Leonard Verrelli
Acting Commissioner
Alaska Department of
Environmental Conservation

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Vapor Controls at Alyeska Terminal Require New Source Review under Clean Air Act

Robert K. Reges
Assistant Attorney General
Natural Resources Section - Juneau

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STATEMENT OF ISSUE: May the Alyeska Pipeline Service Company (APSC) avoid New Source Review (NSR) under the Prevention of Significant Deterioration (PSD) program for a pollution control project at the Alyeska Valdez Marine Terminal (AVMT) because a United States Environmental Protection Agency (EPA) memorandum holds that pollution control projects are not "modifications" to a facility and, therefore, do not trigger such review?

ANSWER: No, it may not. The modification must go through new source review.

I. BACKGROUND INFORMATION:

A. Statutory and Regulatory Underpinnings.

Title I of the Federal Clean Air Act (CAA), P.L. 91-604, 84 Stat. 1676 (1970), as amended, has three programs designed to ensure that no new air pollution--whether from new sources or from modifications to existing sources--can be emitted unless the source complies with new source requirements. Of those three programs, the one at issue here is the New Source Review (NSR) portion of the Prevention of Significant Deterioration (PSD) program.

The new source requirements, known as New Source Performance Standards (NSPS), are technology-based standards. They were created in response to a mandate of the 1970 CAA, which required EPA to promulgate standards governing the construction or modification of stationary sources that cause or contribute significantly to air pollution if that pollution may reasonably be anticipated to endanger public health or welfare.

CAA § 111(b)(1)(A). The NSPS prevent these new air pollution problems by regulating newly constructed sources and certain existing sources. *National Asphalt Pavement Assoc. v. Train*, 539 F.2d 775, 783 (D.C. Cir. 1976). Because the AVMT is an existing facility, this memorandum will focus upon the application of new source requirements to existing sources.

With respect to existing sources, the "new source" performance standards become applicable if the existing source is modified. *See generally* CAA § 111; 40 C.F.R. Part 60. Congress defined the term "modification" as "any physical change in, or change in the method of operation, of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted." CAA § 111(a)(4). Two key concepts are the idea of a physical change and the idea of an increase in emissions.

In 1977, Congress adopted additional amendments to the CAA. These amendments expanded the scope of application of the new source requirements. The amendments created the Prevention of Significant Deterioration (PSD) program and called for preconstruction permitting of "major" new or modified sources. CAA § 165(a); CAA § 169(C). Congress intended to expand the scope of "new source" requirements to the point where they applied generally to industrial changes likely to increase pollution in an area. *Alabama Power Co. v. Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979). Congress incorporated in the PSD the same definition of "modification" as set forth in the NSPS. CAA § 169(2)(C).

In the PSD context, new source requirements are imposed through a "new source review" (NSR) which leads to the PSD permit.[1] In the case where a person is operating an existing facility, the requirement to undergo NSR--and, ultimately, to secure a PSD permit implementing NSPS--turns on the question of whether the person's facility will be undergoing a "major modification." To answer that question, a regulatory definition

[1] There are myriad limitations and boundaries to this program. For instance, the NSR program for PSD (section 160--169 of the Act) is limited to "attainment areas"; those areas which have attained the national ambient air quality standards (NAAQS). These factors are not discussed in this memorandum because they play no role in the current analysis.

of "major modification" is used. That definition is not identical to the statutory definition of "modification." While both the federal rule and statute focus upon physical and operational changes, the federal rule excludes certain activities which would otherwise fall within a common-sense view of "physical or operational change." *Cf*. CAA § 111(a)(4) with 40 C.F.R. § 51.166(b)(2)(i). The regulatory definition is also somewhat different than the statute with respect to the concept of increased emissions. While the statute looks to any increase or any emission of a new pollutant, the federal rule calls for NSR only if the physical or operational change will result in a **significant net** increase of emissions. *Id.*[2]

The State of Alaska has an approved PSD program, which means that it is the primary permitting authority in this situation. While the state's program is explored in more detail below, we note that the state's definitions are more akin to the federal statute than they are to the federal rule. The state's definitions include all changes and all increases. 18 AAC 50.900(28)"modify" (1980); 18 AAC 50.990(55)"modify" (December 5, 1994 [adopted but not yet filed]); AS 46.14.990(14) (1993).

