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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[FRL–7107–4]

RIN 2060–AJ60

Change to Definition of Major Source

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This action promulgates a proposed change to the definition of "major source". The change would no longer require States to provide that sources in categories subject to standards under section 111 or 112 promulgated after August 7, 1980 must include fugitive emissions in determining major source status under section 302 or part D of title I of the Act. The EPA is making this change to address a petition by the American Mining Congress (now known as the National Mining Association) challenging the requirement in the current regulation that sources in all section 111 or 112 categories must count fugitive emissions, regardless of when the section 111 or 112 standards were promulgated, in determining major source status under section 302 or part D of title I. By making this change, we will also allow full approval in several State programs that contain the August 7, 1980 date.

EFFECTIVE DATE: November 27, 2001.

ADDRESSES: Docket No. A–93–50 contains information considered by EPA in developing the promulgated rule and is available for public inspection between 8:00 a.m. and 5:30 p.m., Monday through Friday, excluding Federal holidays, at the following address: U.S. EPA, Air and Radiation Docket and Information Center (6102), 401 M Street SW, Washington, DC 20460, telephone (202) 260–7548. The docket is located at the above address in room M–1500, Waterside Mall (ground floor). A reasonable fee may be charged for copying docket materials.

FOR FURTHER INFORMATION CONTACT: For further information, contact Mr. Raymond H. Vogel, Jr., Operating Permits Group, Information Transfer and Program Implementation Division (MD–12), Office of Air Quality Planning and Standards, U.S. EPA, Research Triangle Park, North Carolina 27711, telephone number (919) 541–3153, facsimile number (919) 541–5509, electronic mail address: *vogel.ray@epa.gov*.

SUPPLEMENTARY INFORMATION:

Regulated Entities

Categories and entities potentially affected by this action include facilities currently required to obtain title V permits by State programs because of having been required to count fugitive emissions for sources in categories subject to section 111 or 112 standards promulgated *after* August 7, 1980.

World Wide Web (WWW)

After signature, the final rule will be posted on the policy and guidance page for newly proposed or final rules of EPA's Technology Transfer Network at *http://www.epa.gov/ttn/oarpg/t5.html*. For more information, call the TTN HELP line at (919) 541–5384.

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I. Background and Public Participation

Title V of the Clean Air Act (the Act) requires EPA to promulgate regulations governing the establishment of operating permits programs. The current regulations were promulgated on July 21, 1992 and codified at 40 CFR part 70. All major sources are required to obtain Title V operating permits. Major sources include those sources subject to prevention of significant deterioration (PSD) and nonattainment new source review (NSR), and any other sources with the potential to emit 100 tons per year of an air pollutant. To determine major source status under section 302 or part D of title I, the current rules require you to count fugitive emissions if you are subject to a standard under section 111 or 112, regardless of when the standard was promulgated. The EPA proposed to revise the definition of "major source" for section 302 and part D of title I in August, 1994 to limit the requirement to count fugitive emissions to source categories regulated by section 111 or 112 standards promulgated as of August 7, 1980. (See 59 FR 44460, August 29, 1994.) We proposed this revision in response to a petitioner who asserted that EPA could not require that fugitive emissions be counted for determining major source status until EPA conducted rulemaking as required under section 302(j) of the Act. The EPA has not performed such rulemaking; therefore, we are today revising the rule to add the August 7, 1980 date. In the future, EPA will consider doing rulemaking under section 302(j) for individual source categories.

Subsequently, in August 1995, EPA proposed to revise the same part of the "major source" definition that it had proposed to change in 1994, this time to limit the requirement to count fugitive emissions for section 111 or 112 standards to those standards for which EPA had performed the rulemaking required under section 302(j). (See 60 FR 45530, August 31, 1995.) This change was proposed simply for administrative reasons, to allow EPA to avoid revising part 70 each time it performed a section 302(j) rulemaking. Today's rule does not adopt this language because some commenters expressed concern about knowing whether EPA had performed the latest section 302(j) rulemaking and which source categories they must as a result consider in determining major source status. Nevertheless, EPA will approve a State program that adopts the language we proposed in August, 1995 in lieu of the language promulgated in today's rule because the 1995 language effectively covers the same source categories.

