

Significantly Affect Energy Supply, Distribution, or Use. We have determined that it is not a "significant energy action" under that order because it is not a "significant regulatory action" under Executive Order 12866 and is not likely to have a significant adverse effect on the supply, distribution, or use of energy. The Administrator of the office of Information and Regulatory Affairs has not designated it as a significant energy action. Therefore, it does not require a statement of Energy Effects under Executive Order 13211.

Technical Standards

The National Technology Transfer and Advancement Act (NTTAA) (15 U.S.C. 272 note) directs agencies to use voluntary consensus standards in their regulatory activities unless the agency provides Congress, through the Office of Management and Budget, with an explanation of why using these standards would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., specifications of materials, performance, design, or operation; test methods; sampling procedure; and related management system practices) that are developed or adopted by voluntary consensus standards bodies.

This rule does not use technical standards. Therefore, we did not consider the use of voluntary consensus standards.

Environment

We have analyzed this rule under Commandant Instruction M16475.1D, which guides the Coast Guard in complying with the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321–4370f), and have made a preliminary determination that there are no factors in this case that would limit the use of a categorical exclusion under section 2.B.2 of the Instruction. Therefore, we believe that this rule should be categorically excluded, under figure 2–1, paragraph (34)(g), of the Instruction, from further environmental documentation. This event establishes a safety zone, therefore, paragraph (34)(g) of the Instruction applies.

A preliminary "Environmental Analysis Check List" is available in the docket where indicated under **ADDRESSES**. Comments on this section will be considered before we make the final decision on whether the rule should be categorically excluded from further environmental review.

List of Subjects in 33 CFR Part 165

Harbors, Marine Safety, Navigation (water), Reporting and record keeping requirements, Security measures, Waterways.

■ For the reasons discussed in the preamble, the Coast Guard amends 33 CFR part 165 as follows:

PART 165—REGULATED NAVIGATION AREAS AND LIMITED ACCESS AREAS

■ 1. The authority citation for part 165 continues to read as follows:

Authority: 33 U.S.C. 1226, 1231; 46 U.S.C. Chapter 701; 50 U.S.C. 191, 195; 33 CFR 1.05–1(g), 6.04–1, 6.04–6, and 160.5; Pub. L. 107–295, 116 Stat. 2064; Department of Homeland Security Delegation No. 0170.1.

■ 2. A new temporary section 165.T09–001 is added as follows:

§ 165.T09–001 Security Zone; Superbowl XL, Detroit River, Detroit, MI

(a) *Location*: The following area is a temporary security zone: An area of the Detroit River beginning at a point of land adjacent to Joe Louis Arena, at 42°19'26.6" N, 083°03'06.6" W; then extending offshore to the 3rd St. junction buoy at 42°19'24.2" N, 83°03'4.7" W; then northeast through the Griswold St. junction buoy at 42°19'31" N, 83°02'34.1" W; then northeast at 42°19'40" N, 083°02'00" W; then north to a point on land at 42°19'46.3" N, 083°02'00" W (near Atwater Customs station); then southeast following the shoreline back to the point of origin. All geographic coordinates are North American Datum of 1983 (NAD 83).

(b) *Effective period*. This regulation is effective from 8 a.m. (local) on January 31, 2006 until 8 a.m. (local) on February 6, 2006.

(c) *Regulations*. (1) In accordance with the general regulations in section 165.33 of this part, entry into, transiting, or anchoring within this security zone is prohibited unless authorized by the Captain of the Port Detroit, or his designated on-scene representative.

(2) This security zone is closed to all vessel traffic, except as may be permitted by the Captain of the Port Detroit or his designated on-scene representative.

(3) The "on-scene representative" of the Captain of the Port is any Coast Guard commissioned, warrant or petty officer who has been designated by the Captain of the Port to act on his behalf. The on-scene representative of the Captain of the Port will be aboard either a Coast Guard or Coast Guard Auxiliary vessel. The Captain of the Port or his designated on-scene representative may be contacted via VHF Channel 16.

(4) Vessel operators desiring to enter or operate within the security zone shall contact the Captain of the Port Detroit or his on-scene representative to obtain permission to do so. Vessel operators given permission to enter or operate in the security zone shall comply with all directions given to them by the Captain of the Port Detroit or his on-scene representative.

Dated: January 11, 2006.

P.W. Brennan,

Captain, U.S. Coast Guard, Captain of the Port Detroit.

[FR Doc. 06–811 Filed 1–27–06; 8:45 am]

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ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R08–OAR–2006–0017; FRL–8026–1]

Disapproval of Air Quality Implementation Plans; Montana; Maintenance of Air Pollution Control Equipment for Existing Aluminum Plants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is disapproving a State Implementation Plan revision submitted by the State of Montana on January 16, 2003. If approved, this revision would exempt existing aluminum plants from meeting emission requirements during scheduled maintenance. This action is being taken under section 110 of the Clean Air Act.