Given the two definitional concepts of "change" and "increase", a two-step analysis must be employed when determining whether an existing facility need undergo NSR. In the first step, the Alaska Department of Environmental Conservation (ADEC) determines whether a physical or operational change will occur. If so, ADEC proceeds to the second step to determine whether the physical or operational change will result in an increase of emissions over baseline levels. If the expected emissions include new pollutants or increased amounts of any pollutant, NSR is mandated.[3]

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[2] There are regulatory definitions of "modification" and "major modification" in the other two programs designed to apply new source requirements (which are the original NSPS program and the "nonattainment" program). Those definitions are very similar to the regulatory definition used in the PSD program. For a cross reference to those definitions, *see* 57 Fed. Reg. 32,316, n.7 (1992).

[3] Under the federal regulatory regime, NSR would be mandated only if the expected increases were "significant." An increase is "significant" if it exceeds national ambient air quality standards (NAAQS) or certain regulatorily specified "increments." 40 C.F.R

The issue raised by Alyeska involves the first step. Alyeska posits that the undertakings it proposes will not constitute physical or operational changes within the meaning of "major modification." To determine whether that is correct, we focused upon those portions of the federal regulatory definition in which EPA excludes certain activities that, under a common-sense view, are clearly "changes." The definition states, in pertinent part:

> § 51.166(b)(2)(i): *Major modification* means any physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase[4] of any pollutant subject to regulation under the Act.
>
> [but]
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> (iii) A physical change or change in the method of operation shall not include:
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> (*h*) The addition, replacement or use of a pollution control project at an existing electric utility steam generating unit, unless the Administrator determines that such addition, replacement, or use renders the unit less environmentally beneficial, or except:

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§ 51.166(b)(3)(i) and (b)(23).

[4] "Net emissions increase" and "significant" are defined elsewhere in the federal rule. *See* 40 C.F.R. § 51.166(b)(3)(i) and § 51.166(b)(23)(1993). Because those concepts are not adopted in the state rule, those definitions are irrelevant to this analysis.

> (1) When the reviewing authority has reason to believe that the pollution control project would result in a significant net increase in . . . actual annual emissions of any criteria pollutant . . ., and
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> (2) The reviewing authority determines that the increase will cause or contribute to a violation of any national ambient air quality standard or PSD increment, or visibility limitation.

Subsection (iii)(*h*)--known as the WEPCO rule because promulgated in response to the judicial opinion of *Wisconsin Electric Power Co. v. Reilly, (WEPCO)*, 893 F.2d 901 (7th Cir. 1990)--eliminates NSR for utility companies when the change in the facility involves air pollution control equipment. It does this by addressing the first step of the two-step process. Changes involving pollution control equipment at utilities do not constitute "a physical or operational change" for purposes of the definition of "major modification." Absent a "major modification," there is no basis for requiring NSR.

Alyeska claims that it can benefit from the same exemption because EPA has broadened the scope of the WEPCO rule to include pollution control activities at all facilities, not just utility companies. The basis for that claim is explored in the next section of this memorandum.

B. An EPA Guidance Document Supplements the WEPCO Rule.

At the time EPA crafted the WEPCO rule, it addressed the rationale for the rule:

> The EPA has always recognized that the definition of physical or operational change in section 111(a)(4) could, standing alone, encompass the most mundane activities at an industrial facility (even the repair or replacement of a single leaky pipe, or a change in the way that pipe is utilized). However, EPA has always recognized that Congress obviously did not intend to make every activity at a source subject to new source requirements.
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> As a result, EPA has defined "modification" in the

> NSPS and NSR regulations to include common-sense exclusions from the "physical or operational change" component of the definition. . . .