The EPA also proposed in the same 1995 notice to delete the phrase "but only with respect to those air pollutants that have been regulated for that category." The EPA proposed to delete this phrase to make the regulatory definitions of part 70 consistent with the corresponding provisions of the PSD and NSR nonattainment programs (hereafter, the term "NSR" is used to refer collectively to both programs). As

mentioned later in this preamble, today's rule takes final action by deleting this phrase.

Under today's final rule, for purposes of determining whether a source is a major source under section 302 or part D of title I, a source belonging to a source category subject to a section 111 or 112 standard is required to include fugitive emissions of all regulated pollutants under section 302 or part D of title I in its calculation of major source status only if the standard was promulgated as of August 7, 1980. Under today's final rule, for purposes of determining whether a source is a major source under section 302 or part D of title I, State title V permitting programs are not required to provide that sources belonging to categories subject to section 111 or 112 standards promulgated *after* August 7, 1980 must include fugitive emissions of all regulated pollutants under section 302 or part D of title I in calculating major source status. Sources must, however, continue to include fugitive emissions of all hazardous air pollutants in determining major source status under section 112 of the Act.

The final rule takes effect today, November 27, 2001. State permitting authorities with programs that currently provide the August 7, 1980 limitation on including fugitive emissions need take no action, since their rules would be consistent with this final rule with respect to the August 7, 1980 date. Other permitting authorities may, but are not required to, revise their programs to include the August 7, 1980 limitation. That is, States may include requirements that are more stringent than the Federal requirements, by requiring sources subject to section 111 or 112 standards promulgated after August 7, 1980 to count fugitive emissions in major source determinations under section 302 or part D of title I. (See section 116 of the Act which allows States, within certain exceptions, to adopt requirements that are not less stringent than the requirements of the Act.)

Except where legislative action is needed as described in the following paragraph, States must revise their programs by November 27, 2002 to delete the phrase "but only with respect to those air pollutants that have been regulated for that category." The Administrator specifies a deadline of 12 months for submittal of program revisions to delete the "but only with respect to" phrase in light of the narrow scope of the revision required of State programs. Authority for this deadline is provided in 40 CFR 70.4(i)(1), which specifies that the deadline for submittal of revisions to State part 70 programs following revision of relevant Federal regulations is 180 days or "such other period as the Administrator may specify, following notification * * *" Today's notice is the notification that triggers the 12-month deadline.

If a State can demonstrate that additional legal authority is needed, the deadline for submittal of a revised program to delete the phrase "but only with respect to those air pollutants that have been regulated for that category" is November 27, 2003. Authority for this deadline is the same provision in 40 CFR 70.4(i)(1) described in the preceding paragraph for the 12-month deadline.

Any sources that become subject to part 70 because of revisions to State programs deleting the "but only with respect to" phrase must apply for title V permits either within 12 months of EPA's approval of the revised State program or by an earlier deadline that the permitting authority establishes. As provided in section 503(c) of the Act and 40 CFR 70.5(a)(1)(i), a timely application for a source applying for a permit for the first time is one that is submitted within 12 months after the source becomes subject to the operating permits program or on or before such earlier date as the permitting authority may establish.

II. Response to Comments on Proposed Rule

A. Proposal To Insert August 7, 1980 Date Into Paragraph (2)(xxvii) of the "Major Source" Definition

The preamble for the proposed rule in August 1994 described the rationale for the proposed revision. Public comments were solicited at the time of proposal and a public hearing was held. Industry representatives, regulatory agencies, environmental groups, and the general public were given the opportunity to comment on the proposed rule and to provide additional information during and after the public comment period, and at the public hearing.