DATES: Effective Date: This final rule is effective March 1, 2006.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA–R08–OAR–2006–0017. All documents in the docket are listed on the <http://www.regulations.gov> Web site. Although listed in the index, some information is not publicly available, e.g., Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through <http://www.regulations.gov> or in hard copy at the Air and Radiation Program, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 300, Denver, Colorado 80202–2466. EPA requests that if at all possible, you contact the individual listed in the **FOR**

FURTHER INFORMATION CONTACT section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8 a.m. to 4 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT:

Laurie Ostrand, Air and Radiation Program, Mailcode 8P-AR, Environmental Protection Agency (EPA), Region 8, 999 18th Street, Suite 200, Denver, Colorado 80202, (303) 312-6437, oststrand.laurie@epa.gov.

SUPPLEMENTARY INFORMATION:

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Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials *Act* or *CAA* mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words or initials *CFAC* mean or refer to the Columbia Falls Aluminum Company.

(iii) The words *EPA*, *we*, *us* or *our* mean or refer to the United States Environmental Protection Agency.

(iv) The initials *SIP* mean or refer to State Implementation Plan.

(v) The words *state* or *Montana* mean the State of Montana, unless the context indicates otherwise.

I. Background

On January 16, 2003, the State of Montana submitted a new rule for incorporation into the SIP. The rule is titled Administrative Rules of Montana (ARM) 17.8.335, Maintenance of Air Pollution Control Equipment for Existing Aluminum Plants.

The state adopted the rule for the purpose of modifying the approved SIP. The rule covers maintenance of air pollution control equipment for existing aluminum plants. There is currently one source that is subject to this rule, the Columbia Falls Aluminum Company (CFAC) in Columbia Falls, Montana. CFAC operates a primary aluminum reduction plant. The plant is equipped with air pollution control equipment, including ducts conveying exhaust to dry scrubbers. The state and CFAC have indicated they believe that air pollution control equipment requires periodic maintenance to keep it in good operating order. The state and CFAC have also indicated that the failure to maintain the air pollution control equipment eventually results in the failure of the equipment. Finally, the

state and CFAC have indicated that the failure of the equipment would result in air pollution emissions from the plant that exceed those allowed and may create an unacceptable risk to public health.

Further, the state and CFAC indicated that the maintenance of the air pollution control equipment requires the plant to shut down the dry scrubbers and to bypass some of the dry scrubbers during the maintenance event. If the plant continues to operate during the shutdown of the dry scrubbers, the air pollution emissions from the plant may exceed those allowed by rules governing emission of air pollutants.

In the past the plant has applied to the state for, and in several cases been granted, a variance from rules governing emission of air pollutants so that the plant could conduct maintenance on the air pollution control equipment while continuing to operate the plant. CFAC expressed that the process for obtaining a variance is time consuming. The state has adopted a rule that allows the plant to conduct maintenance on air pollution control equipment while the plant is operating, without requiring the plant to obtain a variance.

Our review of ARM 17.8.335, Maintenance of Air Pollution Control Equipment for Existing Aluminum Plants, indicated that it is not approvable and we proposed to disapprove Montana's SIP revision on October 29, 2003 (68 FR 61650). Our October 29, 2003 notice describes in detail the rationale for our proposed disapproval.

II. What Comments Were Received on EPA's Proposal and EPA's Response

We received three comments on our October 29, 2003 proposed action. One commenter generally supported our proposed action and the other two commenters opposed our proposed action.

(1) *Comment:* The commenter that supported our proposed action indicated they " * * * generally concur with EPA's stated reasons for proposing to disapprove the Montana SIP rule change regarding maintenance of air pollution control equipment at existing primary aluminum reduction plants * * *". The commenter also expressed an interest in ultimately allowing the maintenance emissions under limited circumstances when the result would be less impact to the airshed.

Response: Although we generally agree with the commenter, we think provisions excusing the source from complying with the existing requirements during maintenance should only be allowed if the state can

demonstrate that the national ambient air quality standards (NAAQS) and prevention of significant deterioration (PSD) increments will be protected, and other CAA requirements met, during periods of maintenance at the facility. The primary purpose of the SIP is to ensure attainment and section 110(l) of the CAA provides that EPA may not approve a SIP revision that would interfere with attainment, reasonable progress or any other applicable requirement of the Act.

(2) *Comment:* One commenter indicated that "EPA proposes to disapprove Montana's rule based, in part, on guidance. EPA contends excess emissions should be treated as compliance violations based upon provisions in EPA memoranda cited in footnotes to the proposed rulemaking. However, guidance is not law and does not replace the requirements of a rule or statute passed by a legally enabled body with the opportunity for public scrutiny and comment." The commenter also indicated that "while guidance may be helpful in certain circumstances, reliance on guidance as a method of 'codifying' internally-developed policy often creates confusion among the regulated-community and the public because of the imperious and arbitrary nature of guidance development. Furthermore, failure to engage in rulemaking implies that notice-and-comment procedures are impracticable, unnecessary, or contrary to the public interest."