57 Fed. Reg. 32,316 (1992). Obviously, this rationale is not limited to electric utilities. In fact, EPA had relied upon this rationale to support a longstanding practice of giving case-by-case exemptions from NSR to facilities of all sorts. *Id.* at 32,314.[5] Nonetheless, the WEPCO rule is limited to utilities.

EPA explained that the WEPCO rulemaking was so limited for several reasons. *Id.* Most important to Alyeska was EPA's statement that utilities needed immediate relief because impending acid rain requirements imposed by Title IV of the CAA only applied to utilities. Compliance with these requirements could be accomplished only by placing long lead orders for major equipment and materials. EPA felt that compliance with the acid rain program would be jeopardized if the effected utilities were not informed of their status vis-a-vis NSR at a time early enough to place these orders. 57 Fed. Reg. 32,332-33 (1992). Exempting utilities from the NSR would allow them to undertake the acid rain control projects under existing permit provisions. Putting the utilities through NSR would be costly and time consuming, siphoning funds and opportunities from the acid rain program.

So, EPA hurried through a rule that only exempted utilities. EPA proposed, however, to quickly develop a collateral rule for other industries. In the 1992 preamble to the WEPCO rule, EPA stated:

> The EPA does not believe that this rule should be expanded at this time but will address this issue in a separate rulemaking. Specifically, EPA currently has underway a separate rulemaking which will consider the desirability of adopting for other source categories the NSR pollution control

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[5] In the preamble to the WEPCO rule, EPA stated that "in recent individual applicability determinations EPA has excluded pollution control projects from NSR . . ." EPA's case-specific exclusions had taken the form of "no action assurances," which is similar to a covenant not to sue, and "nonapplicability determinations," which is a determination that certain rules do not apply to a specific undertaking. NSR Guidance at 2 (*see infra* for the complete citation to this Guidance).

> project exclusion . . . that [has] been adopted today for utilities.
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> In the rulemaking which EPA intends to undertake by early summer [1993,] EPA will address the precise applicability of the pollution control project exclusion . . . to non-utility source categories.

57 Fed. Reg. 32,332-33 (1992).

At the time of this writing, EPA has not regulatorily expanded the WEPCO rule to other industries. Rather, the agency has prepared and issued a Guidance memorandum. *See* Guidance On Excluding Pollution Control Projects From Major New Source Review, from John S. Seitz, Director, Office of Air Quality Planning and Standards, U.S.-EPA (July 1, 1994) (NSR Guidance).[6] The NSR Guidance iterates EPA's policy that state authorities may exempt any source from NSR if the proposed activity at the source involves a "pollution control project" that meets certain safeguards.[7]

NSR Guidance at 4. The safeguards insure against overly broad exemptions from NSR.

Those safeguards established in the policy are similar

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[6] The Guidance states that EPA expects to issue its expanded rule in 1996. For purposes of this memorandum, the important point is that no such rule has yet been promulgated.

[7] The Guidance defines "pollution control project" as:

> any activity that through process changes, product reformulation or redesign, or substitution of less polluting raw materials, eliminates or reduces the release of air pollutants and other pollutants to the environment (including fugitive emissions) prior to recycling, treatment, or disposal; it does not mean recycling (other than certain `in-process recycling' practices), energy recovery, treatment, or disposal.

NSR Guidance at 6 n.4.

to the safeguards built into the WEPCO rule. *See* 40 C.F.R. § 51.166(b)(2)(iii)(*h*)(1) and (2), quoted *supra at 4*. The project must meet the definition of a pollution control project; it must be environmentally beneficial; and, any new emissions resulting from the project may not violate NAAQS, "increments," or visibility standards. In addition, a state agency that wishes to apply the Guidance can require the entity seeking exemption to perform an air quality impact assessment. NSR Guidance at 4. This would involve quantification and qualification of air quality in the vicinity of the facility both before and after installation of the pollution control project. Finally, before a state can waive NSR in reliance upon the Guidance, the state must provide EPA a written statement affirming that the state has statutory authority to impose these safeguards in lieu of NSR. NSR Guidance at 4-5.

