

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

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

C. Analysis of Statutory Requirements for Modifications

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

Section 112(g) is analogous in certain important respects to statutory provisions at issue in the recent D.C. Circuit decision concerning inspection and maintenance (I/M) programs under

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

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

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

The concept of *de minimis* values is likewise integral to the definition of "modification" in section 112(a)(5). This is because a "modification" is defined in section 112(a)(5) as a "physical change in, or change in the method of operation of, a major source which increases the actual emissions of any hazardous air pollutant * * * by more than a *de minimis* amount * * *." Until *de minimis* values are established in the section 112(g) rule, the definition of "modification" remains incomplete,

lacking the lower boundary that the statute contemplates will be established through a notice and comment process. The statute, recognizing that establishment of *de minimis* values would require the application of scientific expertise and judgment, called for the EPA to set these values based on a notice and comment process. It would be contrary to the intent of the Act to require the section 112(g) program for review of modifications to go forward when the issue of what constitutes a "modification" cannot be resolved with the degree of certainty envisioned by the statute.

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

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

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

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