Response: EPA's reference to and reliance on the guidance documents mentioned, which are publicly available and a part of the record for this action, is not prohibited by the Clean Air Act or the Administrative Procedure Act. EPA agrees that the guidance documents do not establish enforceable and binding requirements; the guidance documents do not purport to be anything but guidance. This is why EPA has performed this rulemaking—a notice-and-comment rulemaking—to take comment on its statutory interpretations and factual determinations in order to make a binding and enforceable determination regarding the SIP submittal (*i.e.*, ARM 17.8.335, Maintenance of Air Pollution Control Equipment for Existing Aluminum Plant). Our October 29, 2003 proposed rule refers to EPA guidance not as binding the Agency to adopt the interpretation of the CAA therein, but rather as a useful description of the rationale underlying those interpretations. EPA has explained the legal and factual basis for its rulemaking in the October 29, 2003 proposed rule and afforded the public a full

opportunity to comment on EPA's proposed interpretation and determination. This action is consistent with the applicable procedural requirements of the Administrative Procedure Act. In the final rule, EPA is fully responding to any concerns with EPA's interpretations as set forth in the guidance documents and relied on in the proposed rule. Thus EPA has not treated the guidance as a binding rule.

(3) *Comment:* The commenter that indicated it was not appropriate to rely on guidance for disapproving the rule further indicated that "the Department of Environmental Quality (Department) does not believe that ARM 17.8.335 is inconsistent with the direction provided in the 1999 Herman/Perciaspe and 1988 Bennett memos. ARM 17.8.335 differs in several respects from the generalized exemptions cited in the policy."

First, the commenter indicated that "EPA claims all instances of excess emissions must be considered violations. ARM 17.8.335 does not exempt the excess emissions from being considered a violation, it merely prohibits the Department from initiating an enforcement action for the violation."

Second, the commenter indicated that "the memos cited are not entirely relevant since they address generalized exemptions for all excess emissions, regardless of impact. ARM 17.8.335 is very specific. It applies to a single source at a single facility. This means that the impacts of the exemption were identified and modeled. The modeling demonstrated the exemption would not violate the ambient standards."

Third, the commenter indicated that "EPA contends that ARM 17.8.335 is not acceptable, because it must contain emission standards or limitations to protect ambient standards. Since ARM 17.8.335(1)(a) contains an emission limitation as well as work practice standards, Montana believes that ARM 17.8.335 is consistent with the policy in this respect."

Fourth, the commenter indicated that "EPA also states they disagree with Montana's contention that ARM 17.8.335 will not allow violation of ambient standards or Prevention of Significant Deterioration Increments. Since ARM 17.8.335(11) contains clear language prohibiting violation of ambient standards, Montana stands by its contention."

Response: First, EPA's interpretation of the CAA, as reflected in our guidance, is that excess emissions must be considered violations because SIPs must provide for the attainment and maintenance of the NAAQS and the

achievement of the PSD increments. The commenter indicated that the rule meets the guidance because the rule "does not exempt excess emissions from being considered a violation, it merely prohibits the Department from initiating an enforcement action for the violation." Without the threat of an enforcement action, the label of "violation" loses all meaning.

The state's proposed approach (*i.e.*, prohibiting itself from enforcing a violation) is inconsistent with section 110 of the CAA. Section 110 requires the SIP to include enforceable emission limitations, a program to provide for the enforcement of these emission limitations, and assurances that the state has adequate authority under state law to carry out the SIP (and is not prohibited by any provision of state law from doing so). ARM 17.8.335 prohibits the state from enforcing applicable emission limitations during source maintenance; absent an adequate demonstration under section 110(l) of the CAA that the higher emissions allowed in ARM 17.8.335 will not interfere with the CAA requirements, the state must continue to allow for enforcement action, but may exercise its enforcement discretion in determining whether to pursue any particular violation of the SIP.

Second, the commenter indicated that the modeling demonstrated the exemption would not violate ambient standards. As discussed in the proposal we had concerns with the modeling and indicated that the approach used would not assure protection of the NAAQS. We stand by that statement in our proposal and therefore, do not agree with the commenter that the modeling demonstrated that the exemption would not violate ambient standards. Below, in comment/response #4, is further discussion regarding the modeling. Additionally, the state did not evaluate the impact of the excess emissions on the PSD increments.

Third, the commenter indicated that ARM 17.8.335 contains an emission limitation as well as work practice standards that protect the ambient standards. As indicated above, we do not agree that it has been demonstrated that the ambient standards would be protected. Also, EPA questions the enforceability of the "emission limitation" the commenter refers to. Presumably the commenter is referring to ARM 17.8.335(1)(a)(ii), which indicates that the department may not initiate an enforcement action for a violation of various rules, or any emission standard, resulting from necessary scheduled maintenance of air pollution control equipment at an

existing primary aluminum reduction plant, if, among other things, the maintenance event meets the following conditions: "the maintenance event will not cause uncontrolled PM-10 emissions to exceed normal operating emissions from the reduction cells by more than 700 lbs. per 24-hour period as estimated using emissions factors." The rule does not establish or define "normal operating emissions from the reduction cells." Without establishing or defining "normal operating emissions from the reduction cells" we question how the department could ever enforce the requirements in ARM 17.8.335(1)(a)(ii). Also, we question if the necessary scheduled maintenance could occur at other emission points that would not affect the level of emissions from the reduction cells but would cause an increase in emissions elsewhere.

