

applicable to a CAA section 112(d) source category rule when the source category rule is promulgated and becomes effective.

The NESHAP General Provisions were first promulgated on March 16, 1994 (59 FR 12408). We subsequently proposed a variety of amendments to that initial rule, based in part on settlement negotiations with industrial trade organizations which had sought judicial review of the rule and in part on our practical experience in developing and implementing NESHAP, also known as maximum achievable control technology (MACT) standards, under the General Provisions (66 FR 16318, March 23, 2001). We then promulgated final amendments to the General Provisions pursuant to that proposal (67 FR 16582, April 5, 2002).

#### B. CAA Section 112(j) Provisions

The 1990 Amendments to section 112 of the CAA included a new section 112(j), which is entitled "Equivalent Emission Limitation by Permit." Section 112(j)(2) provides that the provisions of section 112(j) apply if EPA misses a deadline for promulgation of a standard under section 112(d) established in the source category schedule for standards. After the effective date of a title V permit program in a State, section 112(j)(3) requires the owner or operator of a major source in a source category, for which the EPA failed to promulgate a section 112(d) standard, to submit a permit application 18 months after the missed promulgation deadline.

We first promulgated a rule to implement section 112(j) on May 20, 1994 (59 FR 26429). We subsequently proposed a variety of amendments to that initial rule, based in part on settlement negotiations with industrial trade organizations which had sought judicial review of the rule and in part on our own further evaluation of the existing procedures (66 FR 16318, March 23, 2001). We then promulgated final amendments to the section 112(j) rule, along with our final amendments to the General Provisions (67 FR 16582, April 5, 2002).

#### C. The Sierra Club Litigation

We promulgated the final rule amending the NESHAP General Provisions and the requirements for case-by-case determinations under CAA section 112(j) on April 5, 2002 (67 FR 16582). The Sierra Club filed a petition seeking judicial review of that final rule on April 25, 2002, *Sierra Club v. U.S. Environmental Protection Agency*, No. 02-1135 (DC Circuit). The Sierra Club also filed a petition seeking administrative reconsideration of

certain provisions in the final rule, pursuant to CAA section 307(d)(7)(B).

Shortly after the filing of the petition, EPA commenced discussions with the Sierra Club concerning a settlement agreement. We reached initial agreement with the Sierra Club on the terms of a settlement and lodged the tentative agreement with the court on August 15, 2002. Under the proposed settlement, we agreed to propose a rule to make specified amendments to the General Provisions and section 112(j) rules no later than 2 months after signature and to take final action on the proposed amendments within 7 months after signature.

#### D. Review of Proposed Settlement Under CAA Section 113(g)

As required by section 113(g) of the CAA, EPA published a notice in the **Federal Register** affording interested persons an opportunity to comment on the terms of the proposed settlement in *Sierra Club v. U.S. Environmental Protection Agency*, No. 02-1135 (DC Circuit) (67 FR 54804, August 26, 2002). In response to that notice, we received 110 timely comments, the vast majority of which opposed one or more provisions of the proposed settlement.

Virtually all of the commenters expressed concern about the practical consequences of a provision in the proposed settlement which required us to propose reducing the time between section 112(j) Part 1 and Part 2 applications from 24 months to 12 months. We agreed with the commenters that this approach would have resulted in wasteful expenditures by the applicants and the permitting agencies to prepare and to process applications which in all likelihood would never have been acted upon. Given the strong opposition to this approach reflected in the comments both by industry sources and organizations and by State and local permitting authorities, we were pleased when the Sierra Club agreed to discuss modifying the proposed settlement to establish an alternative timetable for submission of section 112(j) Part 2 applications.

The EPA and the Sierra Club then negotiated a revised settlement based on a new approach suggested by organizations representing State and local governments. In the revised settlement, we agreed to propose a schedule requiring that section 112(j) Part 2 applications for affected sources in those categories for which MACT standards were scheduled to be promulgated prior to May 15, 2002, be submitted by May 15, 2003, and section 112(j) Part 2 applications for all

remaining source categories be submitted by 60 days after the scheduled promulgation date for the source category in question. We also agreed to propose the same amendments to the General Provisions concerning SSM plans which were set forth in the original settlement. The EPA and the Sierra Club executed a final settlement agreement in *Sierra Club v. U.S. Environmental Protection Agency*, No. 02-1135 (DC Circuit), and filed it with the court on November 26, 2002.

#### E. Proposed Rule

Following execution of the final settlement agreement, we published a proposed rule effectuating its terms (67 FR 72875, December 9, 2002). In addition to the proposed amendments required by the settlement, we also proposed to revise a new recordkeeping provision concerning SSM plans we adopted in the April 5, 2002 final rule, and we requested comment on issues presented by the section governing the content of section 112(j) Part 2 applications and on certain other sections in the NESHAP General Provisions we amended in the April 5, 2002 final rule.

We received 73 public comment letters in response to our proposal. We have carefully evaluated all of these comments and have modified the amendments we proposed in certain respects. Our responses to some of the major comments we received, and the decisions we have made concerning appropriate final amendments to the NESHAP General Provisions and the section 112(j) rule, are discussed in the sections which follow.

## II. Final Amendments to the General Provisions

### A. Startup, Shutdown, and Malfunction Plans

#### 1. The General Duty To Minimize Emissions

We proposed revisions in the language in 40 CFR 63.6(e)(1)(i) to correct a potential problem in interpreting the relationship between the general duty to minimize emissions established by that section and the compliance of a source with its SSM plan. The section in question was modified in the April 5, 2002 final rule because the prior language appeared to impose on a source a general duty to further reduce emissions even when the source is already in full compliance with the applicable MACT standard. We deemed this result to be unreasonable and made corresponding changes in the language of the rule.