C. Alyeska's Request.

Alyeska Pipeline Service Company (APSC) is preparing to meet new federal standards for marine tank vessel loading operations and National Emission Standards for Hazardous Air Pollutants (NESHAPS) for benzene. The company's compliance with those standards will involve some activities which might qualify as pollution control projects as that term is defined in the NSR Guidance. However, APSC's activities involve structural alterations to the AVMT and "will likely result in emission increases of NO_x and other criteria pollutants."[8] Correspondence from APSC Environmental Team Leader Randy Poteet to Leonard Verrelli, Chief, ADEC Air Quality Management Section (September 8, 1994). Consequently, the company's compliance efforts will constitute a "modification" and will be subject to NSR unless the NSR Guidance is applied and the activities are determined not to be a "change." APSC has asked ADEC to apply the Guidance to this situation.

D. ADEC'S Initial Response.

In a letter dated November 22, 1994, Mr. Verrelli responded to Mr. Poteet's request. He concluded that the

[8] It is unclear whether the increases anticipated by Alyeska would be "significant net increases" within the meaning of the federal rule. However, given the broader (more stringent) reach of the state's definitions, we deem the issue of "significance" immaterial to this inquiry.

Department could not employ the policies set forth in the NSR Guidance. Mr. Verrelli explained:

> We believe that three actions must occur before the Department could implement the policies described in the memo. First, EPA must revise 40 C.F.R. 51 to incorporate the NSR exemption policy into regulation. Second, the Department must revise its own implementation plan and state regulations to meet the new NSR regulations. Third, EPA must review and approve Alaska's plan according to the new NSR regulations.

Mr. Verrelli recommended that APSC follow Alaska's current regulations.

E. Alyeska's Reply

Alyeska Pipeline Service Company's Program Manager, Norman Ingram, replied to Mr. Verrelli that the situation faced by APSC at the AVMT was very similar to the situation formerly faced by electric utilities. APSC would soon be placing long lead orders for major equipment and materials so that it could meet newly promulgated, impending, CAA deadlines. Correspondence from Mr. Norman Ingram to Mr. Verrelli (December 14, 1994). Attached to Mr. Ingram's letter was a legal explication of APSC's position. It reasoned:

(1) EPA Region X feels that the NSR Guidance would apply to Alyeska's situation;

(2) AS 46.03.170 is proof that ADEC may provide variances from air quality regulations;

(3) Alaska statutes do not implicitly nor expressly prohibit ADEC from exempting pollution control projects from PSD permitting;

(4) Nothing in 18 AAC 50 prevents ADEC from providing the requested exemption;

(5) An exemption does not contradict ADEC's definition of "modification" because ADEC has often stated that its definition is intended to parallel the federal definition.

Mr. Ingram closed by asking ADEC for an "interpretive ruling" that the term "modification" does not include certain pollution control

projects; that the proposed tanker vapor control system is a "pollution control project" within the meaning of NSR Guidance; and, that APSC can proceed using a "minor source" permit procedure which is substantially less expensive and time-consuming than the NSR/PSD procedure.

II. ANALYSIS

A. ADEC Is Advised Not To Adopt the NSR Guidance.

Alyeska's threshold argument is that EPA would grant the requested exclusion were it in charge because the NSR Guidance provides ample basis to do so. Without wallowing in the niceties of federal administrative procedure, we doubt the legal validity of the Guidance and advise ADEC that implementation of that Guidance is not defensible.

Prior to promulgation of the WEPCO rule, EPA granted exemptions from NSR on a case-by-case basis. 57 Fed. Reg. 32,314, 32,316, 32,320 (1992). This was accomplished by giving "no action assurances" or "nonapplicability determinations." NSR Guidance at 2. We offer no opinion as to whether such federal documents had any legal value. It is clear, however, that by 1992 EPA felt the need to codify this practice as a regulation. Had EPA believed that it could grant legitimate exemptions by fiat, the agency would not have gone through the time and trouble of amending its regulations to allow such exemptions.