Fourth, the commenter indicated that "since ARM 17.8.335(11) contains clear language prohibiting violation of ambient standards, Montana stands by its contention" that the rule will assure protection of the NAAQS or PSD increments. As we indicated in our proposal, we believe ambient standards and the PSD increments are protected by establishing limits that assure the standards and increments will be met. ARM 17.8.335(11) indicates that nothing in the rule shall be construed to allow an owner or operator to cause or contribute to violations of any federal or state ambient air quality standards.¹ We do not believe such a generic provision ensures protection of the NAAQS. At best, it simply means that if the ambient standards are violated—jeopardizing the health of the community, the Department could then bring an enforcement action. ARM 17.8.335(11) provides no clear cut standard the source must meet to protect public health.

In lieu of relying on monitors to assure the NAAQS are protected, particularly when the monitoring network is sparse, EPA believes enforceable emission limits should be established that, through modeling, demonstrate that the NAAQS would be protected. As we indicated earlier and below, we do not believe the modeling completed for this SIP revision was adequate to demonstrate that the NAAQS would be protected or that enforceable emission limits were adequately established.

¹ We note that while ARM 17.8.335(11) discusses "ambient standards" it does not specifically mention PSD increments. A document in the state's submittal indicates that the reference to "ambient standards" includes both the NAAQS and PSD increments.

(4) *Comment:* Several comments were raised regarding EPA's concerns about the rule's impact on the NAAQS. The comments pertained to whether or not: (a) The impact of the rule in the nearby Columbia Falls PM-10 nonattainment area had been addressed adequately, (b) there was an adequate demonstration that the NAAQS would be protected, and (c) appropriate modeling techniques were used.

Comment A. Regarding EPA's concerns about the impact of the rule on the Columbia Falls PM-10 nonattainment area, the commenter indicated that "EPA approved the Columbia Falls PM-10 control plan on April 14, 1994, at 59 FR 17700. This action included approval of the technical support documents that demonstrate Columbia Falls Aluminum (CFAC) is an insignificant source of emissions contributing to the nonattainment area. Specifically, on January 27, 1994, at 59 FR 3804, EPA stated the control plan demonstration would provide for attainment within the prescribed time periods and would further maintain NAAQS compliance in future years. Further analysis demonstrating this rule's impact on the nonattainment area is unnecessary as a result of EPA's control plan approval. Therefore, the burden lies with EPA to demonstrate that a rule affecting a source, recognized in an approved control plan as an insignificant contributor to the nonattainment area, would otherwise interfere with an applicable requirement concerning attainment 42 U.S.C. 7410(l)."

Response A. The commenter is correct that EPA approved the Columbia Falls PM-10 nonattainment area plan on April 14, 1994 (59 FR 17700). The attainment demonstration for the plan was based on receptor modeling (chemical mass balance (CMB)) and rollback modeling. However, as noted on page 17702, in the middle column,

"[t]he State has made a separate commitment to testing and further dispersion modeling of emissions from the Columbia Falls Aluminum Company (CFAC) facility. This facility is located outside the nonattainment area and emissions from CFAC were not identified on the Chemical Mass Balance analysis of filters collected from the monitor in the Columbia Falls nonattainment area. Emissions from CFAC are a potential concern, however, since this source accounts for 20 percent of the emission inventory (at permitted allowable emissions). EPA will continue to monitor the testing and assist the State with any action required by the results."

The state's commitment was made in a May 6, 1992 letter from Governor Stan Stephens.

The state developed a new PM-10 emissions inventory for CFAC but did not complete the dispersion modeling. EPA completed the dispersion modeling analyses using the new PM-10 emissions inventory for CFAC to determine CFAC's impact in the nonattainment area. On September 19, 1996 the Montana Department of Environmental Quality (MDEQ) sent us the actual and allowable PM-10 emissions for CFAC. EPA input this emission information into the ISC3/Complex1 models to determine the effect on the Columbia Falls PM-10 nonattainment area. The modeled 24-hour impact at the Columbia Falls monitor was 24 $\mu\text{g}/\text{m}^3$ using allowable emissions and 8 $\mu\text{g}/\text{m}^3$ using actual emissions. We also noted that the highest modeled 24-hour concentrations of actual emissions at the CFAC ambient PM-10 monitor (different from the Columbia Falls monitor) was about 30 $\mu\text{g}/\text{m}^3$. This seemed to compare favorably with measurements at that site when background concentrations were also considered.

On July 1, 1997, the State submitted a maintenance plan and redesignation request for the Columbia Falls PM-10 nonattainment area. The July 1, 1997 submittal was later withdrawn on October 27, 1998. However, the July 1, 1997 maintenance plan projected the ambient PM-10 24-hour concentrations in the Columbia Falls PM-10 nonattainment area for the 2009 maintenance year to be 146.2 $\mu\text{g}/\text{m}^3$. The 24-hour PM-10 NAAQS is 150 $\mu\text{g}/\text{m}^3$. The 2009 maintenance year projection, however, did not consider any emissions impact from CFAC. If we add the dispersion modeled impact from CFAC using either allowable emissions (24 $\mu\text{g}/\text{m}^3$ impact) or actual emissions (8 $\mu\text{g}/\text{m}^3$ impact) to the maintenance year projections then the Columbia Falls PM-10 nonattainment area would be projected to exceed 150 $\mu\text{g}/\text{m}^3$ and not attain the PM-10 NAAQS (i.e., $24 + 146.2 = 170.2 \mu\text{g}/\text{m}^3$ and $8 + 146.2 = 154.2 \mu\text{g}/\text{m}^3$). In addition, we note that the impact of the "maintenance" emissions (i.e., the additional 700 lbs of PM per 24-hour period expected during maintenance) on the Columbia Falls PM-10 nonattainment area were not analyzed here.

