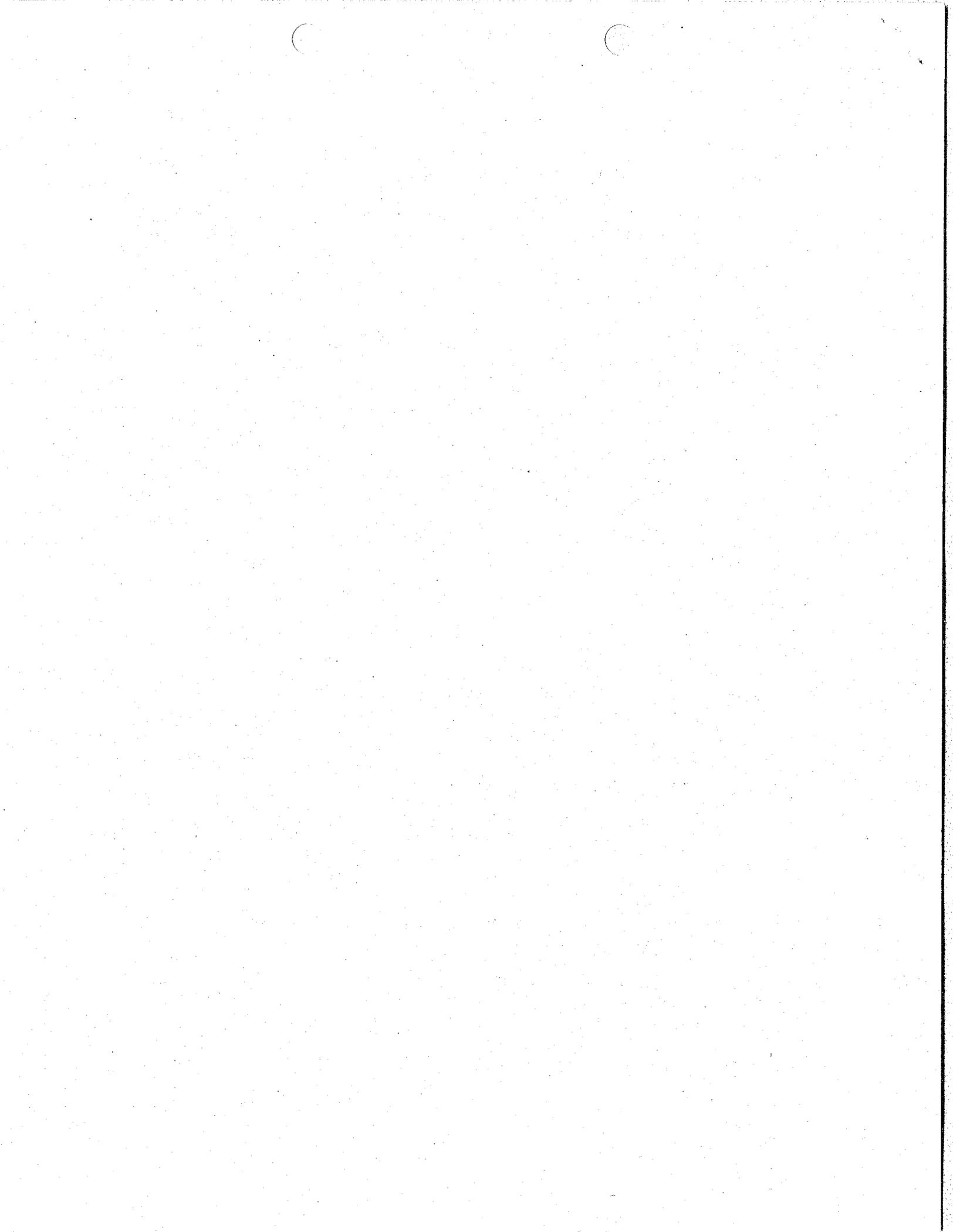
PADEP has not changed parts of the current rule that discourage economic development. PADEP should encourage the reactivation of plants by extending the time to file reactivation and maintenance plans, and Emission Reduction Credit (ERC) applications, to three years from the last date of operation. PADEP should encourage modernization of plants by discontinuing the aggregation of federally exempt emission increases.

Insufficient justification for a Pennsylvania-specific rule instead of adopting the federal program

PADEP's decision to continue its old construction permit rules and reject federal reforms will hinder efforts to encourage plant expansions and new investment in southwestern Pennsylvania. PADEP has not provided sufficient justification for the need for a state-only rule. Ohio adopted the federal rules in 2004 and West Virginia adopted them in 2005. For reasons detailed in the attached comments, the federal rules are significantly more friendly to plant modernization and improvements. Pennsylvania should adopt the federal rules to maintain an even playing field for southwestern Pennsylvania, and avoid a multi-layer set of regulations on modernizing plants – at the federal, state, and Allegheny County jurisdictions.

Perpetuating the uncertainties associated with new source permitting

The text of the proposed rule is unclear, internally inconsistent and so ambiguous as to be incomprehensible, even to experts in the air quality field. The proposed rule makes a complex system even more complex and expensive (e.g., by requiring analysis of multiple pollutants from past operations for five years for nonattainment New Source Review, 10 years for Prevention of Significant Deterioration, and 15 years for de minimus aggregation, all of which can apply to the same permit.) Manufacturers will be forced to hire experts when facing any issue of plant modernization, further increasing costs of projects and delays to important economic development in Pennsylvania.





Pennsylvania Department of Environmental Protection

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P.O. Box 2063

Harrisburg, PA 17105-2063

March 6, 2007

Policy Office

717-783-8727

Kim Kaufman, Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown #2
333 Market Street
Harrisburg, PA 17120

Re: Final Regulation – Nonattainment New Source Review (#7-399)

Dear Mr. Kaufman:

Enclosed is a copy of a final regulation for review and comment by the Independent Regulatory Review Commission pursuant to Section 5(a) of the Regulatory Review Act. The Environmental Quality Board (EQB) adopted this proposal at its February 20, 2007 meeting.

These final amendments to 25 Pa. Code Chapters 121 and 127 revise the state New Source Review (NSR) program - which is a pre-construction air quality permitting program mandated under the federal Clean Air Act. The owners and operators of new or modified major facilities must comply with the lowest achievable emissions rate (LAER) technology and the emission offset requirements which are based on the nonattainment classification of the area in which the new or modified air contamination source is located. The purpose of this final rulemaking is to revise the existing NSR regulation to incorporate certain changes required by the U.S. Environmental Protection Agency and to revise the State Implementation Plan.

The EQB approved the proposed amendments on December 20, 2005. They were subsequently published in the *Pennsylvania Bulletin* on April 29, 2006. The EQB held three public hearings - in Harrisburg (June 6, 2006), Pittsburgh (June 13, 2006), and Norristown (June 19, 2006) and received comments from thirty-three commentators during the public comment period.

The Department will provide assistance as necessary to facilitate the Commission's review of this final-form regulation under Section 5.1(e) of the Regulatory Review Act. This review is tentatively scheduled for your April 19, 2007 meeting.





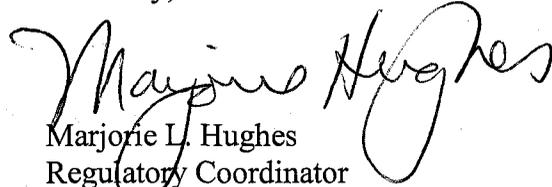
Kim Kaufman, Executive Director

- 2 -

March 6, 2007

Please contact me if you would like additional information.

Sincerely,

A handwritten signature in cursive script that reads "Marjorie Hughes". The signature is written in black ink and is positioned above the printed name and title.

Marjorie L. Hughes
Regulatory Coordinator
Policy Office

Enclosures





**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO
 THE REGULATORY REVIEW ACT**

I.D. NUMBER: 7-399
 SUBJECT: NONATTAINMENT NEW SOURCE REVIEW
 AGENCY: DEPARTMENT OF ENVIRONMENTAL PROTECTION

TYPE OF REGULATION

- Proposed Regulation
- Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Tolerated Regulation
 - a. With Revisions
 - b. Without Revisions

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 INDEPENDENT REGULATORY
 REVIEW COMMISSION

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
3/6/07	<i>D. Neuf</i>	Majority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
3/6/07	<i>Jessica R. Paule</i>	Minority Chair, HOUSE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
3-6-07	<i>D. Ladd</i>	Majority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
3-6-07	<i>A. Rybaczyn</i>	Minority Chair, SENATE COMMITTEE ON ENVIRONMENTAL RESOURCES & ENERGY
3-6-07	<i>Kathy Cooper</i>	INDEPENDENT REGULATORY REVIEW COMMISSION
_____	_____	ATTORNEY GENERAL (for Final Omitted only)
_____	_____	LEGISLATIVE REFERENCE BUREAU (for Proposed only)