We received comments on this proposed rule revision, including a number of comments from industry in support of inserting the August 7, 1980 date in paragraph (2)(xxvii) of the major source definition. However, several regulatory agencies opposed this change. One of these agencies commented that source categories regulated by new source performance standards (NSPS) are the significant source categories and for this reason should be required to include fugitive emissions for purposes of applicability determinations. Another agency commented that State fee levels for title V were based on an evaluation of sources that would be subject to the program under the original major source definition, and to change that definition could result in fewer emission fees which could adversely affect State permitting programs.

The EPA responds that we do agree that sources in categories subject to section 111 standards are significant sources of emissions. We also understand that States may have forecasted emission fees based on the original major source definition, and that overall fees could potentially drop as a result of this change. However, as EPA noted in the preamble to the proposed rule, we did not follow the procedural steps necessary under section 302(j) to expand the scope of sources for which fugitive emissions must be counted in making major source determinations. (See 59 FR 44460, 44514.) Because the Agency is required to undertake rulemaking under section 302(j) before it can require the inclusion of fugitive emissions of regulated pollutants under section 302 or part D of title I in major source determinations and because this rulemaking has not occurred for sources subject to section 111 or 112 standards promulgated after August 7, 1980, we have to revise the rule as described.

Finally, today's final rule inserts the August 7, 1980 date using the exact language from the corresponding provisions in the nonattainment NSR and PSD regulations in 40 CFR parts 51 and 52. This ensures that the title V and NSR programs are entirely consistent.

B. Proposal To Delete the Phrase "but Only With Respect to Those Air Pollutants That Have Been Regulated for That Category"

Today's action also deletes the phrase "but only with respect to those air pollutants that have been regulated for that category" from paragraph (2)(xxvii) of the major source definition. The EPA proposed to delete this phrase in its 1995 supplemental proposal to revise part 70. (See 60 FR 45530, August 31, 1995.)

Five industry commenters opposed the deletion of the phrase. Two of these commenters recommended that EPA keep the phrase until it undertakes new rulemaking under section 302(j), at which time the Agency could expand the types of fugitive emissions that must be considered when determining major source status. Two other commenters also noted that the rules implementing title V are intended to ensure that larger sources of potentially harmful emissions are drawn into the program more

quickly than smaller, nonmajor sources. They also noted that the purpose of the title V program is to compile in one permit all the requirements for regulated pollutants emitted from a major source. These commenters believe that neither of these purposes are served by counting the fugitive emissions of unregulated pollutants in the major source determination. Commenters also suggested that there is no need to rush sources subject to section 111 or 112 standards into the permit program on the basis of unregulated emissions, as these sources will be required to have permits independently of the major source program if and when EPA decides to require them to obtain permits. Commenters note that Congress, under section 502(a) of the Act, gives EPA authority to exempt nonmajor sources from the permit program by rule, and that this is evidence of Congressional intent to exclude sources from the program if the emissions of regulated pollutants do not reach major source levels.

Commenters also asserted that it is not necessary to count unregulated fugitive emissions to harmonize the title V program with the NSR program, as EPA has suggested. Any potential problems caused by the inconsistency can be easily cured, they assert, by changing the part 70 rule implementing title V to require that a source required to have a permit under part C or D of the Act is also required to have a title V permit.

The EPA disagrees with the approach advocated by the commenters. The Agency believes it is necessary to have consistent applicability approaches for the title V and NSR programs because title V incorporates major source definitions from section 302 and part D of title I which are used in the NSR program. Inconsistencies between title V and NSR could lead to a source being considered major under nonattainment NSR or PSD, but nonmajor under title V.[1] Being considered nonmajor has certain ramifications in the part 70 program. Title V operating permits for nonmajor sources are required under 40 CFR 70.3(c)(2) to include all the applicable requirements for the emissions units that caused the source to be subject to part 70. If an emission unit at the nonmajor source did not trigger the requirement to apply for a title V permit, then none of that unit's applicable requirements are required to be included in the source's permit.[2] In addition, a part 70 source is required under 40 CFR 70.5(c)(3)(i) to report in its permit application emissions for which it is major as defined by part 70. If EPA adopted inconsistent applicability approaches between title V and NSR, a source could exclude reporting information about emissions for which it is major under title V from its part 70 permit application, even if it had the potential to emit those emissions in major amounts under PSD or nonattainment NSR. Also, deleting the "but only with respect to those air pollutants that have been regulated for that category" phrase will not bring fugitive emissions of "unregulated" pollutants into major source determinations as commenters assert. Technically, a pollutant is considered regulated once it is subject to regulation under the Act. A pollutant need not be specifically regulated by a section 111 or 112 standard to be considered regulated. (See 61 FR 38250, 38309, July 23, 1996.)