The state believes CFAC is in a different airshed from the nonattainment area and that emissions from CFAC do not have a significant impact on the Columbia Falls PM-10 nonattainment area. CFAC is only about one mile from the City of Columbia Falls. Existing information (indicated above) supports a conclusion that

emissions from CFAC do affect the nonattainment area and thus further analyses would need to be completed before it could be determined that maintenance emissions from CFAC would not impair the ability of the Columbia Falls PM-10 nonattainment area to attain and maintain the NAAQS.

We stand by our proposal that further analysis is needed to show that CFAC does not interfere with the ability of the Columbia Falls nonattainment area to attain and maintain the NAAQS.

Additionally, we note that we disagree with the commenter's statement that it is EPA's burden to demonstrate that a SIP revision would interfere with an applicable requirement concerning attainment. In general, we believe the primary burden in supporting a SIP revision rests with the state. Here we note that the available information (EPA's modeling in conjunction with the state's withdrawn maintenance plan) supports a conclusion that the SIP revision would interfere with attainment and maintenance of the NAAQS and the state has failed to submit any information to counter that conclusion.

Comment B. Regarding whether or not there was an adequate demonstration that the NAAQS would be protected, the commenter indicated that "as stated in EPA's Notice of Proposed Disapproval, a State Implementation Plan contains requirements necessary to protect ambient air quality standards. The record of adoption of ARM 17.8.335 clearly demonstrates that ARM 17.8.335 continues to protect those standards. Since EPA has not demonstrated that ARM 17.8.335 violates any requirement of the Clean Air Act, EPA must approve this SIP change."

Response B. We do not believe the state's record of adoption supports the conclusion that the rule will protect the ambient air quality standards. The SIP must provide for attainment and maintenance of the NAAQS and the protection of PSD increments. The state must demonstrate that this SIP revision will not interfere with the state's ability to attain and maintain the NAAQS (sections 110(a)(1) and 110(l) of the Act). SIP provisions that allow for an automatic exemption for excess emissions from start-up, shut-down, malfunction and maintenance activities result in levels of emissions that are difficult to predict and thus it is difficult to demonstrate the effect of these activities on attainment or maintenance or the protection of the PSD increments. Therefore, EPA generally prohibits such rules in SIPs. However, we recognize that in limited circumstances a state may be able to

demonstrate periods of excess emissions will not interfere with these requirements by showing that the CAA requirements are met during the periods of excess emissions. CFAC conducted modeling to demonstrate that excess emissions during the maintenance procedures would not cause or contribute to violations of the Montana Ambient Air Quality Standards (MAAQS) or NAAQS. We outlined our concerns with the modeling in our proposed notice.² The commenter did not present any new technical information that has changed our mind regarding the adequacy of the state's modeling to demonstrate that the CAA requirements are met during periods of excess emissions.

Comment C. Regarding whether or not appropriate modeling techniques were used, the commenter indicated, "EPA has applied the modeling guidance for permit demonstrations to review the analysis conducted for this rule adoption. The guidance, as quoted in this instance, is not appropriate for use in this very special case. The Department used professional judgment and local knowledge to determine the analytical procedures and approval criteria for this rule analysis. The analytical method used was within the discretion allowed to the State as a 'SIP Approved' state and EPA does not have the authority to require any other, or additional, demonstrations. EPA has not provided any additional comments on the modeling and the Department had already addressed the previous comments through the notice of adoption of this rule (MAR 17-160 pg. 2189-2194)."

Response C. The modeling guidance we referenced in our proposal is contained in the Code of Federal Regulations (CFR) at 40 CFR part 51, Appendix W and is titled "Guideline on Air Quality Models" (hereinafter called "Guideline"). In our proposal we were pointing out that the state had incorporated by reference our modeling guidance in its permitting rules. However, just because the state has only incorporated our modeling guidance in its permitting rules does not mean the

modeling guidance should not be used for other purposes. Section 1(a) of Appendix W indicates "[t]he Guideline recommends air quality modeling techniques that should be applied to State Implementation Plan (SIP) revisions for existing sources and to new source reviews (NSR), including prevention of significant deterioration (PSD). * * * Applicable only to criteria air pollutants, it is intended for use by EPA Regional Offices in judging the adequacy of modeling analyses performed by EPA, State and local agencies and by industry. The guidance is appropriate for use by other Federal agencies and by State agencies with air quality and land management responsibilities. The Guideline serves to identify, for all interested parties, those techniques and data bases EPA considers acceptable. The Guideline is not intended to be a compendium of modeling techniques. Rather, it should serve as a common measure of acceptable technical analysis when supported by sound scientific judgment."