EPA did not believe the WEPCO Rule could be established by fiat. In the preamble to that rule, EPA said:

> [J]ust as EPA had the statutory authority to exclude pollution control projects **by regulation** from NSPS, the statutory authority exists for EPA to explicate **by regulation** an exclusion for pollution control projects from [the PSD program].

57 Fed. Reg. 32,319 (emphasis supplied). Going one step further, EPA expressly debunked the idea that administrative fiat would be sufficient:

> Several commenters [sic] challenged the need for a regulatory exclusion, noting that EPA has already excluded numerous individual pollution control projects pursuant to its existing regulatory

> authority. However, while EPA has in fact made case-by-case determinations excluding pollution control projects from NSR, it has never provided a comprehensive statement of its policy in this regard nor formally included this exclusion in its NSR regulations . . . **EPA believes that** a **formalrulemaking** spelling out the exact parameters of the exclusion **is necessary**.

57 Fed. Reg. 32,321 (emphasis supplied). The agency concluded that "the **regulatory** clarification of this exclusion is a lawful and appropriate exercise of its powers." *Id*. With this we agree.

That does not mean extra-regulatory expansions of the rule are also lawful and appropriate. At the time EPA promulgated the WEPCO rule, the agency understood that any expansions would have to be done in accordance with the Federal Administrative Procedures Act.

> The EPA does not believe that this rule should be expanded at this time but will address this issue **in a separate rulemaking.** Specifically, **EPA currently has underway a separate rulemaking which will consider the desirability of adopting for other source categories the NSR pollution control project exclusion** . . . that ha[s] been adopted today for utilities. . . .
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> * * *
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> EPA considered going forward **with a rule** that applied to all source categories . . .
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> * * *
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> In the **rulemaking** which EPA intends to undertake . . . EPA will address the precise applicability of the pollution control project exclusion . . . to non-utility source categories.

57 Fed. Reg. at 32,332-33. Despite these repeated references to future rulemaking, EPA now contends that the 1992 preamble contained a "note" in which EPA stated that the policy of granting extra-regulatory, case-by-case exclusions would continue. NSR Guidance at 4. We have studied the 1992 publication and fail to

find any such "note." We think it likely that the promised rulemaking simply took longer than expected so the agency retreated to its policy and relied upon an imaginary "note" to justify this deviation.

Note or no note, we question the legality of granting case-by-case exemptions which unequivocally contradict the plain language of duly-adopted regulations. The presently existing, federal, regulatory definition of "major modification" excludes only pollution control projects at utilities. AVMT is not a utility. AVMT's project falls squarely within the federal definition of "major modification."[9]

We fail to see how EPA can legally ignore its duly adopted regulations. *Woerner v. Small Business Administration,* 1990 WL 109018, *4 (D.D.C. 1990) (The general rule is that an agency must follow its own regulations); *see also Waste Management Inc. v. U.S.-EPA*, 669 F. Supp. 536, 539-40 (D.D.C. 1987). Those regulations define "major modification" in a way that includes Alyeska's proposed project. As a consequence, the project must go through NSR. No quantum of "Guidance" or "policy" will legally vitiate this effect of the rules. *Pacific Gas and Electric Co. v. Federal Power Comm'n,* 506 F.2d 33, 38 (D.C. Cir. 1974). Thus, we advise ADEC not to adopt or employ EPA's Guidance because we feel that application of the Guidance contravenes the law and is indefensible.

B. AS 46.03.170 Has Been Repealed and So Is Not Proof of Anything.

Alyeska's second argument is that AS 46.03.170 allows ADEC to grant variances from air quality regulations and, while Alyeska is not seeking to employ that section because variances granted under it must be limited in duration, the existence of section 170 proves that ADEC is free to grant variances, waivers, or exclusions where regulations do not otherwise prohibit such grants. To this there are three answers.

First, AS 46.03.170 has been repealed. § 27 ch 74 SLA

[9] Again, the information provided to us does not say whether the consequential emissions will be "significant." For purposes of the statement in which this note appears, we assume that they will be.

1993. As such, it has no authority for anything. Moreover, it was not replaced with any equivalent because it was deemed by ADEC to be an archaic remnant of the neonatal years of the air program which had not been used for quite some time.[10]

Second, before the agency could grant a variance under section 170, it had to follow explicit procedures which called for many of the same procedures as are required for rulemaking (i.e., public notice and hearing; consideration of public comments). In this regard, section 170 tends to support the position that variances, exclusions and exemptions cannot be given through curtailed processes based upon federal guidance. Rather, the safeguards of rulemaking--or, in the case of section 170, quasi rulemaking--are required.

Third, the existence of AS 46.03.170 does not suggest that ADEC is unrestricted whenever regulations are silent with respect to a specific activity. Section 170 was a statute. Its existence suggests that the legislators preserved to themselves the right to decide how, and in which cases, variances, grants or exclusions would be given. Its existence suggests that ADEC does not have *carte blanche* authority to formulate extra-regulatory exemptions (or even regulatory exemptions).

C. Alyeska's Reading of Existing Statutes Is Correct.

As a third point, Alyeska contends that Alaska statutes do not implicitly nor expressly prohibit ADEC from exempting pollution control projects from NSR. With this we agree. Although a person could reasonably argue that the existence of AS 46.03.170 implicitly prohibited ADEC from granting variances, exclusions or exemptions other than those contemplated by section 170, that provision is no longer in force or effect. At present, the NSR portion of the PSD program as it pertains to modifications of existing facilities is implemented under AS 46.14.120(a) and (d), AS 46.14.130(a)(5), AS 46.14.110(d) and § 30(b) ch. 74 SLA 1993 (Effective June 26, 1993); *see* § 31 ch. 74 SLA 1993. Those statutory provisions are, in turn, subject to refinement via AS 46.14.120(e), AS 46.14.140(a)(8) and the inherent authority to interpret statutes that is vested in every executive agency. *Chevron U.S.A., Inc. v. Natural Resources Defense Council,*

[10] This statement is based upon personal communications with air staff during 1992 drafting of revised air statutes.

467 U.S. 837, 843 (1984). Those authorities would permit ADEC to adopt the NSR Guidance, or an equivalent, **in regulations.** *See* the cited provisions and AS 44.62.030. However, regulations are the only avenue available. *Cf.* AS 46.09.020(b) which is the statutory language used when the legislature authorizes an executive agency to adopt "guidance" or "policy."

This limitation is most clearly evidenced by the language of AS 46.14.120(e). That provision instructs ADEC to adopt, in regulation, most exemptions from CAA § 502 that are adopted by EPA. Section 502 says that a person subject to the PSD permit program must also secure an operating permit.[11] Assume that the NSR Guidance document had the effect of totally exempting from PSD a facility that would otherwise be subject to that program. This could have the indirect effect of also exempting the facility from section 502 (assuming that the facility was not subject to that section for other reasons). Could ADEC adopt that exemption? Unequivocally, "yes," but, according to AS 46.14.120(e), only by regulation.

We see no difference here. Were ADEC desirous of adopting a pollution project exclusion, nothing in applicable statutes would prohibit them from doing so. Statutes would, however, require that the exclusion be adopted in regulation.