The EPA agrees with commenters who pointed out that any source required to have a permit under part C or D is also required to have a title V permit. (See section 502(a) of the Act.) However, this does not make the source a major source for part 70 and the inconsistencies noted above would still remain. A source required to have a part C or D permit but considered nonmajor for part 70 would be subject to part 70, but would not be required to include all applicable requirements for all emissions units in its title V permit. Additionally, the requirement in part 70 for a source to report emissions of all pollutants for which it is major would not be in effect because the source would be considered nonmajor under part 70. These arguments point to the need for sources which emit or have the potential to emit air pollutants in major amounts under NSR to be treated as major sources under title V. A further argument for consistency is that the PSD program does not include sources with the potential to emit between 100 and 250 tons/year, whereas the title V program does.

The EPA also disagrees with commenters who contend that Congress intended for EPA to exempt or defer all nonmajor sources by including the provision in section 502(a) which allows EPA to exclude nonmajor sources from the title V program by rule. While Congress gave EPA discretion to exempt some categories of nonmajor sources if the Administrator determined that compliance with title V permitting requirements would be impracticable, infeasible or unnecessarily burdensome on such categories, it did not require that EPA exclude all nonmajor sources. In fact, the presumption in section 502(a) is that nonmajor sources subject to a section 111 or 112 standard will be permitted. Congress simply provided that EPA could, in its discretion and after making the necessary finding, exempt some nonmajor sources from the requirement to obtain a title V permit. Requiring consistent applicability approaches is wholly within this Congressional intent, even if it could result in more sources being major under the title V program compared to approaches suggested by commenters.

Finally, EPA disagrees with commenters who contend that sources in a category subject to a section 111 or 112 standard should be deferred from title V if they do not emit major amounts of fugitive pollutants regulated by that specific standard. Under the approach advocated by commenters, a source subject to a section 111 or 112 standard emitting major amounts of fugitive emissions of a pollutant could be considered nonmajor for part 70 if the pollutant was not regulated by the section 111 or 112 standard that applied to the source. In the view of the Agency, if a source emits or has the potential to emit major amounts of fugitive emissions of a regulated pollutant under section 302 or part D of title I, and there has been the requisite rulemaking performed under section 302(j), then the source must be considered major and subject to title V, even if the pollutant is not regulated by a section 111 or 112 standard. Inclusion of fugitive emissions of all regulated pollutants under section 302 and part D of title I, not just those regulated by section 111 or 112 standards, is the approach used in the NSR program. As mentioned previously, EPA believes it is important to maintain consistency between NSR and title V.

In addition, following the commenters' approach would require EPA to exempt sources from title V that emit or have the potential to emit major amounts of fugitive emissions, even if the Agency has undertaken the rulemaking required by section 302(j). Congress clearly expressed its intent in section 502(a) to subject major sources to title V by precluding EPA from exempting major sources from title V requirements. In addition, Congress

[1] Consider, for example, a source that has the potential to emit nonmajor levels of fugitive emissions of particulate matter (PM) regulated by an NSPS and major levels (over 250 tons) of fugitive emissions of volatile organic compounds (VOC's) which are not regulated by this NSPS. If part 70 continued to include the phrase "but only with respect to those air pollutants that have been regulated for that category," the source would be nonmajor for title V because only its PM emissions would be counted. Yet, the source would be major for NSR because of the VOC emissions.

[2] All applicable requirements are required to be included, however, for units that caused the source to be subject to part 70. (See 40 CFR 70.3(c)(2).)

provided a mechanism in section 302(j) for determining whether fugitive emissions must be considered in applicability determinations under section 302 or part D of title I. Where EPA has performed the rulemaking required by section 302(j), as it has for section 111 and 112 standards promulgated as of August 7, 1980, EPA must follow an approach that gives due weight to the Congressional intent expressed in section 502(a) of subjecting major sources to title V. Accordingly, EPA rejects commenters' views and instead adopts an approach that requires sources to have title V permits if they are subject to a section 111 or 112 standard promulgated as of August 7, 1980 and emit or have the potential to emit major amounts of fugitive emissions of any regulated pollutant under section 302 or part D of title I, even if the pollutant is not regulated by the section 111 or 112 standard.

III. Administrative Requirements

A. Executive Order 12866: "Significant Regulatory Action Determination"

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

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

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

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

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

Because this action involves a narrow change to a single regulatory requirement, it has been determined not to meet any of the criteria listed above. Thus, it has been determined that this action is not a "significant regulatory action" under the terms of Executive Order 12866, and is not subject to OMB review.

Executive Order 12866 also encourages agencies to provide a meaningful public comment period, and suggests that in most cases the comment period should be 60 days. The EPA provided a 60-day comment period and a public hearing on the entire proposed rule, including the change that is the subject of today's action, in 1994.

B. Regulatory Flexibility Act Compliance as Amended by the Small Business Regulatory Enforcement Fairness Act of 1966 (SBREFA), 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

We analyzed the potential impact of the proposed regulatory revisions on small entities and determined that any cost increases would be substantially less than one percent of revenues. Since today's action involves a single regulatory provision of the many that were proposed, we certify that this action will not have a significant economic impact on a substantial number of small entities.

C. Paperwork Reduction Act

The OMB has approved the information collection requirements contained in this rule under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* and has assigned OMB control no. 2060–0243.

The Administrator has determined that the net effect of this rule could result in fewer sources submitting applications for title V permits, and accordingly, in less paperwork. Some State and local permitting agencies will be required to revise their title V programs, and to submit them for EPA and public review, and to respond to comments.

Because the amount of paperwork could be reduced for some sources, this action should reduce the overall burden on sources. There could be minimal increase in burden on some permitting authorities that will be required to revise their program; however, that increase in burden should be inconsequential in light of the very limited scope of this rule. Up to 112 permitting authorities are potential one-time respondents, although fewer than 112 should need actual rule changes. Burden means the total time, effort or financial resources expended to generate, and maintain, retain, or provide information to the permitting authority as required by this rule. This includes the time needed to review instructions; develop, acquire, install and use technology and systems for collecting, validating and verifying information or processing and maintaining information; adjust the existing ways to comply with previous instructions and requirements; train personnel to respond to the collection of information; search data sources; complete and review the information; and transmit the information.

D. Submission to Congress and the Comptroller General

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. The EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. This rule is not a major rule as defined by 5 U.S.C. 804(2).

E. Unfunded Mandates Reform Act

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

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

Because of the very limited scope of this action, the EPA has determined that this action contains no regulatory requirements that might significantly or uniquely affect small governments. The EPA has also determined that this action does not contain a Federal mandate that may result in expenditures of $100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Thus, this proposal is not subject to the requirements of the UMRA.

F. Executive Order 13132 (Federalism)

Executive Order 13132, entitled "Federalism" (64 FR 43255, August 10, 1999), requires EPA to develop an accountable process to ensure "meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications." "Policies that have federalism implications" is defined in the Executive Order to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under Executive Order 13132, EPA may not issue a regulation that has federalism implications, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or EPA consults with State and local officials early in the process of developing the proposed regulation. The EPA also may not issue a regulation that has federalism implications and that preempts State law unless the Agency consults with State and local officials early in the process of developing the proposed regulation.

If EPA complies by consulting, Executive Order 13132 requires EPA to provide to the Office of Management and Budget (OMB), in a separately identified section of the preamble to the rule, a federalism summary impact statement (FSIS). The FSIS must include a description of the extent of EPA's prior consultation with State and local officials, a summary of the nature of their concerns and the Agency's position supporting the need to issue the regulation, and a statement of the extent to which the concerns of State and local officials have been met. Also, when EPA transmits a draft final rule with federalism implications to OMB for review pursuant to Executive Order 12866, EPA must include a certification from the Agency's federalism official stating that EPA has met the requirements of Executive Order 13132 in a meaningful and timely manner.

This action will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132. This action would not alter the overall relationship or distribution of powers between governments for the part 70 program. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

G. Executive Order 13175: Consultation With Tribes

It does not have a substantial direct effect on one or more Indian tribes, on the relationship between the Federal Government and Indian tribes, or on the distribution of power and responsibilities between the Federal Government and Indian tribes, as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because it does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Accordingly, this rule is not subject to Executive Order 13175.

H. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), applies to any rule that the EPA determines (1) economically significant as defined under Executive Order 12866, and (2) the environmental health or safety risk addressed by the rule has a disproportionate effect on children. If the regulatory action meets both criteria, the Agency must evaluate the environmental health or safety effects of the planned rule on children and explain why the planned regulation is preferable to other potentially effective and reasonably feasible alternatives considered by the Agency.

This action is not subject to Executive Order 13045, because it is not an economically significant regulatory action as defined by Executive Order 12866, and it does not address an environmental health or safety risk that would have a disproportionate effect on children.

I. Executive Order 13211 (Energy Effects)

This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355, May 22, 2001) because it is not a significant regulatory action under Executive Order 12866.

J. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act (NTTAA), Public Law 104–113, section 12(d) (15 U.S.C. 272 note) directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (*e.g.*, materials specifications, test methods, sampling procedures, business practices, etc.) that are developed or adopted by voluntary consensus standard bodies. The NTTAA directs EPA to provide Congress, through OMB, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA is not considering the use of any voluntary consensus standards.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: November 19, 2001.

Christine Todd Whitman,

Administrator.

For the reasons set out in the preamble, title 40, chapter I, part 70 of the Code of Federal Regulations is amended as follows:

PART 70—[AMENDED]

1. The authority citation for part 70 continues to read as follows:

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

2. Section 70.2 is amended by revising paragraph (2)(xxvii) of the definition of "major source" to read as follows:

§ 70.2 Definitions

* * * * *

Major source * * *

(2) * * *

(xxvii) Any other stationary source category, which as of August 7, 1980 is being regulated under section 111 or 112 of the Act.

* * * * *

[FR Doc. 01–29383 Filed 11–26–01; 8:45 am]

BILLING CODE 6560–50–P

FEDERAL EMERGENCY MANAGEMENT AGENCY

44 CFR Parts 59 and 64

RIN 3067–AD18

Changes to General Provisions and Communities Eligible for the Sale of Insurance Required To Include Future-Conditions Flood Hazard Information on Flood Maps

AGENCY: Federal Emergency Management Agency (FEMA).

ACTION: Final rule.

SUMMARY: This Final Rule revises the National Flood Insurance Program (NFIP) regulations to include definitions for future-conditions hydrology and for the floodplains that may be shown on Flood Insurance Rate Maps (FIRMs), for informational purposes at the request of the community, to reflect future-conditions hydrology; and establish the zone symbol to be used to identify future-conditions flood hazard areas on FIRMs.

DATES: This Final Rule is effective December 27, 2001.

FOR FURTHER INFORMATION CONTACT: Matthew B. Miller, P.E., Chief, Hazards Study Branch, Hazard Mapping Division, Federal Insurance and Mitigation Administration, FEMA, Washington, DC 20472, (202) 646–3461.

SUPPLEMENTARY INFORMATION:

Background

It was the expressed intent of the U.S. Congress, in enacting the Housing and Urban Development Act of 1968 (commonly referred to as the National Flood Insurance Act of 1968), to "encourage State and local governments to make appropriate land use adjustments to constrict the development of land which is exposed to flood damage and minimize damage caused by flood losses, and guide the development of proposed future construction, where practicable, away from locations which are threatened by flood hazards * * *" 42 U.S.C. 4001(e). The revisions to the NFIP regulations documented in this Final Rule are a result of the continuing reappraisal of the NFIP for the purpose of encouraging sound floodplain management to reflect that intent.

Historically, flood hazard information presented on NFIP flood maps has been based on the existing conditions of the floodplain and watershed. When the mapping of flood hazards was initiated under the NFIP, the intent was to reassess each community's flood hazards periodically and, if needed, revise the flood map for that community. Flood hazards may change significantly in areas experiencing urban growth. The FEMA document entitled *Flood Insurance Study Guidelines and Specifications for Study Contractors* (FEMA 37, January 1995) specifies that flood hazard determinations should be based on conditions that are planned to exist in the community within 12 months following completion of the draft Flood Insurance Study (FIS). Examples of future conditions to be considered in the context of FEMA 37 are public works projects in progress, including channel modifications, hydraulic control structures, storm-drainage systems, and various other flood protection projects. These are projects that will be completed in the near future for which completion can be predicted with a reasonable degree of certainty and their completion can be confirmed prior to the new or revised flood map becoming effective. By contrast, future land-use development, such as urban growth, is uncertain and difficult to predict, and has not been considered in the context of the FEMA guidelines.

Communities experiencing urban growth and other changes have expressed a desire to use future-conditions hydrology in regulating watershed development. While some communities do regulate based on future development, others are hesitant to enforce more restrictive standards without Federal support.

From a floodplain management standpoint, future-conditions floodplains can be used, and are being used, by communities to enforce more stringent floodplain management policies than those required by FEMA. By displaying future-conditions floodplains on the FIRM, the community and FEMA are alerting the public that flood hazards may increase in the future due to urban development. Many progressive communities throughout the United States develop future-conditions hydrology and create their own maps to regulate floodplain development. This has resulted in two sets of maps being produced for a community: future-conditions maps for local floodplain management and existing-conditions FIRMs for flood insurance determinations. As a result, these progressive communities have not had a sense of ownership for the FIRMs, and their resources have been directed toward maintaining their own future-conditions maps.

Recent Evaluation and Conclusions

To assist officials in such progressive communities, FEMA undertook an evaluation to determine whether future-conditions flood hazard information could and should be placed on FIRMs and in the accompanying FIS reports. The results of that extensive evaluation are documented in a FEMA report entitled "Modernizing FEMA's Flood Hazard Mapping Program: Recommendations for Using Future Conditions Hydrology for the National Flood Insurance Program" (see *www.fema.gov/mit/tsd/FT_hydro.htm*). The specific conclusions reached in the report are as follows:

- The local community should determine the future-conditions land-use and hydrology.
- If the community chooses to adopt a regulatory floodway based on future-conditions hydrology, the use of this floodway should be supported by local ordinances.
- If the community requests that FEMA do so, the future-conditions 1-percent-annual-chance (100-year) floodplain should be shown on the printed FIRM and be designated as Zone X with no base (1-percent-annual-chance) flood elevations (BFEs) shown.
- When possible, three floodplains should be shown on the FIRM: existing-conditions 1-percent-annual-chance (100-year) floodplain, existing-conditions 0.2-percent-annual-chance (500-year) floodplain, and future-conditions 1-percent-annual-chance (100-year) floodplain. However, when the future-conditions 1-percent-annual-chance (100-year) floodplain and the existing-conditions
- 0.2-percent-annual-chance (500-year) floodplain are so close together as to be confusing if both are shown on the printed FIRM, the future-conditions 1-percent-annual-chance (100-year) floodplain should be shown in lieu of the existing-conditions 0.2-percent-annual-chance (500-year) floodplain. When this occurs, appropriate reference should be made to the existing-conditions 0.2-percent-annual-chance