The commenter indicated that the modeling guidance quoted in our proposal is not appropriate for use in this very special case. We do not agree. Since ARM 17.8.335 is allowing an increase in PM-10 emissions, and since there is a PM-10 NAAQS and a PM-10 nonattainment area near the source, we think the modeling used to show that the NAAQS will be protected should be the same level of modeling used to support an attainment demonstration.

The commenter indicated that the Department used its professional judgment and local knowledge to determine the analytical procedures and approval criteria for this rule analysis and that the analytical method used was within the discretion allowed to the state as a "SIP Approved" state and EPA does not have the authority to require any other, or additional, demonstration. We do not agree with this comment. We do not know what the commenter is referring to when it indicates that they have discretion because they are a "SIP Approved" state. While we have approved various portions of the SIP for Montana, such approval does not give Montana the discretion to ignore the Guidelines in 40 CFR part 51, Appendix W in determining the type of modeling that would support approval of SIP revisions. The CFR at 40 CFR 51.112(a) indicates:

(a) Each plan must demonstrate that the measures, rules, and regulations contained in it are adequate to provide for the timely attainment and maintenance of the national standard that it implements.

(1) The adequacy of a control strategy shall be demonstrated by means of applicable air quality models, data bases, and other requirements specified in appendix W of this part (Guideline on Air Quality Models).

(2) Where an air quality model specified in appendix W of this part (Guideline on Air Quality Models) is inappropriate, the model may be modified or another model substituted. Such a modification or substitution of a model may be made on a case-by-case basis or, where appropriate, on a generic basis for a specific State program. Written approval of the Administrator must be obtained for any modification or substitution. In addition, use of a modified or substituted model must be subject to notice and opportunity for public comment under procedures set forth in § 51.102.

Further, EPA has the authority to require other, or additional, demonstrations. Section 110(a)(2)(K) of the Act indicates that:

[e]ach implementation plan submitted by a State under this Act shall be adopted by the State after reasonable notice and public hearing. Each such plan shall. * * * (K) provide for—(i) the performance of such air quality modeling as the Administrator may prescribe for the purpose of predicting the effect on ambient air quality of any emissions of any air pollutant for which the Administrator has established a national ambient air quality standard * * *

Finally, the commenter indicated that EPA had not provided any additional comments that the Department has not already responded to in its rulemaking. On May 16, 2002 we submitted comments to the Board of Environmental Review during the state's rulemaking process to adopt ARM 17.8.335. In our May 16, 2002 letter we expressed our concerns with the modeling and the May 16, 2002 comments are similar to the concerns expressed in our proposed rulemaking. The state responded to our comments in its notice of adoption. We reviewed the notice of adoption before we proposed our action on ARM 17.8.335. We do not believe the state's response, in its notice of adoption, adequately addressed our concerns and that is why the same concerns with the modeling were detailed in the proposal notice. We continue to believe our concerns with the modeling are valid.

Because of our concerns with the modeling and the potential impact in the Columbia Falls nonattainment area, we believe the state has not demonstrated that ARM 17.8.335, Maintenance of Air Pollution Control Equipment for Existing Aluminum Plants will not interfere with any applicable requirement concerning attainment and reasonable progress or any other applicable requirement of the Act (sections 110(a)(1) and 110(l) of the Act).

² We indicated the state's modeling approach was inconsistent with EPA's Guideline on Air Quality Models, 40 CFR part 51, Appendix W for several reasons. As discussed in greater detail in the proposed notice, allowable emissions, rather than normal operating emissions, should be used in the modeling; nearby point sources that cause a significant concentration gradient should also be included in the modeling; and five years of National Weather Service meteorology data is generally recommended to ensure that worst case meteorological conditions are considered. Finally we were not convinced that the 17 µg/m³ value is an appropriate value to be used for background concentrations.

5. *Comment:* The commenter indicated that "EPA also states they do not find the aluminum smelting process sufficiently unique to warrant unique maintenance procedures. Montana's SIP submittal contained testimony that aluminum smelters do not undergo regular plant-wide maintenance shutdowns like other industries and that the emissions from startup and shutdown would be significantly greater than that emitted under the maintenance procedure allowed in ARM 17.8.335."

Response: We agree that the SIP submittal did contain such statements. The point in our proposal was that we spoke to the EPA Region 10 office and found that the emission control system for most primary aluminum plants in that Region have been designed in a modular manner so that one or more components can be taken off-line for maintenance without shutting down the whole system. Two vertical Soderberg plants (similar in design to CFAC) in Region 10 have not requested the type of exemption for maintenance provided for CFAC in the SIP submission. Thus we are not convinced that the CFAC aluminum process is so unique, or that control technology could not be modified or added, to address scheduled maintenance.

6. *Comment:* Another commenter indicated that "the rule was developed to allow maintenance activities on the facility's air pollution control system to occur in a manner that is most protective of the environment * * * This rule is necessary and needed by CFAC in order to perform maintenance activities that minimize malfunctions and the resulting uncontrolled release of pollutants into the atmosphere. This rule allows CFAC to reduce emissions through the performance of maintenance activities that prevent unplanned air pollution control system downtime that result in excess emissions."