D. Existing Regulations Do Prevent ADEC From Providing the Requested Exemption.

Pregnant in Alyeska's second argument, and explicit in its fourth, is the idea that because 18 AAC 50 is silent on the issue of exemptions, it does not prohibit the granting of exemptions. The version of 18 AAC 50 adopted when AS 46.03.170 was in effect would have been silent on the topic of variances, exclusions, or exemptions simply because there was no need to repeat in rule that which already existed in statute. Drafting Manual for Administrative Regulations at 9 (11th Ed. 1993). The silence of those regulations neither implies a prohibition nor an authority.[12]

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[11] "[I]t shall be unlawful for any person to . . . operate . . . any . . . source required to have a permit under parts C or D of title I . . . except in compliance with a permit issued by a permitting authority under this title."

[12] However, as opined above, the existence of section 170

More importantly, it is erroneous to contend that the rules are truly silent. Both the "old" rules (adopted in 1980, as amended) and the "new" rules (adopted on December 5, 1994, but not yet filed with the Lt. Governor) include definitions of "modification." With minor editorial variations, the definitions are identical to one another and the existing statutory definition of the term:

> "modification" or "modify" means to make a change or a series of changes in operation, or any physical change or addition to a facility or source, that increases the actual emissions of an air contaminant.

AS 46.14.990(14). *See also* 18 AAC 50.900(28)(1980, as amended) and 18 AAC 50.990(55) (Dec. 5, 1994). Neither of these is "silent" in the sense of implicitly excluding some physical changes. They unequivocally include all changes.[13] ADEC is not free to ignore the plain language of these rules on the theory that their general terms somehow exclude specific situations. Neither the WEPCO rule nor the NSR Guidance are part of Alaska's rules.

Additionally, air permits are regulated by 18 AAC 15 as well as chapter 50. 18 AAC 15.010(a)(6). Subsection 15.100(c), entitled "Permit Limitations" expressly addresses the matter here at issue:

> A permit . . . authorizes only that operation specified in the permit. . . . Any expansion, modification, or other change in a facility process or operation which might result in an increase in emissions . . . requires a new permit. . . . Any other change in the operation requires an amendment to the permit. . . .

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implied a prohibition for anything other than the variances prescribed by it.

[13] The "new" regulations appear to adopt some portions of the WEPCO rule albeit in a cryptic manner. *See* 18 AAC 50.990(1)(B) "actual emissions" (1994). They do not adopt the broad-sweeping exclusion proposed by the NSR Guidance.

The regulations are not silent. They do not allow ADEC to implement federal policies which contradict state regulations.

E. An Exclusion Does Contradict ADEC's Regulatory Definition of "Modification" Despite ADEC's Statement that Its Definition is Intended to Parallel the Federal Definition.

We do not doubt that Alaska's Department of Environmental Conservation tailors its regulations to fit the federal Clean Air program. Indeed, the concept of addressing only "significant" increases in emissions is a concept adopted into permit application review (as opposed to NSR review) for Alaska's PSD program. *See* 18 AAC 50.300(a)(6)(C). Because EPA approval is required before the state may take over the PSD program, it is logical to assume that EPA will approve only those state regulations which are substantially similar to their own. *See* CAA § 161 (states required to develop PSD program); 168(a) (federal rules control until state has approved program); 40 C.F.R. § 52.02 (necessity of state program to mimic federal program). Nonetheless, there is invariably a lag between the time a federal rule is adopted and the time of adoption of a state equivalent. This is the problem with the WEPCO rule. While the federal EPA adopted it in 1992, ADEC's rules are only now being conformed.

Nor have the federal rules caught up with EPA's desire to exclude from NSR all pollution control projects. Thus, whatever the "intent" of drafters, the regulatory language is clear. In Alaska, a "modification" includes all physical changes to a facility or source which actually increase emissions. Alyeska's proposed vapor control system is a "modification" and NSR is required.

III. CONCLUSION

Although an EPA Guidance document purports to relieve owners and operators of the effects of federal regulations, it could not, and does not, relieve owners and operators of the effects of state regulations. Presently existing state regulations require "new source review" when an owner of a facility that emits air pollutants undertakes a "modification" of that facility. The AVMT is a facility that emits air pollutants and the proposed vapor control system is a "modification."

Consequently, APSC must submit its plans for new source review.

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