Response: Although EPA supports pollution control maintenance, for the reasons discussed earlier, we cannot approve a rule that allows increased emissions during maintenance activities unless it can be adequately demonstrated that the rule will not interfere with the state's ability to attain and maintain the NAAQS (section 110(a)(1) of the Act) or any applicable requirement concerning attainment and reasonable progress or any other applicable requirement of the Act (section 110(l) of the Act). Rather than trying to balance which excess emissions would be worse, malfunction or maintenance, perhaps the facility could be redesigned so that

maintenance could be completed on portions of the control equipment without having to shut down the control equipment. As we indicate in our response to comment (5) above, we spoke to another EPA Regional office and found that the emission control system for most primary aluminum plants in that Region have been designed in a modular manner so that one or more components can be taken off-line for maintenance without shutting down the whole system.

III. Final Action

We have carefully considered the comments received and still believe we should disapprove the SIP revision. EPA is disapproving the SIP revision submitted by the State of Montana on January 16, 2003, which requested that ARM 17.8.335, Maintenance of Air Pollution Control Equipment For Existing Aluminum Plants, be added to the SIP.

IV. Statutory and Executive Order Reviews

A. Executive Order 12866, Regulatory Planning and Review

The Office of Management and Budget (OMB) has exempted this regulatory action from Executive Order 12866, entitled "Regulatory Planning and Review."

B. Paperwork Reduction Act

Under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, OMB must approve all "collections of information" by EPA. The Act defines "collection of information" as a requirement for "answers to * * * identical reporting or recordkeeping requirements imposed on ten or more persons * * *" 44 U.S.C. 3502(3)(A). Because this final rule does not impose an information collection burden, the Paperwork Reduction Act does not apply.

C. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) 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.

This rule will not have a significant impact on a substantial number of small entities because EPA's final disapproval action only affects one industrial source of air pollution; Columbia Falls Aluminum Company. Only one source is impacted by this action. Furthermore,

as explained in this action, the submission does not meet the requirements of the Clean Air Act and EPA cannot approve the submission. The final disapproval will not affect any existing State requirements applicable to the entity. Federal disapproval of a State submittal does not affect its State enforceability. Therefore, because the Federal SIP disapproval does not create any new requirements nor impact a substantial number of small entities, I certify that this action will not have a significant economic impact on a substantial number of small entities.

Moreover, due to the nature of the Federal-State relationship under the Clean Air Act, preparation of flexibility analysis would constitute Federal inquiry into the economic reasonableness of state action. The Clean Air Act forbids EPA to base its actions concerning SIPs on such grounds. *Union Electric Co., v. U.S. EPA*, 427 U.S. 246, 255–66 (1976); 42 U.S.C. 7410(a)(2).

D. Unfunded Mandates Reform Act

Under sections 202 of the Unfunded Mandates Reform Act of 1995 ("Unfunded Mandates Act"), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of \$100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

EPA has determined that the disapproval action does not include a Federal mandate that may result in estimated costs of \$100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action determines that pre-existing requirements under State or local law should not be approved as part of the federally-approved SIP. It imposes no new requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

E. Executive Order 13132, Federalism

Federalism (64 FR 43255, August 10, 1999) revokes and replaces Executive Orders 12612 (*Federalism*) and 12875 (*Enhancing the Intergovernmental*

Partnership). Executive Order 13132 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. 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.

This rule 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, because it merely disapproves a state rule implementing a federal standard, and does not alter the relationship or the distribution of power and responsibilities established in the Clean Air Act. Thus, the requirements of section 6 of the Executive Order do not apply to this rule.

F. Executive Order 13175, Coordination With Indian Tribal Governments

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 9, 2000), requires EPA to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” This final rule does not have tribal implications, as specified in Executive Order 13175. It will not have substantial direct effects on tribal governments, 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.

This action does not involve or impose any requirements that affect Indian Tribes. Thus, Executive Order 13175 does not apply to this rule.

G. Executive Order 13045, Protection of Children From Environmental Health Risks and Safety Risks

Protection of Children from Environmental Health Risks and Safety Risks (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that EPA has reason to believe may have 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 rule is not subject to Executive Order 13045 because it is not economically significant as defined in Executive Order 12866.

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

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.

I. National Technology Transfer and Advancement Act

Section 12 of the National Technology Transfer and Advancement Act (NTTAA) of 1995 requires Federal agencies to evaluate existing technical standards when developing a new regulation. To comply with NTTAA, EPA must consider and use “voluntary consensus standards” (VCS) if available and applicable when developing programs and policies unless doing so would be inconsistent with applicable law or otherwise impractical.

The EPA believes that VCS are inapplicable to this action. Today’s action does not require the public to perform activities conducive to the use of VCS.

J. Congressional Review Act

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. Section 804, however, exempts from section 801 the following types of rules: rules of particular applicability; rules relating to agency management or personnel; and rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties. 5 U.S.C. 804(3). EPA is not required to submit a rule report regarding this action under section 801 because this is a rule of particular applicability.

K. Petitions for Judicial Review

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by March 31, 2006. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this rule for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2).)

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Dated: January 19, 2006.

Robert E. Roberts,

Regional Administrator, Region 8.

■ 40 CFR part 52 is amended to read as follows:

PART 52—[AMENDED]

■ 1. The authority citation for part 52 continues to read as follows:

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

Subpart BB—Montana

■ 2. In Section 52.1384, add paragraph (f) to read as follows:

§ 52.1384 Emission control regulations.

* * * * *

(f) Administrative Rules of Montana 17.8.335 of the State’s rule entitled “Maintenance of Air Pollution Control Equipment for Existing Aluminum Plants,” submitted by the Governor on January 16, 2003, is disapproved. We cannot approve this rule into the SIP

because it is inconsistent with the Act (e.g., sections 110(a) and 110(l)), prior rulemakings and our guidance.

[FR Doc. 06-789 Filed 1-27-06; 8:45 am]

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DEPARTMENT OF HOMELAND SECURITY

Federal Emergency Management Agency

44 CFR Part 64

[Docket No. FEMA-7909]

Suspension of Community Eligibility

AGENCY: Mitigation Division, Federal Emergency Management Agency (FEMA), Department of Homeland Security.

ACTION: Final rule.

SUMMARY: This rule identifies communities, where the sale of flood insurance has been authorized under the National Flood Insurance Program (NFIP), that are scheduled for suspension on the effective dates listed within this rule because of noncompliance with the floodplain management requirements of the program. If FEMA receives documentation that the community has adopted the required floodplain management measures prior to the effective suspension date given in this rule, the suspension will not occur and a notice of this will be provided by publication in the **Federal Register** on a subsequent date.

DATES: *Effective Dates:* The effective date of each community's scheduled suspension is the third date ("Susp.") listed in the third column of the following tables.

ADDRESSES: If you want to determine whether a particular community was suspended on the suspension date, contact the appropriate FEMA Regional Office or the NFIP servicing contractor.

FOR FURTHER INFORMATION CONTACT: Michael M. Grimm, Mitigation Division, 500 C Street, SW., Room 412, Washington, DC 20472, (202) 646-2878.

SUPPLEMENTARY INFORMATION: The NFIP enables property owners to purchase flood insurance which is generally not otherwise available. In return, communities agree to adopt and

administer local floodplain management aimed at protecting lives and new construction from future flooding. Section 1315 of the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage as authorized under the NFIP, 42 U.S.C. 4001 *et seq.*; unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed in this document no longer meet that statutory requirement for compliance with program regulations, 44 CFR part 59 *et seq.* Accordingly, the communities will be suspended on the effective date in the third column. As of that date, flood insurance will no longer be available in the community. However, some of these communities may adopt and submit the required documentation of legally enforceable floodplain management measures after this rule is published but prior to the actual suspension date. These communities will not be suspended and will continue their eligibility for the sale of insurance. A notice withdrawing the suspension of the communities will be published in the **Federal Register**.

In addition, FEMA has identified the Special Flood Hazard Areas (SFHAs) in these communities by publishing a Flood Insurance Rate Map (FIRM). The date of the FIRM, if one has been published, is indicated in the fourth column of the table. No direct Federal financial assistance (except assistance pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act not in connection with a flood) may legally be provided for construction or acquisition of buildings in identified SFHAs for communities not participating in the NFIP and identified for more than a year, on FEMA's initial flood insurance map of the community as having flood-prone areas (section 202(a) of the Flood Disaster Protection Act of 1973, 42 U.S.C. 4106(a), as amended). This prohibition against certain types of Federal assistance becomes effective for the communities listed on the date shown in the last column. The Administrator finds that notice and public comment under 5 U.S.C. 553(b) are impracticable and unnecessary because communities listed in this final rule have been adequately notified.

Each community receives 6-month, 90-day, and 30-day notification letters addressed to the Chief Executive Officer stating that the community will be suspended unless the required floodplain management measures are met prior to the effective suspension date. Since these notifications were made, this final rule may take effect within less than 30 days.

National Environmental Policy Act. This rule is categorically excluded from the requirements of 44 CFR Part 10, Environmental Considerations. No environmental impact assessment has been prepared.

Regulatory Flexibility Act. The Administrator has determined that this rule is exempt from the requirements of the Regulatory Flexibility Act because the National Flood Insurance Act of 1968, as amended, 42 U.S.C. 4022, prohibits flood insurance coverage unless an appropriate public body adopts adequate floodplain management measures with effective enforcement measures. The communities listed no longer comply with the statutory requirements, and after the effective date, flood insurance will no longer be available in the communities unless remedial action takes place.

Regulatory Classification. This final rule is not a significant regulatory action under the criteria of section 3(f) of Executive Order 12866 of September 30, 1993, Regulatory Planning and Review, 58 FR 51735.

Paperwork Reduction Act. This rule does not involve any collection of information for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*

List of Subjects in 44 CFR Part 64

Flood insurance, Floodplains.

■ Accordingly, 44 CFR part 64 is amended as follows:

PART 64—[AMENDED]

■ 1. The authority citation for part 64 is revised to read as follows:

Authority: 42 U.S.C. 4001 *et seq.*; Reorganization Plan No. 3 of 1978, 3 CFR, 1978 Comp.; p. 329; E.O. 12127, 44 FR 19367, 3 CFR, 1979 Comp.; p. 376.

§ 64.6 [Amended]

The tables published under the authority of § 64.6 are amended as follows: