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WHITE HOUSE
CORRESPONDENCE TRACKING WORKSHEET

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Name of Correspondent: Bill Rosenberg

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Subject: Amendments to Permitting and Enforcement Titles of the Administration Clean Air Bill

ROUTE TO:		ACTION		DISPOSITION		
Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
CMAQC		ORIGINATOR	90/02/07			/ /
Cmte 18		Referral Note: H	90/02/07		S	90/02/17
Cmte 17		Referral Note: I	/ /			/ /
Cmte 02		Referral Note: I	/ /			/ /
Cmte 09		Referral Note: I	/ /			/ /
		Referral Note:				

ACTION CODES:
- A - Appropriate Action
- C - Comment/Recommendation
- D - Draft Response
- F - Furnish Fact Sheet to be used as Enclosure
- I - Info Copy Only/No Action Necessary
- R - Direct Reply w/Copy
- S - For Signature
- X - Interim Reply

DISPOSITION CODES:
- A - Answered
- B - Non-Special Referral
- C - Completed
- S - Suspended

FOR OUTGOING CORRESPONDENCE:
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5/81

FEB 5 1990

To: Roger Porter
Boyden Gray
Nancy Maloley
Bob Grady
Rob Fairweather
Linda Stuntz

From: Bill Rosenberg

Re: Amendments to Permitting and Enforcement Titles of the Administration Clean Air Bill

Attached is draft language for the permitting and enforcement provisions reflecting amendments that have been agreed to within the Administration. I have also attached a final draft of the permits program concept paper. In view of the possibility that permitting and enforcement provisions will be discussed in the negotiations with the Senate as early as tomorrow, I would like to schedule a meeting as soon as possible to confirm our position on these provision.

cc: Tom Kiernan
John Beale

FEB 5 1990

TITLE V--PERMITS

SEC. 501. The Clean Air Act is amended--

(1) by inserting after the heading "TITLE III---GENERAL" the subheading "PART A--MISCELLANEOUS and

(2) by adding at the end of title III the following:

"PART B--PERMITS

"DEFINITIONS

"SEC. 350. As used in this title--

"(1) The term 'major source' means any stationary source (or any group of stationary sources located within a contiguous area and under common control) that--

"(A) is a major source as defined under section 112 or part D of this Act; or

"(B) is a major stationary source as defined in section 302(j).

"(2) For sources subject to standards issued under section 112 of this Act, the terms 'stationary source' and 'area source' shall have the meaning given in that section.

"(3) For sources subject to standards issued under section 111 of this Act, the term 'stationary source' shall have the meaning given in that section.

"(4) The term 'schedule of compliance' means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an applicable implementation plan, emission standard, emission limitation or emission prohibition.

"(5) the term 'permitting authority' means the Administrator, or the air pollution control agency authorized by the Administrator to carry out a permit program under this title.

"PERMIT PROGRAMS

"SEC. 351. (a) After the effective date of any permit program approved or promulgated under this title, it shall be unlawful for any person to violate any requirement of a permit issued under this title, or to operate any source subject to title IV, a major source, any other source (including an area source) subject to standards or regulations under sections 111 or 112, or any other stationary source designated by regulations promulgated by the Administrator, except in compliance with a permit issued by a permitting authority under this title. Nothing in this subsection shall be construed to alter the requirements of sections 165, 172, and 173 regarding the requirement that a permit be obtained prior to construction. The Administrator may, in the Administrator's discretion, promulgate regulations to exempt one or more source categories from the requirements of this subsection if the Administrator finds that the air quality benefits of subjecting the source category or categories to the requirements of this subsection would not be commensurate with the costs to EPA, permitting authorities, and sources required to do so, or that such an exemption would be consistent with the purposes of this Act.

"(b) Not later than twelve months after the date of enactment of this title, the Administrator shall promulgate

regulations establishing the minimum elements of a permit program to be administered by any air pollution control agency. These elements shall include:

"(1) Requirements for permit applications, including a standard application form and criteria for determining in a timely fashion the completeness of the applications;

"(2) Monitoring and reporting requirements.

"(3) (A) A requirement under State or local law that the owner or operator of all sources subject to the requirement to obtain a permit under this title pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable costs of developing and administering the permit program, including, but not limited to, the reasonable costs of--

"(i) reviewing and acting upon any application for such a permit,

"(ii) if the owner or operator receives a permit for such source, whether before or after the date of enactment of this section, implementing and enforcing the terms and conditions of any such permit (not including any court costs or other costs associated with any enforcement action),

"(iii) emissions and ambient monitoring,

"(iv) preparing generally applicable regulations or guidance,

"(v) modeling, analyses, and demonstrations, and

"(vi) preparing inventories and tracking emissions.

"(B) The total amount of fees collected by the permitting authority shall conform to the following requirements:

"(i) The Administrator shall not approve a program as meeting the requirements of this paragraph unless the air pollution control agency demonstrates that, except as otherwise provided in clauses (ii) through (v) of this subparagraph, the program will result in the collection, in the aggregate, from all sources subject to subparagraph (A), of an amount not less than $25 per ton of each regulated pollutant, unless the Administrator determines that a lesser amount adequately reflects the costs of the program.

"(ii) As used in this subparagraph, the term 'regulated pollutant' shall mean (I) a volatile organic compound; (II) each pollutant regulated under section 111 or 112; and (III) each pollutant for which a national primary ambient air quality standard has been promulgated (except that carbon monoxide shall be excluded from this reference).

"(iii) In determining the amount under clause (i), the permitting authority is not required to include any amount of regulated pollutant emitted by any source in

excess of 4,000 tons per year of that regulated pollutant.

"(iv) The requirements of clause (i) shall not apply if the permitting authority demonstrates that collecting an amount less than the amount specified under clause (i) will meet the requirements of subparagraph (A).

"(v) The fee calculated under clause (i), shall be increased (consistent with the need to cover reasonable costs) in each year beginning after the year of enactment of this section by the percentage, if any, by which the Producer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Producer Price Index for the calendar year 1989.

"(C) (i) If the Administrator determines, under section 502(d), that the fee provisions of the operating permit program do not meet the requirements of this paragraph, or if the Administrator makes a determination, under section 502(i), that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to taking any other action authorized under this title, collect reasonable fees from the sources identified under subparagraph (A) without regard to the requirements of subparagraph (B).

"(ii) Any source that fails to pay fees lawfully imposed by the Administrator under this subparagraph shall pay a penalty of 50 per centum of the fee amount, plus interest on the fee amount computed in accordance with section 6621(a)(2) of title 26, of the United States Code (relating to computation of interest on underpayment of Federal taxes).

"(iii) Any fees, penalties, and interest collected under this subparagraph shall be deposited in a special fund in the United States Treasury for licensing and other services, which thereafter shall be available for appropriation, to remain available until expended, subject to appropriation, to carry out the Agency's activities for which the fees were collected.

"(iv) Any fee required to be collected by an air pollution control agency under this subsection shall be utilized solely to support the air pollution control permit program of such agency, as provided in this paragraph.

"(4) Requirements for adequate personnel and funding to administer the program.

"(5) A requirement that the permitting authority have adequate authority to--

"(A) issue permits that apply, and assure compliance by all sources required to have a permit under this title with

each applicable standard, regulation or requirement under this Act;

"(B) issue permits for a fixed term, not less than one year and not greater than five years;

"(C) assure that upon issuance or renewal, permits incorporate emission limitations and other requirements in an applicable implementation plan;

"(D) terminate, modify, or revoke and reissue permits for a material inaccuracy in the permit that renders the permit inconsistent with the Act, or if EPA promulgates regulations after the permit is issued, and the permit must implement such regulations in order to protect public health;

"(E) enforce permits, permit fee requirements, and the requirement to obtain a permit, including authority to recover civil penalties in a maximum amount of not less than $10,000 per day for each violation, and appropriate criminal penalties;

"(F) ensure that no permit will be issued if the Administrator timely objects to its issuance under section 505; and

"(G) extend a permit's term if a timely and complete application for renewal is made, until the permitting authority takes final action upon the renewal application.

"(6) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, and for

processing such applications for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permit actions, including applications.

"(7) Authority to make available to the public any permit application, compliance plan, permit, and monitoring or compliance report under section 503(e), subject to the provisions of section 114 of this Act.

"(8) Adequate and expeditious procedures for permit modification.

"(9) Procedures and other requirements to minimize, to the maximum extent practicable, duplication, needless paperwork, and delays in the issuance of permits under this title.

"(c) A single permit may be issued for a facility with multiple sources.

"(d) Not later than three years after the enactment of this title, the Governor of each State shall develop and submit to the Administrator a permit program under State or local law or under an interstate compact meeting the requirements of this title. In addition, the Governor shall submit a legal opinion from the attorney general (or the attorney for those State air pollution control agencies that have independent legal counsel), or from the chief legal officer of an interstate agency, that the laws of the State, locality, or the interstate compact provide adequate authority to carry out the program. Not later than one year after receiving a program, and after notice and opportunity for public comment, the Administrator shall approve or disapprove

such program, in whole or in part. The Administrator shall approve a program to the extent that the program meets the requirements of this Act, including the regulations issued under subsection (b) of this section. If the program is disapproved, in whole or in part, the Administrator shall notify the Governor of any revisions or modifications necessary to obtain approval. The Governor shall revise and resubmit the program for review under this section within one hundred and eighty days after receiving notification. If the Governor fails within such period to resubmit an approvable program, the Administrator may in the Administrator's discretion take either or both of the following actions:

"(1) apply any of the sanctions specified in section 176(a) of this Act other than the sanction specified in section 176(a)(2); or

"(2) promulgate a program, or portion of a program, under this title.

"(e) The Administrator shall suspend the issuance of permits promptly upon publication of notice of approval of a permit program under this section, but may in such notice retain jurisdiction over permits that have been federally issued, but for which the administrative or judicial review process is not complete. The Administrator shall continue to administer and enforce federally issued permits under this title until they are replaced by a permit issued by a permitting program. Nothing in

this provision should be construed to limit the Administrator's ability to enforce permits issued by a State.

"(f) INTERIM APPROVAL.--If a program submitted under this title substantially meets the requirements of this title, but is not fully approvable, the Administrator may by rule grant the program interim approval. In the notice of final rulemaking, the Administrator shall specify the changes that must be made before the program can receive full approval. An interim approval under this subsection shall expire on a date set by the Administrator not later than two years after such approval, and may not be renewed.

"(g) EFFECTIVE DATE. The effective date of a permit program, or interim program, approved under this title, shall be the effective date of approval by the Administrator.

"(h) Whenever the Administrator makes a preliminary determination that a permitting authority is not adequately administering and enforcing a program, or portion thereof, in accordance with the requirements of this title, he shall notify the permitting authority of such determination and the reasons therefor. Such notice shall be made public. If the permitting authority fails to take action to assure adequate administration and enforcement, the Administrator may in the Administrator's discretion, but not before ninety days after issuing such notice, take one or more of the following actions:

"(1) withdraw approval of the program or portion by rule;

"(2) propose to apply any of the sanctions specified in section 176(a) of this Act other than the sanction specified in section 176(a)(2); or

"(3) promulgate a program, or portion of a program, under this title.

"PERMIT APPLICATIONS

"SEC. 352. (a) Any source specified in section 502(a) shall become subject to a permit program, and required to have a permit, on the later of the following dates:

"(1) the effective date of a permit program or interim permit program applicable to the source; or

"(2) the date such source becomes subject to section 502(a).

"(b)(1) The regulations required by section 502(b)(1) shall include a requirement that there is submitted with the permit application a compliance plan describing how the source will comply with all applicable requirements under this Act. The compliance plan shall include a schedule of compliance, and a schedule under which the owner or operator will submit progress reports to the permitting authority no less frequently than every six months.

"(2) The regulations shall further require the permittee to periodically certify that the facility is in compliance with any applicable requirements of the permit, and to promptly report, consistent with provisions of the United States Constitution

regarding self-incrimination, any violations of such requirements to the permitting authority.

"(c) The owner or operator of any source required to have a permit shall, not later than 30 months after the date on which the source becomes subject to a permit program approved or promulgated under this title, or such earlier date as the permitting authority may establish, submit to the permitting authority a compliance plan and an application for a permit signed by a responsible corporate official, who shall certify the accuracy of the information submitted. The Administrator, in consultation with the permitting authority, shall establish a schedule for submission of all or part of the application by sources or categories of sources (including any class, type, or size within such category) within the 30-month period in a manner that minimizes administrative burdens. The Administrator may base the schedule on the amount of emissions from the sources or categories of sources, air quality considerations, or such other factors as he may consider relevant. The Administrator, in consultation with the permitting authority, may extend the date for submission of permit applications by any source or category of sources for up to an additional one year if the Administrator determines in his discretion that insufficient resources are available to assure adequate review of such permit applications by the permitting authority or the Administrator. Additional extensions may be granted for periods of not to exceed one year

if the Administrator makes a new determination for each such additional extension.

"(d) Except for sources required to have a permit prior to construction under sections 165, 172, or 173, if an applicant has submitted a timely and complete application for a permit required by this title, but final action has not been taken on such application, the source's failure to have a permit shall not be a violation of this Act, unless the delay in final action was due to the failure of the applicant to timely submit information required or required to process the application. No source required to have a permit under this title shall be in violation of section 502(a) before the date on which the source is required to submit an application under subsection (c) of this section.

"(e) A copy of each permit application, compliance plan, emissions or compliance monitoring report, certification, and each permit issued under this title, shall be available to the public. If an applicant or permittee is required to submit information entitled to protection from disclosure under section 114(c) of this Act, the applicant or permittee may submit such information separately. The requirements of section 114(c) shall apply to such information. The contents of a permit shall not be entitled to protection under section 114(c).

"PERMIT REQUIREMENTS AND CONDITIONS

"SEC. 353. (a) Each permit issued under this title shall include emission limitations and standards, a schedule of

compliance, and such other conditions as are necessary to assure compliance with applicable requirements of this Act.

"(b) The Administrator may by rule prescribe procedures and methods for determining compliance and for monitoring and analysis of pollutants regulated under this Act.

"(c) Each permit issued under this title shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions. Such monitoring and reporting requirements shall conform to any applicable regulations under subsection (b) of this section. Any report required to be submitted by a permit issued to a corporation under this title shall be signed by a responsible corporate official, who shall certify its accuracy.

"(d) The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to permits under this title. No source covered by a general permit shall thereby be relieved from the obligation to file an application under section 503.

"(e) The permitting authority may issue a single permit to an owner or operator authorizing emissions from similar operations at multiple temporary locations. No such permit shall be issued unless it includes conditions that will assure compliance with all the requirements of this Act at all authorized locations, including, but not limited to, ambient standards and compliance with any applicable increment or

visibility requirements under part C of title I. Any such permit shall in addition require the owner or operator to notify the permitting authority in advance of each change in location. The permitting authority may require a separate permit fee for operations at each location.

"(f)(1) Compliance with a permit issued under this title shall be deemed compliance with section 502. Compliance with the permit shall also be deemed compliance with any other applicable emission limitation or standard in effect under this Act at the time of permit issuance. Compliance with the permit shall also be deemed compliance with any other emission limitation or standard under the Act, except as provided by the Administrator by rule. The preceding two sentences shall not apply in the case of a standard issued under section 112(f).

"(2) Notwithstanding the provisions of paragraph (1), compliance with a permit issued under this title shall not alter, modify or otherwise affect the authority of the Administrator under section 303 (emergency powers) or the requirement to comply with any order issued under section 303.

"NOTIFICATION TO ADMINISTRATOR AND OTHER STATES

"SEC. 354. (a)(1)(A) Each permitting authority shall transmit to the Administrator a copy of each permit application, including any compliance plan, or for a permit modification, submitted under this title, and shall provide notice, in accordance with regulations promulgated by the Administrator, of every action related to the consideration of the application, including each permit proposed to be issued by the authority.

"(B) A proposed permit shall not be required to be forwarded to the Administrator for review under subsection (b) whenever the permitting authority states in the public notice of the permit that it is a codifying permit--which is defined as a permit that implements, and does not change any material requirement of, any applicable implementation plan or other regulation or standard promulgated by the Administrator--unless--

"(i) the Administrator notifies the permitting authority, not later than the close of the public comment period that the permit is a modifying permit, which is defined as a permit that does not so implement such requirements; or

"(ii) the final permit modifies any provision in the permit submitted for public notice.

Any decision by the Administrator whether to issue a

notification under clause (i) shall be committed to agency discretion and not subject to judicial review.

"(2) The permitting authority shall notify all States whose air quality may be significantly affected by a permit of each permit application, and each draft permit or proposed permit forwarded to the Administrator under this section, and shall provide an opportunity for such States to submit written recommendations respecting the issuance of the permit and its terms and conditions. If any part of those recommendations are not accepted by the permitting authority, such authority shall notify the State submitting the recommendations and the Administrator in writing of its failure to accept those recommendations and the reasons therefor.

"(3) For purposes of paragraph (2), emissions from a permitted source may significantly affect air quality in any State within fifty miles from the source. The Administrator may enlarge or reduce this distance by rule.

"(b) No permit shall be issued if the Administrator (1) within ninety days after receipt of the proposed permit under subsection (a)(1)(A) of this section, or (2) within ninety days after receiving notification under subsection (a)(2), objects in writing to its issuance as not in compliance with the applicable implementation plan or other applicable emission limitations, standards, or other applicable requirements of this Act. The Administrator may object to a modifying permit only if it would result in emissions regulated under an applicable implementation

plan that are greater than under such plan (unless such emissions are either offset by reductions from another permitted source or are accounted for under an applicable implementation plan approved by the Administrator), or would not comply with another applicable requirement of this Act. The Administrator shall provide with the objection a statement of the reasons for the objection. A copy of any objection and statement shall be provided to the applicant.

"(c) If the permitting authority fails within ninety days after the date of the objection, to submit a permit revised to meet the objection, the Administrator shall promptly issue or deny the permit in accordance with the requirements of this title. No objection shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection. A failure of the Administrator to object to a modifying permit submitted for review under subsection (a)(1)(A) of this section shall be subject to judicial review under section 307(b).

"(d) The Administrator may, by regulation, require that specified modifications to requirements of the applicable implementation plan with respect to specified categories of sources (including any class, type, or size within such category) be made only through a revision to the applicable implementation plan.

"(e)(1) The Administrator may waive the requirements of subsections (a) and (b) of this section at the time of approval

of a permit program under this title for any category (including any class, type, or size within such category) of sources covered by the program.

"(2) The Administrator may by regulation establish categories of sources (including any class, type, or size within such category) to which the requirements of subsection (a) and (b) of this section shall not apply.

"(3) The Administrator may exclude from any waiver under this subsection notification under paragraph (a)(2). Any waiver granted under this subsection may be revoked or modified by the Administrator by rule.

"(f) If the Administrator finds that cause exists under section 351(b)(5)(D) to terminate, modify, or revoke and reissue a permit under this title, the Administrator shall notify the permitting authority of such finding. The permitting authority shall, within ninety days after receipt of such notification, forward to the Administrator under this section a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend such ninety day period for an additional ninety days if the Administrator finds that a new or revised permit application is necessary, or that the permitting authority must require the permittee to submit additional information. The Administrator may review such proposed determination under the provisions of subsections (a) and (b) of this section. If the permitting authority fails to submit the required proposed determination, or

if the Administrator objects and the permitting authority fails to resolve the objection within the period prescribed in subsection (c) of this section, the Administrator may, after notice and in accordance with duly promulgated procedures, terminate, modify, or revoke and reissue the permit.

"RELATION TO OTHER AUTHORITY

"SEC. 355. (a) Nothing in this title shall prevent an air pollution control agency from establishing additional permitting requirements not inconsistent with this Act.

"(b) Nothing in this title shall be construed to authorize the Administrator, or a State, or other permitting authority, to modify or revoke any allowance granted under title IV, or to alter or amend any requirement of sections 111 or 112.

"(c) For the purposes of this Act, any permit properly issued or revised shall become part of the applicable implementation plan.

"(d) In promulgating any standard under section 111 or 112, the Administrator shall identify which sources or categories of sources (including any class, type, or size within such category) subject to such standard shall be subject to this title.

SEC. 502. Section 304(f)(1) is amended to read as follows:

"(1) an emission limitation, standard of performance, or an emission standard, or a schedule or timetable of compliance that is currently legally enforceable;"

February 2, 1990

DRAFT FINAL

CLEAN AIR ACT AMENDMENTS

TITLE IV-PERMITS AMENDMENTS
CONCEPT PAPER

SUMMARY

After a series of discussions with interest groups and additional discussions within the Administration, we have further developed amendments to provisions in the pending clean air bills that establish a Federal permits program. These revisions reflect many of the concerns raised by industry, environmentalists, and state and local air pollution control agencies. Overall, the revisions will simplify the program, making it more effective and efficient, while still achieving the positive effect on air quality.

The key amendments are as follows:

- Sources would apply to the State for one of two types of permits: "codifying" permits or "modifying" permits. "Codifying" permits are those that incorporate and do not change any requirements of the SIP, air toxics regulation, or other requirements affecting a source's operation. "Modifying" permits are those that do change SIP or other requirements affecting a source's operation. There would be no EPA review of "codifying" permits, except that EPA may disagree with a state's finding that a permit is "codifying", thus triggering the review required for "modifying" permits. If EPA disagrees, it must do so during the public comment period. The EPA review that would be triggered is the same as that which is currently in the bills.[1]

- The period when sources must submit permit applications would be expanded. In addition the Administrator would have the authority to grant one year extensions if additional time to handle the volume of permit applications is needed.

- Limits would be placed on the circumstances under which downwind states must be notified of draft permits, and on the scope of EPA's authority to resolve disputes between states

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[1] EPA anticipates that most permits will fall into the category of "codifying" permits, so EPA review will occur infrequently.

over air quality impacts.

- o EPA's action on a "modifying" permit issued by a state is subject to judicial review in Federal court, while a codifying permit is not.

There are also a number of other simplifying and clarifying amendments, which are discussed below.

BACKGROUND

The purpose of the permits program is to fill a serious gap in the current Clean Air Act by imposing a Federal requirement for air pollution sources to obtain an operating permit. Since December, EPA has considered many comments on the program included in the President's clean air proposal. The comments came from industry, environmentalists and state and local air pollution control agency representatives. Industry's comments reflect concern that extensive EPA review will cause bottlenecks in the permitting process, that states will expend limited resources allocated to review permits addressing EPA objections to their permit decisions, and that requirements that contiguous states be notified of every permit issued will further add to the administrative burden. Both industry and state and local air pollution control agencies have expressed concern that the initial crush of permits will overwhelm the ability of regulatory agencies to review them, resulting in long delays and inadequate permits. States and local agencies are also concerned with the authority the provisions give to EPA to veto any state permit decision. The key concern from environmental groups is that a permit decision EPA has not objected to would be Federally unreviewable, and that states could issue permits that are less stringent than SIPs, thus inhibiting attainment.

EPA recognizes that the permits title, as currently drafted, may impose unnecessary administrative burdens by providing for EPA review of many permits when no such review is necessary, and by failing to account for the fact that numerous permit applications will be submitted to states in a short time period, possibly creating permit processing backlogs. EPA also recognizes that EPA action on permits that change SIP or other applicable requirements should be reviewable in Federal court, regardless of whether EPA vetoes the permit. The amendment presented here addresses these matters, further clarifies the intent of the bill, and addresses some minor technical problems.

DISCUSSION OF MAJOR AMENDMENTS

Codifying and Modifying Permits: Under this significant amendment, EPA is not authorized to review "codifying" permits: those permits that simply implement SIP or other applicable

requirements. Review of these permits is generally unnecessary because a similar review takes place under the SIP process. EPA anticipates that most permits will fall into the "codifying" permits category, thus minimizing unnecessary Federal review. However, since there will be some cases where it is unclear whether a "codifying" permit does, in fact, simply implement a SIP, the amendments retain for EPA the opportunity to convert misclassified "codifying" permits to "modifying" permits. In cases where EPA believes that a states incorrectly proposes to issue a "codifying" permit, EPA may object during the public comment period, thereby causing the permit to become a "modifying" permit and subjecting it to the EPA review process currently in Title IV of the President's proposal. By limiting EPA's opportunity to object to the public comment period and by establishing guidelines on the basis for objecting in future rulemakings, needless delays and excessive EPA interference will be avoided.

Judicial Review: The amendments add authority for members of the public to obtain judicial review if EPA decides not to veto a "modifying" permit. This change assures an opportunity for review of a decision in Federal court regardless of whether EPA takes action on a "modifying" permit.

Contiguous States: This amendment places limits on when downwind states must be given notice of draft permits. Specifically, the permitting authority must notify all states within 50 miles of the source of a proposed permit, unless EPA changes this distance by rule. This change addresses the concern commonly voiced about the current language that would, for example, require Texas to notify Louisiana of a permit it proposes to issue for a West Texas source whose impact on Louisiana could not be significant.

Permit Application Submittal Schedule: This amendment expands the time allowed for a source to submit permit applications from 6 months to 30 months. In addition, the amendment directs EPA and the states to work together to establish permitting priorities. These revisions will eliminate the potential problem of permit backlogs that industry groups and state and local agencies have emphasized. The amendment further provides that if additional time to handle the volume of permit applications is needed, EPA may grant one-year extensions.

OTHER AMENDMENTS

There are numerous other simplifying and clarifying amendments. These are listed below and in the more detailed attachment. These amendments are:

- clarify the relationship of permits to SIPs by providing that a permit automatically becomes a part of the SIP;

- clarify the circumstances under which EPA may modify a permit

by defining cause to mean a material inaccuracy in the permit or the need to incorporate a new regulation to protect public health;

- o eliminate confusing anti-backsliding provisions;
- o clarify the "requirements" of the Act that can form the basis for an EPA veto;
- o eliminate the sanction that prohibits EPA from acting on source-specific SIP revisions if a state fails to submit an adequate permit program;

DETAILED AMENDMENTS

- Delete unneeded definitions;
- Clarify applicability of permits title;
- Clarify standard by which EPA may exempt sources from application of permits title;
- Clarify that local agencies, as well as States, may implement permits programs;
- Correct typos and incorrect cross-references;
- Change inflation adjustment to rely on the Producer Price Index, instead of the Consumer Price Index, because the Producer Price Index more accurately forecasts future inflation trends than does the Consumer Price Index;
- Provide that permits may not be issued for a term of less than one year;
- Clarify that the state need only have the authority to impose a penalty as large as $10,000 and that such a penalty need not be imposed in every case;
- Provide that a permit is automatically extended if the source properly applies for a renewed permit;
- Require states to establish streamlined procedures for acting on permit modifications;
- Require EPA to minimize paperwork burdens;
- Eliminate unnecessary restrictions on EPA's authority to approve partial permit programs;
- Clarify that permits may not change NSPS or NESHAP requirements;
- Clarify that when EPA promulgates a NSPS or NESHAP, EPA must, at that time, specify what sources subject to the new NSPS or NESHAP are also subject to the permits title;
- Make other changes to conform to Dingell-Lent.

1 p.m.

REVISED CAA ENFORCEMENT PROVISIONS

All amendments are to S. 1630 (December 20, 1989 Committee Print). New language is underlined, deletions are ~~stricken~~.

1. RECORDKEEPING CRIMES: KNOWING OMISSIONS OF MATERIAL INFORMATION

Amend Section 601 of S. 1630 [new CAA § 113(c)(4)(a)] (p. 522, lines 1-7) as follows:

"(A) makes any false statement, representation, or certification in, or omits information which such person knows or reasonably should have known to be material ~~information~~ from or knowingly alters, conceals or fails to maintain or file any notice, application, record, report, plan, or other document ~~filed or~~ required pursuant to this Act to be either filed or maintained~~, or used for purposes of compliance under this Act~~ . . ."

2. NEGLIGENT INJURY (FORMERLY NEGLIGENT ENDANGERMENT)

Amend Section 601 of S. 1630 [creating new CAA § 113(c)(2)] (p. 520 line 22 to p. 521 line 3) as follows:

"(2) Any person who negligently releases into the air any hazardous air pollutant listed pursuant to section 112 of this Act or any extremely hazardous substance listed pursuant to section 11002(a)(2) of title 42, which such person knows or reasonably should have known could place another person in imminent danger of death or serious injury and who ~~at the time negligently places another person in imminent danger of death or serious bodily injury~~ thereby causes or contributes to death or serious bodily injury to any person shall, upon conviction, be punished . . .

* * *

Amend Section 601 of S. 1630 [creating new CAA § 113(c)(2)] (p. 521 line 10) by adding at the end thereof:

"For any hazardous air pollutant listed pursuant to section 112 for which the Administrator has set an emissions standard or for which a permit has been issued under Part B of title III, or for which any other relevant federal standard has been set, a release of such pollutant in accordance with such standard or permit shall not constitute a violation of this paragraph ~~unless it exceeds such standard~~.

6. REVIEWABILITY OF ADMINISTRATIVE ORDERS

A. Amend Section 602 of S. 1630 [amending Section 307 of the Act] (page 531 lines 2-23) to read as follows:

"SEC. 602. (a) Section 307(b)(2) of the Clean Air Act is amended by adding at the end thereof: "~~Orders or notices issued under section 113(a), section 167 and section 303,~~ Administrative subpoenas under section 307(a), and actions under sections 114, 206(c) and 208 of this Act are not considered final actions for purposes of this section. Such ~~orders, notices,~~ subpoenas and actions shall not be subject to judicial review except in a proceeding commenced by the United States under sections 113, 120, 204 or 205, or in a citizen suit commenced under section 304, to enforce the ~~order, notice,~~ subpoena or action. No such ~~order, notice,~~ subpoena or action may be challenged in any citizen suit under section 304 unless the Administrator and the Attorney General are notified in writing of such challenge.

"(b) Section 307(e) of the Clean Air Act is amended by inserting at the end thereof the following: "~~Orders or notices issued under section 113(a), section 167 or section 303, s~~Subpoenas issued under section 307(a), and actions under sections 114, 206(c) and 208 of this Act may only be reviewed in a proceeding commenced by the United States under section 113, 120, 204, or 205, or in a citizen suit under section 304, to enforce the ~~order, notice,~~ subpoena or action. "

"(c) Section 307(b)(1) of the Clean Air Act is amended by striking "under section 113(d) of this title," immediately before "under section 119 of this title" in the second sentence.".

B. Amend Section 601(d) of S. 1630 [amending Section 113(a)(4) of the Act] (page 517, lines 11-23) to read as follows:

"(d) Section 113(a)(4) of the Clean Air Act is amended by deleting the first sentence and inserting at the end thereof: "An order issued under this subsection shall require the person to whom it was issued to comply with the requirement . . . or applicable implementation plan promulgated or approved under this Act. The provisions of subsections (d)(2), (d)(4), and (d)(5) of this section shall apply to any order issued under this subsection.".

"(A) after the order ~~making the assessment or field citation~~ has become final, or

"(B) after a court in an action brought under paragraph (4) has entered a final judgment in favor of the Administrator,

the Administrator shall request the Attorney General to bring a civil action in an appropriate district court to enforce the order or to recover the amount assessed (plus interest at rates established pursuant to section 6621(a)(2) of title 26, United States Code, from the date of the final order or decision or the date of the final judgment, as the case may be). In such an action, the validity, amount, and appropriateness of such order or penalty shall not be subject to review.

7. REVIEW PROCEDURES GOVERNING EMERGENCY ORDERS AND NEW SOURCE CONSTRUCTION ORDERS

I. Amend Section 606 of S. 1630 [amending Section 303 of the Act] (page 534-535) by revising Section 606(d) as follows:

(d) ~~deleting subsection (b) in its entirety and redesignating subsection 303(a), as amended, as section 303.~~ replacing subsection (b) with the following: "An order issued by the Administrator under this section shall become effective upon issuance. Any person to whom such an order is issued may request a hearing under section 307(h) of this title.

II. Create new Section 60_ of S. 1630 to read as follows:

NEW SOURCE CONSTRUCTION

60_. (a) Amend Section 167 of the Clean Air Act by adding the following to the end thereof:

"An order issued by the Administrator under this section shall become effective upon issuance. Any person to whom such an order is issued may request a hearing under section 307(h) of this title. If a hearing is requested but not held within the time provided by regulation, such order shall be automatically stayed, and no penalties for noncompliance shall accrue thereafter, until such hearing is held.

(b) Section 307 of the Clean Air Act is amended by adding

applicable test method), payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. The court shall not assess penalties for noncompliance with administrative subpoenas under section 307(a), and actions under section 114, 206(c), and 208 of this Act, where the violator had sufficient cause to violate or fail or refuse to comply with the order, notice, subpoena, or action.

9. CITIZEN SUIT AND JUDICIAL REVIEW AMENDMENTS

A. JUDICIAL REVIEW OF AGENCY ACTION UNREASONABLY DELAYED

Amend Section 609(b) of S. 1630 [amending Section 304(a) of the Act] (page 537, line 14 through page 538, line 12) by deleting existing Section 609(b) in its entirety and substituting the following:

(b) UNREASONABLE DELAY.--Section 307(d)(1) of the Clean Air Act is amended by inserting before the last sentence the following:

"However, actions under this subsection shall be subject to the provisions of subsection 706(1) of title 5 of the United States Code.".

B. JUDICIAL REVIEW OF DEFERRED ACTIONS

Amend Section 609(d) of S. 1630 [amending Section 307(b) of the Act] (page 539, lines 3-11) by deleting Section 609(d) in its entirety.

C. PETITIONS

Amend Section 609(e) of S. 1630 [creating a new Section 307(h) of the Act] (page 539, lines 15-25) by deleting the existing language in its entirety and inserting the following:

"(e) PETITIONS.--Section 307 of the Clean Air Act is amended by adding the following new subsection at the end thereof:

"(h) PETITIONS.--Any interested person shall have the right to petition the Administrator for the issuance, amendment, or repeal of a rule, unless such right is expressly limited by any other provision of this Act.".

words "applicable implementation plan" insert "or approved permit program"; ~~and~~ following the words "shall notify the person" replace "in violation of" with "who violated"; and after the words "the plan" insert "or program" both places they occur.

"(2) In the second sentence,

(A) strike the words "If such violation extends beyond the 30th day after the date of the Administrator's notification," and insert in lieu thereof the words "At any time after the expiration of 30 days following the date on which such notice of the violation is issued,";

(B) insert after ". . . of such plan" the following: "or program, may issue an administrative penalty order in accordance with subsection (d),"; and

(C) insert, at the end of the sentence, the following: ", without regard to the period of the violation (subject to section 2462 of title 28 of the United States Code)."

13. ADMINISTRATIVE SUBPOENA AUTHORITY

Amend (605 of S. 1630 (p. 534 line 17-20) as follows:

" . . . or administrative enforcement proceeding under ~~the Act (including but not limited to~~ section 113, . . . or section 306~~),, or to otherwise carry out the provisions of the Act,~~"

CAA - Permitting & Enforcement

U.S. Department of Justice
Land and Natural Resources Division

Office of the
Assistant Attorney General

C. Boyden Gray
Roger Porter
Nancy Maloley
Robert Grady

Attached are recommendations and analysis which Jim Strock (Assistant Administrator for Enforcement and Compliance Monitoring) and William Rosenberg (Assistant Administrator for Air and Radiation) at EPA, and I are sending for your consideration in connection with the Clean Air legislation.

We would be pleased to discuss this with you further, if you so desire.

Dick Stewart
by Barry Hartman

Withdrawal/Redaction Sheet
(George Bush Library)

Document No. and Type	Subject/Title of Document	Date	Restriction	Class.
01. Paper	Recommended Changes to the Enforcement Provisions in the Clean Air Act Amendment Bills, S 1630 and HR 3030 (16 pp.)	n.d.	P-5, (b)(7)	

Collection:

Record Group: Bush Presidential Records
Office: Counsel to the President, Office of
Series: Holmstead, Jeffrey
Subseries: Environmental Subject Files
WHORM Cat.:
File Location: Clean Air Act - Permitting [2]

Date Closed: 7/15/2002	**OA/ID Number:** 45125-031
FOIA/SYS Case #: 2001-1865-F	
Re-review Case #:	
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P-1 National Security Classified Information [(a)(1) of the PRA]
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(b)(1) National security classified information [(b)(1) of the FOIA]
(b)(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
(b)(3) Release would violate a Federal statute [(b)(3) of the FOIA]
(b)(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

CLEAN AIR ACT AMENDMENTS OF 1990

MYTHS & FACTS -- TITLE VI ENFORCEMENT

THE ADMINISTRATION'S RESPONSE TO ISSUES AND ARGUMENTS BEING MADE BY THE REGULATED COMMUNITY IN OPPOSITION TO PROPOSED CLEAN AIR ACT AMENDMENTS TO THE ACT'S ENFORCEMENT AUTHORITIES.

January 19, 1990

NOT CLEARED FOR DISTRIBUTION OUTSIDE OF THE EXECUTIVE BRANCH

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MYTHS & FACTS -- TITLE VI

GENERAL COMMENTS

MYTHS	FACTS
Title VI "breaks new ground and . . . would violate basic tenets of our legal system. . . . [T]his bill is much more severe than [other environmental laws.]" (CMA) "[A]n unprecedented expansion of EPA enforcement authority." (NAM) "[I]nherent unfairness of many of the provisions." (NEDA)	Title VI fine-tunes existing CAA enforcement authorities, combining the strong yet fair enforcement and investigatory authorities of other environmental statutes and eliminating technical impediments to enforcement in the Act. All of the amendments which are not specific to air pollution are patterned after other environmental statutes. (See specifics discussed below.) STAPPA and ALAPCO "generally support . . . Title VI and expect that [it] would strengthen and streamline the existing program."
Fails to "reflect a balance between important economic, technical and political factors." (NAM)	To the contrary, the amendments enhance EPA's ability (i) to deter violations and eliminate the discriminatory economic advantages enjoyed by non-compliers; and (ii) to use less intrusive, more accurate, and more cost effective compliance monitoring techniques. Importantly NAM's concern that "imposition of substantial civil penalties for violations of the broadly expanded range of paperwork and notice requirements required under the bill is inappropriate . . .[,]" is addressed by provisions such as the field citation program for minor violations, while other provisions preserve the option of stiffer penalties for egregious violations.

MYTHS	FACTS
"The president made no mention of new enforcement provisions in his June 12 speech[.]" "[Provisions are] extremely stringent." (NAM)	The President's June 12 speech dealt only with the bill's substantive program proposals (acid rain, air toxics and nonattainment). However, without effective enforcement authorities no progress can be assured. At his July 21st Rose Garden speech the President spoke of the need for felony criminal sanctions for knowing violations. As is discussed further below, such sanctions are no more stringent than in other environmental statutes.

SEC. 113(a) ADMINISTRATIVE COMPLIANCE ORDERS (AOS)

MYTHS	FACTS
	Supported by STAPPA and ALAPCO.
The authority "is arbitrary [and] unnecessary" in that "[EPA] would be required to mandate compliance no later than one year after the order is issued, and would not be reviewable." (CMA)	The amendments to the AO authority are to the advantage of the regulated community. Currently AO compliance schedules cannot exceed 30-days, and are thus not appropriate to resolve most compliance problems. Authorizing administrative schedules of up to one-year, therefore, adds flexibility providing a vehicle for resolving many violations without going to court. Except for hazardous pollutants, the AO does not go into effect until the source is given an opportunity to confer -- and presumably negotiate a compliance schedule.
The authority is "incredibly harsh . . . creating triple jeopardy" because sources would still be subject to penalties or criminal enforcement. (CMA)	AOs are purely injunctive in nature and not a sanction for past violations. It is, therefore, appropriate for sources to be liable for penalties for the underlying violation notwithstanding bringing their facility into compliance in accordance with an administratively issued compliance schedule order. Although it is highly unlikely that an administrative order would be relied upon by EPA to correct a criminal violation, no such compliance order should insulate a source from the full weight of the law for the criminal misconduct.

MYTHS	FACTS
The AO authority is unfair because EPA would have the authority to "issue orders even when state or local authorities act to abate the sources of pollution, or otherwise to deal with the problem." (CMA)	EPA currently does, and under Title VI would continue to, have the authority to issue an administrative order or to otherwise enforce a CAA requirement, notwithstanding prior state or local action with regard to the same violation. This authority to overfile is both necessary and proper to the effective functioning of a national program. It ensures against unequal enforcement of the law resulting from the wide disparity in enforcement authorities and resources under state and local law. Under "timely and appropriate" agreements with each state, EPA does not enforce unless the state/local action has not been expeditious or is inadequate.

CRIMINAL AUTHORITIES GENERALLY (§113(c))

New criminal authorities (e.g. felony sanctions for most knowing violations, enhanced reporting violation authority, new endangerment provisions, and misdemeanor for intentional fee violations) are supported by STAPPA & ALAPCO. "NAM agrees that criminal penalties are appropriate for intentional violations of important emissions control requirements, reporting requirements and permit conditions."

MYTHS	FACTS
"[U]nprecedented criminal penalties would be created for activities such as knowingly releasing a substance in compliance with a state permit." (BASF)	Felony level penalties for knowing criminal violations of environmental laws is the rule rather than the exception. See e.g. CWA, 33 U.S.C. §1319(c)(2); RCRA, 42 U.S.C. §6928(d); Safe Drinking Water Act, 42 U.S.C. §300h-2(b)(2); Shore Protection Act of 1988, Pub. L. 100-688, 102 Stat. 4154 (November 19, 1988) (codified at 33 U.S.C. § 2609(c); CERCLA, 42 U.S.C. §9603(b). State law is often more lenient than federal law. Where a source knowingly violates a federal standard in a federally preempted area of law such as the Clean Air Act, compliance with a less stringent state law is not a defense. See comment below regarding defenses to criminal endangerment.
Prison sentences of 150 or even 450 years could result from a single continuing incident under the "per day for each violation" language of the Senate bill. (CMA)	The U.S. Sentencing Commission Guidelines of Title 18 establish a detailed formula for calculating the sentence in cases of multiple and continuing violations. The Guidelines do not permit the judge to simply multiply the maximum penalty by the number of violations to determine the total maximum sentence (as was done by CMA

MYTHS	FACTS
	to arrive at the theoretical sentences cited). Rather the continuous or repetitive nature of the violation is but one of several factors that can increase the penalty. The resulting penalty for an ongoing violation is generally less than double the maximum penalty for a single violation. See U.S. Sentencing Commission Guidelines §3D1.1, et seq. [HR 3030 originally contained the "per day for each violation" language, but it was dropped in the Dingell/Lent substitute.]
"Criminal penalties should not be imposed for knowing failure to pay a fee when a fine would be a sufficient deterrent." (NAM)	The criminal penalties for failure to pay a fee are misdemeanors only, and will not, absent extraordinary circumstances, exceed the Sentencing Guidelines' criteria necessary to trigger imprisonment. In those circumstances where imprisonment is warranted the maximum term is expressly limited to one year.

CRIMINAL NEGLIGENCE AND KNOWING ENDANGERMENT (§113(c))

The bill provides for criminal sanctions to protect against placing "another person in imminent danger of death or serious bodily injury" by knowingly or negligently emitting a pollutant listed under section 112 of the CAA or section 11002(a)(2) of title 42 [Emergency Planning and Community Right to Know Act]. Such authority would allow EPA, for the first time, to address dangerous releases of toxic pollutants such as occurred in Bhopal, India and Institute, West Virginia.

MYTHS

It is unfair that liability may result with regard to a hazardous pollutant for which EPA has not yet promulgated a maximum available control technology (MACT) standard for specific industries. (CMA; BASF) Should limit endangerment to violation of a regulation or SIP. (NEDA)

"Negligent release of <u>any</u> hazardous air pollutant . . . could also constitute a criminal violation." "[A] criminal penalty could be imposed for accidental releases even when no one is injured." (NAM)

FACTS

Industry's arguments are misplaced. First, MACT standards are only one of several types of regulations provided for in Section 112. MACT will only be required for some categories of sources and only for pollutants listed in Section 112(b). Section 112(m) (H.R. 3030 as reported to the full Committee) requires EPA to promulgate a list of acutely hazardous substances (based on CERCLA 301), and release prevention regulations but not MACT standards.

Many of these regulations will not be promulgated for up to ten years. Delaying liability for knowing or negligently handling <u>known</u> hazardous and extremely hazardous pollutants until the lengthy process of surveying state-of-the-art technology or of promulgating release prevention systems is completed not prudent. Given the constantly changing world of hazardous chemicals, it is prudent to hold persons handling such materials to a high standard of care. Thus, the intent of the endangerment provisions -- to encourage the careful handling of hazardous substances -- is not unlike

MYTHS

FACTS

the purpose behind strict-liability in tort law for ultrahazardous activities.

Nor are the proposed criminal endangerment provisions more vague than the CWA, 33 U.S.C. 1319(c)(3) [knowing endangerment] and §1319(c)(1) [criminal negligence], and RCRA, 42 U.S.C. §6928(e) [knowing endangerment]. Endangerment liability would apply <u>not to any pollutant</u>, but only to a pollutant listed under section 112 of the CAA or section 11002(a)(2) of title 42. By comparison the CWA, 33 U.S.C. §1319(c)(3), imposes felony liability for the endangerment due to knowing violations of broad requirements of that act, including the discharge of <u>any</u> pollutant without a permit, and, at 33 U.S.C.§1319(c)(1), criminal negligence for violating <u>any requirement</u> of the CWA, even where there is no endangerment.

The CAA would, thus, give clear notice of the chemicals of concern. Future listings of hazardous pollutants will include risk assessments and opportunities for industry comment. In addition, the term "serious bodily injury" is clearly defined in the bill.

Finally, the very high burdens of criminal proof will ensure against unfairness. A "negligent" release would result only if "reasonable" industry practice were not being followed. This provision would not apply

MYTHS	FACTS
	to releases that occurred despite reasonable care. "Knowing" violations would require proof not only of a knowing release but also that the violator knew the activity unreasonably placed someone in imminent danger of serious bodily injury or death. Finally, as in any other criminal action, the government must prove its case "beyond a reasonable doubt".
Sources should be able to defend against liability under the endangerment provisions based on compliance with state or local standards. (CMA, BASF)	The commenters are attempting to address an issue best left to the courts under the Federal Rules of Evidence. This is not to say that compliance with a properly issued state or local standard might not be admissible if pertinent. However, a VOC standard may not protect against endangerment related to benzene. Similarly, although a standard based on an averaging time (e.g. 24-hour), might not have been violated, the release may have been at such a high concentration over a short period so as to cause the endangerment. Finally, as compared to criteria pollutants which are regulated through state implementation plan requirements, Congress deemed hazardous pollutants to be of too great a concern to leave to state regulation which might not be sufficiently protective.

KNOWING OMISSIONS AND RECORD-KEEPING VIOLATIONS (§113(c))

MYTHS	FACTS
The expanded record-keeping authorities of the CWA are inappropriate for sources of air pollution, since CWA involves far fewer sources which are monitored at only several points in a plant. (NEDA)	That air polluters may have substantially more complex emission points and equipment than CWA sources only underscores the importance for complete record keeping enforcement authorities.
"The bill would make knowing failure to act, including the submission of an incomplete permit application or failure to keep certain non-required records, a felony . . .. The bill does not even limit criminal sanctions to records that EPA requires a source to maintain." Makes criminal "long list of recordkeeping omissions far broader than false statement violations in the Clean Water Act." (CMA) Makes criminal omissions of non-material information and mistakenly "incomplete permit applications". (BASF) Makes "unintentional or negligent recordkeeping and monitoring errors" criminal. Would be a trap for the unsophisticated. (NEDA) Makes "paperwork errors" and "inadvertent late submissions" a crime. (NAM)	Contrary to industry assertions, criminal "records" liability is limited to <u>knowing</u> violations. Liability for omissions is limited to knowing omissions of <u>material information</u>. Criminal sanctions for <u>knowing</u> "records" violations, such as omissions of material information, alterations, and concealments, conforms the CAA to RCRA (knowing omissions, failure to file required documents), and CWA (knowing false statements, representations, tampering). Industry's concerns regarding the destruction of records not required to be maintained under the Act are misplaced. The new language in the bill expressly limits documents covered to those "filed or required to be <u>filed</u>, maintained, <u>or used for purposes of compliance</u> under this <u>Act</u>" [amending language emphasized]. The amendments do not impose sanctions for the destruction in the normal course of business of production records, unless they are <u>required</u> to be filed, maintained, or used to determine compliance.

DELETION OF SECTION 113(d) -- DELAYED COMPLIANCE ORDERS

MYTHS	FACTS
Restore and expand. (NEDA)	Not necessary or appropriate in light of expanded §113(a) administrative compliance order, SIP revision, and permit authorities, and the history of long delays in compliance which resulted from this authority in the past. The current authority is, moreover, not a true enforcement tool. It changes the compliance deadline through notice and comment rulemaking that effectively duplicates the SIP revision mechanism in Section 110 of the Act. Innovative approaches to achieving compliance will still be possible through settlements of enforcement actions and through SIP revisions.

ADMINISTRATIVE PENALTIES (113(d))

MYTHS	FACTS
	Supported by STAPPA and ALAPCO. Not opposed by NEDA, which only seeks added due process protections.
"[Would] allow EPA to act as prosecutor, judge and jury." (CMA) "No assurance that penalties will be fairly assessed[.]" (BASF) "Add due process protections to administrative penalties/field citations." (NEDA) The authority is more "repressive" than the CWA. (NAM)	Both the formal and informal agency hearing officer enforcement procedures provided for in the bill are consonant with the Administrative Procedure Act (APA), and have been litigated and upheld as constitutional. The authority proposed here is nothing new and conforms to the CWA, RCRA, TSCA, FIFRA, and a myriad of other non-environmental statutes under both federal and state law. As with those statutes, penalty awards will be subject to published penalty assessment criteria and guidance. The proposed authorities for the CAA are replete with requirements which guarantee due process. APA Section 554-556 procedures which must be followed include the right to representation of counsel, cross-examination and judicial appeal. The field citation authority similarly provides an opportunity for litigation before an independent hearing officer and judicial review.
The $200,000 penalty cap under §113(d)(1) can be amended without judicial review, as compared to CWA. (CMA, BASF, NAM)	The amendable [House only] $200,000 cap on the penalty which may be awarded in any one administratively litigated case is a DOJ-EPA housekeeping provision designed <u>solely</u> to

MYTHS	FACTS
	indicate which cases may be handled before an administrative tribunal and which before only a judicial tribunal. It in no way is meant to imply that ALJ adjudications are somehow lesser procedures. (See e.g. TSCA, where administrative penalties are not limited and ALJ assessments have been as high as $264,000, and settlements have exceeded $1,000,000.)
The Field Citation penalty authority (§113(d)(3)) is not subject to a statutory maximum such as the $25,000 maximum under the CWA. (BASF) Field citations could be issued up to $200,000 or more, and EPA has no appropriately trained staff. (NAM)	Field citation penalty authority is limited to $5,000 per day for each violation. Moreover, a penalty schedule to be promulgated by EPA will further limit the actual penalty for each violation. Indeed, as has been mentioned, this authority addresses NAM's concern that "imposition of substantial civil penalties for violations of the broadly expanded range of paperwork and notice requirements required under the bill is inappropriate . . .[,]" although we retain the authority to proceed judicially when appropriate.
EPA and citizens may assess additional penalties for the same violation for which a field citation has been issued. (BASF)	The bill reserves the right of further enforcement (injunctive relief and penalties up to the statutory maximum of $25,000 per day for each violation) only if the violation which is the subject of a field citation continues. The bill does not provide for duplicative citizen suit penalties for the same violation, and the penalty assessment criteria in Section 113(e) provides otherwise.

MYTHS	FACTS
Field citations may infringe upon state and local agency enforcement. Should be limited to (1) periods of federally-assumed enforcement; (2) when enforcement is not delegated; (3) after 30-days advance notice, or (4) when requested by a state or local, and should be issued only by EPA employees. (STAPPA & ALAPCO)	The field citation program will be implemented through regulations which will protect against infringement on state and local enforcement. 30-days advance notice would, however, undermine the utility of this authority which would enable inspectors to issue a citation while inspecting a facility. EPA agrees that the citations will not be issued by contractors.
The administrative penalty authority is "bizarre" because it is in addition to "administrative penalty authority already provided under Section 120 of the law." (CMA)	Section 120 only authorizes EPA to administratively recoup the economic benefit of non-compliance, not to impose a gravity based penalty. Thus Congress made clear that Section 120 assessments are in addition to, not in lieu of, judicial penalties under Sections 113(b) or (c). Preventing a source from deriving a competitive advantage from non-compliance only places the source in the same position it would be in if it had complied. Given the limited chances of being caught, many sources might choose to take their chances absent the deterrent effect of a gravity based penalty. The administrative penalty authority proposed by Title VI would authorize deterrence penalties in the less complicated cases which might not be brought judicially. (Moreover, Section 120 actions can be cumbersome, and their usefulness as an administrative enforcement mechanism in cases not suitable for full judicial enforcement is limited.)

DOCUMENTING AND PROVING CONTINUITY OF VIOLATION (113(e)(2)) & COMPLIANCE CERTIFICATION AUTHORITY (§114(a))

MYTHS	FACTS
	Supported by STAPPA and ALAPCO.
"Presumption of Guilt - Shifts the burden to the accused to prove his innocence." (BASF)	EPA bears the initial burden of proving a violation. The bill provides only for a shifting of the burden of proving the number of days the violation continued in the context of determining an appropriate penalty. The source is always in the best position to document its performance and, if EPA obtains admissible evidence of a violation, the source is better positioned to prove when a violation was corrected. Both the compliance certification and burden shifting provisions eliminate the need for EPA to require expensive daily compliance tests. Court over-sight will ensure fairness.
"Owners and operators would be penalized for failure to document continuous compliance, even though there is no requirement to do so. . . . [T]his is fundamentally unfair." (CMA; see also NEDA -- there should be no liability for violations identified by self-policing).	EPA now has the authority to require a source to test daily and to report compliance. The proposed amendments to the Act clarify this authority and, as with discharge monitoring reports under the Clean Water Act, 33 U.S.C. §1318 [reporting of discharges, including permit violations], require such continuous reporting by major sources where appropriate. The fairness and constitutionality of self-reporting requirements for federally regulated activities has long since been upheld. Shapiro v. U.S., 335 U.S. 1 (1948); Selective Service System v. Minnesota

MYTHS	FACTS
	Public Interest Research Group, 104 S.Ct. 3348 (1984) [No privilege against self incrimination for required government records]. Hale v. Henkel, 201 U.S. 43 (1906); Bellis v. U.S., 417 U.S. 85 (1974) [no Fifth Amendment privilege for corporations, organizations, and other nonnatural persons]. The obvious example is the tax code. Such information may be used as evidence in both civil and criminal actions. See, e.g., CWA, 33 U.S.C. §1319(c).
Enhanced recordkeeping and self-reporting "create a disincentive for responsible corporate managers to put in place or continue strong compliance auditing programs." (NEDA)	Sources following a "strong compliance auditing program" (i.e. good air pollution control practices) are unlikely to have excess emissions absent unexpected malfunctions. As under current law, the Government will continue to take a sources good faith compliance efforts and self-reporting into account in the exercise of its enforcement discretion. Under the revised penalty assessment criteria, a sources good faith efforts to comply are a factor the court must consider. Thus, there are many incentives for sources to maintain strong compliance auditing programs.

MONETARY AWARDS TO PERSONS PROVIDING INFORMATION LEADING TO A CRIMINAL CONVICTION OR JUDGMENT OF LIABILITY (§113(f)) [House Bill Only]

MYTHS	FACTS
Industry, referring to this proposal as a "bounty hunter" provision, fears that it will encourage retaliatory accusations by disgruntled employees or encourage such employees to cause violations of the Act to go unnoticed so they can later collect a reward for reporting the violation. CMA cites three statutes where this authority has not yet been added, but does not cite any of the Acts where similar authority exists. (CMA; Note BASF objects to such rewards only to the extent it expands on CERCLA.)	As CMA recognizes, monetary awards would only be available where a person has actually violated the Act. Where a witness comes forward to report a violation of law, it matters little what that person's motives may have been. Congress has over the years promulgated similar authorities in other environmental statutes, e.g. the Lacey Act, 16 U.S.C. §3375(d), the Endangered Species Act, 16 U.S.C. §1540(d), CERCLA, 42 U.S.C. §9609(d), the Shore Protection Act of 1988, Title IV of P.L. 100-688, recognizing that, despite large expenditures of resources on enforcement, it is relatively easy to violate the law without being detected. Encouraging good citizenship on the part of persons witnessing a violation who might otherwise be motivated not to get involved is, therefore, an important enforcement tool. Industry's fears that monetary awards might encourage disgruntled employees to cause or hide violations ignore the not small deterrent of criminal sanctions for such acts or omissions. Moreover, implementing regulations can be drafted to safeguard against anyone profiting from such involvement in the underlying illegal activity.

CONTRACTOR INSPECTIONS (§114(a)(2) AND (c)) [Senate Bill Only]

MYTHS	FACTS
Cost ineffective. EPA should rely on the state and local agencies. (STAPPA and ALAPCO.)	The Senate bill authorizes, but does not require, the use of contractor inspectors. The provision merely clarifies and confirms EPA's current practice in all but the 6th and 10th Circuits. Protocols regarding when to use a contractor, as compared to a state, local or EPA inspector, can be established to maximize the efficient use of resources. However, in some specialized areas of engineering a contractor might be the only effective resource. Through the use of contractors cost savings are obtained in that EPA can adjust to the differing demands for expertise without keeping a cadre of full-time employees on staff.
Inappropriate due to concerns over confidential business information (General Industry Comment)	Inspectors would be held to same confidentiality requirements as employees. See also RCRA, 42 U.S.C. §6927 [amended in 1980 adding the word "representative" to explicitly sanction contractor inspections]; TSCA, 15 U.S.C. §2613 ["duly designated representative"]; Aluminum Co. of America v. DuBois, No. C80-1178V (W.D. Wash. June 11, 1981) [construing TSCA to apply to private contractors]; Senate report on S. 1480, the precursor to CERCLA [independent contractors may be used in making inspections under either the CAA or the FWPCA].

EMERGENCY POWERS (§303)

MYTHS	FACTS
Under the proposed amendments liability may result where a standard has not yet been promulgated. "[T]he bill totally undermines the purpose and intent of a true emergency power provision.. . . [The provision] is sufficiently broad to apply to virtually <u>any</u> environmental air pollution condition[,] . . . to address any risk, no matter how small." (CMA; <u>see also</u> BASF)	Industry comments go not to the proposed amendments but, rather, to the emergency authority as it currently exists under the CAA. The CAA's current emergency authority is not limited to violations of regulatory standards. In this sense Congress has long imposed a statutory standard vesting the EPA with plenary authority to address any air pollution causing an imminent and substantial endangerment to the health of persons. The bill proposes to expand this authority to protect the public welfare and the environment, conforming the CAA precisely to TSCA, CERCLA, and RCRA. This will enable EPA to address air pollution which, for example, endangers livestock or endangered species habitats. <u>See also</u> CWA (endangerment to human livelihood). It does not apply to situations which do not pose an "imminent and substantial endangerment".
Unfairly "[r]emoves limitations on the length of time [EPA emergency] orders can remain in effect." (BASF; <u>see also</u> NEDA which asks that current authority not be changed.)	Existing authority limits the duration of EPA emergency orders to 24 hours, unless a civil judicial action is initiated; and if a judicial action is initiated the administrative order is limited to 48 hours. Deletion of the time limitations conforms the CAA to TSCA, CERCLA, RCRA, and the CWA, and will enable EPA to address air pollution emergencies which cannot be effectively remedied in one or two days.

CONTRACTOR LISTING (§306)

MYTHS	FACTS
"Extending the potential reach of [federal contract debarment to other facilities owned or operated by the convicted person] would, as a practical matter, add little to the already significant deterrent" effect of being ineligible for government contracts. (AIA)	The authority is discretionary and thus flexible, but very necessary to effectively debar business owners who can avoid the effects of debarment (1) by dissolving business entities and creating new ones; or (2) because they are involved in activities, such as asbestos demolition and renovation, where the "facility" is constantly changing.

ADMINISTRATIVE SUBPOENAS (§307)

MYTHS	FACTS
"In essence removes all limits on subpoenas." (CMA)	Subpoena authority under the Act, which is already broadly authorized for rulemaking purposes, would be expanded to ensure its availability in enforcement/compliance activities under the Act. Administrative subpoenas enabling EPA to compel the testimony of persons who are not "sources" under the Act conforms the CAA to TSCA and CERCLA, and is essential to effective implementation of the proposed administrative penalty authority.
The subpoena authority "forces a law-abiding citizen to disobey the subpoena and wait for the government to sue in order to have any opportunity for judicial review." (CMA)	Administrative subpoenas are not self-enforcing since EPA does not have contempt powers. As with any other requirement of law, violators do so at their own peril.

REVIEW OF ADMINISTRATIVE ORDERS (§307(b)(2)) [Senate Bill Only]

MYTHS	FACTS
Title VI "limit[s] the constitutional right of judicial review." (NAM)	It is long established law under §307 that non-final agency action is not judicially reviewable.

THE WHITE HOUSE

WASHINGTON

January 11, 1990

MEMORANDUM FOR THE FILE

FROM: JEFFREY R. HOLMSTEAD JRH
ASSISTANT COUNSEL TO THE PRESIDENT

SUBJECT: Deficiencies in Permit Program of H.R. 3030

I have reviewed the above-referenced document, which will be used in on-going discussions regarding the President's proposed amendments to the Clean Air Act. No further action is necessary.

CLEANAIR.2

Subject File:

Clean Air Act:

Permitting

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WHITE HOUSE
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Subject: Deficiencies in Permit Program of H.R. 3030

ROUTE TO: **ACTION** **DISPOSITION**

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Cuffe	ORIGINATOR	89/12/13			/ /
	Referral Note:				
Curat M	A	89/12/13		S	89/12/15
	Referral Note:				
Curat D2	I	/ /			/ /
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MEMORANDUM

Re: Deficiencies in Permit Program of H.R. 3030

The following are some of the key concerns raised by the permit program contained in H.R. 3030:

1. Scope and Complexity of Program: As an initial matter, the H.R. 3030 permit program is too broad and complex. There was a far simpler permit program contained in the "Group of Nine" bill and that should be the preferred model. The H.R. 3030 program would:

a. Apply to all sources, even small "area" sources. This means that gas stations, dry cleaners, auto paint shops, bakeries, etc. are subject to the permit requirements.

b. Impose a requirement for operating permits. This is a dramatic departure from the current Clean Air Act (which focuses on construction permits) and would allow federal intervention in every ongoing industrial activity.

c. Impose detailed data requirements and "compliance plan" submissions as part of the permit application process.

2. Anti-Trading Provisions: One of the most troublesome aspects of the H.R. 3030 permit program is its impact on emissions trading. While other portions of the Administration's bill emphasize flexibility and economic efficiency through trading, the permit provisions cut the other way. Specifically,

Section 404(f)(1) specifies that a permit cannot be modified to contain emission limits that are less strict than the limitations contained in a previous permit (or implementation). This means that a facility cannot increase emissions from one permitted unit, even if that increase is offset by decreases in another unit (the essence of cost-effective emissions trading). The bill does provide an exception to this limitation (§ 404(f)(2)(a)), but the applicant must make a showing that the revised limitation is "consistent with any demonstration of attainment and any progress requirement in an approved implementation plan" and the trade must be consistent with "rules prescribed by the Administrator." These requirements will stop emissions trading.

3. Federalism Issues: The permit provisions would allow EPA to veto any state permit -- § 405(b). Beyond that, EPA can "pocket veto" a state permit and insulate its action from judicial review -- § 405(c). EPA would also be given the authority to "terminate, modify or revoke" any permit -- § 405(e). The only limitation on this authority is that EPA must find that "cause" exists to take the action. "Cause" is undefined in the bill. EPA thus has essentially unlimited authority to revoke or modify state-issued permits. This amounts to an all-inclusive grant of federal authority, clearly at odds with the Administration's federalism principles.

CAA - Permitting + Enforcement

ID # _____ CU

rec'd 11:15am 2/13

WHITE HOUSE
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Subject: letter to Richard Darmen from Carol Crawford re: S. 1630, the Senate bill amending the Clean Air Act

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
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	Referral Note:				
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Cuat 02	I	/ /			/ /
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U.S. Department of Justice
Office of Legal Counsel

Washington, D.C 20530

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02. Draft Letter	From Carol T. Crawford, Assistant Attorney General to Richard G. Darman, Director of OMB RE: Department of Justice comments on S. 1630 (22 pp.)	02/12/90	~~P-5~~	

Collection:

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FOIA/SYS Case #:	2001-1865-F		
Re-review Case #:			
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(b)(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
(b)(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
(b)(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
(b)(9) Release would disclose geological or geophysical information

Lands final draft

Honorable Richard G. Darman
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Darman:

This letter is in response to your request for the comments of the Department of Justice on S. 1630, the Senate bill amending the Clean Air Act, scheduled for consideration on the Senate floor January 23, 1989. We are generally pleased with the enforcement provisions in titles II and VI of the bill, which closely track those in the Administration's Clean Air Amendments bill. However, we have especially strong objections to certain of the bill's provisions regarding citizens suits and judicial review, and those establishing an independent board to investigate accidental releases of toxic chemicals. Many of our other concerns, however, could easily be addressed by minor language changes. If you wish, we would be willing to repackage those comments as a set of proposed technical amendments to S. 1630 to offer to the Senate.

This letter's references to provisions and page numbers in S. 1630 are to the Senate Energy and Commerce Committee Print, Calendar No. 427 (December 20, 1989), except for those in the discussion of constitutional concerns in Part VIII below. In that part, references are to the November 28, 1989 draft Committee Print.

I. Citizen Suit and Judicial Review Amendments

The amendments proposed in Sections 609(b), (d), and (e) of S. 1630 would make significant changes in the citizen suit and judicial review provisions of the Act, sections 304 and 307, respectively. (S. 1630 pp. 537-39.) The Department is deeply concerned about those changes and the impacts which those changes, if enacted, might have on the ability of the Environmental Protection Agency to carry out its mission under the Act. In addition, because these changes would constitute such a radical departure from the existing judicial review scheme, we urge that the Administration recommend that these

amendments also be referred to the Judiciary Committee. Very similar provisions may be offered in the House of Representatives as an amendment to H.R. 3030 by Representative Collins.[1] Our comments here are thus largely applicable to Representative Collins' possible amendment as well, and we urge the Administration to oppose these provisions or seek substantial modifications in both Houses of Congress.

A. The Unreasonable Delay Amendments (Section 609(b) on page 537-38)

As currently enacted, Section 304(a)(2) of the Clean Air Act authorizes any person to file suit in district court "against the Administrator where there is alleged a failure of the Administrator to perform any act or duty . . . which is not discretionary with the Administrator. . . ." S. 1630 would amend that provision to also allow citizen suit actions against the Administrator where there is alleged "a failure to act that . . . constitutes unreasonable delay . . . ". Moreover, the amendment would delete the restriction that such suits are for nondiscretionary acts only. It also provides that if the Administrator designates a written decision not to act as final agency action, the decision is reviewable in the courts of appeals.

This provision should be deleted in its entirety and substituted with a minor amendment to Section 307(d)(1). First of all, the deletion of the nondiscretionary act requirement significantly expands the scope of citizens suits in district courts. The courts have uniformly drawn clear distinctions between "non-discretionary" acts or duties, which are enforceable under section 304(a)(2), and discretionary acts, which are not. See Kennecott Copper Corp. v. Costle, 572 F.2d 1349, 1355 (9th Cir. 1978); Oljato Chapter of Navajo Tribe v. Train, 515 F. 2d 654, 662-63 (D.C. Cir. 1975). In particular, an act which involves an exercise of judgment or discretion by the Administrator is, by definition, not a non-discretionary act. E.g., Environmental Defense Fund v. Thomas, 870 F. 2d 892, 899-900 (2d Cir. 1989); Oljato Chapter of Navajo Tribe v. Train, supra, 515 F. 2d at 663.

By deleting the discretionary act language, the provision in question would apparently allow suits regarding almost any claim that EPA should have done something that it has not done, conceivably giving district courts jurisdiction over any claim seeking to compel EPA to take any action. Heretofore, citizen suits under the Act have only been available to compel

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[1] See Letter from Carol Crawford, Assistant Attorney General for Legislative Affairs, November 9, 1989, discussing Representative Collins's set of amendments, entitled "Citizen Suits and Citizen Petitions".

EPA to carry out clear congressional commands. Mountain States Legal Foundation v. Costle, 630 F.2d 754, 766 (10th Cir. 1980), cert. denied, 450 U.S. 1050 (1981). Typically, these commands require the Administrator to take action by a specific deadline or to perform a purely ministerial act after specified statutory preconditions have been satisfied. Sierra Club v. Thomas, 828 F. 2d 783, 790, 792 (D.C. Cir. 1987). However, the amending language would draw no distinctions between such clear-cut mandatory duties and circumstances where Congress granted the Administrator discretion in determining how and at what pace he would proceed in various areas of regulatory responsibility.

This unprecedented expansion of judicial authority to oversee the Agency's air program is likely to have several adverse consequences. First, there is likely to be a dramatic increase in district court litigation under the Act. Interested persons across the political spectrum could be expected to bring suit to compel the Agency to take action in the particular regulatory areas which they believe are important. Indeed, if an interested person or organization did not file suit to compel the Agency to focus on its particular area of concern, it would run the risk that other competing concerns would gain priority by virtue of being subject to litigation, and consequent court orders, initiated by others.

Second, along with the increase in litigation there is likely to be a much greater diversion of scarce agency resources -- both legal and technical -- to help defend against the additional citizen suits rather than taking environmental protection initiatives. Thus, the proliferation of citizen suits may ironically make it more difficult to accomplish the very objectives of those suits. Department of Justice litigating resources would likewise be strained by the heavier case load, and would be diverted from enforcement efforts to defense of such litigation.

Third, because non-discretionary acts and discretionary acts would presumably be on an equal footing for purposes of citizen suit enforcement, the amendment would undercut the priority due the deadlines and clear mandates set forth in the Act by Congress. If the Agency is obligated by court order to carry out a range of discretionary acts, it may be hampered in its ability to carry out the acts which Congress specifically mandated.

Finally, and most important, the amendments would result in significant judicial intervention in the Executive Branch's management of the Agency's air programs and its ability to determine its priorities. To a much greater extent than currently exists, citizens suits and resulting court orders would control EPA's regulatory agenda and reduce the Administrator's ability to determine priorities in the face of competing demands and finite resources. The net result of the broadening of citizen suit authority is likely to be a much less effective and

manageable EPA and impairment of the President's ability to manage and control policy and administration within the Executive Branch.

In addition to the troublesome language just discussed, proposed Section 609(b) would also give district courts jurisdiction over claims that the Administrator has engaged in "unreasonable delay" by failing to perform a particular act. Although this change would be less troubling than the deletion of a nondiscretionary act requirement, we believe that the change would not be desirable and would unnecessarily disrupt existing jurisdictional allocations and case law. The District of Columbia Circuit, which is exclusively responsible for review of all nationally applicable regulations under section 307(b)(1), has established that unreasonable delay claims under the Act involving nationally applicable actions should be considered solely by it. Sierra Club v. Thomas, supra, 828 F. 2d at 794-96. Under the proposed amendment, the various district courts would have jurisdiction over all unreasonable delay claims. We believe that, since the courts of appeals have exclusive jurisdiction over final actions by EPA under the CAA, those courts and not the district courts should determine whether unreasonable delay has occurred. In particular, it makes more sense for the District of Columbia Circuit, which will review all nationally applicable regulations, to develop a uniform body of case law regarding unreasonable delay in issuing such regulations than for various district courts throughout the nation to issue possibly divergent rulings.

To the extent that Congress may be concerned that some EPA failures to act within a reasonable time are currently immune from judicial challenge, this concern could be easily rectified. Section 307(d) of the Act designates certain major rulemaking activities as being subject to special rulemaking requirements set forth in that subsection. It also expressly exempts most of such activities from the chief rulemaking and judicial review provisions of the Administrative Procedure Act (5 U.S.C. §§ 553-557, 706), including the provision in 5 U.S.C. § 706(1) authorizing a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed". It follows that a party may not presently bring an unreasonable delay claim with regard to a CAA rulemaking activity covered by section 307(d). See Sierra Club v. Thomas, supra, 828 F. 2d at 796. In order to ensure that all rulemaking activities under the Act are subject to the unreasonable delay provision of the APA, the following language could be inserted before the last sentence in section 307(d)(1):

> However, actions under this subsection shall be subject to the provisions of section 706(1) of Title 5.

This minor language change could replace all of the language in proposed paragraph (b) of Section 609.

The amendments also state that a court's ability to find the existence of statutory preconditions giving rise to a non-discretionary duty will not depend upon whether EPA has published a final determination in the Federal Register finding that the preconditions have been met. (Section 609(b)(3), page 538, lines 4-12.) This amendment is primarily directed to situations where the Act directs EPA to take certain action (e.g., rulemakings) if the Administrator has made certain discretionary findings (e.g., regarding the existence of a hazard). By stating that a Federal Register notice is unnecessary to establish that preconditions have been met, this provision will enable plaintiffs to rely upon such documents as internal memoranda, technical documents, press releases, and letters in order to establish that preconditions have been met. (Certain parties have unsuccessfully pursued such theories in the past.) One probable result of these provisions is that courts will be induced to find the existence of preconditions where the Administrator has had no opportunity or reason to even consider the question. At the same time, EPA may become reluctant to make any informal statements that could be later construed as a finding of preconditions because such statements, even by lower level employees, could give rise to valid citizen suits under the new provision. This chilling effect would certainly be harmful.

In sum, all of Section 609(b) should be deleted from S. 1630, and Section 307 of the CAA should be amended to provide appellate review of unreasonable delay. At an absolute minimum, if Congress decides to place review of unreasonable delay actions in the district courts (rather than in the courts of appeals as provided in the APA), this provision should be amended to limit suits to alleged delays of acts or duties "that are not discretionary with the Administrator".

B. Deferred Actions

S 1630's Section 609(d) provides that whenever the Administrator undertakes to perform an action, but then "defers such performance to a later time, any interested person may either challenge the deferral pursuant to paragraph (1) [of Section 307(b)] or bring an action at any time under section 304(1)(2) to compel such performance."

This provision apparently gives parties the option of filing suit in either district courts or courts of appeals to challenge EPA determinations to defer actions. It would allow interested persons to challenge the Administrator's decision to defer an action either by bringing an action "pursuant to paragraph (1)" of Section 307(b) in the court of appeals, or by bringing a citizens suit under Section 304(a)(2) in district court. The provision is ambiguous and is likely to give rise to a substantial amount of litigation in order to clarify its meaning. We also seriously question the advisability of giving prospective parties an option as to whether to proceed in district court or the court of appeals. One obvious problem is

that some parties may go to various district courts and other parties may simultaneously go to a court of appeals. Because the provision provides no guidance as to what should happen next, this approach is likely to give rise to inconsistent rulings and result in a waste of judicial and litigation resources.

Another problem with providing district court and appellate court litigation options is that only the appellate option places a time limitation on bringing suits. Under Section 307(b)(1) of the Act, a challenge to the Administrator's decision to defer an action must be brought within 60 days of that decision. But under Section 304(a)(2), there would be no cut-off. Any interested party could bring an action at any time to challenge the deferral.

In light of these problems, the Department of Justice would recommend deletion of this entire paragraph (f), leaving the courts of appeals as the single forum in which citizens may challenge a final decision to defer agency action.

3. Citizen Petitions

Section 609(e) of S. 1630 would amend Section 307 of the Act to allow any person to petition the Administrator "to issue any regulation or order pursuant to this Act or to, amend, reconsider, or repeal any regulation or order under the authority of this Act." (p. 539) Providing interested persons with a means to petition the EPA for consideration of regulations is not an unreasonable objective; in fact, such a petition would be the preferred method for obtaining agency action where a person believes the agency has unreasonably delayed a rulemaking, or where the person desires the agency to take discretionary action. However, the proposed amendment presents unnecessary problems. It should be replaced with a straightforward reference to the relevant provisions of the Administrative Procedure Act.

The amendment inexplicably applies to any "order" issued under the Act (as well as to "regulations"), a significant departure from existing administrative law. Thus, a party could petition EPA for reconsideration of miscellaneous orders such as compliance orders which are not reviewable agency actions, presumably get judicial review of any EPA order disposing of the petition, and thus indirectly obtain review of otherwise unreviewable orders. This would be inconsistent with the principle embodied elsewhere in S. 1630 and the original Administration bill that such orders should not be reviewed until EPA has commenced an enforcement proceeding. Rather than trying to address orders, the provision should simply incorporate the specific language of the Administrative Procedure Act, 5 U.S.C. § 553(e), which deals with petitions for rulemaking. Specifically, the first sentence of proposed new section 307(h) should be replaced with "Any interested person shall have the right to petition the Administrator for the issuance, amendment, or repeal of a rule."

Yet another unjustifiable divergence from the APA is the requirement in proposed section 307(h) that the Administrator either grant a petition or issue a final decision denying the petition within 12 months for certain actions and 4 months for others. The APA, which governs all federal agencies in the absence of specific contrary statutory provisions, specifies no particular deadline; we see no reason why EPA should be held to a 4 or 12 month review for all petitions under the CAA, especially if such petitions could be brought to compel all orders that may be issued under the Act's authority.

In summary, the Department finds certain aspects of these amendments very troubling. The amendments are likely to engender considerable confusion and to cause a dramatic increase in the number of citizen suits filed. Because of the resulting increased judicial intervention into EPA's management and policy decisions in this regulatory area, the Agency's ability to carry out its statutory missions would likely be adversely affected.

II. Title III Provisions regarding "Accidental Releases"

This amendment provides a complex regulatory scheme for the prevention of accidental releases of air toxics and establishment of a quasi-independent investigatory board, in sharp contrast to the limited provisions for an Air Pollutant Release Investigation Board contained in the original Administration bill. See H.R. 3030, Section 705, as offered to Congress by the President. Certain aspects of these provisions could seriously complicate the Department's civil and criminal enforcement activities.[2]

A. Defining "Accidental Release" (Section 304 Proposing Section 129(b)(1))

We are very concerned by the broad and vague definition of the term "accidental release". The amendment proposes defining "accidental releases" as

> ". . . the direct or indirect introduction of an extremely hazardous substance into the air under circumstances which are not routine and which are not authorized pursuant to any permit or emission limitation or standard under any other provision of this Act or any other Federal law."

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[2]In addition, certain provisions raise significant constitutional concerns, especially proposed Section 304(e), involving the creation of a Chemical Safety and Hazard Investigation Board. These are discussed below.

This definition would encompass any emission in violation of a permit requirement, whether intentional or not, so long as it was not "routine" (another term that ought to be defined). However, intentional excess emissions could certainly be other than "routine". In such case, they should not be characterized as "accidental", which connotes something occurring by chance or fortuity, something unintended, and thus an absence of fault. This could hinder civil and criminal enforcement actions, which is why the Administration's bill used the more neutral term "air pollutant release". If what the proposals are intended to reach are non-routine, unpermitted releases -- terms that really do not equate to "accidental" -- then the term "extraordinary" would be more fitting than "accidental" throughout the proposal.

B. Section 302(i)(7) Regarding the Use of Board Reports

Section 304 (creating new Section 129(e)(8)) provides that "no part of the conclusions, findings, or recommendations of any report of the Board, relating to any accidental release or the investigation thereof shall be admitted as evidence or used in any action or suit for damages growing out of any matter mentioned in such report or reports." (p. 392) This language should explicitly reference criminal actions (e.g., "any civil or criminal action or suit for damages"), since the two-fold objective of an evidentiary bar in the case of an independent investigatory board -- to insulate the Board's reports from any chilling effect of political pressures from the agencies and to limit the Board's effect on the Department of Justice's and federal agencies' civil and criminal enforcement efforts -- is the same in civil and criminal actions. For example, if the Board's reports suggest one cause or party responsible for a particular accident, but our prosecution pursues a different causal theory based on different evidence, introduction of the board's conclusions can create problems.

C. Administrative Order Authority for Accident Prevention

The order authority of proposed Section 129(h) (pp. 400-01) is redundant with the emergency order authority of Section 303 of the existing CAA and should be deleted. If the order authority remains in the bill, its penalty provision should be deleted as redundant, since proposed Section 129(i) (p. 402) already makes the violation of orders civilly and criminally enforceable under Section 113 as amended in S. 1630's Title VI. If not deleted, the penalty provision should be made consistent with the amendments to Section 303 found in S. 1630's Title VI and in S. 1490, the Administration bill. Those provisions provide criminal penalties for "knowing" violations of emergency orders, and delete the requirement of a "willful" violation for civil penalties. See S. 1630, Section 601(g) at 521, and Section 606, at 534-35; S. 1630 Committee Report at 370-71.

III. Outer Continental Shelf CAA Regulatory Authority

The Department opposes Section 111, which proposes a new Section 327 of the Act transferring authority for regulating air quality on the Outer Continental Shelf (OCS) from the Department of the Interior to the Environmental Protection Agency. (S. 1630 pp. 275-77.) The Department has participated with DOI and EPA for several years in a negotiated rulemaking to set criteria for major sources on the OCS. Either a proposed or final new rule should be published in the near future. We defer to DOI and EPA on the effect this amendment may have on that rulemaking. It should also be noted that the Committee Report description of proposed Section 327 contains some factual errors. Many major sources are in fact currently regulated, and the regulations being developed will be stiffer than those currently in effect. The Department's comments concerning constitutional issues raised by this provision are noted below.

IV. Indian Amendments

Proposed Section 112(b)(2) authorizing Indian tribes to exercise CAA authority contains an ambiguous provision, not found in the Administration's bill, that should be corrected. It states

> "Nothing in this section shall be construed to allow Indian tribes to assume or maintain primary responsibility for assuring air quality and enforcement of air pollution control in a manner less protective of public health or welfare than such responsibility may be assumed or maintained by a State."

S. 1630 Section 112(b)(2), p. 278, line 24 to p. 279, line 4. The provision's reference to a "State" does not make clear whether the Tribal Implementation Plan must conform to the federal standards to which all states are subject, or whether it must conform to the standards of the surrounding or adjoining

state when that state has set more stringent standards for itself. The Department's comments concerning constitutional issues raised by this provision are noted below.

V. Stratospheric Ozone and Climate Protection (Title VII of S. 1630)

We continue to share the views of the State and Defense Departments and the Environmental Protection Agency that this entire title should be opposed as inconsistent with the Montreal Protocols. If, however, this title were to become a new part of the Clean Air Act, the judicial review and citizen suit provisions found in Sections 516 (p. 573-75) and 517 (p. 575-78) should be deleted as extraneous. The authority they provide is already present in Sections 304 and 307 of the existing CAA. Moreover, proposed section 516 is inconsistent with existing section 307 because it would make nationally applicable actions reviewable in individual circuit courts of appeals rather than in the District of Columbia Circuit, and because it provides 90 days instead of 60 days for petitioning for review. Note also the constitutional concerns raised below regarding these provisions.

As with stratospheric ozone, the United States is participating in international cooperative efforts to control greenhouse gases which could be compromised by S. 1630's unilateral approach. We also note that the proposed title attempts to address both stratospheric ozone protection and greenhouse gas reduction policies. The two problems are scientifically and economically different and should be treated differently. We know of no reason for making the timetable for reducing the two classes of gases -- stratospheric ozone depleting gases and greenhouse gases -- the same.

VI. Municipal Incinerator Ash Provisions

A. General Comments. The Department of Justice firmly opposes S. 1630 Section 307, "Ash Management and Disposal", which contains 16 pages of amendments to the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 et seq. RCRA is scheduled for comprehensive reauthorization later in this Congress and thus should not be piecemeal amended within the CAA reauthorization amendments. For specific policy criticisms of these provisions, we defer to the Environmental Protection Agency at this time, with one exception. Section 401(f)(2) (p. 440) should be revised to indicate whether the penalties provided are administrative penalties, civil judicial penalties, or both, and how such orders are reviewable.

We defer to the Environmental Protection Agency on the merits of Section 306, "Municipal Waste Combustion: Air Emissions", which was not part of the Administration's bill. The Department's comments concerning constitutional issues raised by this provision are noted below.

B. Preemption Bar. Of grave concern is an absolute preemption bar provision, applicable to the entire Clean Air Act, buried within the Municipal Waste Combustion amendments. Section 306(a), proposed Section 130(g)(2) of the Act, provides that "Nothing in this Act shall be construed, interpreted, or applied to preempt, supplant, or displace other State or Federal Law, whether statutory or common." S. 1630, p. 422, lines 10-12. It is possible that the language "this Act" is an artifact from when the Municipal Waste amendments stood alone as a separate bill. If so, the provision must be so clarified. If not, it should be deleted. The existing CAA contains specific preemption language that this provision would squarely contradict, most notably the federal automobile emissions requirements.

C. Trust Fund for Civil Penalties under Municipal Waste Amendments

We also note our particular concern with Section 306's proposed new Section 130(j) of the Act, which provides that penalties recovered in enforcement actions against a municipality under the Municipal Incinerator Ash amendments shall go into a fund administered by the court or the State, to be used in support of public programs that "serve to enhance the protection of human health and the environment of the residents" of that municipality. S. 1630, p. 423-24.

In cases where penalties have been recovered in a citizen suit brought under Section 304 of the Act, the penalties should go into the penalty fund proposed in Title VI of S. 1630, Section 609(a)(2) (p. 536-37). Note also our constitutional concerns, discussed more fully below, that a federal court's administration of this proposed fund is the exercise of an executive function reserved to the Executive Branch.

VIII. Constitutional Concerns with S. 1630

A. The Appointments Clause and the President's Supervisory Power.

As the Supreme Court made clear in Buckley v. Valeo, 424 U.S. 1, 126 (1976), any person "exercising significant authority pursuant to the laws of the United States" must be appointed in conformity with the provisions of the Appointments Clause of the Constitution, Art. II, § 2, cl. 2. See also United States v. Germaine, 99 U.S. 508, 510 (1879) ("all persons who can be said to hold an office under the government about to be established under the Constitution were intended to be included within one or the other of these modes of appointment," either as officers or inferior officers). In addition, Article II, § 1 of the Constitution provides that "[t]he executive Power shall be

vested in a President of the United States of America." Corresponding to this power is the President's duty to "take Care that the Laws be faithfully executed." U.S. Const., Art. II, § 3. To vest enforcement of federal law in state officials, over whom the President has no control, would both derogate from the President's constitutional authority to supervise the execution of the laws and violate the Appointments Clause. See Myers v. United States, 272 U.S. 52, 117 (1926) ("The vesting of executive power in the President was essentially a grant of power to execute the laws."); id. at 163-64 ("[A]rticle 2 grants to the President the executive power of the government--i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers. . . .").

Accordingly, previous environmental statutes such as the Clean Air Act and the Clean Water Act and the President's proposed amendments to the Clean Air Act have been carefully structured as programs of cooperative federalism. In such programs, federal pollution control standards, enforceable by federal officers appointed in conformity with the Appointments Clause, serve as the model for pollution control programs under state law, enforceable by state officials. This parallel structure ensures that state officials neither set the standards enforced by federal officers nor themselves execute federal law. A number of the provisions of S. 1630 do not observe this critical structural distinction but instead permit states directly to enforce federal law, thereby encroaching both on Congress's legislative authority and on the President's fundamental constitutional responsibility to "take Care that the Laws be faithfully executed." Art. II, § 3. Accordingly, we have revised certain sections of the bill to eliminate such constitutional problems.

--Section 182(a)(2)(A)[3] [p.204] should be revised to delete "(or the State may prescribe, if the Administrator does not)".

--Section 185(c)(4) [pp. 230-231] would provide that the Administrator "may . . . delegate to any State that so requests,[sic] administration and enforcement of [certain] regulations promulgated [by the Administrator to decrease emissions of ozone precursors from certain categories of products]." This provision must be deleted.

--Section 186(d)(4) [p. 237] should be revised by inserting "or otherwise modify" after "partially disapprove and partially

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[3] Unless otherwise noted, references hereinafter will be to provisions of the Clean Air Act as revised by S. 1630, rather than to provisions of S. 1630.

approve"; similarly, section 186(d)(5) should be revised by inserting ", or approval as modified" after "partial approval".

--Section 188(g)(2)(A) [p.248] should be modified by inserting "satisfactory to the Administrator" after "a detailed statement".

--Section 189(b) [p. 254], concerning employee ridership programs and compliance plans that specified State plan revisions must require certain employers to develop, should be revised to provide either for approval by the Administrator of such programs and plans, if they are to be enforceable under federal law, or an express statement that such plans and programs are enforceable only under State law notwithstanding the fact that the State plan revision pursuant to which they were developed was approved by the Administrator.

--Section 327(b) [p. 275] would permit States to submit to the Administrator "a procedure for implementing and enforcing the requirements promulgated by the Administrator . . . for [Outer Continental Shelf] sources. If the Administrator finds that the State procedure is adequate he shall delegate to that State any authority he has under this Act to implement and enforce such requirements." Inasmuch as this provision would permit the Administrator to delegate enforcement of federal laws to the States it is inconsistent with the Appointments Clause and must be revised. It may be recast, however, as a program of cooperative federalism by the following revision: "a procedure for implementing and enforcing the requirements promulgated by the Administrator . . . for [Outer Continental Shelf] sources <u>as part of State law</u>. If the Administrator finds that the State procedure is adequate he shall <u>approve it. Nothing in the foregoing sentence shall be construed to prevent the Administrator from continuing to enforce the requirements of this part</u>." (changes underscored).

--Section 328(a)(2) [p. 277], permitting the Administrator to "delegate to [certain Indian] tribes primary responsibility for assuring air quality and enforcement of air pollution control," must be deleted.

--Section 112(i)(8)(A), providing for waiver of certain statutory standards by the Administrator or a State with an approved program, should be revised by inserting ", subject to the approval of the Administrator," before "a State".

--Sections 112(j)(2)(A) and (B) [pp. 355-56], (C) [p. 356], and section 112(j)(3)(D) [p. 358], relating to permit programs, should be clarified wherever the phrase "(or State)" appears, by revising them to read "(or State with an approved permit program)." In addition, section 112(j)(2)(B) should be revised by adding at the end thereof, "Any permit issued by a State pursuant to an approved permit program shall be submitted to the

Administrator for his approval or disapproval. If the Administrator has taken no action thirty days after submission the permit shall be deemed approved" and section 112(j)(5)(A) [p. 358] should be revised by deleting "(but not including certifications for temporary permits)." Section 112(j)(5)(D) [p. 359], purporting to relieve the Administrator of the obligation to review all permits issued by the State if he conducts an audit program, must be deleted: because the bill would make violation of a State permit a violation of federal law, a federal official must have the opportunity to approve each such permit or class of permits, thereby incorporating them into federal law.

--Section 112(l)(1) [p. 366] should be revised to delete "may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards and prevention requirements but".

--The Municipal Waste Combustion provisions of the bill could be read to raise numerous questions and require extensive clarifying changes. Several provisions of this part provide for state enforcement of standards promulgated pursuant to the Act. States would be allowed to submit plans for "implementation and concurrent enforcement of the requirements" of either proposed section 310, governing municipal waste combustion, or proposed section 4011 of the Solid Waste Disposal Act, regulating management, treatment, use, and disposal of municipal waste combustion ash. See sections 310(h), 4011(h)(1). States authorized to implement these plans would wield significant enforcement authority, such as the ability to issue permits for municipal waste incineration units, section 310(h), or municipal incineration ash disposal facilities, section 4011(h)(1), review certain permits on a periodic basis, section 310(f), impose additional conditions on permits being reviewed, id., and grant variances from or approve alternative methods of compliance with assorted requirements of the Act, sections 4011(b)(4),(c),(j)(3),(j)(4).

In our view, this part fails to make sufficiently clear that state officials would have no enforcement authority with respect to federal law. Certain of its provisions are most naturally read to mean that state officials would be enforcing federal regulations adopted pursuant to this Act, rather than state regulations embodying standards at least as stringent as federal law. Sections 310(h) [p. 422] and 4011(h)(1) [p. 441] authorize submission of state programs for "concurrent enforcement" of "the requirements of this section," and authorize the Administrator to withdraw approval of a state program whenever he determines that the "State is not enforcing the requirements of this section in a manner equivalent to Federal enforcement." Section 310(h) also provides for initial disapproval if "the Administrator determines that the State program does not provide enforcement equivalent to Federal

enforcement under this Act." These provisions should be redrafted to permit submission and approval of state programs for "implementation and enforcement of state standards at least as stringent as federal standards adopted pursuant to this section." The state program should be disapproved if it does not provide for "enforcement of state standards equivalent to Federal enforcement under this Act," and approval should be withdrawn if the State is not "enforcing state standards in a manner equivalent to Federal enforcement of this section." Similarly, sections 310(b)(2)(A) and (f), which mention permits issued "under this Act," should instead refer to permits issued "under this Act or a state program approved pursuant to this Act."[4] Finally, sections 310(f) [pp. 419-20] and 4011(j)(3) and (4) [p.443] should be revised by inserting "with an approved permit program" after "State" wherever it appears.

Beyond being redrafted to clarify that state officials could enforce only state law, the bill should emphasize that state enforcement decisions would in no way diminish the Administrator's authority to demand full compliance with federal standards. If state officials could exempt individuals from enforcement of federal standards, they would be exercising significant authority pursuant to the laws of the United States without having been appointed as officers of the United States, in violation of the Appointments Clause. See Buckley, 424 U.S. at 126, 137-42. Accordingly, sections 4011(j)(3) and (4) [p. 443], which would permit States to grant variances on a case-by-case basis from certain requirements for disposal of municipal waste incineration ash, should allow the Administrator, as a matter of federal law, to deny any variance granted by a State from compliance with state law standards. The same is true of section 4011(c) [p.435], under which a State may allow ash

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[4] Section 310(n) makes it "unlawful to operate a municipal waste incineration unit unless each person with control over processes affecting emissions from such unit has satisfactorily completed a training and certification program meeting the requirements established by the Administrator under this subsection." The Administrator would develop a "model State program" for such training and certification. Id. The Administrator could "authorize any State to implement a State program for the training and certification of municipal waste incinerator operators if the State has adopted a program which is at least as stringent as the model program developed by the Administrator." Id. (emphasis added). In our view, this subsection makes sufficiently clear that the State would be administering a State law certification program approved by the Administrator, rather than implementing and enforcing federal training and certification regulations. Thus, this provision needs no redrafting to avoid the constitutional difficulties discussed above.

disposal in waste disposal units created by vertical expansion of an existing facility, an act otherwise prohibited by the bill. Section 4011(b)(4) [p. 434] already provides that the Administrator, on appeal by any person or on his own motion, may review and reverse a State's decision to waive certain design requirements for landfills and monofills in which municipal waste incineration ash is to be deposited. While that provision requires the Administrator to "make a decision on any appeal within one hundred and eighty days," we do not read this language as imposing a time limit on the Administrator's decision to conduct such a review on his own motion.

We also have serious reservations about section 310(a)(1)(B) [p. 405]. That provision requires the Administrator to promulgate emission standards which "reflect the greatest degree of emission limitation achievable through application of the best available control technologies and practices which the Administrator determines...has been achieved in practice...or ...is contained in a State or local regulation or any permit for municipal waste incineration units...whichever is more stringent," unless the Administrator finds that the standard will not be achievable or was adopted for reasons peculiar to the regulated unit or jurisdiction. These requirements apply to initial promulgation of emission standards within eighteen months of the Act's adoption, section 310(a)(1)(A), and to subsequent revisions of such standards, section 310(a)(3). Congress may incorporate by reference a determinate standard found in state law. However, this provision raises the possibility that a State or local government could determine what the federal standard would be by passing stricter air pollution controls. Such a provision could be read to vest "significant authority pursuant to the laws of the United States" in State or local governments during the eighteen-month period following the bill's enactment provided for by section 310(a)(1)(A), or prior to subsequent revisions of standards, contrary to the Appointments Clause. See Buckley v. Valeo, 424 U.S. at 126. Accordingly, the bill should be changed to reference a determinate standard in state or local law as of the date of enactment.

Constitutional questions are also raised by section 310(j) [p. 423], which would require courts to deposit fines assessed against local governments into a trust fund "established by [the] court or the State" and would allow the court to use the fund to finance "public programs. . . that serve to enhance the protection of human health and the environment" for local residents. The legislation does not make clear whether the courts imposing such fines would be federal courts, or both federal and state courts. Allowing a federal court to develop and finance programs to enhance the protection of human health and the environment would be incompatible with the judicial function. As a general rule, "executive or administrative duties of a nonjudicial nature may not be imposed on judges holding

office under Art. III of the Constitution." Buckley v. Valeo, 424 U.S. 1, 123 (1976); see Mistretta v. United States, 109 S. Ct. 647, 661 (1989). While a federal court may fashion remedies for a violations of the law, these provisions appear to authorize a broader power to develop programs unrelated to the harm caused by the legal infraction which resulted in imposition of the fine.

--Section 510(a) [pp. 554-55] would require the Administrator to issue regulations barring, after 1992, the performance of certain services by private parties not using equipment "certified [by either the National Institute of Standards and Technology of the Commerce Department, the Underwriters Laboratories, or any entity designated by the Administrator] as meeting the standards set by the Society of Automotive Engineers." While Congress may incorporate by reference an existing determinate standard promulgated by a private body into law, legislation purporting to incorporate by reference whatever such standard was in existence on a certain future date would raise serious constitutional questions under the Appointments Clause. Such a standard may be prescribed by Congress itself either directly or through incorporation of an existing standard created by some other body, or by an 'Officer of the United States' pursuant to criteria prescribed by Congress; but because the prescription of the standard amounts to the exercise of significant authority pursuant to the laws of the United States, it may not be delegated to private parties, as this provision would appear to contemplate. Accordingly, this provision should be revised to either incorporate the Society's standards on the date of the bill's enactment or to require the Administrator to consider adopting the Society's standards as of 1992. A related issue is raised by future certifications by nonfederal entities such as the Underwriters Laboratories, and accordingly the provision should be further revised to delete that reference and to permit the Administrator to designate other federal agencies to certify.

--Section 519(c) [p.574] should be revised to provide that the Administrator may waive certain requirements relating to State regulation either "upon application of any person or upon his own motion." (change underscored).

B. Chemical Safety and Hazard Investigation Board: Restrictions on the President's Removal and Supervisory Authority; Intrusion into Interagency Deliberations.

The purported limitation of the President's removal authority over members of the Chemical Safety and Hazard Investigation Board established in section 129(e) [p. 388] would create serious constitutional concerns. The Board would be established as an "independent safety board" "within the Environmental Protection Agency," an agency within the Executive Branch of the government. Section 129(e)(1). In addition, many of its functions could be characterized as the "exercis[e] [of]

significant authority pursuant to the laws of the United States," Buckley v. Valeo, 424 U.S. 1, 126 (1976), such as the ability to adopt binding regulations for the report of accidental hazardous substance releases, section 129(e)(5)(C), investigate such releases, section 129(e)(5)(A), and conduct research, section 129(e)(7). The Administrator would be required by the bill to respond "formally and in writing" to recommendations that the Board would be obliged to submit to him, giving reasons for any departure from the Board's recommendations. Sections 129(e)(9), (10). The Board would be empowered to compel testimony of witnesses and production of evidence, and to enter premises on which certain accidents had occurred, perform investigations thereon, and inspect records relevant to such investigations. Section 129(e)(11). The Board would be empowered to establish both procedural and administrative rules necessary to exercise the foregoing functions, section 129(e)(12), and the Administrator would be obliged to provide to the Board "such support and facilities as may be necessary for [its] operation . . . ." Section 129(e)(13). In addition, it would be authorized to enter into contracts, leases, cooperative agreements, and other legal relations necessary to its functions. Section 129(e)(12). The Board would also be empowered to make determinations to withhold access to otherwise available materials from the public under specified conditions. Section 129(e)(14).[5]

Despite giving the Board these attributes of executive authority, the bill would provide that Board members could only be removed by the President for "inefficiency, neglect of duty, or malfeasance in office." Section 129(c)(3) [p. 388]. We

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[5] We recognize that some of the authorities that this provision would confer on the Boards could be deemed to be "essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees . . . ." Buckley v. Valeo, 424 U.S. 1, 137 (1976). We are satisfied, however, that a number of the Boards' powers should be deemed the "exercis[e] [of] significant authority pursuant to the laws of the United States. See, e.g., section 129(e)(5)(C) (power to adopt binding regulations); section 129(e)(11) (power to enter premises and investigate); sections 129(e)(9),(10) (power to issue recommendations to which EPA must respond). Moreover, even if the Board were not empowered to exercise significant authority within the meaning of Buckley v. Valeo, the fact that the bill provide that the Boards would be "within" EPA provides a separate and independent reason why the removal restrictions at issue are impermissible. Congress cannot place in the Executive Branch a board whose members' powers could, in light of the restrictions upon the President's control of them, be justified only on the theory that they are legislative in nature.

recognize that the Supreme Court approved certain limitations on the President's removal power over independent prosecutors in Morrison v. Olsen, 108 S. Ct. 2597 (1988). The Court emphasized, however, that the independent prosecutor, unlike the Chemical Safety and Hazard Investigation Board, lacked policymaking or significant administrative authority. Id. at 2619. Further, while the independent counsel enjoyed only limited jurisdiction and tenure, id., Board members would be appointed for five years and have a broader jurisdiction, section 129(e)(3),(5). Finally, the Court noted that the independent prosecutor was only an "inferior officer" for Appointments Clause purposes. Morrison, 108 S. Ct. at 2619. There is a substantial argument that at least the Board chairperson, who "shall be the chief executive officer of the Board and shall exercise the executive and administrative functions of the Board," section 129(e)(4), would be classified as a principal officer of the United States for purposes of the Appointments Clause. This argument is reinforced by the provision of the bill requiring the members of the Board to be appointed by the President with the advice and consent of the Senate. Section 129(e)(2). The offices which would be created under this bill are sufficiently distinct from that considered in Morrison to create a substantial question regarding the constitutionality of the proposed restrictions on the President's removal power, and those provisions accordingly must be removed.

The bill also purports to impose independent restrictions on the President's authority to supervise the Board. Although the Board would be part of the Environmental Protection Agency (EPA) and would, as noted above, exercise significant authority under the laws of the United States, section 129(e)(15) [pp. 395-96] purports to require the Board, "whenever [it] submits or transmits any budget estimate, budget request, supplemental budget request, or other budget information, legislative recommendation, prepared testimony for congressional hearings, recommendation or study to the President, the Administrator, or the Director of the Office of Management and Budget . . . [to] concurrently transmit a copy thereof to the Congress." Further, the provision purports to deprive any officer or agency of the United States of "authority to require the Board to submit its budget requests or estimates, legislative recommendations, prepared testimony, comments, recommendations or reports to any officer or agency of the United States for approval or review prior to the submission of such recommendations, testimony, comments or reports to the Congress." It would further provide that "[i]n the performance of their functions as established by this Act, the members, officers and employees of the Board shall not be responsible to or subject to supervision or direction of any officer or employee or agent of any other part of the Environmental Protection Agency or any other agency of the United States except that the President may

remove any member of the Board for inefficiency, neglect of duty or malfeasance in office."

These provisions raise extremely serious constitutional questions and must be deleted in their entirety. It has been the longstanding view of this Department that Congress may not consistent with the Constitution require Executive Branch officials to submit reports and proposals to Congress without prior review by their superiors in the Executive Branch. See, e.g., 6 Op.O.L.C. 632, 640 (1982); 1 Op.O.L.C. 16, 17-18 (1977) (concurrent reporting requirement offends President's art. II power to direct). See also Myers v. United States, 272 U.S. 52, 163-64 (1926); Congress Construction Corp. v. United States, 314 F.2d 527, 530-32 (Ct. Cl. 1963). Congress a fortiori may not directly deprive the President and his delegates of the authority to supervise his subordinates. See id. Accordingly, these provisions must be deleted in their entirety.

Sections 129(e)(9) and (10) [p. 392] of the bill contain provisions requiring the Board to publish recommendations to which the Administrator would be required to respond "formally and in writing." Section 129(e)(16) [p. 396] would require the Board to submit an annual report to the President and Congress including, inter alia, recommendations for legislative and administrative action made by the Board and any action taken to implement such recommendations by EPA or other federal agencies.

By requiring the Board to make available to the public its recommendations to EPA and requiring EPA or the Board annually to provide Congress with such recommendations and the agency's response thereto, these provision would impermissibly impair the integrity of the Executive Branch's deliberations by requiring the publication of interagency consultations. They would thereby run counter to the President's authority as head of the unitary Executive Branch to "take Care that the Laws be faithfully executed," U.S. Const. art. II, sec. 3, and to coordinate and supervise his subordinates. In addition, such mandatory procedures inevitably reduce the quality of the advice tendered to federal decisionmakers, to the serious detriment of the public interest. As the Supreme Court has noted,

> [T]he importance of this confidentiality is too plain to require further discussion. Human experience teaches that those who expect public dissemination of their remarks may well temper candor with a concern for appearances and for their own interests to the detriment of the decisionmaking process.

United States v. Nixon, 418 U.S. 683, 705 (1974) (footnote omitted). Because the provisions noted above compromise what the Supreme Court has termed "the necessity for protection of the public interest in candid, objective, and even blunt or harsh

opinions" in Executive Branch decisionmaking, id. at 708, they must be modified or deleted. Specifically, section 129(e)(10) must be deleted, and section 129(e)(16) must be revised by deleting "the President and to" and "which the Board has made, the actions which have been taken by the Administrator or the heads of other agencies to implement such recommendations,".

C. Mandated Submission of Legislative Proposals.

Article II, § 3 of the Constitution confers on the President plenary and exclusive discretion concerning the timing and content of legislative proposals submitted by the Administration to the Congress. Accordingly, Congress may not consistent with the Constitution require the President to submit legislative proposals, even of unspecified content. A number of the provisions of S. 1630 contravene this clear textual prohibition.

--Section 185(c)(1) [p. 229] requires the Administrator to submit to Congress a report on certain emissions of ozone precursors and to "include recommendations for the control of such emissions." This provision must be revised to require submission of any recommendations that he deems appropriate.

--Section 112(k)(7) [p. 365] should be revised to require submission of any recommendations that the Administrator deems appropriate.

--Section 510(e)(2) [p.557] should be revised to require the Administrator to propose any appropriate alternative effective dates.

D. Citizen Suits Under the Stratospheric Ozone Title.

Control over federal law enforcement is at the core of the President's responsibilities under Article II. Accordingly, statutory provisions for citizen suits to collect civil penalties payable to the Treasury must be careful tailored to provide adequate means for the President to assert control over such litigation. Similarly, such provisions must be narrowly crafted to ensure that the Article III requirements of standing are satisfied. Accordingly, the citizen suit provisions of Title VII of S. 1630, relating to stratospheric ozone, must be revised to conform in substance with the provisions of the President's proposal, which were carefully drafted with these considerations in mind.

--Section 517(a)(1) [p. 571] must be revised to delete "to have violated or". This phrase could be read to permit citizens to sue for civil penalties arising from nonrecurring past violations. Such suits would fail to meet Article III's requirements because the payment of such penalties to the

Treasury would not redress in any meaningful sense the citizen's alleged injuries. See, e.g., Allen v. Wright, 468 U.S. 737, 751 (1984). In addition, it would trench upon the President's exclusive authority to enforce federal law.

--Section 517(d) [p. 572] must be revised by adding at the conclusion thereof the amendment to section 304(c)(2) of the Clean Air Act proposed in section 610(c) of the President's Clean Air Act Amendments: "at any time in the proceeding. In such intervention, the Administrator may substitute himself as the plaintiff with regard to any claim for civil penalties. Upon such substitution, the citizen plaintiff's claims for civil penalties shall abate. A judgment in an action under this section to which the United States is not a party shall not, however, have any binding effect upon the United States." This revision is essential to ensure that the President may exercise the control required by Article II of the Constitution over litigation relating to the enforcement of federal laws.

The Department appreciates very much the opportunity to comment on these proposed amendments. If you should need further elaboration on any of our comments, or learn of other possible amendments to S. 1630 or to H.R. 3030, please let me know.

Sincerely,

Carol T. Crawford
Assistant Attorney General

ID # _____ CU

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Subject: In Defense of the Administration's VETO power over the Issuance of Permits in Title IV

ROUTE TO: **ACTION** **DISPOSITION**

Office/Agency (Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
Cuofc	ORIGINATOR	89/12/01			/ /
	Referral Note:				
Cuat 17	A	89/12/6		S	89/12/11
	Referral Note:				
Cuat 02	I	/ /			/ /
	Referral Note:				
CuGray	I	/ /			/ /
	Referral Note:				
		/ /			/ /
	Referral Note:				

ACTION CODES:
A - Appropriate Action
C - Comment/Recommendation
D - Draft Response
F - Furnish Fact Sheet to be used as Enclosure
I - Info Copy Only/No Action Necessary
R - Direct Reply w/Copy
S - For Signature
X - Interim Reply

DISPOSITION CODES:
A - Answered
B - Non-Special Referral
C - Completed
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Comments: No response required. JRH 2/13/90

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Send all routing updates to Central Reference (Room 75, OEOB).
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5/81

CAA - permitting
+ enforcement

Assistant Administrator
for Air and Radiation
Washington, D.C. 20460

Bob, Nancy + John

Because of recent criticism of the Permitting provision, I have attached only, internal talking points.

We have had scheduled technical meetings with industry to explain the provision in an attempt to educate them. If you are interested to one in the 12 - 13th meeting, let me know.

Tom K

IN DEFENSE OF THE ADMINISTRATION'S VETO POWER OVER THE ISSUANCE OF PERMITS IN TITLE IV.

CRITICISM:

- Permit by permit review is unworkable and unnecessarily burdens the States with Federal oversight.

RESPONSE:

- One of the major purposes of Title IV is to replace the SIP revision process for individual sources with a simpler, more expeditious process. In the past, EPA approval of SIP revisions could take up to 18 months. Under the new permit system, the EPA has 90 days to review and perhaps veto the permit. If a permit is vetoed, the State has 90 days to respond to EPA and revoke or modify the permit. Approval by EPA is no longer needed. Since permits under Title IV are Federally enforceable and supercede the SIP requirements, some Federal review is clearly necessary.

- Several State and local agencies have suggested that an audit program would be preferable to veto authority. Because each permit written under Title IV is Federally enforceable, veto authority is needed for extreme cases to protect Federal interests.

- It is important to remember that these are operating permits rather than permits to construct. If the EPA takes no action the source continues to operate. Even if the veto power is exercised there are provisions under which the source may continue to operate. In addition, experience in the water program with permit veto authority has demonstrated that it is a viable method that does not result in duplication of effort or excessive burdens.

- The EPA can only review permits against the requirements explicit in Titles I, III and V. If these requirements have been met the permit cannot be vetoed.

FACT SHEET: PROVISIONS OF TITLE IV PERMIT PROGRAM

- The Administration's proposal would establish a permit program aimed at major sources of air pollution.

- The program is intended to integrate and improve implementation of all requirements applicable to major sources (criteria pollutants, acid rain, and air toxics). It also provides a simplified mechanism for revising requirements for specific sources. It is patterned after the program applicable to point sources under the Clean Water Act.

- The proposal requires EPA to promulgate regulations on permit requirements 12 months from enactment. States would have to submit permit programs to EPA for approval 3 years from enactment. The permit program must include a fee schedule sufficient to recover permit processing and applicable monitoring, modeling, and regulatory development costs.

- If a State fails to submit an approvable permit program, EPA may impose sanctions or promulgate Federal permit program. Draft permits must be subject to EPA and public comment and submitted to EPA. The EPA may veto the permit within 90 days of receipt; if no objection, the permit issues. The EPA may require a State to modify a permit for cause.

- Sources must submit permit application within 6 months after program approval. Sources must have a permit in order to operate, but submission of a timely application protects a source from enforcement in case the State has not acted on the application.

- To get a permit, sources will have to show that they meet the requirements of all of the applicable Titles of the Clean Air Act.

- The major criticism of Title IV, raised by some States and industry, is that permit-by-permit review and possible veto by EPA is unworkable and unnecessarily burdens the States with Federal oversight.

- One of the major purposes of Title IV is to replace the SIP revision process for individual sources with a simpler, more expeditious process. In the past, EPA approval of SIP revisions could take up to 18 months. Under the new permit system, the EPA has 90 days to review and perhaps veto the permit. If a permit is vetoed, the State has 90 days to respond to EPA and revoke or modify the permit. Approval by EPA is no longer needed. Since permits under Title IV are Federally enforceable and supersede the SIP requirements, some Federal review is clearly necessary. After-the-fact audit and veto would be more disruptive.

- It is important to remember that these are operating permits rather than permits to construct. If the EPA takes no action, the permit is issued and the source continues to operate. Even if the veto power is exercised, there are provisions under which the source may continue to operate.

- The EPA can only review permits against the requirements explicit in Titles I, III and V. If these requirements have been met the permit cannot be vetoed.

Clean Air Act - Permitting & Enforcement

January 18, 1990

PROPOSED REVISIONS TO TITLE IV - PERMITS

CONCEPT PAPER

Summary of Revisions

This paper outlines possible amendments to provisions in the pending Senate and House amendments to the Clean Air Act that establish a federal permits program. These revisions, which address comments received from environmentalists, industry and state and local air pollution control agencies, will make the program more effective and efficient.

Under the proposed revisions, there would be two groups of permits, which are called Type A and Type B permits. Type A permits would be those that simply implement the SIP or other applicable Federal requirements and that do not contain any requirements less stringent than those in the SIP or other Federal requirements. Type B permits would be permits that either do not implement the SIP or other federal requirements or that contain conditions less stringent than those in the SIP or other Federal requirements. Permits asserted by EPA to be "equivalent" to the SIP's requirements would be Type B.

Procedurally, the state in which the source operates would identify each permit as Type A or Type B in the public notice required to be posted for the permit. Permits the state identifies as Type B would be handled according to the current bill's review and objection provisions, except that EPA's decision not to object would be judicially reviewable. As with the current bill, if EPA fails to act on a proposed permit, the state may issue the permit. By limiting EPA's opportunity to comment to the public comment period, any changes to the permit in question will not result in needless delays.

Permits a state identifies as Type A would be issued by the State after the close of the comment period without EPA review. A permit identified by the state as a Type A permit will nevertheless be treated as a Type B permit if EPA notifies the State during the comment period that it considers the permit to be Type B. In addition, a procedure to allow members of the public to obtain a reviewable decision from EPA concerning the categorization of permits would be established.

The permits title would also be revised to reduce the possibility of delays in issuing permits by establishing a schedule to be included in the statute for phasing in the permit requirements for particular groups of sources. The initial period for submission of applications by sources subject to the permit requirement would be extended from 12 to 30 months. Also, the Administrator would be given the discretion to extend this phase-

in period for a renewable one-year period for any class or category of source for which he finds that insufficient resources are available to assure adequate EPA review of permits.

Finally, the revisions would clarify language in the current bill (Section 402) to allow the Administrator to exempt one or more source categories from the permit provisions if he finds that the costs of permitting such source categories exceed the benefits.

Discussion

The purpose of these changes is to assure the smooth functioning of the permit program. Comments on the program from industry have reflected concern that extensive EPA review will cause bottlenecks in the permitting process, and that the states will expend their limited resources allocated for permit reviews addressing EPA objections instead of issuing construction permits for new sources. They and state and local air pollution control agencies have also expressed concern that the initial crush of permits will overwhelm EPA's ability to review them, resulting either in long delays to resolve half-formed EPA objections, or the issuance of inadequate permits. Environmental groups were concerned that the Agency's failure to object to a permit under the current bill would be unreviewable, and that States could issue permits that were less stringent than SIPs and would undermined attainment demonstrations.

The changes discussed above address these concerns. EPA review is unnecessary for permits that simply implement SIPs or other applicable Federal requirements and EPA is willing to waive its review of such permits. However, it will not always be clear that a permit simply implements a SIP. For example, a permit may reflect an improper state interpretation of which RACT rule should apply to a source. To assure that the SIP is properly implemented through the permit, EPA needs some opportunity to convert permits misclassified by the state as Type A permits into Type B permits. By limiting this opportunity to the public comment period, these changes will not result in needless delays.

Affected members of the public also need the opportunity to call upon EPA to make a reviewable decision on whether to object to a permit asserted to deviate from the SIP. These revisions require such a decision for any permit identified by the state or EPA as Type B, or if a public commenter meets certain threshold requirements.

Further Technical Changes

The above amendments address the most fundamental concerns raised by industry and environmental groups. In addition, the following technical changes reflect other concerns raised in meetings with and submissions by various groups.

a. Contiguous States: States would be required to notify only those states in which the permitted source could have a significant air quality impact. EPA would be authorized to object to permits after such notice only if emissions from the source would interfere with attainment and maintenance with NAAQS, PSD increments and visibility in the downwind state.

b. Completeness of Permit Applications: This change would track the Dingell-Lent version of the bill by requiring EPA to set out criteria for determining when permit applications are complete.

c. Fees: EPA supports the Dingell-Lent provisions.

d. Permit Modifications: EPA would have authority to issue rules allowing states to provide expedited procedures for minor permit modifications.

e. Source-specific SIP Revisions: Delete the sanction prohibiting source-specific SIP revisions in states that fail to submit adequate permit programs.

f. Priority for Construction Permits: Establish a system giving permit review priority to permit applications for new or modified source construction.

g. Paperwork Reduction: Add a general provision, comparable to the Clean Water Act, requiring EPA to minimize paperwork burdens.

h. Multiple Definitions of Source: Review permits title to see if it is possible to minimize the number of different definitions of sources subject to the program (chances are not much can be done along this line without a major overhaul to the rest of the bill, since the permits title merely cross-references to definitions in other parts of the bill that identify regulated sources).

29137(a)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

COUNSEL'S OFFICE
RECEIVED
DEC 3 1991

THE ADMINISTRATOR

MEMORANDUM

TO: Members of the Council on Competitiveness

FROM: William K. Reilly

SUBJECT: Final Clean Air Act Permits Rule

I have prepared this memorandum to advise you of the schedule for issuing the final Clean Air Act Permits Rule, and three matters which I believe are essential to make the President's Clean Air Act enforceable, flexible and market based.

Schedule for Final Rule

The statutory deadline for issuing the Permits rule was November 15, 1991. EPA transmitted a draft final rule to OMB on October 15, 1991, the required 30 days prior to scheduled issuance. I testified before the House Subcommittee on Health and Environment that I would issue the final rule within one month after the deadline. I would like to issue the final rule on December 18 and will fully consider any comments presented by OMB or the Council before that date.

Proposal was Flawed

Comments received during the public comment period have shown that the May 10, 1991 proposed rule requires substantial change. The proposal allowed major sources to significantly change the terms of their permits unilaterally without any opportunity for public comment or meaningful review by state permitting authorities or EPA. If the state or EPA failed to object after 7 days notice, the source would be "shielded" from enforcement of the substantive public health regulations. Thirty-four states commented on the proposed rule which is designed to provide them with guidance on how to develop their state programs. All of their comments about this permit modification process were negative.

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Three Important Issues

Three permitting issues are especially important:

1) Opportunity for Public Comment

It is important to provide an opportunity for public comment on permit decisions, made under authority of Federal law, which affect emission levels and enforceability. Public participation is specifically embodied in the new statutory language, and is consistent with long-standing EPA precedent under the Clean Air Act and other environmental laws.

2) Limitation of Shield

A shield enables a business to protect itself from charges that it is not meeting the requirements of the statute by demonstrating that it is complying with the specific terms of its permit. This defense should not be available until all parties have had a full and fair opportunity to review the permit provisions for correctness.

No shield exempting sources from new requirements like air toxic regulations, which are scheduled to be promulgated over the next ten years, or state implementation plan revisions can be appropriate where the shield would frustrate meeting deadlines specified in the statute.

3) Monitoring

Effective monitoring procedures that provide accurate and representative emissions data must be specified in permits to assure compliance, and to lay the foundation for market based approaches.

Opportunity for Public Comment

When President Bush stood at the Grand Canyon in August, he celebrated an historic agreement among the owners of the Navajo power plant, the State of Arizona and environmental groups. He recognized the importance of the regulatory participation of The Grand Canyon Trust and other members of the public in bringing the issue to EPA's attention. The President stated:

> It is so wonderful that they are cooperating in this forward-looking manner -- partners in an historic agreement.... Today's event celebrates the kind of civility and cooperation that our Administration has tried to promote for our entire society. For too many years, Americans have divided into feuding camps -- people sparring over

causes; special interests battling it out against special interests and so on.... Ten years ago, I was Chairman of the Presidential Task Force on Regulatory Relief, then Vice President. And I called for greater use of informal negotiation techniques -- instead of litigation -- and for market-based approaches to controlling pollution. And this agreement shows that those innovations work.

The President has always been a firm supporter of public participation in community matters. Few issues arouse citizens more than pollution in the air they breathe. If an incinerator in Alexandria, Virginia wants to increase mercury emissions more than its permit allows, or a chemical plant in Kanawha Valley, West Virginia wants to emit more benzene, or a steel mill in Gary, Indiana increases emissions of particulates, the public will demand the opportunity to comment upon those decisions. Any attempt to preclude the public from the process will only result in increased litigation. But the original proposal failed to allow the opportunity for public comment on changes in permits which increase total pollution over the original permit terms.

Streamlined Provisions Allow Flexibility

EPA has drafted new provisions to streamline the opportunity for accelerated public comment while also assuring that business has operational flexibility on a timely basis to respond to market needs that arise in a competitive economy. Six methods are specified to allow companies to change their operations without having to seek any change in the permit so long as the state is notified and overall emissions do not increase. When the permit must be modified, EPA's guidance to states calls for a streamlining process to provide for appropriate review -- before or after the change is made -- based on the environmental significance of the increase. In a vast majority of cases, business will be able to make the change in 10 - 75 days. Small changes can be made after 10 days notice, with public comment and EPA and state review after the changes are made. Moderate changes are subject to an accelerated 75 day review. Major changes could occur in nine months, well before the 18 months allowed in the statute. As a practical matter, these provisions will not affect business before 1996.

Precedent and Statute

Experience with similar opportunities for public comment under the Clean Water Act indicates that formal public hearings on permit changes have been requested only 2% of the time. It would be an unfortunate departure from

universal precedent for EPA not to require the opportunity for public comment on permit changes. Such a deviation would nullify the public comment process required when the original permit was issued.

EPA's General Counsel has advised that statutory language which requires "public notice, including an opportunity for public comment and a hearing" (emphasis added) covers both the original permit issuance as well as modifications and revisions.

$1-2 Billion Savings to Economy

An enforceable permit and monitoring system will provide savings to the economy. While it is true that less stringent enforcement of existing requirements could lower costs for a particular business, the total burden on the economy will increase. The new Clean Air Act mandates specific compliance dates and an annual 3% emission reductions in nonattainment areas from states. Therefore, less individual compliance will likely cause others to bear higher costs in response to stringent standards that will have to be adopted to make up the deficiency.

EPA is seeking the least cost reduction when it seeks to fully enforce existing limits. This will mean more reductions at a cost of $1000-1500 per ton from existing standards vs. marginal costs of $5000-15,000 per ton from more stringent standards or $25,000 per ton from additional controls on new cars. Initial estimates indicate this could save the economy $1-2 billion annually. EPA's amendments to the permits proposals are necessary first steps towards achieving these savings.

Market Based Reform

Accountable permit limits and effective monitoring were the prerequisites for making the Acid Rain Allowance Trading System work. Accountability is equally significant for industrial permits, if market based approaches like emission trading, banking and averaging are to be accepted by the states and the public. Regulatory reforms for VOC, NOx and air toxic rules will stand or fall based upon how state regulators and the public regard the integrity of the accounting. Loose permit modification procedures will destroy that credibility according to 34 states that commented negatively on the proposal.

Shield

Finally, EPA must act cautiously before offering shields against enforcement of legal requirements. Any shield must not restrict the applicability of new toxic standards which are not yet promulgated or interfere with a state's ability to achieve the statutory required 3% annual emissions reductions. If these requirements are

not met, highway construction ban sanctions must be imposed by EPA and Federal Implementation Plans must be enacted.

Summary

The issues of opportunity for public comment, monitoring and the shield directly affect the enforceability of permit limits which polluting sources have a legal obligation to meet. The weaknesses in the proposal must be corrected to achieve air quality deadlines proposed by the President. EPA's accelerated procedures (which are themselves a significant regulatory reform) address these problems while providing business with the flexibility to make required changes on a timely basis.

Jeff Holmstead
FYI

Steven B. Hellem
Executive Vice President

NEDA

National Environmental
Development Association

1440 New York Avenue, NW
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Washington, DC 20005
(202) 638-1230

NEDA
National Environmental Development Association
A Coalition of Organized Labor, Agriculture and Industry

TESTIMONY OF
DAVID A. CHITTICK
AT&T CORPORATE ENVIRONMENT AND SAFETY VICE PRESIDENT

on Behalf of the
NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S
CLEAN AIR REGULATORY PROJECT
and THE AMERICAN ELECTRONICS ASSOCIATION

on the Proposed Operating Permit Rule
56 Fed. Reg. 21712 (May 10, 1991)

before the Environmental Protection Agency
Washington, D.C.
June 4, 1991

Thank you for this opportunity to testify on the proposed permit rule. I am David Chittick, Vice President for AT&T's Environmental Engineering, Safety and Health Program, and I am here today testifying for both the National Environmental Development Association's Clean Air Regulatory Project (NEDA/CARP) and the American Electronics Association (AEA).

We appreciate EPA's commitment to the roundtable process and the Administration's open door policy, allowing all interested parties to provide input into the proposed rule. We are concerned that since the permit rule's proposal, EPA may have interpreted industry silence for endorsement. While we think that the proposal may be workable, there are many issues that are of great concern to the industries I represent.

Industry supports a balanced, workable permit program. We see the prerequisite principles guiding implementation of Title V as the following:

- All regulated sources must meet the emission control requirements outlined in other Titles of the Clean Air Act, and these can be most effectively met through a workable permit program.

- The permit rule should reflect the intent of Congress by providing for the minimum requirements outlined in Title V. Industry recognizes the need for states to make a transition to a new program of operating permits, and we have a stake in making it work.

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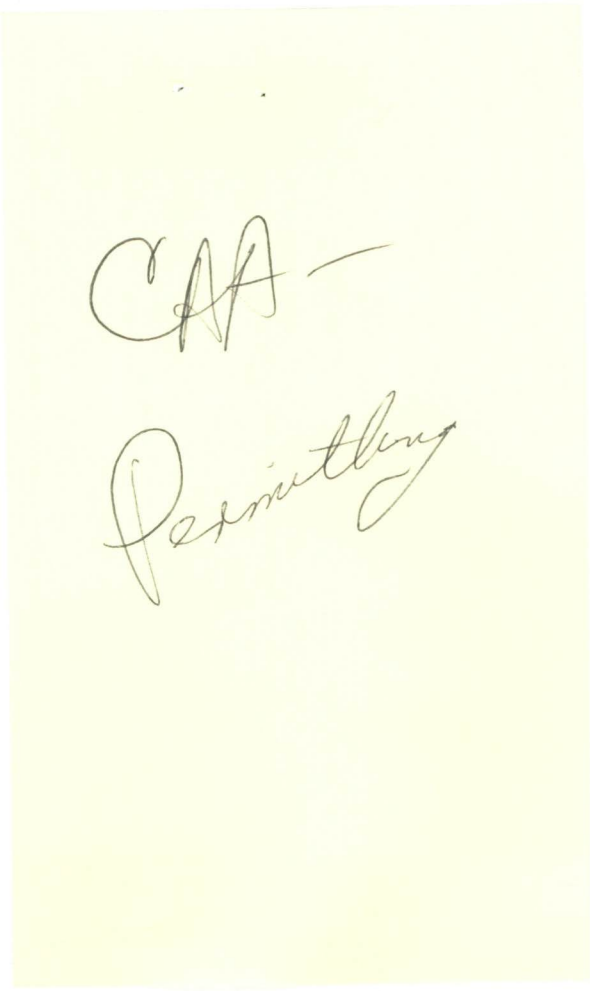
CAA
Permitting

- Not only federal, but state flexibility is the cornerstone for a successful permit program - effective implementation by the states will go a long way toward making this program work.

- But the overriding principle must be that U.S. manufacturing facilities be allowed fundamental operational flexibility to produce goods for competitive markets while proceeding through a permit program which provides timely implementation at a reasonable cost.

While the proposed rule is significantly better than any of the previous draft proposals, there is great concern among environmental professionals at the plant levels of our member companies. These people are seeing the permit rule, in most instances, for the first time, and they are voicing considerable disbelief when we tell them that <u>this</u> rule is an improvement over prior drafts. Their concerns are heightened when they speak with state and local officials about state implementation.

Of greatest concern is the conflict between the need for operating flexibility within the terms of the specific permits and the desire by EPA to assure uniformity and predictability in an uncertain economic world. The rule must move further in the direction of flexibility. There has been progress from prior drafts, but it is not sufficient.

Let me explain why the proposed rule reflects the <u>beginning</u> of progress in the right direction, and why more is needed:

We must maintain <u>at a minimum</u> the features in the proposed rule providing for operational flexibility. Let me describe what we would face if EPA backslides <u>at all</u> in the permit rule and includes provisions, as in prior drafts, which would impose a quasi preconstruction review period, which I emphasize is not required by the 1990 Clean Air Act Amendments. If there were requirements for months of review and hearings or an affirmative approval for changes, engendering delay, now eliminated by the operational flexibility and minor permit provisions in the proposal, our company would have reconsidered the following changes - which, I think that you will agree, are environmentally beneficial.

AT&T has made a corporate commitment, just as many of our other association members have, to phase out as rapidly as possible the use of materials which have been linked to the depletion of the stratospheric ozone layer. In one facility for instance where we strip photoresist films from circuit boards being produced, we replaced the methylene chloride and methyl chloroform used for cleaning the boards with an aqueous solution which is emitted from the plant as precipitated sodium carbonate. Emissions of hazardous air pollutant solvents were reduced from 51 lbs/hr or about 185 tons per year of a hazardous emission to 0.4 lbs per hour or about 1.7 tons per year of nonhazardous particulate. We needed to

install new emitting units to make this change. The change took us about three months to permit in the state. Without the minor permit amendment, it would take us 18 months from the time we obtained a "completeness determination" from the permitting authority. Faced with such delay, we would not have been able to make this change. Industry has to have the operational flexibility to make these types of changes that the proposed rule's minor permit amendment allows.

At the same facility in another operation, we replaced methyl chloroform with butyl carbatol - a glycol ether. Emissions of methyl chloroform had been about 40 lbs/hr; after the change the facility emitted 0.8 lbs/hr or 5 tons per year of another type of emission regulated under the Clean Air Act - but not one associated with ozone depletion. Under the proposed rule, since we had contemplated this change at the facility for at least a year in advance, we might have been able to permit the process change under section 70.7 (d); under previous drafts we would have had to go through an 18 month process to revise our permit. This is another illustration why dynamic companies like ours need to be able to use the operational flexibility provisions in this regulation in order to permit future operating scenarios.

While the operational changes I just used to illustrate how the operational flexibility and minor permit provisions can be used for environmentally-beneficial changes, I need to emphasize that in the electronics, aerospace, pharmaceutical, petrochemical, refining and consumer products industries, our companies make numerous daily and even hourly changes involving solvents as product intermediates and cleaners or "degreasers." In electronics manufacturing, for instance, temperature and humidity changes can necessitate the need for a different solution to remove foreign materials from circuit boards and microprocessors. I need go no further than to say that it would not be rational for regulators to want us to revise our permit half-a-dozen to several dozen times a day to make these changes.

Now, let me describe where the proposal does not go far enough. This proposal is overreaching in a number of respects. Specifically, the provisions of section 70.3 require that if a source (meaning a piece of equipment or the entire facility) is deemed "major" because for example it has a process that has the potential to emit 10 tons per year of a toxic, then every piece of emitting equipment, however small, and every fugitive emission from the facility of every regulated pollutant, must be accounted for in the permit. This happens regardless of whether there are any applicable regulations for any of these other sources. In fact we have a facility in Illinois that has 105 emissions points, but only one process that qualifies as a major source in the facility. Our people are having difficulty understanding how EPA intends to have industry count the emissions for the permit application, account for fugitive emissions of all regulated pollutants from the plant,

or devise the operating scenarios for inclusion in the permit under the proposed rule. Now I submit to you, and I think that you might agree, that if the environmental professionals in our company are having difficulty designing a system to meet what they interpret as EPA's requirements set out in this proposal, other companies must be in similar or far worse circumstances. This level of complexity runs counter to the intent of Congress or EPA to develop a workable permit program.

I would like to close by offering for the public record my written testimony and a list of examples where industry needs the operational flexibility provisions in this proposal. The hearing officer should note that the examples were prepared in an effort to understand the implications of the March EPA draft proposed permit regulations on NEDA's member companies. We urge you to study the examples and would be happy to go over them with you in more detail. None of the examples is unusual and none would cause the violation of any applicable standard, emissions limitation, or requirement under the Clean Air Act. These examples are offered to prove that the proposed rule reflects only the beginning of movement in the right direction.

Again, let me clearly state - Number one, it is the position of NEDA's and AEA's member companies that we will meet - within the prescribed time frames - all of the emission control requirements of the Act. Because of other provisions in the Act, these permit provisions do not provide the opportunity to avoid or delay such control. Number two, The states must be allowed flexibility to develop and implement workable programs. We all expect the states to continue to write operating permits which absolutely set tight emission rates based on pollution control technologies. The operational flexibility and permit amendment provisions would in no way compromise these tough requirements. Number three, U.S. manufacturing facilities are tremendously concerned about potential for delay - delay in asking changes to processes which improve and/or insure quality of our products; - delay in making changes to produce new products; - and delay engendered by bureaucratic overload.

If this rule fails to work as intended, industry, the EPA, and state agencies will be blamed, while the critics of flexibility will not bear the responsibility for its failure. Industry wants this program to work, but we urge you to retain the minimum flexibility required for American business to be competitive in the world marketplace and to continue to improve the rule by moving it toward being more flexible.

If the hearing officer or his staff have more questions regarding my testimony, please feel free to contact me directly or contact NEDA/CARP and the American Electronic Association's staff.

MAIN PROBLEM AREA	EXAMPLE	PROPOSED SOLUTION	PAGE NO.	EPA RESPONSE	COST
1.0 PERMIT PROBLEM AREA					
1.1 Inclusion of all "emission units" if Part 70 source in facility	University or medical research laboratory with one hood venting 10 TPY of toluene used to wash lab lab equipment/ or ethylene oxide from centrifuges must include in the school or hospital's permit every lab hood and characterize all air emissions including fugitives from all facilities on the campus/clinic. Minor electronics facility (i.e., $\leq$ 100 TPY) with one Part 70 equipment (which may be an NSPS small boiler or etcher) must characterize emissions from 4000 "emission units" such as adhesive applications on work bench or small degreasing operations to clean circuit boards in permit application, including operation and maintenance plan and operator training for operating facility. Small business "ABC" Screw Press which punches brass screws and uses a Part 70 degreaser must submit detailed compliance plan for how it intends to maintain oxygen trim on boiler (incidentally unequipped with anything but a pressure gauge), which performance testing methods operator intends to use to demonstrate compliance, recordkeeping specifications, operation & maintenance plan for degreaser, and operator training procedures to ensure degreaser will not malfunction and will be operated properly. Small chemical specialty company/ or large pharmaceutical company must detail all chemicals, isomers, inerts and reactants it will ever use in the future to respond to consumer preferencesfor all products which could possibly be demanded, calculate worst scenario if facility runs on two-three shifts making the chemical specialty group with the highest possible volatility (although company probably makes that group four weeks out of the year) to preserve opportunity to utilize operational flexibility provisions for seven day notification. Company also tries to anticipate what products it might be producing three years from time application is filed and how that product might be synthesized to preserve possibility for producing it without permit modification.	Do not require all unregulated, non-Part 70 "emissions units" in permit, and calculate annual historical emissions for fee other purposes using purposes using accepted material balance, estimates of product throughput or Toxic Release Inventory reporting.	69-72, 141-42 [17-18/70.3(c), (e)]	We need all of this information for emissions inventories and SIP planning purposes. This information gives our inspectors a better enforcement handle on companies' operations.	U.S. Census indicates that approximately 300,000 businesses will require permits based on 1988 figures. Note, 4,000 man years of backlogged permit applications according to U.S. EPA, RCRA Implementation Study (July 1990). CONSAD study estimated Title V permitting would cost $10 billion annually without any environmental benefits. Companies will be unable to forecast consumer preferences five years in advance. Confusion over requirements related to unregulated sources.

ATTACHMENT TO

TESTIMONY OF
DAVID A. CHITTICK
AT&T CORPORATE ENVIRONMENT AND SAFETY VICE PRESIDENT

ON BEHALF OF

THE NATIONAL ENVIRONMENTAL DEVELOPMENT ASSOCIATION'S
CLEAN AIR REGULATORY PROJECT
AND THE
AMERICAN ELECTRONICS ASSOCIATION

BEFORE THE

ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, DC
JUNE 4, 1991

MAIN PROBLEM AREA	EXAMPLE	PROPOSED SOLUTION	PAGE NO.	EPA RESPONSE
	Auto manufacturer must include all metals and volatile materials to enable it to use green paint in its spray booths, in case green cars become popular with the public again even though the company produces only red cars now. In addition, in the hope that the market will return for domestic automobiles in the midsize range which company produces, manufacturer must permit facility at highest possible allowable emissions based on three shifts and all lines for that midsize, to avoid permit modification (i.e. 18 month delay) if market swings back in favor of domestic car market.			
1.2 Detail in compliance plan creates operational straightjacket	Major east coast refinery with thousands of emissions units including flanges and valves on piping and tankage must characterize and estimate when all seals, manifolds, couplings and valves will be repaired and serviced for purpose of operation and maintenance plan required by EPA, must include scheduled maintenance plan for servicing all large and small pieces of equipment, must anticipate all safety and mechanical situations requiring shutdown procedures, planned or unplanned on all process equipment and tankage, must specify testing methods (devising some where none exist), and must devise and specify at which couplings of equipment continuous emission monitoring devices will be installed, operated and maintained, and records retained by the company.	Do not require operation & maintenance plans, operating parameters, test methods, and operator training in permit, where it becomes subject to permit modification provisions if changes occur AND SUBJECT to ENFORCEMENT IF DEVIATED FROM.	92-93, 95-110, 114-120, [38-46, 47-49/70.6(a), (c)]	We need to ensure that companies are doing everything they need to d to minimize emissions and avoid violating the law, and the only way we can d this is by making these responsibilities enforceable.
1.3 Compliance schedules for sources in compliance	Chemical company knows that MACT has been proposed and that it must meet MACT two years from date permit is issued. Company must make enforceable commitments to buy technology from vendor on certain date, install equipment by certain date, do performance testing on certain date, and begin shakedown on certain date to comply with eventual standard. Despite fact that chemical company may eventually devise product substitution or work practice to meet standard or other technology becomes available more economically in one year time frame, all information must be submitted in compliance plan now	Do not require complaince schedules with immovable targets in permits. Make policy decision clear that for sources in compliance, changes in milestones do not require permit modification and do not occasion enforcement unless final compliance with new regulation is not achieved by applicable date.	109-110	We need to ensure that al companies make these commitments early, and continue to meet schedule dates, and the water program taught us that companies would not plan ahead to meet pollution requirements unless reporting and enforceable commitments were required by the government.

MAIN PROBLEM AREA	EXAMPLE	PROPOSED SOLUTION	PAGE NO.	EPA RESPONSE	COST
2.0 OPERATIONAL FLEXIBILITY			59-61, 131-154 [50-51, 70.6(d), 70.7[(d)-(f)]		
2.1 Emissions increases and changes that do not exceed permit allowables	Pharmaceutical company gets order to increase production of vaccine for flu epidemic, but must wait at least seven days to increase production using more volumes of VOCs.	For changes and emissions increases that are anticipated by permit, make notification of change satisfactory; for changes that are not anticipated in permit, but do not exceed allowables, apply seven day notification requirement, delineate what "emergencies" are that waive seven day requirement, as required by law.		Our inspectors will not be able to identify enforcement situations or which requirements in the "permit envelop" apply, if they don't receive 7 day prior notification. Section 502(b)(10) requires at least 7 days notice for these equipment and process changes, just as if a company were increasing its emissions. We have no latitude to make a policy decision.	Companies and states are in perpetual mode of revising, modifying permits without operating certainity. Confusion as to legality of changing processes to meet market demand, consumer preferences, emergencies, etc. Conflict with Total Quality Management Practices. Conflict with OSHA Hazard Regulations. Conflict with National Energy Strategy. Impedes Voluntary Reduction Program under Title III and Pollution Prevention Initiatives. Reduction in Exports. Move high tech companies, with rapid product turnover overseas. Lags and reductions in GNP. Lost business opportunities in electronics, pharmaceuticals, batch chemicals, metal fabrication and metal processing industries. Inability to respond to domestic need for new products like drugs.
	Pharmaceutical company needs to utilize equipment pool #1 to produce more of one drug, but backs down use of equipment pool #2 so no net emissions increase from facility as a whole - but emissions from the Part 70 sources in each equipment pool change in previously unanticipated ways. Cogenerating facility must repipe steam lines to host plant to supply greater process steam to one area of plant with higher steam demand, but physical change does not trigger PSD because emissions do not increase. Electronics circuit board manufacturer must routinely change degreaser composition several times a day to clean boards based on humidity in plant and other variables, but is constrained by seven day notification provision. Specialty chemical batching chemical company gets order to make xyz compound instead of abc compound for client, delivery by end of week, and cannot respond. Small saw mill receives more green softwoods than hardwoods and fires mill boiler causing higher particulate levels, possibly violating 7 day notice requirement. University laboratory enlarges course selection so students experimenting with new compounds. Must university's permit be modified? Refinery receives shipment of sour crude in normal course of business which will cause fluctuations in SO_2 and NO_x emissions routinely.				

MAIN PROBLEM AREA	EXAMPLE	PROPOSED SOLUTION	PAGE NO.	EPA RESPONSE
2.2 Emission increases and changes above allowables.	Electronics plant must wait 18 months to replace methylene chloride (a non-VOC, but HAP) degreaser with VOC substitute, although emissions remain below levels requiring NSR review in nonattainment area.	Require notification and apply provisions of other air pollution control requirements under NSPS, or section 112 when requirement triggered. Do not require protracted permit modification until preconstruction review triggered by emissions increases under PSD/NSR programs as amended by CAAA.		Congress could not have intended to regulate changes within the permit envelope by requiring 7 day prior notification and not intended full permit modifications for changes greater than allowables but still less than that required for new source review under PSD/NSR. We must interpret the silence in the law to require full reopening of the permit with EPA, ajdacent state, and public review every time this situation occurs. Besides states say they have no SIP planning mechanism to monitor these changes and any increase over allowables will blow their SIP RFPs apart.
	Refinery's "normal" crude shipments are interrupted because of force majeure situation and is forced to buy alternative more "sour" crude on spot market, but must shut down or severely curtail production [redacted] at least until 7 day notice period passes.			
	FDA approves a new drug application for pharmaceutical company to produce revoluntionary new arthritis drug, but it takes additional 18 months to 24 months to revise permit for new product step, although changes do not require PSD review.			
	A refinery may be depending on clean natural gas as a fired fuel to meet stack emissions limitations. During a particularly long winter cold snap, just when consumers dependant on home heating oil are most in need of maximum refinery output of home heating oil, similar consumers who need natural gas for heat may be given priority access to natural gas and the refinery may be curtailed. If the refinery is unable to shift to an alternate fuel because of emissions or permit parameter limitations, home heating oil supplies would become constrained.			
	Another electronics plant must wait 18 months or longer to get permit modification to substitute water-based solution for CFCs currently used to clean circuit boards.			

MAIN PROBLEM AREA	EXAMPLE	PROPOSED SOLUTION	PAGE NO.	EPA RESPONSE
	Manufacturer figures out way to produce compostable diapers by replacing compound A with newly discovered compound B, but must wait at least 18 months to trial produce new diaper since compound B is HAP and is not in permit. Pulp and paper mill buys new process to substitute for bleaching, but must get a permit modification before it can stop using chlorine in process although new equipment need not be built and emissions remain within permit allowables.			
2.3 Changes in operation and maintenance, operator training, routine repair and replacement programs, and compliance schedules	Instead of taking Claus sulfur recovery unit out of service for scheduled maintenance, company must pull one unit off line because clogging creating safety concern, bypassing hydrotreater and flaring hydrogen sulfide gas stream until stand-by SRU can come on-line. This situation is not scheduled O&M, but is prudent given the situation. Must prior notice be given? Is the compliance plan subject to an 18 month delay before it can be modified to accommodate this situation recurring in the future? A paper and pulp mill gets EPA to agree that Method 5, instead of 5A, is more accurate way of conducting performance test. Is there an 18 month delay while the permit is modified? An electronics company wants to change its operator training program, or a state insists on such changes, but the permit must be modified before these changes occur. Chemical company learns that heaters for new boiler replacement program, needed to comply with NO_x reduction requirements mandated by SIP 9 months in the future, will not arrive on scheduled date and that scheduled performance test and shake-down period in schedule of compliance need to be altered. Does missed milestone create enforcement situation? Is permit modification really necessary to change schedule of compliance?	Do not require permit revisions for these types of changes. See above at 1.2.		This is not clear, and the fourth draft suggests some rethinking of this issue, by including at least some of these changes as administrative amendments.

MAIN PROBLEM AREA	EXAMPLE	PROPOSED SOLUTION	PAGE NO.	EPA RESPONSE	COST
1.0 GENERAL PERMITS					
3.1 No EPA commitment to general permits for small business or definition of "similar sources" that might qualify	Despite fact that nearly all dry cleaners, metal fabricators, small printing operations, metal finishing operations, small textile mills, small electronics facilities are similar, operating with nearly identical equipment and having relatively the same emissions profiles, these businesses must each prepare permit applications, go through the process individually of defining which pieces of equipment and processes must be described in the application, evaluating type of emission and calculating annual emissions (or hourly emissions), figure out which test method applies, and devise an acceptable alternative monitoring scheme (in lieu of continuous emissions monitors), and devise a separate operation & maintenance plan for plant. States, left by EPA rules, with the task of characterizing each small industry group in the state and devising general permit rule, but meeting only once every one to two years, often with limited sessions and constitutional mandates to deal with revenue matters and redistricting, will never consider legislation on general permits and states will not have ability to devise such rules, particularly without guidance from EPA on source categories.	EPA should commit to issuing rules, or model guidance for small industry groups in electroplating, metal fabricating, printing, batch chemical, batch food processing, metal finishing, metal furniture, textile mills, batch plastics, machinery manufacturing, and electronics categories.	154-159 [51 52/70.6(f)]	Agency cannot commit these resources, and states can do it if there is enough political pressure. We are not concerned that these state rules may look different for the very same industry.	Small businesses cannot operate while preparing permit applications, and EPA has seriously underestimated cost of permit application preparation. Small businesses cannot afford to respond to customer preferences and lose clients, eventually go out of business. States that do try to get EPA approval of general permit provisions end up with mish-mash of state regulations.
3.2 No procedures or guidance for states to use postcard registrations under general permits		This regulation should define what a "similar source" is and should delineate procedures for postcard registrations for sources covered under general permits so they can continue to operate.		The law is silent, and therefore, we do not have legal authority to define these issues and provide for these procedures.	

Further Examples of Permitting Situations under Draft Rule

UNIQUE PRODUCTION REQUIREMENTS

o Dynamic Manufacturing: Because of the urgent need to get new drugs out quickly to respond to patient needs and because earlier research cannot anticipate all real world conditions, it is inevitable that the launch of a new drug will begin before the manufacturing process can be well-honed. The manufacturer must constantly refine the manufacturing process to increase its efficiency as time passes. These refinements cannot be anticipated, but they not only reduce the cost of the drug to consumers and medical providers but reduce the amount of pollutants released as well.

UNANTICIPATED CHANGES

o FDA generally will not issue new drug approval (NDA) until it has inspected a completely constructed facility. In addition, it can require changes in a product formula or, conversely, prohibit such changes because the product will differ. FDA-driven changes cannot be anticipated.

o Unanticipated demand occurs constantly. An epidemic or a rash of unexpected illnesses occur; other sources of supply in the drug market are lost.

o A new medical use for an existing drug may be found. A drug was used for shingles, then was found to be an anti-acne drug. A pharmaceutical company had flat demand for a drug for many years; suddenly it was discovered to be resistant to a strain of bacteria prevalent in hospitals. Demand soared overnight.

o Disasters occur that demand new or expanded pharmaceutical production. Cyanide antidote kits were requested from a pharmaceutical manufacturer to be shipped to Kuwait during Desert Storm. Medical aid and drugs were needed for San Francisco earthquake victims. Cancer treatment agents were needed for the Chernobyl nuclear plant relief effort.

o Seasonal variability affects demand unevenly. Chicken producers require an anticoccidial poultry feed additive as soon as they discern that it will be needed, always at the last minute because it is a marginal decision. They need to have the antibiotic immediately. The only US producer of this product must compete with three foreign

companies which do not have to wait to begin production. Waiting for several months to get approval to begin manufacturing operations would destroy the US market for this product.

ENVIRONMENTAL AND HEALTH COSTS DUE TO UNNECESSARY DELAY

o Changes that would reduce the amount of pollutants being emitted to the atmosphere must be delayed to accomodate lengthy review. Hundred of thousands of pounds per month of VOC reduction, for example, is forfeited because new technology to reduce these emissions drastically was not anticipated at the time of the last permit renewal. In fact, the technology was not even known at that time. But the environment as well as more efficient production suffers needlessly because the improvement cannot be made expeditiously.

o Life-saving drugs will be delayed waiting for review of permit changes. Drugs being investigated now for cancer treatment, advanced gastrointestinal treatment, antidepressants, treatment for eating disorders, AIDS -- all examples of areas where extensive research is underway -- would be subject to lengthy reviews -- unnecessary for environmental benefit. Every day of review delays the ability of such a drug to benefit or save an individual's health and/or life.

FAX COVER SHEET

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Clear Air Act Permitting

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EPA AT LAST ISSUES CAA PERMIT REGULATION, LEAVING MANY ISSUES OPEN TO COMMENT

EPA on April 24 unveiled its long-awaited Clean Air Act operating permits program proposal, leaving many key issues open to public comment. Staving off industry rumors that the regulation could be delayed up to two weeks because of still unresolved issues with the White House, the Executive Branch decided it was better to "get the vehicle on the street," according to one EPA source. The regulation has been plagued with controversy ever since EPA began its open process involving industry, state regulators and environmentalists in the proposal. The proposal is slated to be published in the *Federal Register* within the next two weeks.

Overall, there has been fighting on only 5% of the text, while 95% of the issues were resolved two months ago, says an EPA source. The issue "on which there has been the most bloodshed" is operational flexibility, or how to allow industry to make minor changes to its operations without undergoing an extensive permit review. Last week, EPA had decided to encourage states to be flexible in allowing modifications (Inside EPA, April 19, p12). In the final proposal, the agency is taking comment on that issue and the process that should accompany any modifications. The agency plans to take comment on all procedural issues, including how long a state should have to review a modification. "We recognize the document will serve an essential function of eliciting comment in a formal way," says an agency source.

Text on the operational flexibility section follows.

Excerpt from EPA's New CAA Permit Proposal

Operational Flexibility and Permit Revisions

(a) General

During discussions preceding the proposal of these regulations, many in the regulated community expressed concern over the ability of states to make changes in permits to reflect routine operational changes. Several different aspects of the permit program provide substantial flexibility for industry to make changes in operations without having to obtain prior governmental approval in the form of amendments to the existing terms of their permit.

Sections 70.6(d) and 70.7 of this proposed regulation set forth the framework for operational flexibility and permit revisions. More specifically, they establish minimum procedures for four classes of changes at sources: 1) changes under the CAA section 502(b)(10) that require no prior revisions to the permit (see section 70.6(d)); 2) changes classified as "minor permit amendments" (see section 70.7(f)); 3) changes classified as "administrative permit amendments" (see section 70.7(e); and, 4) changes classified as "permit modifications" (see section 70.7(d)). The last three of these are grouped together under the term "permit revisions" (see section 70.2(v)). These changes are discussed below.

(b) Flexible Source Operation Under CAA section 502(b)(10)

The first, and perhaps the most important, source of flexibility is the general principle, articulated elsewhere in this preamble, that emissions or other practices not specifically prohibited by a permit are allowed if otherwise legal under the SIP and applicable federal or state law (see preamble discussion at section IV.E.5.b). Air permits summarize existing restrictions; a permit change is not affirmatively required to authorize every change in practices which are otherwise legal under the SIP or federal law merely because an existing permit does not address the practice. Thus, changes in industrial practices and procedures that do not run afoul of the terms of a permit can be made without seeking any change to the terms of the permit. For example, an industry would be free to alter its production processes in ways that alter its emissions unless some term of the permit (or other provision of the law) prohibits the change. Permits should be drafted with this principle in mind, so that they do not include unnecessary detail or restrictions which might unduly hamper industrial flexibility to change operations at a later date. See discussion of designing flexible permits in section (f) below. The states do, of course, have the ability to devise permit programs that would enable sources to choose between: 1) making changes that do not violate the permit without including them in their permits; and, 2) including such changes in the permit pursuant to the procedures established by the state. In the latter case, the sources would have the benefit of a permit shield.

If the explicit terms of the permit do prohibit a practice (for example, if a compliance plan for a noncomplying source contains specific provisions regarding how a source plans to comply which it then not wishes to change), the operational flexibility provisions under section 502(b)(10) of the Act (Section 70.6(d)) provide a "fast track" process for changing the terms of the permit without undue delay provided that the changes do not involve an increase in the level of regulated emissions allowable under the permit.[5]

Although section 502(b)(10) avoids having the States and EPA continually repeat the full permit-review process for minor changes in operation, it does not alter a source's obligation to comply with any requirements of the Act that apply to its operations. This conclusion is suggested by the interaction of the "permit shield" provisions in section 504(f) with the "operational flexibility" provisions in section 502(b)(10). The permit shield provides that compliance with a permit is deemed to be compliance with the requirements of the Act to the extent the permit contains those requirements of the Act or contains a specific finding that a requirement does not apply. To the extent a permit does not address requirements that apply to a change in operations at a facility, those requirements are necessarily outside the scope of the protection provided under the permit shield provision, unless the permit has been revised.

Where the change would not be allowed in the permit but would not exceed allowable emissions under the permit, EPA interprets section 502(b)(10) to require that the source give at least 7 days advance written notice to both the permitting authority and EPA. This notice must contain sufficient information to determine what new requirements of the Act apply (if any) to the changed operations. Of course, the permitting authority must incorporate any new requirements upon renewal. The EPA is therefore taking comment on its proposal to require an update of the permit after notification has occurred, provided that the new version of the permit be made publicly available.

The EPA believes that this proposal gives certainty as to what requirements are applicable to the source and assures the permit is consistent with section 502(b)(10), which specifies how sources may act without the need for a permit revision to incorporate changes not anticipated during permit issuance. In any case, upon renewal, the new conditions would be eligible for protection by the shield.

---

[5] Section 502 (b)(10) requires that Title V programs "allow changes within a permitted facility...without requiring a permit revision, if the changes are not modifications under any provision of Title I and if the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions)," provided that there is written notification at least 7 days in advance, unless the permitting authority provides in its regulations a shorter timeframe for emergencies. See the following footnote for what constitutes a "modification" under CAA Title I.

Clean Air Act
Amendments

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 5 1991

OFFICE OF
AIR AND RADIATION

MEMORANDUM

SUBJECT: Option Paper: Phase I Extension

FROM: William G. Rosenberg, Assistant Administrator
for Air and Radiation

TO: Al Hubbard
Council on Competitiveness

I. BACKGROUND

Section 404(d) of the Clean Air Act, as amended, authorizes Phase I units to submit permit applications seeking a two-year extension of the Phase I compliance deadline (from January 1, 1995 to January 1, 1997), by committing to install technology that achieves a 90 percent reduction in SO_2 emissions (i.e., high efficiency scrubbers). Units qualifying for the extension are eligible to receive allowances in addition to their basic allowance allocation, which EPA is to allocate from a special reserve provided for under Section 404(a)(2). The reserve is to contain allowances equal in number to the reductions in SO_2 emissions projected to occur in 1995 under the requirements of the legislation, but not to exceed 3.5 million tons. EPA is required to act on extension applications "in order of receipt," and must disapprove all applications received after the reserve is depleted. Current forecasts are that the reserve will be oversubscribed, although the amount of oversubscription is uncertain.

II. ISSUES

Two major issues have been raised: 1) whether there should be an early rulemaking or early ranking procedure, and 2) how to allocate the reserve (in order of receipt, pro rata, or lottery). What follows is a discussion of these issues, supplemented by a preliminary economic analysis of the impact of different approaches on the use of scrubbers, coal consumption, and job displacement. (See attached).

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A. Early Rulemaking/Early Ranking Procedure

The Acid Rain Advisory Committee (ARAC) and various utility representatives, e.g., the Utility Air Regulatory Group (UARG), have asked EPA to do an expedited rulemaking establishing a ranking procedure. The concern is that under the statutory 18-month rulemaking deadline and the twenty-seven to thirty-three month permitting schedules, they may not learn whether they will receive allowances under the Phase I extension provision until as late as August of 1993. This does not give interested Phase I unit owners and operators adequate time to effectively plan for installation of the necessary equipment. Design engineering and construction plans are estimated to require no less than three years. Various Federal and State requirements could add another six months or more to the schedule. The uncertainty surrounding receipt of allowances could, thus, eliminate the Phase I extension incentive as a viable compliance option for many.

OPTIONS:

1. Issue an expedited rulemaking with an early ranking procedure for establishing "presumptive" places in line for units wishing to take advantage of the extension authority. Assuming a January promulgation date, a presumptive ranking could be completed as early as March of 1992. While the actual number and receipt of allowances would not be guaranteed until a complete permit application is submitted and a permit is issued, the presumptive ranking would reduce uncertainty.

2. Include an early ranking procedure in the currently planned 18-month rulemaking. Information on the advanced ranking would be available as early as July 1992.

3. Proceed with the 18-month rulemaking, without an early ranking procedure, and review permit applications in the normal timeframe (up to 33 months after enactment or August of 1993). This last option does not respond to the concern raised by ARAC. It is nevertheless expected that the number of units applying for extensions under this scenario will exceed the 3.5 million ton reserve.

Analysis:

Preliminary analysis suggests that on an early rule or normal rule/early ranking schedule, 20-50 units may scrub versus 20-42 units if no early rule or early ranking was

done. For transfer units, the figures would be 25-65 for the early rule or early ranking approaches versus 25-50 under the normal rulemaking permitting procedure. Because of the overlap in these ranges, it is not clear that there would be any significant differences in the amount of scrubbing that would occur under either scenario.

B. Approaches to Allocating the Reserve

The second issue that has drawn major comment concerns the approach EPA uses to determine the order for review of and action on Phase I extension applications and thereby the allocation of allowances from the reserve. As is noted above, the allowances available for this program cannot exceed 3.5 million tons; however, under any of the rulemaking options discussed above, the demand for allowances is forecasted to exceed 3.5 million, resulting in oversubscription of the reserve. No clear consensus position has emerged from the ARAC and other commenters regarding how EPA should handle oversubscription of the reserve. However, UARG pushed the utility industry for a consensus on this issue, and all utilities are now publicly supporting a pro rata approach (discussed below). Some commenters point out that Section 404(d)(3) instructs the Administrator to take action on each extension proposal **"in order of receipt."** Others point out that the Administrator may also approve applications "in whole or in part."

OPTIONS:

Three approaches have been suggested for resolving oversubscription: a strict construction approach, a pro rata approach, and a lottery. The discussion which follows focuses on the strict construction and the pro rata approaches, because the lottery approach, although implemented differently, does not result in economic impacts different from those projected for the strict construction approach. (See attached). The lottery approach was suggested during ARAC deliberations as a way of resolving oversubscription. It is administratively more complex than strict construction.

1. **Strict Construction** -- Under this approach, following the letter of the law, EPA would: set up a desk or window for receiving applications, date and time stamp each application as received, and act on each application in strict chronological order until the reserve is depleted, disapproving any remaining submissions. Concern has been

raised by some utility representatives, however, that this approach could result in persons camping out at the entrance to EPA, with some jostling among applicants as they vie for their place in line. Applicants may argue that they both arrived at the same time.

- Legal Implications: The strict construction approach follows the literal letter of the law.

- Administrative implications: The strict construction approach is the most expeditious option because the number of applications reviewed is limited to those not exceeding 3.5 million. The approach could be implemented in a manner that would reduce the risk of a scene at EPA's doors. For example, EPA could require that the submission be made by the designated representative, restrict the formation of lines prior to a specified time, and warn applicants that they will be asked to leave in the event of unruly behavior.

2. **Pro Rata** -- Under this approach, EPA would allocate allowances in the reserve "in order of receipt" until the day when the reserve is oversubscribed. Allowances the remaining in the reserve on that day would be apportioned on a pro rata basis among all qualifying applications submitted on the day oversubscription occurs. All applications received after the day oversubscription occurs would be denied. Applications received prior to the day oversubscription occurs would be allocated the entire amount of allowances sought and substantiated in the application. Applicants slated for receiving pro rata shares would be given a 30-day grace period to withdraw their application since the fractional amount of allowances apportioned may be insufficient to justify a source's plans to proceed with installation of a scrubber.

- Legal implications: The pro rata approach could be challenged on the basis that it was considered during the legislative process and rejected.

- Administrative implications: Because all applications received would have to be reviewed under this approach, time would be needed to review the sufficiency of the applications (one or two months). Additionally, because of the 30-day grace period, notification of allowance awards would be delayed while applicants decide whether to withdraw their extension request, and, thereafter, for EPA to recalculate the distribution.

Analysis:

Preliminary analysis suggests that under the pro rata approach, 31-50 units may scrub versus 20-25 if a strict construction approach were adopted. The number of transfer units which would continue to burn high sulfur coal would be 25-65 under the pro rata approach versus 35-50 under the strict construction approach. Because the pro rata approach potentially broadens participation in the allowance reserve, there could be a significant difference in the amount of scrubbing projected under that approach versus the strict construction approach.

Attachments:

cc: John Charseen, White House
Rob Fairweather, OMB
Art Fraas, OMB
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Teresa Gorman, White House
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04/09/91 09:40 ☎202 0892 OAIAP/EPS 007

WHO SUPPORTS WHAT

I. Need for Early Rulemaking/Early Ranking

- o Supported by ARAC and UARG.
- o No opposition.
- o Concern expressed by certain ARAC members that some utilities may be disadvantaged by early decisionmaking.

II. Strict Construction/Lottery Approach to Oversubscription

- o Supported by ARAC minority consisting of low sulfur coal interests (Alliance for Acid Rain Control and A.T. Massey Coal Co.), and EDF.
- o Supported by Senator Simpson.

III. Pro-Rata Approach to Oversubscription

- o Supported by ARAC majority, including NRDC, high sulfur coal interests, majority of utilities represented on ARAC.
- o Supported by UARG.
- o Supported by Senator Byrd.

ICF RESOURCES[SM]
INCORPORATED

9300 Lee Highway, Fairfax, Va. 22031-1207 Phone: 703 934-3000 Fax: 703 691-3349 Telex: 440126 ICF UI

March 5, 1991

MEMORANDUM

TO: Brian McLean, EPA
Rachel Hopp
Kathy Ehrenberger

FROM: Bruce Braine
Ed Miller

SUBJECT: Preliminary Analysis of Regulatory Options for Distributing Phase I Extension Allowances

---

You have asked us to analyze on a preliminary basis the economic impact of various regulatory options associated with Phase I extension allowances under the bill. In particular, you have asked us to quickly assess the effect of Phase I extension allowances on the amount of forecasted scrubbing and attendant coal market impacts assuming several alternative, regulatory options which pertain to the distribution and timing of the extension allowances.

Please note that this analysis is preliminary. Evaluating the effects of various distribution/allocation/timing options is very complicated in light of the uncertainties regarding economic and market behavior. Further, the economic assessments we have conducted suggest that the decision to scrub or not scrub is quite close in costs in many cases which indicates that final decisions may be made based more on financial and other non-economic factors (e.g. local coal protection). Accordingly, the analysis presented herein has merely attempted to bracket the potential effects of these alternative schemes.

Summary Findings

The distribution of extension allowances (assuming oversubscription of the reserve on day one), whether on a pro-rata basis (to effectively all applicants), or on an all-or-nothing strict construction/stand-in-line or lottery approach, could affect the amount of retrofit scrubbing in Phase I and the attendant coal market impacts. The pro-rata approach will likely result in somewhat more retrofit scrubbing and hence fewer shifts away from high sulfur coal producing regions (i.e. Northern Appalachia and the Midwest) to low sulfur coal producing regions.

An earlier rule or ranking process (versus a normal rule) would also tend to increase the amount of scrubbing and hence lessen the shifts from high to lower sulfur coal production in Phase I. However, the differences are likely to be less significant than the differences under a pro-rata versus a lottery distribution approach. A very important uncertainty will be the extent to which utilities can wait for the results of a lottery or a pro-rata cooling off period in the case of a normal

rule prior to beginning the major part of scrubber construction activities and then still be able to bring a scrubber on line by January 1, 1997.

Background - Phase I Technology Allowances

Phase I technology allowances reflect additional allowances allocated to Phase I affected powerplant units (or Phase I substitution units) installing 90% SO_2 removal technology on or before January 1, 1997 and after 1985.

As stipulated by the Section 404d of the Act, these units would receive:

- Extension allowances in 1995-96 equal to the lesser of average '88-'89 emissions or projected 1995 (or 1996) emissions minus "baseline" fuel x 2.5 lb. rate.

- Additional (2-1) allowances in 1997-99 equal to "baseline fuel" x 1.2 lb. rate minus projected controlled emissions.

In addition, a Phase I affected unit may "transfer" its Phase I emission reduction obligation to another unit employing a qualifying Phase I technology. This "transfer" unit (i.e., the unit transferring its reduction obligation) would also receive "extension" allowances in 1995-96 but no additional (2-1) allowances during 1997-99. The extension allowances would be limited by the amount of actual reductions below Phase I allowance levels achieved by the controlled unit.

In total, Phase I technology allowances are limited to 3.5 million tons or the total projected reductions in 1995 as defined under section 404(a)(2), whichever is less. While the exact level is uncertain, it would likely total 3.5 million tons which we have assumed for this analysis.

Alternative Regulatory Options/Cases

At your request we have evaluated the potential effects of several alternatives regarding the timing and distribution of allowances:

- Timing - when the extension allowances are actually provided, to utilities will play an important role in decision making. This is because it is unclear how many extension allowances (if any) that each utility unit will receive, given the likely oversubscription to the 3.5 million ton Phase I reserve. The options analyzed include:

  - an expedited early rule (January 1, 1992) and an early ranking procedure with Phase I extension allowances conditionally allocated by March 1992.

  - a normal rule (5/92) with an early ranking process with the conditional allocation of Phase I extension allowances known by July 1992.

- a normal rule process with Phase I allowances not set aside until EPA approves a permit application assumed to be August 1993.

- Distribution - how the allowances are distributed given the likely oversubscription may also affect utility decision making. Two options are being considered:

  - pro-rata distribution to all "first day" applicants (for purposes herein this is assumed to be equivalent to pro-rata for all applicants). Applicants would have 30 days to "drop out" after the initial pro-rata distribution.

  - strict construction/place in line or lottery approach where applicants receive all or none of the extension allowances. (We have assumed under this scenario that all applicants have an equal probability of receiving the allowances.)

For this preliminary analysis, we have developed four cases to evaluate these factors: as shown below, we have not developed seperate case estimates for the early rulemaking versus normal rule/early ranking case. This latter case would have only marginally lower technology incentives than the early rule.

- Early Rule or Early Ranking (3/92)/Pro-rata Share
- Normal Rule (8/93)/Pro-rata Share
- Early Rule or Early Ranking (3/92)/Stand-in line
- Normal Rule (8/93)/Stand-in-line

To evaluate these cases, we have made the following assumptions:

- Utilities are generally risk averse because of the downside risks associated with prudence reviews and more limited upside potential (because of regulated rates of return on investments).

- Some initial scrubber design studies have already been or are being conducted at "serious" Phase I scrubber candidates.

- Scrubbers would take about 3 - 4 years to permit and construct after a contingent contract (contingent on allowance allocations) is signed.

Accordingly, we have made the following specific assumptions in the analysis of the options.

- For the early rule or normal rule with early ranking/pro-rata case - utilities would be able to scrub as early as 1/1/96, and would know their pro-rata share.

- For the normal rule/pro-rata case - utilities would not be able to scrub until 1/1/97, but would know their pro-rata share.

- For the early rule or normal rule with early ranking/stand-in-line case - utilities would be able to scrub as early as 1/1/96 and would know their final allocation (i.e., none or all) before making this decision.

- For the normal rule/stand-in-line case - same as previous case but the utility would not be able to scrub until 1/1/97.

The decision to apply for the extension allowances will be affected significantly by the perception of future markets (i.e. the market value of allowances, and the extent of emissions trading) and non-economic incentives such as state and local coal protection considerations.

To capture the potential range of these decision making criteria, in a very approximate manner, we have used a range in the Phase II value of allowances from $450 - $750 per ton. The lower end of the range reflects a long run competitive market price (based on the EPA base case and control cost assumptions and Senate bill analysis results). The upper end of the range reflects a higher perceived market price for allowances or other non-economic reasons (e.g. local coal protection). Obviously, the decision making criteria are only captured in very approximate manner through this range. A more detailed analysis would be required to assess more precisely these utility specific decisions.

Summary Findings - Amount of Retrofit Scrubbing/Transfer Units

Summary findings are shown in Table 1 and 2 on the following page. Table 1 indicates the estimated range in the number of powerplant units and capacity that would scrub under the different cases, given the alternative economic and market assumptions. Table 2 indicates the range in the number of transfer units.

The findings suggest:

TABLE 1
Retrofit Scrubbing Capacity*

Timing	Distribution			
	Pro-rata		Strict Construction/Stand-in-line	
	No. of Units	Capacity (gw)	No. of Units	Capacity (gw)
Early Rule/Early Ranking (3/92-7/92)	32-50	12-23	20-25	10-12
Normal Rule (8/93)	31-42	11-19	20-25	10-12

* The totals include about 7 units and 2 gigawatts of powerplant capacity which are estimated to scrub without any Phase I extension allowances.

TABLE 2
"Transfer" Units

Timing	Distribution			
	Pro-rata		Strict Construction/Stand-in-line	
	No. of Units	Capacity (gw)	No. of Units	Capacity (gw)
Early Rule/Early Ranking (3/92-7/92)	25-65	12-25	35-50	15-20
Normal Rule (8/93)	25-50	12-20	35-50	15-20

- There is a relatively significant difference in the amount of forecasted scrubbing under the alternative distribution schemes (i.e. pro-rata versus strict construction systems). There is more scrubbing under a pro-rata distribution system than a strict construction system. This is particularly true at the upper end of the range when the perceived value of allowances is greater.

- There is also a difference in the amount of forecasted scrubbing given the timing of the rule (assuming a pro-rata distribution). Earlier timing of the rule or an early ranking with a normal rule would result in more scrubbing.

- The estimates suggest that there is no difference in the amount of scrubbing given the timing of the rule if a strict construction or lottery system is employed. This is because there is forecasted to be a greater demand than supply of extension allowances under both the early and normal rule assumptions. Importantly, it has been assumed for this analysis that utilities would be able to construct scrubbers after the 8/93 "in order of receipt" decisions by 1/1/97 under the normal rule. However, if this could not be accomplished (or could only be accomplished at a much higher cost) utilities would make the scrub/no scrub decision much earlier and probably factor into their decision, a conservative probability of receiving extension allowances. This could reduce the amount of scrubbing under the normal rule.

TABLE 3
Phase I (1997) Change in Northern Appalachia/Midwest Coal Production (Relative to Base Case Levels in Millions of Tons)*

Timing	Distribution	
	Pro-rata	Strict Construction/ Stand-In-Line
Early Rule or Early Ranking (3/92-7/92)	-20 to -40	-40 to -45
Normal Rule (8/93)	-25 to -40	-40 to -45

* Gains in Central Appalachia/Western Coal production are approximately equivalent to the reductions in Northern Appalachia/Midwest coal production shown above.

TABLE 4
Phase I (1997) Change in Northern Appalachia/Midwest Coal Mining Employment (Relative to Base Case Levels in Thousands of Workers)

Timing	Distribution	
	Pro-rata	Strict Construction/ Stand-In-Line
Early Rule or Early Ranking (3/92-7/92)	-3 to -6	-6 to -7
Normal Rule (8/93)	-4 to -6	-6 to -7

Summary Findings - Coal Production/Coal Mining Employment Impacts

The estimated impacts of the alternative Phase I extension allowance regulatory cases on regional coal production and coal mining employment are presented in Tables 3 and 4. The findings indicate:

- Consistent with the scrubber capacity forecasts, there are fewer losses in regional high sulfur coal production from Northern Appalachia and the Midwest and fewer job losses from these regions assuming a pro-rata distribution. The difference amounts to about 5-20 million tons of coal production and 1-3 thousand jobs. Conversely, there are greater gains in Central Appalachia and Western low sulfur coal production under a strict construction/stand-in-line system.

- An earlier rulemaking or early ranking could also mitigate high sulfur coal production and coal mining employment losses (under a pro-rata distribution system).

- Phase II coal market impacts (not presented here) are estimated to be only marginally affected by the forecasted changes in Phase I retrofit scrubber capacity between the alternative regulatory cases.

Clean Air Act Permitting

OFFICE OF POLICY ANALYSIS AND REVIEW

Facsimile Cover Sheet

Facsimile No. (202) 475-9766
Confirmation No. (202) 382-5580

TO: Jeff Holmstead

OFFICE: _____

TELEPHONE: 456-7953 **FAX:** 456-7929

DATE: _____ **NO. OF PAGES:** _____ *(Including this sheet)*

FROM: Kate Fay / Tim Williamson

MESSAGE/INSTRUCTIONS: _____

(i) The provisions of section 303 of the Act (emergency orders), including the authority of the Administrator under that section.

(ii) The liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance.

(iii) The applicable requirements of the acid rain program, consistent with section 408(a) of the Act.

(iv) The ability of EPA to obtain information from a source pursuant to section 114 of the Act.

(i) Property limitation. The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.

§ 70.7 Permit issuance, renewal, revisions, and reopenings.

(a) Action on Application.

(1) A permit modification, renewal, or reopening may be issued only if all of the following conditions apply:

(i) The permitting authority has received a complete application for a permit, except that a complete application need not be received before issuance of a general permit under section 70.6(f) of this Part.

(ii) The permitting authority has complied with the public participation procedures for permit issuance specified in paragraph (i) of this section.

(iii) The conditions of the permit provide for compliance with the applicable requirements of the Act, and regulations promulgated under Act.

(iv) The Administrator has received a copy of the permit and any notices required under sections 70.8(a) and 70.8(b) of this part, and has not objected to issuance of the permit under section 70.8(c) of this part within the time period specified therein.

(2) Except as provided under the initial transition plan provided for under section 70.4(b)(11) of this part or in Parts 71 and 72 of this chapter for the permitting of affected sources under the acid rain program, the program shall provide that the permitting authority take final action on each permit application (including request for permit modification or renewal) within 18 months after receiving a complete application.

(3) The program shall also contain reasonable procedures to prioritize action on applications for construction or modification under Title I, Parts C and D of the Act.

(4) The permitting authority shall promptly provide notice to the applicant of whether the application is complete. Unless the permitting authority provides an applicant a notice of incompleteness (outlining additional information requirements, within 30 days of receipt of an application, the application shall be deemed complete.

(5) The permitting authority shall develop a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and any other person expressing an interest.

(6) The submittal of a complete application shall not affect the requirement that any source have a preconstruction permit under sections 110, 165, 172, or 173 of the Act.

(b) Requirement for a permit.

(1) Except as provided in the following sentence, no Part 70 source may operate after the time that it is required to submit a timely and complete application under an approved permit program except in compliance with a permit issued under a permit program approved under this part or Part 71 of this chapter. The program shall provide that if a Part 70 source submits a timely and complete application for permit issuance (including for modification or renewal), the source's failure to have a Part 70 permit is not a violation of this part until the permitting authority takes final action on the permit application, except as noted in paragraph (b)(1)(i) through (iii) of this section.

(i) This protection shall cease to apply if the applicant fails to submit by the deadline specified by the

permitting authority any additional information needed to process the application and requested in writing by the permitting authority subsequent to the completeness determination made pursuant to paragraph (a)(4) of this section to process the application.

(ii) This process shall not affect the requirement that any source have a preconstruction permit under sections 110, 165, 172, or 173 of the Act.

(2) The protection provided by paragraph (b)(1) of this section to operate without a permit shall also apply if the application or requested additional information is submitted less than 3 months after the required submittal date. Nothing in this paragraph shall be deemed to prevent the permitting authority or EPA from bringing an enforcement action and assessing penalties against a source for failing to submit a timely application. In such case, penalties may be assessed for the entire period from the time the application was required to be submitted to the time a complete application was actually submitted.

(3) The protection provided by paragraph (b)(1) of this section to operate without a permit shall also apply if the source submits a timely application and if the permitting authority determines it to be incomplete despite good faith effort on the part of the source; provided that the source cures the defect during an expeditious time period specified by the permitting authority. Nothing in

this paragraph shall be construed to limit the exception to such protection that is set forth in the introductory text of paragraph (b)(1) of this section.

(c) Permit renewal and expiration. The program shall provide the following:

(1) Permits being renewed are subject to the same procedural requirements, including those for public participation and Federal oversight, that apply to initial permit issuance.

(2) Permit expiration terminates the source's right to operate unless a timely and complete renewal application is submitted consistent with paragraph (b) of this section.

(d) Permit modifications.

(1) ~~Any revision to a permit that does not qualify as an administrative amendment or a minor permit amendment shall be treated as a permit modification.~~ A permit modification includes any proposed revision to address a change at the source that would constitute a modification under any provision of Title I of the Act.

(2) Notwithstanding section 70.6(d) of this part, and paragraph (e) ~~and (f)~~ of this section, any change to the methods for monitoring and analyzing emissions for ~~compliance purposes approved for operation~~ or relaxation in the reporting requirements or to milestones with the schedule of compliance for a noncomplying source in the current version of the Part 70 permit are subject to this paragraph as a permit modification. 70.7(d)

(3) Permit modifications shall be subject to the same procedural requirements, including those for public comment

including a change in monitoring!

determining allowable emission under the applicable requirements included in the permit (except to the extent those applicable requirements are amended under section 70.7(f))

INSERT: p. 366, section 70.7 (e)

(i) An administrative permit amendment shall be made by the permitting authority administratively, without being subject to advance notification or the procedural requirements applicable to a permit modification.

(ii) The permitting authority shall take no more than 60 days from receipt of notice of any administrative amendment to incorporate into the permit the changes comprising such amendment, provided that the permitting authority designates any such permit revision as having been made pursuant to this paragraph.

(iii) The permitting authority shall submit a copy of the revised permit to the Administrator and make it readily available at the offices of the permitting authority.

INSERT: p. 367, section 70.7(f)(2)

[EPA solicits comment on the procedural and additional substantive requirements for minor permit amendments. In its final rulemaking EPA intends to address minimum requirements for such amendments.]

and Federal oversight, as original permit issuance, except that the required review shall cover only the proposed changes rather than the unchanged activities of the permittee. Nothing in this provision shall limit the authority of the permitting authority or EPA under paragraphs (g) and (h) of this section.

INSERT

(e) Administrative permit amendments. An Administrative permit amendment shall be made by the permitting authority administratively and consistent with the requirements of paragraph (f)(3) of this section without being subject to advance notification on the procedural requirements applicable to a permit modification. The principles governing what constitutes administrative or minor permit amendments for purposes of the acid rain portion of permit shall be governed by Part 72 of this chapter.

(f) Minor permit amendments.

(1) Applicability. The permitting authority may treat any proposed revision to a Part 70 permit as a minor permit amendment in accordance with this subsection if the proposed revision meets all of the following conditions:

(i) The proposed revision does not constitute a modification under any provision of Title I of the Act; and

(ii) The proposed revision complies with all applicable requirements of the Act.

INSERT

(iii) In the case of the pollutants described in sections 70.2(z)(1) and (2), the applciable implementation plan for the area in which the Part 70 source is located assures that the cumulative increase in emissions resulting from all minor permit amendments in the area authorized under this subsection will not interfere with timely attainment and maintenance of any national ambient air quality standard, or with any required demonstration of progress toward attainment of such a standard.

(iv) The Part 70 program provides for at least as much notice, public comment, and review as described in sections 70.7(f)(2) and (3).

(2) Notice. The Part 70 program shall provide for at least the following notice of any minor permit amendment that qualifies under section 70.7(f)(1).

(i) At least 7 working days before making the proposed change, the source applicant shall submit a notice to the permitting authority, the Administrator, all other parties previously offering comment on the issuance of the Part 70 permit now in effect, and any other parties designated by the permitting authority who have reasonably expressed interest. The permitting authority may provide in its regulation a different timeframe for notices involving emergencies.

(ii) The notice in paragraph (f)(2)(i) of this section must describe the nature and timing of the change including,

but not limited to, any changes in plant configuration or emission units, all pollutants emitted as a result of the change and anticipated emission rates, a description of any newly installed control equipment, all State and Federal air pollution control requirements applicable as a result of the change, any necessary changes to the permittee's monitoring, reporting, and compliance certification requirements and any other information reasonably needed by the permitting authority to process the permit revision described in paragraph (f)(3) of this section. The notice shall also include a demonstration that the proposed revision meets the requirfements of subsection 70.7(f)(1) and the revised permit language under which the source proposes to operate. This notice must be signed and certified by a responsible official consistent with section 70.5(b)(10) of this part.

(iii) The source may implement the proposed change unless the permitting authority notifies the source within the period for prior notice, established pursuent to 70.7(f)(2)(i), that the proposed change does not qualify as a minor permit amendment or would not meet all applicable requirements of the Act. In the event that the source fails to demonstrate to the satisfaction of the permitting authority that the proposed change qualifies for processing as a minor amendment under this paragraph, the proposed change shall be processed as a permit modification under the procedures set forth in paragraph (d) of this section. In

such event the change shall not occur until the permit is revised following the EPA review period.

(3) Permit revision.

(i) The permitting authority shall take no more than 60 days from receipt of the notice required in paragraph (f)(2) of this section to revise the Part 70 permit and may use administrative procedures to incorporate the changes comprising the minor permit amendment, provided that it designates any such permit revisions as having been made pursuant to this paragraph.

(ii) The permitting authority shall submit a copy of the revised permit to the Administrator and make it readily available at the offices of the permitting authority.

~~4. Source liability.~~

move & insert on p. 371

(5) The permitting authority shall reopen a Part 70 permit pursuant to ~~paragraph (g) of~~ this section 70.7(g) whenever the permitting authority or the Administrator determines that any permit revision accomplished pursuant to ~~this~~ section 70.7(f) does not assure compliance with all applicable requirements of the Act or did not qualify for processing under ~~this~~ section 70.7(f)

(g) Reopening for cause.

(1) Each issued permit shall include provisions addressing the conditions for revision prior to the expiration of the permit. Such revisions shall be made as

Clean Air Act - Permitting

APR 23 1991

ENVIRONMENTAL PROTECTION AGENCY
40 CFR Part 70
Operating Permit Program

AGENCY: Environmental Protection Agency (EPA)
ACTION: Proposed rule; notice of opportunity for public hearing.

SUMMARY: The EPA is proposing a new Part 70 of Chapter I of Title 40 of the Code of Federal Regulations. This part will contain regulations requiring States to develop, and submit to EPA, programs for issuing operating permits to major stationary sources (including major sources of hazardous air pollutants listed in section 112), sources covered by new source performance standards (NSPS), sources covered by emissions standards for hazardous air pollutants pursuant to section 112, and affected sources under the acid rain program. Today's proposal would defer for 5 years the requirement for certain nonmajor sources to obtain a permit, including those in nonattainment areas if a State makes certain showings. These sources may still opt to secure a permit.

Title V of the Clean Air Act (Act) Amendments of 1990, P.L. 101-549, enacted on November 15, 1990, requires EPA to promulgate regulations within 12 months of enactment that require and specify the minimum elements of State operating permit programs. This new Part 70 will contain these provisions. Title V establishes timeframes for developing and implementing the State permit programs. Within 3 years of enactment, States must submit proposed permit programs to EPA for approval. In some cases, EPA can approve interim programs for up to 2 years, but States by the end of that period must submit and EPA must approve a full program to avoid sanctions for failure to submit a program. The EPA must act to approve or disapprove a State program within 1 year of submittal by the State to EPA. If a State fails to submit a fully approvable program within the 3-year period, EPA will apply specific sanctions pursuant to the provisions of Title V and, in any event, must establish a Federal program within the following 2 years. Any such Federal program will be promulgated in 40 CFR Part 71 (to be proposed at a later date). Sources subject to the program must submit complete permit applications within 1 year after a State program is approved by EPA or, where the State program is not approved, within 1 year after a program is promulgated by EPA.

The Part 70 rules proposed today would require States to include several program elements in their plan submittal to meet the requirements of Title V. These program elements include (1) a statement that the permitting authority has adequate legal authority to implement and enforce the program fully; (2) a standard permit application form and criteria for determining the completeness of the application; (3) a demonstration that the State has adequate resources and funding (including a permit fee schedule) to develop and carry out the program; and (4) regulations with issuance, appeal,

and renewal procedures that ensure that each regulated source can obtain a permit that will assure compliance with all its applicable requirements under the Act.

Part 70 sources must obtain an operating permit addressing all applicable pollution control obligations under the State implementation plan (SIP) or Federal implementation plan (FIP), the acid rain program, the air toxics program, or other applicable provisions of the Act (e.g., NSPS). Sources must also submit periodic reports to the State and EPA as appropriate concerning the extent of their compliance with permit obligations. The permit and compliance reports will be available to the public, subject to any applicable confidentiality protection procedures similar to those contained in section 114(c).

Today's notice also introduces a related future rulemaking action. The EPA intends to propose the terms under which the Agency will issue its own permits under Title V, as well as Federal permit requirements for affected sources under Title IV, the acid rain program. The framework for this program will be located in a new Part 71 of Chapter I of Title 40 of the Code of Federal Regulations. The proposal of Part 71 is now scheduled to occur at the time the Part 70 regulations are promulgated as final rules. Today's notice discusses anticipated requirements and solicits comment on these initial ideas.

DATES: Comments on the proposed regulations must be received by (60 days from the date of proposal). The EPA is likely to be unable to extend the public comment period due to the strict 12 month deadline in the Act. The EPA expects to hold a public hearing and two public meetings at the addresses listed below approximately 30 days after today's date. The EPA will publish a notice announcing the dates and times of these meetings once they are set. Requests to present oral testimony must be received on or before (2 weeks after the date of proposal). If possible, comments should be sent in both paper and computerized form. Two paper copies of each set of comments are requested. Comments generated on computer should also be sent on an IBM-compatible, 5 1/4 inch diskette and clearly labeled. Computer files created with the WordPerfect 5.1 software package should be sent as is. Files created on other software packages should be saved in an "unformatted" mode for easy retrieval into WordPerfect. Comments should refer to specific page numbers whenever possible.

DOCKET: Supporting information used in developing the proposed rules is contained in Docket No. A-90-33. This docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m. Monday through Friday, at the address listed below. A reasonable fee may be charged for copying.

ADDRESSES: Comments must be mailed (in duplicate if possible) to: EPA Air Docket (LE-131), Attn: Docket No. A-90-33, Room M-1500, Waterside Mall, 401 M Street SW, Washington, DC 20460. The public hearing will be held in the Waterside Mall auditorium at the EPA's Headquarters Office in Washington,

D.C., and the public meetings will be held in the Dirksen Federal Building in Chicago, Illinois and in the EPA Regional Office in San Francisco, California.

FOR FURTHER INFORMATION CONTACT: Michael Trutna at (919) 541-5345. Persons interested in attending the hearing or wishing to present oral testimony should contact Ms. Carol Bradsher in writing at the U.S. Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Management Division, Mail Drop 15, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION:

The contents of today's preamble are listed in the following outline:

I. Background And Purpose
II. Implementation Principles
III. Proposal Summary
  A. Applicability
  B. State Permit Program Submittals and EPA Approval
  C. The EPA Program Oversight
  D. Complete Permit Applications
  E. Permit Content
  F. Permit Issuance and Review
  G. Fee Demonstration
  H. Permit/SIP Relationship
  I. New Source Review/Title V Relationship
  J. Small Businesses
  K. Relationship With Section 112 (Air Toxics)
  L. Relationship With Title IV (Acid Rain)
IV. Detailed Discussion of the Key Aspects of the Proposed Regulations
  A. Section 70.1 - Statement of Program Goals
  B. Section 70.2 - Definitions
  C. Section 70.3 - Applicability
  D. Section 70.4 - State Program Submittals and Transition
  E. Section 70.5 - Permit Application
  F. Section 70.6 - Permit Content
  G. Section 70.7 - Permit Issuance, Renewal, Reopenings, Operational Flexibility and Revisions
  H. Section 70.8 - Permit Review by EPA and Affected States
  I. Section 70.9 - Fee Determination and Certification
  J. Section 70.10 - Federal Oversight and Sanctions
  K. Section 70.11 - Requirements for Enforcement Authority
V. Additional Topics of Discussion
  A. Implementation Agreements Between State Agencies and EPA
  B. Relationship of Permit Programs to SIP's
  C. Implications for Acid Rain Program
  D. Judicial Review

E. Implications for Section 112
F. Information Management Support
G. Relationship of Permit Fees to Section 105 Grants
H. Integration of National Pollutant Discharge Elimination System (NPDES) Program Concepts

VI. Federal Operating Permit Program
A. Purpose
B. Part 71 Default Program
C. Acid Rain Program
D. Maximum Achievable Control Technology (MACT) Extensions
F. Federalism Implications

VII. Administrative Requirements
A. Public Hearing
B. Docket
C. Office of Management and Budget (OMB) Review
D. Regulatory Flexibility Act Compliance
E. Paperwork Reduction Act

This preamble is organized to meet the needs of readers who want just an overview of the operating permit program and for readers who want a detailed discussion of the concepts and issues behind today's proposal.

The first section provides background on the effort to amend the Act to include an operating permits program, the purposes of that action, and the expected benefits. The information is useful to anyone seeking any level of information on the operating permits program.

The second section explains the principles EPA has followed while developing the proposed regulations, and the positions on associated issues. The reader should review the preamble and regulations with these principles in mind.

The program summary section (section III.) provides summaries of the major portions of the program. This section of the preamble is similar to an executive summary of a report and allows the reader to obtain general knowledge of the subjects, after which more detailed discussion can be sought in other parts of the preamble.

The detailed discussion of the regulations is in section IV. This section notes the provisions of the regulations, but also provides comprehensive background on the concepts behind the regulations and any issues or controversial aspects to be considered with respect to regulatory requirements. The design of the regulations generally follows the flow of Title V, as does the discussion in section IV.

Section V presents additional topics important to the operating permits program. These areas are not related to specific regulatory requirements proposed here, so a separate section of the preamble is devoted to their detailed coverage. The subjects covered can be found in the preamble outline above.

Another topic warranting separate coverage is the Federal operating permit program that EPA will implement in the event

a State fails to submit an acceptable program or fails to adequately enforce an approved program. Other uses for the program will involve acid rain requirements and early emission reductions from hazardous air pollutant sources. This Federal program is discussed in section VI. of this preamble.

The final section (section VII.) contains the administrative requirements accompanying Federal regulatory actions. These include the topics listed in the preamble outline above.

There is some intended redundancy in this preamble; first because there is a separate summary, but second because a number of issues or topics are related to several regulatory requirements or other topics discussed. In the event the reader focuses on only certain topics, this overlap is intended so as not to ignore a specific issue or subject pertinent to a specific area, just because it is covered elsewhere.

The preamble includes many citations [e.g., (70.6)] to refer the reader to more detail or to the origin of certain requirements. These citation sections will not be followed by their origin such as "of this preamble" or "of Title V." Rather, the reader can recognize the origins of the sections by their nature:

A. Sections of the preamble begin with a roman numeral.
B. Sections of Title V of the Act are in the 500's.
C. Sections of the proposed regulations range from 70.1 to 70.11.
D. Sections of the Act are referenced by three-digit number, such as 112 and 408.
E. Sections of existing EPA regulations generally are preceded by 40 CFR.

This preamble makes frequent use of the term "State," usually meaning the State air pollution control agency which would be the permitting authority. The reader should assume that use of "State" may also include reference to a local air pollution agency or certain Indian tribes. These agencies can either be the permitting authority for the area of their jurisdiction or assist the State or EPA in implementing the Title V permitting program. In some cases, the term "permitting authority" is used and can refer to both State and local agencies, when the local agency directly issues permits or assists the State in issuing permits. The term may also apply to EPA, where the Agency is the permitting authority of record.

I. Background and Purpose

The new Title V of the Act introduces an operating permits program generally modeled after the NPDES program under the Clean Water Act (CWA). Some of the regulations

proposed today are also modeled on NPDES regulations in 40 CFR Parts 122, 123, and 124. The EPA, therefore, will generally look to the NPDES program precedent when resolving similar issues under the Title V permit program. Part 70 sources must obtain an operating permit; States must develop and implement the program; and EPA must issue permit program regulations, review each State's proposed program, and oversee the State's efforts to implement any approved program, including reviewing proposed permits and vetoing improper permits. When a State fails to adopt and implement its own approvable program, EPA must apply sanctions against the State and ultimately also develop and implement a Federal permit program.

The addition of such a permitting program makes the Act more consistent with other environmental statutes, including the CWA and the Resource Conservation and Recovery Act, both of which have permit requirements. While to date there has not been an express Federal requirement that States have an operating permit program for air, a recent comprehensive survey of existing State permit programs indicates that about 40 State programs issue operating permits to at least construction projects. Over half of the existing State operating permit programs address both new and existing sources and require renewal of permits periodically. Many of these programs appear to match closely the intent of Title V in that they have the basic components required by Title V for issuing permits, collecting fees, providing for public participation, reopening permits, and issuing permits for a fixed term. The Part 70 regulations have been designed to minimize the disruption to current State efforts by offering as much flexibility as is provided by the law, while ensuring that existing (and new) State programs will meet the requirements of the Act.

A primary benefit of the Title V permit program is that it will in general clarify which requirements apply to a source in a single document and, thus, should enhance compliance with the requirements of the Act. Currently, a source's obligations under the Act, ranging from emissions limits to monitoring, recordkeeping, and reporting requirements are in many cases scattered among numerous provisions of the SIP or Federal regulations. In addition, regulations are often written to cover broad source categories and, therefore, it may be unclear which, and how, general regulations apply to a source. Similarly, applicable provisions are sometimes not explicit as to reporting requirements (e.g., when to submit periodic compliance reports to EPA or the States). As a result, EPA often has no easy way to establish whether a source is in compliance with regulations under the Act.

The Title V permit program will enable the source, States, EPA, and the public to better understand the requirements to which the source is subject, and whether the source is meeting those requirements. Increased source

accountability and better enforcement should result. The program will also greatly strengthen EPA's ability to implement the Act and enhance air quality planning and control, in part, by providing the basis for better emission inventories.

Another benefit of the Title V permit program is that it provides a ready vehicle for the States to administer significant parts of the substantially-revised Federal air toxics program and the new acid rain program. This enhances EPA's ability to oversee all programs under the Act. Specifically, the Act requires that States use the permit system to administer the air toxics programs. In addition, States will be responsible for reviewing and issuing permits to implement the second phase of the acid rain program (with permitting activities beginning in 1996), and will play a significant role in ensuring compliance with the acid rain requirements in 40 CFR Parts 72 through 78 (to be promulgated at a later date).

Finally, an important benefit is that the permit program contained in these regulations will ensure that States have resources necessary to develop and administer the program effectively. In particular, the permit fees provisions of Title V will require sources to pay their fair share of the costs of developing and implementing the permit program. To the extent the fees are based on emission levels, the fees will create an incentive for sources to reduce emissions.

II. Implementation Principles

The passage of the Act amendments of 1990 was a major accomplishment in the protection of public health and the environment in the United States. The new Act sets forth ambitious goals which can only be achieved through effective and expeditious implementation by EPA and State and local governments. Today's proposed rulemaking is one of the first of several important actions that EPA will be taking to accomplish its rule development responsibilities under the Act. The EPA believes that the following principles should guide the design and implementation of Title V regulations and related programs.

These principles are necessary to preserve the legislative intent underlying the content of Title V. The EPA intends that these principles be appropriately incorporated into all aspects of program development and implementation by both States and EPA. In particular, EPA will employ them when it is responsible for developing rules, overseeing State or local agency programs and permits, or issuing permits. The public is urged to frame its comments on today's proposal keeping in mind the extent to which sections of this proposal are consistent with the various implementation principles outlined below.

A. Ensure Environmental Protection

Congress's basic goal in adopting the Title V permit program is to achieve improved air quality by establishing a broad-based tool to aid effective implementation of the Act and to enhance the Agency's ability to enforce the Act. The EPA believes it is important that other implementation objectives stated below complement this objective, not undercut the potential of Title V for strengthening air quality management efforts across the country.

B. Incorporate Broad-Based Perspective for Rule Development

The EPA continually seeks a better understanding of the key concerns of those most affected by Title V in order to have a broad-based perspective during the regulation development process. With this goal, the Agency hopes to make implementation efforts more effective and to minimize the chances for conflict. Today's proposal was developed with the benefit of insight from important affected parties (including State and local governments, major industries, small businesses, and environmental organizations) which were actively involved in the Title V legislative process. The EPA is interested in receiving additional input from these and other interested parties during the public comment period.

C. Maintain an Effective Partnership With State and Local Governments

The EPA recognizes that the bulk of the responsibility for implementing Title V falls upon State and local governments. Thus, a key principle in developing today's proposed rules has been to build upon existing operating permit programs and to provide the States with regulatory flexibility wherever possible to maintain existing program elements in implementing Title V.

D. Minimize Redundancy in SIP's and Permit Programs

The Title V permit program is designed to complement SIP's in achieving improved air quality management across the country. Because operating permits will contain more source-specific details than SIP's, EPA intends that source-specific permit changes be implemented wherever possible solely through the procedures in the permit program rather than through the SIP process. In this way, subject sources and governments will experience less burden and delay than would be associated with a multi-step procedure which includes the more cumbersome SIP revision process.

E. Encourage Early State Program Development

The EPA supports early adoption of the program by States in order that the Title V framework enable them to implement more quickly other new Act programs. During the transition period, the EPA intends to assist States with their development of timely Title V programs and their efforts to obtain interim program approval.

F. Minimize Small Business Concerns

The Act requires certain small businesses to become regulated for the first time via the requirement to obtain a

Title V operating permit. The EPA will be sensitive to the impact of these regulations on these sources by phasing-in and streamlining the permitting requirements as appropriate. Where possible, EPA intends to promulgate rules which employ cost-effective permitting techniques, such as general permits, to simplify the permit application and issuance process.

G. Promote Pollution Prevention

The EPA encourages permitting authorities to promote cost-effective pollution prevention alternatives where possible in their permitting activities. Permits can, consistent with the law, be used to define creative activities for shifting to inherently cleaner processes, including the maximum use of performance standards, both in meeting requirements for criteria pollutants and the acid rain program, and in meeting otherwise applicable requirements of section 112 of the Act.

H. Facilitate Use of Market-Based Incentives

The operating permit program is intended to be an effective administrative tool for achieving cost-effective improvements in air quality through market-based principles. Title V operating permits will be used to implement the requirements of Title IV of the Act. Acid rain permit requirements must not hinder the effective operation of the allowance trading market. In addition, the Title V permit program will be used to facilitate the incorporation of market-based incentives, to the extent they are consistent with the Act.

I. Allow Flexibility in State Programs and Source Permits

Except as necessary to ensure national consistency to support the market-based, acid rain allowance trading system, requirements for Title V programs are intended to be flexible enough to allow States a reasonable range of options in designing their State programs for EPA approval. Unnecessary regulatory detail will unduly jeopardize approval of different but effective State and local programs. Sources must also be provided flexibility within their permits. Specifically, they should be allowed to make certain types of changes without having to undergo full permit-modification procedures. This will be especially important to some industries so that their market competitiveness is not jeopardized.

J. Establish Certainty for Permitted Sources

A Title V permit should articulate a clear road map of source obligations to inspire confidence in the system. The permit shield provisions should be used by the permitting authority to provide a stable reference point from which to govern the operation of the source until the time of permit renewal, unless there are clear reasons that require an interim reopening of the permit (e.g., to incorporate newly-promulgated standards with near-term compliance dates).

K. Enable Effective and Efficient Information Transfer

The EPA intends that information contained in permits, permit applications, and compliance certification reports (to

the extent not protected under laws of confidentiality) be used for several air quality management purposes. The EPA intends to promote consistent data submittals to track progress, consolidate current reporting burdens, and inform affected parties of a source's compliance status relative to its enforceable obligations.

L. Prioritize EPA Oversight on Overall Program Implementation

The EPA takes seriously its new responsibilities for reviewing permits and overseeing State/local program implementation. The Agency understands, however, that State and local governments have administered effective operating permit programs for many years and can be expected to do so in the future without "micro-management" from EPA. Concern has been raised that overuse of EPA's permit veto authority could lead to serious administrative roadblocks for permitting agencies. Within the limitations of its permit review responsibilities as stated in the Act, the Agency intends to place more priority on the oversight of overall program implementation than on the review of noncontroversial, individual permits so long as clean air goals are being achieved.

M. Promote Possibilities for Integrated Permit Programs

The EPA intends that the Title V rulemaking provide the basis for opportunities to establish a permit program to consolidate the review of a source's impact with respect to the Clean Air Act and to other environmental media. In particular, the Agency encourages close coordination of the preconstruction and operating permit review programs for air to minimize duplication and delay. Comments are specifically solicited as to how integrated permitting can be promoted and not inhibited by this rulemaking.

N. Promote Simple and Streamlined Regulations

It is EPA's intent to simplify and streamline these regulations to the maximum extent possible. To this end, the Agency solicits comment as to how this proposal might be simplified and/or streamlined.

III. Proposal Summary

A. Applicability

The Title V operating permits program requires all Part 70 sources to submit permit applications to the appropriate permitting authority within 1 year of the effective date (i.e., date of EPA approval) of the State program. The proposed operating permit program applies to the following sources:

(1) Major sources, defined as follows:

(a) Air toxics sources, as defined in section 112 of the Act, with the potential to emit 10 tons per year (tpy) or more of any hazardous air pollutant, 25 tpy or more of any combination of hazardous air pollutants, or a lesser quantity

contiguous area that are in the same major group industrial classification). Once subject to the Part 70 operating permit program for one pollutant, a source must be reviewed for emissions of all pollutants regulated under the Act from all regulated emissions units located at the plant. As a general rule, all emissions of regulated pollutants are also subject to fee assessment. The program (including combinations of partial programs) applies to all geographic areas within each State, regardless of their attainment status, although for purposes of the acid rain permit program requirements, the program applies only within the contiguous 48 States.

The EPA is authorized, consistent with the applicable provisions of the Act, to exempt one or more source categories (in whole or in part) from the requirement to have a permit if the Agency determines that compliance with the Part 70 regulations would be "impracticable, infeasible, or unnecessarily burdensome" [section 502(a)]. The EPA may not, however, exempt any "major" or "affected" (i.e., acid rain) source from the permitting requirements. States may, if they wish, allow and/or charge fees for federally-exempted sources.

The EPA believes that coverage at the outset of all the sources described above would be both impractical and infeasible. Therefore, to promote an orderly phase-in of the program, EPA is proposing to defer initially from coverage for 5 years from the date of program approval all sources which are not major. Nonmajor sources in nonattainment areas will receive this deferral only if the permitting authority makes a showing that the State can effectively enforce its SIP obligations on such sources without using federally-enforceable operating permits. The Administrator also reserves the ability to determine on a case-by-case basis future inclusion of nonmajor sources which become subject to new section 112 standards.

Any source whose initial applicability is deferred may opt to obtain a permit prior to the end of the 5-year deferral period. All deferred sources will be required to submit permit applications by the end of the 5-year deferral period, unless they are sources or source categories that receive a continued exemption (i.e., EPA determines that permitting such source categories would be impracticable, infeasible, or unnecessarily burdensome) in a future rulemaking.

B. State Permit Program Submittals and EPA Approval

Title V requires EPA to promulgate regulations establishing the basic elements of a State permit program. State and local pollution control agencies or interstate compacts may implement provisions of Title V, as long as all geographic areas within each State are covered by a permit program. (As mentioned, reference to the "State" will include reference to local agencies where appropriate which would allow granting of a partial program for a specific geographic area within a State.) The EPA oversees development of State programs and enforces the obligation to implement a program in

of a given pollutant if the Administrator so specifies [501(2)(A)].

(b) Sources of air pollutants, as defined in section 302, with the potential to emit 100 tpy or more of any pollutant [501(2)(B)].

(c) Sources subject to the nonattainment area provisions of Title I, Part D, with the potential to emit pollutants in the following or greater amounts[1] [501(2)(B)]:

		TPY	
(i)	Ozone (VOC's and NO_x)		
	Serious	50	
	Transport regions not severe or extreme	50	(VOC only)
	Severe	25	
	Extreme	10	
(ii)	Carbon monoxide		
	Serious (where stationary sources contribute significantly)	50	
(iii)	Particulate Matter (PM-10)		
	Serious	70	

(2) Any other source, including an area source, subject to a hazardous air pollutant standard under section 112.

(3) Any source subject to NSPS under section 111.

(4) Affected sources under the acid rain provisions of Title IV [501(1)].

(5) Any source required to have a preconstruction review permit pursuant to the requirements of the prevention of significant deterioration (PSD) program under Title I, Part C or the nonattainment area new source review (NSR) program under Title I, Part D.

(6) Any other stationary source in a category EPA designates in whole or in part by regulation, after notice and comment.

A major source is defined in terms of all emissions units under common control at the same plant site (i.e., within a

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[1]For this purpose, Title I treats volatile organic compounds (VOC) and oxides of nitrogen (NO_x) sources differently. In areas qualifying for an exemption under section 182(f), NO_x sources with the potential to emit less than 100 tpy would not be considered major sources under Part D of Title I. In areas not qualifying for this exemption, NO_x sources are subject to the lower thresholds created by section 182(f). In ozone transport regions, a lower threshold of 50 tpy for VOC sources is created by section 184(b). Because section 182(f) does not refer to section 184(b), the lower threshold in ozone transport regions applies to VOC sources, but not to NO_x sources. Whatever its location, any 100 tpy source would be considered a major source under section 302.

each State. Should a State fail to develop a permit program, the EPA must implement a program for that State [501(4), 502(d)(1), and 302(b)].

(1) Minimum Program Requirements

Within 1 year of enactment of the 1990 Amendments (November 14, 1991), EPA must promulgate regulations establishing the minimum elements of a State operating permit program. These regulations must include the following elements:

(a) Requirements for permit applications, including standard application forms and criteria for determining the completeness of applications [502(b)(1)].

(b) Monitoring and reporting requirements [502(b)(2)].

(c) A permit fee system [502(b)(3)].

(d) Provisions for adequate personnel and funding to administer the program [502(b)(4)].

(e) Authority to issue permits and assure that each permitted source complies with applicable requirements under the Act [502(b)(5)(A)].

(f) Authority to terminate, modify, or revoke and reissue permits "for cause."

(g) Authority to enforce permits, permit fee requirements, and the requirement to obtain a permit, including civil penalty authority in a maximum amount of not less than $10,000 per day for each violation, and "appropriate criminal penalties" [502 (b)(5)(E)].

(h) Authority to assure that no permit will be issued if EPA timely objects to its issuance [502(b)(5)(F)].

(i) Adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete and for processing applications; for public notice, including offering an opportunity for public comment and a hearing; for expeditious review of permit actions, and State court review of the final permit action [502(b)(6)].

(j) Authority and procedures to provide that the permitting authority's failure to act on a permit or renewal application within the deadlines specified in the Act (section 503 and the deadlines for permitting under acid rain provisions in Title IV) shall be treated as a final permit action solely to allow judicial review by the applicant or anyone else who participated in the public comment process to compel action on the application [502(b)(7)].

(k) Authority and procedures to make available to the public any permit application, compliance plan for noncomplying sources, permit, emissions or monitoring report, and compliance report or certification, subject to the confidentiality provisions similar to those of section 114(c) of the Act [502(b)(8)]; the contents of the permit itself are not entitled to confidentiality protection [503(e)].

(l) Provisions to allow operational flexibility at the permitted facility [502(b)(10)].

(2) State Program Development

Within 3 years of enactment (2 years after EPA is obligated to issue its permit program regulations), the Governor of each State shall submit to EPA a permit program meeting the requirements of Title V. A State may submit its current or proposed program to EPA for approval any time after Part 70 rules become final.

The Governor must also submit a legal opinion from the attorney general, attorney for those State air pollution control agencies with independent legal counsel, or the chief legal officer of an interstate agency stating that the laws of the State, locality, or interstate compact provide adequate authority to carry out the program [502(d)(1)]. The EPA encourages early action by each State to evaluate the potential of its existing enabling legislation to implement Title V and to take additional actions, as needed, to ensure a timely and approvable program submittal.

Several States may need new legislative authority in a number of areas in order to fulfill the requirements of the Act, including (but not limited to): authority to charge, collect, retain, and expand adequate permit fees, and to collect civil penalties of a maximum amount of at least $10,000 per day per violation. The EPA intends to assist States in identifying and obtaining any required new authorities.

(3) The EPA Review of Program Submittals

Within 1 year after receiving the State's program, EPA shall approve or disapprove it, in whole or in part. The EPA may approve the program to the extent it meets the requirements of the Act and EPA's permit program regulations.

If EPA disapproves the program, or any part of it, EPA must notify the Governor of any revisions necessary for EPA approval. The State then has 180 days from this notice to revise and resubmit the program [502(d)(1)]. When EPA approves a program, EPA must suspend issuance of Federal permits, but may retain jurisdiction over permits still under administrative or judicial review [502(e)].

(4) Interim Program Approvals

If a program is not fully approvable, EPA may grant interim approval to a permit program, so long as the program "substantially meets" the requirements of Title V. Criteria for satisfying the "substantially meets" test are proposed to include: (1) the commitment and capability to collect fees adequate to cover the costs of the State permitting program, (2) the legal authority to assure that affected sources comply with all applicable requirements under the Act, (3) fixed permit terms not to exceed 5 years, (4) the opportunity for public participation in the permit issuance process, (5) the opportunity for EPA to review and object to the issuance of any permit, and (6) the requirement that a proposed permit will not be issued if EPA objects to its issuance.

In the notice of final rulemaking granting interim approval, EPA must specify the changes the State must make to

receive full approval. The EPA may grant interim approval, which may not be renewed, for a period of up to 2 years. During the interim approval period, the State is protected from sanctions for failure to have a program and EPA is not obligated to promulgate a Federal permit program in the State [502(g) and (d)(2)-(3)]. Permits issued under a program with interim approval have full standing with respect to Title V and the 1-year time period for source submittal of permit applications begins upon interim approval as does the 3-year time period for processing the initial permit applications discussed in the following section.

(5) State Permit Review

As noted above [III.B.(4)], sources are required to submit permit applications to the permitting authority within 1 year of program approval, whether full or interim. For Title IV (acid rain) sources, however, specific superseding deadlines are provided for the submission of applications for Phase II permit applications, which will not be due to States until January 1, 1996 [408(D)(2)]. For the initial round of permit applications, the permitting authority must establish a phased schedule for processing permit applications submitted within the first full year after program approval. This schedule must assure that the permitting authority will act on at least one-third of the permits each year over a period not to exceed 3 years after approval (interim or full) of the program [503(c)]. The EPA urges States to encourage early submittals of complete applications.

States are required to issue permits under the acid rain program by December 31, 1997 [408(D)(3)]. For most States, this deadline will coincide roughly with the second year of initial permit action. Additionally, expedited review and issuance procedures may be required for permit applications for sources pursuing compliance extensions for early reductions of hazardous air pollutants under section 112(i)(5).

After acting on the initial round of applications, the permitting authority must act on a completed application and issue or deny a permit within 18 months after receiving the complete application. The permitting authority should also establish reasonable procedures to prioritize review of permit applications, especially in the case of applications for new construction or modifications as defined in Title I.

C. The EPA Program Oversight

Federal authority for oversight of State operating permit programs is described in section 70.10. Such oversight activities include situations where a State fails to submit an approvable permit program, or EPA determines that a permitting authority is inadequately administering and enforcing a permit program or an approved permit fee program.

(1) State Failure to Submit A Program

The EPA must apply sanctions to a State where the Governor has not submitted a program within 18 months after

the deadline for submittal, or where 18 months have passed since EPA disapproved the program in whole or in part [502(d)(2)(B)]. The sanctions are the same as those in Title I: a highway funding cutoff, and a two-to-one offset ratio for new or modified sources [179(b)]. The EPA may apply the offset ratio sanction only in areas where the failure to submit or disapproval relates to an air pollutant for which the area is designated nonattainment. One sanction may be applied any time during the 18-month period following the date required for program submittal or program revision [502(d)(2)(A)]. The EPA must apply one of these sanctions after the above-referenced periods elapse. If the EPA finds a lack of good faith effort on the part of the State, both sanctions are to apply until the State comes into compliance with the requirements of Title V [179(a)(4)]. If the State has no approved program 2 years after the date required for submission of the program, EPA must promulgate, administer, and enforce a Federal permit program for the State [502(d)(3)].

If the EPA determines that a State's fee program is not approvable or that a permitting authority is not adequately administering an approved fee program, the EPA will promulgate under Part 71 a Federal permit program which the Agency will administer and enforce where the State fails to submit, correct, or implement its program. The Agency has the authority to collect reasonable fees from the permittees to cover the costs of administering the program. Any source that fails to pay fees shall be subject to additional penalties. Fees, penalties, and interest collected by the EPA will be deposited in a special U.S. Treasury fund for permitting activities and held for future appropriation.

(2) State Failure to Implement a Program

Whenever EPA determines that a permitting authority is not adequately administering and enforcing a program, EPA must notify the State [502(i)(1)]. If EPA determines that the failure to administer and enforce the program persists 18 months after EPA's notice to the State, EPA must apply the same sanctions in the same manner as required for a failure to submit an approvable program [502(i)(2)]. The EPA has the option of imposing any one of the sanctions before the 18-month period has passed [502(i)(1)]. If the State has not cured the failure to administer and enforce the program within 18 months after EPA's notice, EPA must promulgate, administer, and enforce a Federal permit program within 2 years after the notice to the state [502 (i) (4)].

D. Complete Permit Applications

Permit Applications Each State program must establish specific criteria to be used in defining a complete permit application. A complete application is one that the permitting authority has determined to contain all the necessary information needed to begin processing the permit application. The permitting

authority can determine, however, that the application is not complete if the source fails to provide timely updates to the application that the permitting authority needs to issue the permit within the specified deadlines.

The permitting authority must provide notice to the source when a complete application has been received. In the event that no notice is provided to the source within 30 days after receipt of the application by the permitting authority, the application shall be deemed complete.

A source which files a timely and complete application for a permit or a renewal will not be liable for failure to have a permit if the permitting authority delays in issuing or reissuing the permit, provided the delay in issuing the permit was not due to the applicant's failure to respond in a reasonable and timely manner to written requests from the permitting authority for additional information needed to evaluate the application. This protection also applies to sources requiring NSR permits. They must have filed a complete application for a Title V operating permit and have a preconstruction permit before operating the new source or major modification [503(d)]. In general, a complete application must be submitted according to the transition schedule approved within the program and in a timely way for subsequent renewals. "Timely" for renewals is proposed to mean 18 months prior to expiration of the permit, unless some other time is approved by the Administrator. Correspondingly shorter times might be appropriate when the fixed term of the permit is for less than 5 years or where the permitting authority is obligated to act on permit renewals in less than 18 months. In no event will EPA approve a time period which is shorter than 6 months before permit expiration.

All complete applications must contain information which identifies a source, its applicable air pollution control requirements, the current compliance status of the source, the source's intended operating regime and emissions levels, and must be certified as to their truth, accuracy, and completeness by a responsible official after making reasonable inquiry. Each permit application must, at a minimum, include a completed standard application form (or forms) and a compliance plan, which describes how a noncomplying source plans to achieve all applicable air quality requirements under the Act. The plan must include a schedule of compliance and a schedule for the source to submit progress reports to the permitting authority no less frequently than every 6 months. All sources must submit a compliance certification report at least once a year. Parts 72 through 78 will contain specific requirements for acid rain affected sources regarding compliance schedules, progress reports, and compliance certifications.

The minimum data elements proposed for inclusion in all standard application forms, as well as the basic requirements

for compliance plans for noncomplying sources, are presented in
section 70.5 of the regulations. With the exception of certain Federal programs (e.g., acid rain), EPA will not require that any specific form be used by States as long as the minimum data elements are provided to EPA. However, the Agency will encourage the use of certain model forms as a preferred way to meet the requirements of section 70.5.

Additional information may be required from some subject sources. Those located in nonattainment areas under Title I, Part D of the Act may be required to fulfill the emissions statement requirements for certain sources of VOC's and NO_x. Similarly, sources of hazardous air pollutants subject to section 112 which are attempting to comply with alternative emissions limits will also need to submit additional information.

E. Permit Content

The State regulations required under Title V and proposed in section 70.6 must assure that permits meet all applicable requirements of the Act and include the following:

(1) A fixed term, not to exceed 5 years [502(b)(5)(B)], except that affected sources under Title IV must have 5-year fixed terms [408(a)] and solid waste incinerators under section 129(e) must have up to a 12-year fixed term.

(2) Limits and conditions to assure compliance with all applicable requirements under the Act, including requirements of the applicable SIP [504(a)] and Title IV.

(3) A schedule of compliance for noncomplying sources, which is defined as a schedule of remedial measures, including an enforceable sequence of actions or operations, leading to compliance with applicable requirements under the Act [504(a) and 501(3)].

(4) Inspection, entry, monitoring, compliance certification, recordkeeping, and reporting requirements to assure compliance with the permit terms and conditions, consistent with any monitoring regulations that EPA promulgates under section 504(b) and Title V [504(c)] Nothing in this regulation should be read to require continuous emissions monitoring in situations where it is not otherwise prescribed.

(5) A provision describing conditions under which any permit for a major source with a term of 3 or more years must be reopened to incorporate any new standard or regulation promulgated under the Act [502(b)(9)].

(6) Provisions under which the permit can be revised, terminated, modified, or reissued for cause.

(7) Provisions ensuring operational flexibility within a permit so that certain changes can be made within a permitted facility without a permit revision, provided that no "modification" (as defined in Title I of the Act) would occur and a notice is provided to the permitting authority at least

7 days in advance where the permit would not allow such changes [502(b)(10)].

(8) A provision that nothing in the permit or compliance plan issued pursuant to Title V of the Act shall be construed as affecting allowances [408(b)].

The operational flexibility provision contained in Title V must be implemented carefully and fairly so that a source can respond quickly to changing business opportunities while, at the same time, the permitting authority is assured that the source will meet all the applicable requirements of the Act. Before considering EPA's proposed provisions on operational flexibility, however, it should be recognized that the nature of a permit is to allow anything that it does not expressly prohibit. That is, a source may not only do what its permit specifically allows, but also what the permit terms do not specifically prohibit. Thus, when section 502(b)(10) speaks of changes that do not result in exceedances of the emissions allowable under the permit, this means any change that does not violate an express prohibition in the permit is allowed. Several approaches to achieving this flexibility in permits are described in section IV.F.(5). The EPA solicits comments on these and any other suggested approaches.

F. Permit Issuance and Review

Proposed regulations concerning the processes for permit issuance, review, renewal, revision, and reopening are found in section 70.7. Briefly, these include:

(1) Timing of Permit Application, Review, and Issuance

Sources required to have a permit must submit a complete permit application and compliance plan (for noncomplying sources) to the permitting authority within 12 months of the effective date of the State program. The permitting authority may designate a period of less than 12 months for initial submission of applications. Permit applications and compliance plans required under Title IV of the Act (acid rain) must be submitted on a schedule different from those required under Title V. Phase II sulfur dioxide (SO_2) permit applications and compliance plans must be submitted to the States by January 1, 1996 [408(d)(2)]. States must act on these applications by December 31, 1997 [408(d)(3)]. These applications and compliance plans will be binding on the source until a permit has been issued. Applications with respect to NO_x under Title IV will be due January 1, 1998.

(2) Permit Notification to EPA and Affected States

The permitting authority must provide notice to certain States and EPA of permit applications received and proposed permits. It must submit to EPA the following:

(a) The application for any permit, renewal, or revision, including any compliance plan, or any portion EPA determines it needs to review the application and permit effectively; and

(b) Each permit proposed to EPA and each permit issued as a final permit by the State [505(a)(1)].

In regard to notification of States, the permitting authority is required to notify all affected States of each permit application and each permit submitted for public comment. The authority must also notify each State within 50 miles of the applicant source. The permitting authority must give all such States an opportunity to submit written recommendations for the permit. If the authority refuses to accept those recommendations, it must provide its reasons for refusal in writing [505(a)(2)].

The EPA may waive its own and neighboring States' review of permits for any category of sources, except major sources, either when approving an individual program, or in a regulation applicable to all programs. The EPA may also waive its own right to review, but maintain the requirement for a State to notify neighboring States [505(d)]. During Phase II of the acid rain program, the Agency does not intend to waive its own right to review affected sources.

(3) The Agency Review and State Response

The EPA must by law object to any permit that would not be in compliance with the applicable requirements of the Act, including the applicable implementation plan. If EPA objects within 45 days after receiving either the proposed State permit or the notice that the permitting authority has refused to adopt a neighboring State's recommendations for the permit, the permitting authority must respond to EPA in writing. The EPA must provide the permitting authority and permit applicant a statement of reasons for the objection [505(b)(1)].

The permitting authority may not issue the permit with respect to Title V if EPA objects, unless it revises the permit to meet EPA's objections. If the authority has already issued the permit, EPA will modify, terminate, or revoke the permit, and the permitting authority must reissue it to meet EPA's objection [505(b)(3)]. The permitting authority has 90 days after EPA's objection to revise the permit (unless the permitting authority does so first). If the permitting authority fails to do so, EPA must issue or deny the permit [505(c)].

(4) Judicial Review and Public Petition

An approvable program must provide for judicial review in State court of the permit action whether the review is obtained by the applicant, anyone who participated in the public comment process, or any other person who could obtain judicial review of the action under applicable law [502(b)(6)].

Within 60 days after the expiration of the 45-day EPA review period, any person may petition the Administrator to veto a permit if EPA fails to object. The objections in the petition must have been raised during the comment period on the permit provided by the State issuance process, unless the petitioner shows that it was impracticable to raise the objections at that time. The petition shall not postpone the effectiveness of a permit that has issued.

The Administrator shall grant or deny a petition within 60 days after it is filed. The EPA must issue an objection if the petitioner demonstrates to the satisfaction of the Administrator that the permit is not in compliance with the Act, including the applicable SIP and Title IV requirements. If the Administrator denies the petition, the denial is subject to review in the Federal Court of Appeals under section 307 [505(b)(2)].

Where EPA objects to a permit and the State fails to meet EPA's objection, EPA must then issue or deny the permit. The Federal Court of Appeals may review EPA's final action in issuing or denying the permit under section 307. Title V provides that EPA's objection to a permit is not subject to judicial review until EPA takes final action on the permit [505(c)].

(5) Permit Shield and Reopenings

Section 504(f) of the Act defines the permit shield provision of Title V, which enables States and the Administrator to provide sources with greater certainty as to their legal obligations under the Act. This section establishes that the permit may provide that compliance with the permit shall be deemed compliance with all other applicable provisions of the Act, if the applicable requirements of such provisions are included in the permit, or if the permitting authority, in acting on the permit, determines that such other provisions (which shall be referred to in such determinations) are not applicable and if the this determination or a concise summary thereof is included in the permit. The EPA encourages States to employ the "permit shield" routinely to help stabilize the permit process and give greater certainty to the regulated community.

The EPA is soliciting comment on the potential scope and effect of the permit shield. It is possible to read the shield provision narrowly, limiting its protection to those requirements the permit explicitly addresses. The EPA believes, however, that the shield provision should be interpreted broadly, thus protecting a source from enforcement of a whole class of Act requirements if the permit addresses any one of those requirements.

Under either interpretation, EPA may limit the scope of the permit shield by rule. While EPA is proposing a broad interpretation of the shield in today's notice, the Agency intends to prohibit use of the shield in cases where the source initiates changes that result in requirements becoming applicable to the source beyond those contained in the permit (until such changes are later incorporated into the permit) or where an applicable requirement is omitted from a permit. In no event can any source seeking to obtain or renew a Part 70 permit be shielded from enforcement action that results from violations of any applicable requirements (including orders and consent decrees) that occurred before the permit was

issued or from requests for additional information pursuant to section 114 of the Act.

Any approvable program, at a minimum, must require that the permitting authority will revise all permits with terms of 3 or more years to incorporate applicable requirements under the Act that are promulgated after issuance of the permit. Such revisions must be made using the notice and comment procedures for permit issuance, and must be made within 18 months after the promulgation of the new requirement. No revision is required if the effective date of the requirement is after the expiration of the permit term [502(b)(9)]. The EPA is proposing to interpret the provision as being applicable to major source permits with a remaining life of 3 or more years.

Approvable programs also must require that the permitting authority may terminate, modify, or revoke permits for cause [502(b)(5)(D)]. "Cause," for example, may exist when the permit contains a material mistake made in establishing the emissions standards or limitations, or in other permit requirements. For purposes of acid rain, permit revision procedures will be governed by Part 72.

Phase II acid rain permits will need to be reopened to incorporate NO_x provisions, which are not due until 1998. Excess emission offset plans and all allowance allocations and transfers, however, shall be deemed incorporated into each unit's permit, upon recordation or approval by the Administrator, without further permit revision and review.

If EPA finds that cause exists to reopen a permit, EPA must notify the permitting authority and the source. The permitting authority has 90 days after receipt of the notification to forward to EPA a proposed determination of termination, modification, or revocation and reissuance of the permit. The EPA may extend the 90-day period for an additional 90 days if a new application or additional information is necessary. The EPA then may review the proposed determination under the review procedures of permit issuance. If the permitting authority fails to submit a determination or if EPA objects to the determination, EPA may terminate, modify, or revoke and reissue the permit. The EPA must provide notice and "fair and reasonable procedures" when it terminates, modifies, or revokes and reissues a permit [505(e)]. The Agency proposes that any permit reopenings accomplished by the permitting authority will supersede any applicable portion(s) of a permit shield that is in effect.

(6) Permit Revisions

Section 502(b)(6) does not define with precision how permit revisions are to be processed, thus leaving EPA discretion for construing this provision, as explained below. The EPA is today proposing three types of permit revisions that are needed to amend the Part 70 permit to accommodate operational changes which do not qualify under the operational flexibility provisions of section 502(b)(10) [IV.F.(5)] as

previously discussed. Instead, they trigger the need for revision to permits prior to their renewal.

The first class of permit revisions consists of minor permit amendments. These are changes which go beyond the activities allowed in the original permit that increase the total emissions allowed under the permit (for any regulated pollutant from emissions units addressed by the permit), but do not rise to the level of modifications subject to Title I NSR procedures and do not violate any applicable Federal requirements.

Under such a "fast track" process for minor permit amendments, States are free to adopt procedures to allow such changes to take effect automatically after a specified period of time (no less than 7 days), as long as the permitting authority does not object during this period. The second class of permit revisions are administrative permit amendments. These changes are either insignificant ones which adjust details not important to air quality (e.g., change in source name) within Part 70 permits or changes which have been already reviewed and processed under new source review procedures approved into the SIP. Changes qualifying as administrative permit amendments can be administratively incorporated into the operating permit by the permitting authority.

The third class of permit revisions is permit modifications. A permit modification is a revision to a Part 70 permit that meets the requirements of section 707(d) of this Part. A permit modification is subject to the same procedures required for initial permit issuance, including EPA review and the opportunity for public comment and hearing. After receipt of an application for a modified permit, permitting authorities will focus their efforts on review of the specific changes indicated in the application. However, they must also evaluate the application to confirm that it assesses the impacts of such changes on other aspects of the source's operations and assures continued ability to comply with all applicable requirements of the Act.

Sources subject to requirements of the acid rain program must hold allowances to cover their emissions of SO_2. These sources will have conditions in their permits prohibiting emissions exceeding the number of allowances held. Sources holding emissions allowances under the acid rain program may buy, sell, or trade those allowances. Allowance transactions registered by the Administrator will cause automatic amendment of the source's permit as a matter of law, without following either the permit modification or amendment procedures described above. Regulations governing allowance trading will be promulgated at 40 CFR Part 73.

(7) Permit Renewal

Each permit is to have a fixed term not to exceed 5 years (except that permits for municipal waste combustors may have terms up to 12 years). Renewal permits are subject to the

same requirements as those applying to initial permits, including the requirement for a timely and complete application and compliance plan for noncomplying sources and processing by the permitting authority within 18 months of a complete application.

The source will be able to operate after expiration of the permit only if it has submitted a timely and complete application for a new permit, as mentioned in the previous discussion on complete applications [III.D.]. To maintain the protection afforded by having a complete application, the source applicant still must respond in a reasonable fashion upon written request by the permitting authority to provide additional information needed to develop and issue the permit. Should a permit expire before a source submits a complete application, the source's right to operate is terminated unless and until a complete application is filed with the reviewing authority [503(d)], subject to a grace period where only administrative penalties would be applicable. The source is then subject to enforcement action (for operating without a Title V permit) for any period of time that it has operated without a renewed permit and without having submitted a complete application. The application shall be deemed to be complete 30 days from the date of its submission to the permitting authority, unless the permitting authority has already determined that the application is not complete. In addition, consistent with the established precedent in the NPDES program under the CWA, EPA is proposing that, except where inconsistent with State law or as provided in Part 72 for the acid rain portions of a permit, the conditions of a permit where the fixed term has expired still remain enforceable until they are replaced by those in a reissued permit.

G. Fee Demonstration

A key requirement of State operating permit programs is that States establish an adequate permit fee program. Regulations concerning fee programs and appropriate criteria for determining the adequacy of such programs are set forth in section 70.9.

An approvable permit program must require the fee payer to pay an annual fee (or the equivalent over some other period) sufficient to cover all "reasonable (direct and indirect) costs" required to develop and administer the permit program [502(b)(3)(A)]. The EPA proposes to interpret reasonable costs to include the costs of administering most air control program activities which involve sources subject to Title V. All fees collected by a permitting authority under Title V must be used solely to support the permit program [502(b)(3)(C)(iii)]. The EPA is proposing that these fees must cover a broad range of costs, including:

(1) Reviewing and acting upon any application.

(2) Implementing and enforcing the permit, including any permit issued before enactment of Title V, but not any court costs or other costs associated with an enforcement action.

(3) Emissions and ambient monitoring, including continuous emissions monitors (CEMS) (where applicable) and inspections.

(4) Preparing generally applicable regulations or guidance.

(5) Modeling analyses and demonstrations.

(6) Preparing inventories and tracking emissions [502(b)(3)7(A)(i)-(vi)].

(7) Permit-related functions performed by air pollution control agencies which do not issue permits directly.

(8) Development and administration of the State small business stationary source technical and environmental compliance assistance program as it applies to Part 70 sources.

(9) Information management activities to support and track permit applications, compliance certifications, and related data entry.

The program must presumptively collect a fee amount from all permitted sources equal to at least $25 per ton (1990 baseline) for the actual emissions of each regulated pollutant, with the exception of carbon monoxide [502(b)(3)(B)(i) and (ii)] and with the further exceptions that the State is not required to count emissions of any pollutant from any one source in excess of 4,000 tpy [502(b)(3)(B)(iii)] or if these emissions are already accounted for within the emissions of another regulated pollutant (although the State is not precluded from doing so). The program need not collect the $25 per ton amount if it can provide a demonstration that a lesser amount will adequately support the direct and indirect costs of the program [502(b)(3)(B)(iv)]. Conversely, States are free to use different approaches or charge more than $25 per ton and must do so if additional funds are necessary to cover the costs of the program. In any event, the permitting authority must provide for a periodic accounting of how the collected fees were used to support the program, and how they meet the presumptive minimum described above.

The EPA interprets Title V to offer permitting authorities flexibility in setting variable fee amounts for different pollutants or different source categories, as long as the sum of all fees collected is sufficient to meet the reasonable direct and indirect costs required to develop and administer the provisions of Title V of the Act, including section 507. The fee amount is to be increased each year according to the Consumer Price Index (CPI) at the time the index is published as defined by section 502(b)(3)(B)(v). In addition, the EPA interprets Title V to direct States, as a minimum, to recover costs related to meeting Federal requirements, including the requirements of the applicable

State plan that implements the relevant requirements of the Act. Nothing in this section is intended to provide States any additional authority (beyond what is otherwise authorized under State law) to levy fees beyond the amount necessary to offset the program costs of Title V.

Section 408(c)(4) of the Act provides that during the years 1995 through 1999, no fee shall be required to be paid under section 502(b)(3) or under section 110(a)(2)(L) with respect to emissions from any unit which is an affected unit during Phase I of the acid rain program. The Agency interprets this provision to mean that EPA may not collect fees from Phase I-affected sources prior to the year 2000, but that States are not precluded from collecting fees from these sources for permitting activities pursuant to other requirements of the Act.

If EPA determines that a State's fee program is not approvable, or that a State is not adequately administering or enforcing an approved fee program, EPA may collect reasonable fees from permittees. Such fees shall be designed solely to cover EPA's costs of administering the Federal permit program [502(b)(3)(C)(i)]. Sources failing to pay a fee assessed by EPA must pay a penalty of 50 percent of the fee amount, plus interest [502(b)(3)(C)(ii)]. The EPA must deposit federally-collected fees, penalties, and interest in a special Treasury fund, subject to appropriation, to carry out EPA's permitting activities.

H. Permit/SIP Relationship

The SIP remains the basis for demonstrating and ensuring attainment and maintenance of the national ambient air quality standards (NAAQS). The permit program collects and implements the requirements contained in the SIP as applicable to the particular permittee. Since existing SIP's contain all relevant present and past requirements, proper implementation of the permit program will ensure that all SIP provisions applicable to a particular source be defined, clarified, interpreted (as necessary), and collected into a single document. The applicable requirements would include any recent SIP changes, whether as a result of a State or local SIP revision or of a Federal implementation plan (FIP) action by EPA. Where appropriate, EPA intends to promote the implementation of the permit program through the use of model permits for critical source types. Moreover, EPA proposes a broad interpretation of the shield, which requires that States with areas under a SIP call provide permitted sources a shield from compliance with any new SIP requirements in a manner consistent with how the State will meet any outstanding SIP call.

As previously discussed, Title V affords reasonable operational flexibility to subject sources. The relationship between Title V permits and SIPs is a key factor in determining the extent to which operational flexibility is available to sources, since each permit, in part, must assure

compliance with the applicable implementation plan. EPA recognizes that it will take time to complete the transition from a regulatory system where SIPs are the primary tool for implementing and enforcing the Act, to one where operating permits ultimately assume primary responsibility for implementation and enforcement. Elsewhere in today's proposal, the EPA takes comment on ways to ensure a smooth transition to increasingly general, and thus more flexible, SIPs, combined with more detailed permits specifying the enforceable operating limits applicable to subject sources.

Permits issued pursuant to Title V are not part of the SIP, but they, like SIP's, are federally-enforceable. Where reliance on tighter conditions found in permits is critical to satisfy an applicable requirement of the Act, the SIP demonstration must recognize the new permit limits in context of ensuring attainment and maintenance of the NAAQS and any another interim requirements to make reasonable further progress. At the option of the State, this might involve the periodic incorporation of these limits into the SIP to ensure their permanence. The EPA will allow, to the extent possible, batch submittals and/or expedited processing procedures for incorporation of these limits into the SIP. This will include the use of the SIP processing reforms announced in 54 FR 2214, January 19, 1989.

Today's proposal also solicits comment on ways to accomplish an upgrade of the SIP demonstration (relative to the results of the permit process) without making the SIP's so detailed as to limit future permit changes at affected sources. One concept proposed for comment would allow, as a substitute for having to incorporate every tighter permit requirement into the SIP, a single broad SIP provision. This provision would reflect the aggregate effect of tighter limits achieved in the permit program, but only to the extent necessary to demonstrate attainment and maintenance of the NAAQS or to meet any other requirement related to Reasonable Further Progress.

I. New Source Review/Title V Relationship

Decisions made under the NSR and/or PSD programs [e.g., best available control technology (BACT)] define applicable SIP requirements for the Title V source and, if they are not otherwise changed, can be incorporated without further review into the operating permit for the source. The Title V program is not intended to interfere in any way with the expeditious processing of new source permits. The permitting authority is required to have reasonable procedures and resources to assign priority to action on permits for new construction or modification [503(c)].

J. Small Businesses

The EPA has given serious consideration in this rulemaking to minimizing any undue impacts on small businesses. Accordingly, except for acid rain sources, EPA is

proposing to defer initially the applicability from the permitting program of all nonmajor sources which would have been otherwise subject to Title V provisions. These sources are believed to be disproportionately small businesses. The proposed exception to this deferral is for sources in nonattainment areas, where permitting of nonmajor sources may be deferred only if the permitting authority makes a showing that such action will not adversely affect the State's ability to meet its SIP obligations under the Act. The EPA would continue the permitting deferral for certain nonmajor sources if permitting them is demonstrated by EPA to be impracticable, infeasible, or unnecessarily burdensome in a future rulemaking.

For those small businesses still required to obtain, or those opting to obtain, a permit, and for other appropriate source categories, EPA is promoting the use of general permits where possible. A general permit is a single permitting document which can cover a category or class of many similar sources. Public notice and an opportunity for a public hearing must be provided by the permitting authority when considering issuance of a general permit [504(d)], but not when the individual sources subsequently submit requests for coverage and are evaluated for a permit reflecting the terms of the general permit. The permit issuance process for eligible sources can thus be greatly simplified which substantially reduces the administrative burden on both sources and the permitting authority.

Section 507 requires States to establish a small business stationary source technical and environmental compliance assistance program. The program must be adopted as part of the SIP consistent with sections 110 and 112. The States must submit the proposed program within 2 years after enactment of Title V [507(a)]. The State must also establish a Compliance Advisory Panel to monitor implementation of the program [507(e)].

The program must contain the following provisions for small business stationary sources:

(1) Mechanisms for developing information concerning compliance methods and programs to encourage lawful cooperation among such sources.

(2) Mechanisms to assist such sources with pollution prevention and accidental release detection and prevention.

(3) A State ombudsman for such sources to aid in implementation of the Act.

(4) A compliance assistance program to help such sources determine applicable requirements and receive permits.

(5) Mechanisms to assure that such sources receive notice of their rights under the Act.

(6) Mechanisms to assure that such sources are informed of their obligations under the Act, including referrals to qualified auditors.

(7) Procedures to consider requests from such sources to modify work practice or technological compliance methods, or the milestones for implementing such methods. Such requests would be based on the source's technological and financial capability. All such modifications must comply with the Act's requirements, and Federal regulations may only be modified if the regulation provides for the modification [507(a)(1)-(7)].

The EPA must establish a program for small business stationary sources within 9 months after enactment which must (1) assist the States in developing their programs, (2) issue guidance about alternative control technologies and pollution prevention methods, and (3) in States that fail to adopt a program, implement the requirement to assist such sources in determining applicable requirements and receiving permits [507(b)]. The EPA must also have a Small Business Ombudsman to monitor implementation of the program [507(d)]. Other oversight procedures are contained in Title V to ensure the effectiveness of this SIP-based program.

To qualify for assistance from these programs, a source must meet all the following conditions:

(1) Be owned or operated by a person employing 100 or fewer individuals.

(2) Be a small business under the Small Business Act.

(3) Not be a major stationary source.

(4) Not emit 50 tons per year or more of any regulated pollutant.

(5) Emit less than 75 tpy of all regulated pollutants [507(c)(1)].

States may also include a source that is a major stationary source provided that the source does not emit more than 100 tpy of all regulated pollutants combined [507(c)(2)]. The EPA or the State may exclude from the program any category of sources that has sufficient technical and financial capabilities to meet the requirements of the Act without the program. The EPA and the State must consult with the Small Business Administration and provide notice and opportunity for comment on such exclusions [507(c)(3)].

The State or EPA may reduce any fee required under the Act for small business stationary sources [507(f)]. When developing regulations or control technique guidelines (CTG's) which require CEMS, EPA must consider the appropriateness of requiring CEMS at such sources. This provision does not apply to CEMS under the acid rain provisions of Title IV [507(g)]. The EPA must also consider the size, type, and technical capabilities of such sources when developing CTG's [507(h)].

K. Relationship with Section 112 (Air Toxics)

The operating permit program will implement existing section 112 standards for subject sources of hazardous air pollutants, as well as future standards to be promulgated under section 112 which describe requirements for the use of MACT, generally available control technology (GACT), and any technology used to reduce unreasonable residual risk. As

noted earlier, a major source under section 112 is defined as any stationary source (or group of stationary sources) located in a contiguous area and under common control which has the potential to emit, after controls, 10 tpy or more of any hazardous air pollutant, 25 tpy or more of any combination of these pollutants, or a lesser quantity of a given pollutant if the Administrator so specifies.

Section 112(l) of the Act outlines a program for State implementation of section 112. The EPA proposes that the procedural requirements in section 112(l) to review and approve/disapprove State programs will be met by the promulgation of Part 70, specifically as described in section V.E. of the preamble.

The State permit program submittal is required to contain a legal opinion affirming the adequacy of existing legal authority to implement and enforce certain section 112 provisions. Authority is needed to accept delegation of authority to implement and enforce MACT standards; to develop and enforce case-by-case determinations of MACT for new, reconstructed, or modified sources where no applicable emissions limitations have been yet established [112(g)]; and to develop and enforce case-by-case determinations of MACT where EPA fails to issue a standard for a major source category or subcategory within 18 months of the scheduled promulgation date [112(j)].

The operating permit program will also be the principal long-term mechanism for implementing alternative emissions limitations for sources which demonstrate that they have achieved reductions of 90 percent or more in emissions of hazardous air pollutants, or reductions of 95 percent or more in emissions of particulate hazardous pollutants. Existing sources which make sufficient early reductions will receive a 6-year extension from the compliance date for meeting the otherwise applicable standard [112(i)(5)].

L. Relationship With Title IV (Acid Rain)

Title IV mandates a two-phased acid rain control program which will be implemented, as in the case of other Act requirements, through Title V operating permits. The requirements of Part 70 will apply to the permitting of affected sources under the acid rain program, except as modified in 40 CFR Parts 72 through 78, pursuant to Title IV [506(b)]. Compliance with the acid rain program requirements in Parts 72 through 78 will not exempt or exclude the owner or operator of any source subject to those requirements from compliance with any other applicable requirements of the Act [403(f)].

Title IV sets forth certain permitting requirements that supplement the Title V requirements addressed by today's proposal. Places where the acid rain permitting program may differ from the Title V operating permit program have been highlighted, and some specific statutory requirements under Title IV are included in this proposal. Most specific

requirements of the acid rain permit program will be established in a separate rulemaking, with final rule promulgation 18 months after enactment. It is contemplated that the acid rain permit program rules will be promulgated at 40 CFR Part 72. Other requirements for that program will be promulgated at Parts 73 through 78 of 40 CFR. References to those sections are used in this rulemaking where appropriate.

Acid rain-specific permit content requirements must be included in permit applications, compliance plans, and operating permits under both phases of the acid rain program. The permitting process will be different for Phase I and Phase II. Section 408 provides that Phase I of the acid rain program (1995 through the end of 1999) will be implemented entirely through operating permits issued by the EPA. Phase II (beginning in 2000) will be implemented by operating permits issued by the States with federally-approved permit programs, or by the EPA in the event of State defaults. Thus, Phase II permitting will be in accordance with the process established by the rules proposed today, as supplemented by the acid rain-specific content regulations in Part 72.

The acid rain permit regulations are anticipated to include a description of the relationship of the acid rain program to other programs incorporated in the permits, necessary definitions, applicability requirements, and necessary permit elements not included in the rule proposed here. These will include: (1) acid rain-specific requirements for permits and compliance planning, including requirements for affected sources relying on one or more alternative compliance methods authorized by the statute (e.g., extensions, substitutions, reduced utilization, energy conservation or renewable energy, repowering, and options); (2) compliance certification and reporting requirements; (3) requirements for designated representatives for affected sources; and (4) excess emission offset planning and fee requirements.

Whether permits are issued by the State or EPA, acid rain permit application forms must be used, including a provision concerning the binding effect of permit applications, which must (at a minimum) state that the acid rain portion of the permit application and proposed compliance plan, including amendments thereto, submitted for an affected source under the acid rain program shall be binding on the owners and operators, and on the designated representative for the source, and shall be enforceable as a permit for purposes of the acid rain program until a permit is issued by the permitting authority.

All acid rain permits issued to affected sources must prohibit: (1) annual emissions by affected units in excess of the applicable emissions limitation for NO_x; (2) annual emissions of SO_2 by affected units in excess of the number of allowances to emit SO_2 held by the owner or operator, or the

designated representative, for use in that year by each affected unit; (3) any person from holding, using, or transferring any acid rain allowance, except in accordance with regulations at Part 73; (4) the use of any allowance prior to the calendar year for which it was allocated; and (5) circumvention of any other provision of Parts 72 through 78, or of the permit [403(f),(g)]. Standard terms must similarly be included in permits for acid rain affected sources in order to ensure a nationally consistent program. In order to facilitate such standardization, EPA plans to develop forms at the time of the acid rain rulemaking and to develop support for computer generated permitting.

When developing permit revision procedures, States should be aware that the statute forbids requiring permit revisions as a result of allowance transactions. In accordance with Title IV, all acid rain allowance allocations and transfers will, upon being recorded by the Administrator in accordance with section 403 of the Act and Part 72, be deemed a part of each unit's acid rain permit requirements, without need for any further permit review and revision. Nothing in a permit shall be construed as affecting allowances. In addition, no permit revision shall be required for increases in emissions that are authorized by allowances held for a unit pursuant to the acid rain program, provided that the emissions increases authorized under the acid rain program do not excuse noncompliance with any other emissions limitation, standard, or requirement under the Act, including under Title I for the protection of ambient air quality standards, and that the acid rain requirements of the permit shall be governed by and consistent with the regulations at Parts 72 through 78.

No permit or revision to it may be issued that is inconsistent with the requirements of the acid rain program, requirements of the Act, or requirements of Parts 72 through 78. Examples of safeguards that will be developed under the Part 72 rulemaking which should limit permit revisions include: (1) permit revisions shall be effective only to the extent they are consistent with Parts 72 through 78; and (2) limits on the use of the amendment authority, e.g., changes in the designated representative for purposes of a source's acid rain program requirement, shall be supported by a certification of redesignation in accordance with Part 72.

Rules for Federal acid rain permitting during Phase I, and in the event of State defaults during Phase II, will be published at 40 CFR Part 72. Acid rain permit content requirements, which must be included in permits issued by States with approved programs, will be promulgated at that time. Public comment is invited at this time regarding the impact of this general permit program rulemaking on the acid rain permit program. Public comment in response to the acid rain rulemaking proposal will, however, only be accepted with regard to the provisions proposed at that time. Comments will

not be considered at that time reopening matters addressed by this rulemaking.

IV. Detailed Discussion of the Key Aspects of the Proposed Regulations

This portion of the preamble provides more detail on selected provisions of the proposed regulations. Issues are identified and EPA's proposed positions are discussed. Discussion is also included on the implications of the regulations and on the way implementation is expected to occur.

A. Section 70.1 - Statement of Program Goals

The purpose, benefits, and certain concepts of the regulatory requirements in Part 70 are introduced in this section of the regulations. Detailed discussion of some of these concepts appear subsequently in this preamble. The key concepts include: (1) the permitting program generally codifies existing regulatory requirements and does not impose new control requirements; (2) the SIP will continue to be the mechanism for demonstrating attainment and maintenance of the NAAQS; (3) the permits will assure compliance by the source with an applicable requirement of the Act; (4) States may implement a more extensive program consistent with the Act; and (5) EPA must implement a Federal permit program in the event a State fails to satisfactorily implement its program. This program, consequently, may be more limited in scope than the State program.

B. Section 70.2 - Definitions

Many definitions of terms in other parts of the Act or EPA regulations are utilized in Part 70. In addition, a number of new terms introduced in Title V and many terms created in conjunction with developing Part 70 are defined by this section. These new definitions include terms necessary to communicate effectively the new regulatory requirements, including "complete application," " Part 70 permit," "Part 70 source," "permitting authority," and "renewal."

C. Section 70.3 - Applicability

(1) Section 70.3(a) - Sources Subject to Permitting

This section describes program coverage and source applicability by defining "Part 70 sources." Operating permit programs must cover the types of stationary sources (except where EPA has exempted in whole or in part a source category, subject to certain limitations) previously described in detail [III.A.], which includes major sources. Section 70.3(a) covers the sources included in section 502(a).[2]

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[2]. EPA notes that clean-up activities at hazardous waste Superfund sites will not be required to obtain Title V permits, just as they currently need not receive CAA new source review

Source and Major Source: The EPA wishes to clarify how the definitions of "stationary source" and "major source" will be applied under the operating permit programs and to explain how these concepts will relate to the definitions of stationary source currently in effect in other programs under the Act.

Stationary Source: The EPA has patterned its proposed definition of "stationary source" for the permits program on the definition for "stationary source" contained in Title I. The Agency proposes in section 70.2(d) that "stationary source" means any building, structure, facility, or installation that emits or may emit any air pollutant.

Major Source: The EPA is taking comment on how to interpret the section 501(2) definition of "major source." Section 501(2) provides, in relevant part, that "the term 'major source' means any stationary source (or any group of stationary sources located within a contiguous area and under common control)" that would be a major source under sections 112 or 302, or Part D of Title I of the Act. As discussed below, the Agency proposes that "stationary sources" are to be grouped to determine if a major source exists on the basis of the same industrial grouping, or "major group" in the Standard Industrial Classification Manual (SIC code). Accordingly, EPA will require all commonly owned or controlled pollutant-emitting activities on contiguous or adjacent properties to obtain an operating permit if they are within the same SIC major group, and assuming the aggregated activities emit enough pollutants to trigger the applicable emissions thresholds provided in the Act.

The EPA believes that aggregating sources by SIC code at the source site to determine whether a source would be major is the approach intended by Congress. The definitions of major sources in Part D of Title I have language similar to the Title V language. For example, section 182(c) states that, for any serious ozone nonattainment area, "the terms 'major source' and 'major stationary source' include (in addition to the sources described in section 302) any stationary source or group of sources located within a

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permits. The Agency has previously decided that under the Comprehensive Environmental Response, Compensation, and Liability Act, such permitting is not appropriate. See the National Oil and Hazardous Substances Pollution Contingency Plan, 55 FR 8766-57 (March 8, 1990), and 40 CFR sec. 300.5 (definitions of "applicable requirements" and relevant and appropriate requirements). Similarly, facilities that are required to obtain permits for other reasons need not include CERCLA remediation-related information on emissions in their applications; such facilities must, however, include such information on those emissions as is otherwise required, because they are subject to applicable requirements under the Clean Air Act.

contiguous area and under common control that emits, or has the potential to emit, at least 50 tons per year of volatile organic compounds." Although that definition does not explain whether equipment that does not emit VOC's would be excluded from the source if the remaining equipment emitted more than 50 tpy, the House Committee Report explaining the provision sheds light on that issue and on the Title V definition. Specifically, the Report states the following:

The definition of "major source" here and elsewhere in the bill uses the term "group of sources located within a contiguous area and under common control." The Committee understands this to mean a group of sources with a common industrial grouping, i.e., the same two-digit SIC code. It is the approach followed today by EPA as a result of the Alabama Power litigation. It avoids the possibility that dissimilar sources, like a power plant and an adjacent coal mine, will be considered as the same "source" because of common ownership.

The legislative history reference therefore suggests that aggregation by SIC code should be done in a manner consistent with established NSR procedures. Accordingly, any equipment used to support the main activity at a site would also be considered as part of the same major source regardless of the 2-digit SIC code for that equipment. For example, an automobile manufacturing plant may consist of a foundry (SIC group 33), a power plant (SIC group 49), and an assembly plant (SIC group 37). Assume that the equipment is situated at the same site, under common ownership, and that the foundry and power plant are used solely to supply the assembly plant. In this example, all three activities would be considered to be part of one major source. However, if less than 50 percent of the output of the foundry was dedicated to the mentioned auto assembly plant, it would be considered as a separate source. If the power plant supported both the foundry and the assembly plant, it would be considered part of the source that consumes the largest percentage of the power generated.

The EPA solicits comment on whether or not to combine sources according to 2-digit SIC code when determining if those stationary sources constitute a major source under the Title V permit program.

The Amendments require all major stationary sources to be permitted, even if the Act does not impose other substantive requirements on the facility. For example, in some States there are existing major stationary sources in attainment areas for which there are no applicable emission limits in a SIP. Title V requires such major sources to obtain a permit although, under appropriate circumstances, States may choose to issue general permits to reduce the paperwork burden.

Section 112 requires that EPA publish a list of major and area source categories emitting one or more of the listed hazardous air pollutants before EPA sets standards that may apply to their toxic emissions. Title V requires major sources to obtain a permit, even if a MACT standard has not

yet been promulgated and the source is otherwise unregulated under the Act. Even so, the permitting process for many of these sources will be meaningful. Those undergoing construction, modification, or reconstruction will be subject to new substantive controls pursuant to section 112(g). It is unlikely that major sources to which section 112 would be applicable would not be regulated elsewhere under the Act. That is, many of the pollutants regulated under section 112 are also VOC's or particulate matter and are regulated by SIP regulations designed to implement the ozone or PM-10 NAAQS. As discussed more fully in section V.E., Title V permits will also be the vehicle that a permitting authority uses to codify emission limits and monitoring requirements proposed by sources to meet the early reduction requirement under section 112(i)(5), which defers application of MACT.

The EPA also solicits comment on whether the Agency should exempt from permitting requirements those sources that are "major" by virtue of the quantity of their emissions of particular pollutants, but whose emissions are not in any way actually regulated by a standard or other requirement under the Act. Arguably, issuing permits for such sources would serve no useful purpose under the Act.

Potential Emissions: In determining whether the amount of emissions from a stationary source will qualify the source as major and subject to Part 70, EPA will rely on the concept of "potential to emit" [302(j), relevant sections of Part D of Title I, and 112(a)(1)]. In so doing, EPA will determine potential emissions using the maximum capacity of a source to emit a pollutant, taking into account any federally-enforceable physical or operational limitation on that capacity (including any air pollution control equipment).

Including the federally-enforceable limitations on a source in the definition of potential emissions appears to create a circular definition problem. A source which enforceably restricts its emissions below the threshold for major stationary sources may be able to exempt itself from the permitting requirement, assuming no other provision of the Act captures that source in the program. However, the source seeks to exempt itself from one of the very programs capable of making enforceable the limits that create the exemption, but must first meet all substantive procedures and requirements in the process.

States may address this question using several techniques. They may decide not to include such operational limits in the definition of major stationary source for their operating permitting program, thereby assuring that such sources are permitted. A program might be able to permit such sources using general permits designed to impose capacity limits on a category of sources generically. States may then issue such sources State operating permits, without subjecting them to the federally-approved permit program, and submit

those State permits as SIP revisions to make the limits federally enforceable. Alternatively, States may choose to submit their State operating permit programs to the extent that they focus on smaller sources to EPA for approval as a SIP revision. To be approved by EPA, a program must meet the requirements set forth in the requirements EPA articulated in its approval of the definition of "Federal enforceability" in the NSR program [see 54 FR 27274 (June 28, 1989)]. This would then create a framework under which federally-enforceable permits could be subsequently issued by the States to limit the potential to emit of borderline sources without a need for case-by-case EPA approval.

The EPA also takes comment on the possibility of allowing such sources the option to submit to the appropriate permitting authority (with a copy to the EPA Regional Office) a commitment containing specific physical or operational conditions that would restrict the source's potential emissions to a level below the applicability thresholds stated in section 70.3(a). It must be signed by a responsible officer of the source with authority to make legally-binding commitments for the source. A commitment of this type must ensure that participating sources conduct adequate monitoring and submit monthly reports describing pollutant emissions to the permitting authority. The permitting authority and EPA could then continually verify the source's compliance with its commitment, and the source would not be required to obtain a Part 70 permit.

The commitment must include an agreement that the source would submit a Title V permit application within a short time (e.g., 30 days) after it determines that its emissions exceed the appropriate Title V applicability threshold for the previous 12-month period. Failure by a source to meet its agreement and submit a Title V permit application would make the source subject to appropriate enforcement penalties.

In addition, comment is solicited on: (1) applicable methods for ensuring the Federal enforceability of such commitments, (2) ways of providing adequate public review and comment on these commitments, and (3) ways that State programs can cover the costs of administering such a program.

(2) Section 70.3(b)- Source Category Exemptions

Section 502(a) authorizes EPA, consistent with applicable provisions of the Act, to exempt one or more source categories, in whole or in part, from the requirement to have a permit. The EPA must determine that compliance with the permitting requirements is infeasible, impracticable, or unnecessarily burdensome on such source categories. The EPA may not exempt any major source from the permit requirements.

The EPA proposes to use the authority available under section 502(a) to defer initially the applicability of the Title V program to all sources that would otherwise be subject but are not major or affected sources under the Act. The EPA finds that without this deferral, compliance by all these

nonmajor sources with the permitting requirements would be "impracticable" and "infeasible" within the meaning of Section 502(a). This finding is grounded in EPA's judgment that the initial years of the program will see EPA and the States significantly burdened by thousands of permit applications for major sources. This is so in part because the Act greatly broadens the definition of major source for Title V purposes to include relatively small sources for the nonattainment and the toxics provisions. Nationwide, EPA estimates that over 34,000 sources are included in the definition of major source.

Dealing with these applications, at a time when the regulations are new and untried, is likely to tax Federal and State resources up to or beyond their limits. Limited numbers of qualified staff will be available, and in heavy demand by sources and permitting authorities alike. State and local agencies will be challenged to expand rapidly while maintaining effective management of programs and personnel. This initial wave of permitting will be difficult for permitting authorities. Creating the initial permits will require far more attention than the subsequent processing in later years of permit renewals and modifications, which will often involve changes to only some aspects of the initial permits, or no changes at all.

Including the thousands of nonmajor sources covered by section 502(a) would greatly increase the workload on EPA and the State, with relatively minor air quality benefits, and at a time when they will be strained beyond capacity. This conclusion is based on EPA's judgment and experience in implementing new programs, most of which have not approached the scale of the permit program. The EPA's understanding of the number of nonmajor sources is preliminary, since the Agency has had little time between enactment and this proposal to study the coverage of the program in detail. Although EPA believes the current showing (as discussed in more detail below) amply supports this proposal (especially in light of the observation from Alabama Power that a deferral requires far less justification than an outright exemption, 636 F.2d at 360, n. 86), EPA requests any more detailed information and comments on its conclusion that including all sources in the permitting process during the initial glut of application processing would be impracticable and infeasible.

For several reasons, initially excluding minor sources poses few risks to air quality progress. Nonmajor sources emit less than major sources. Concentrating resources on major sources during the first phase of the program will make efficient use of those resources. Not only will the sources deferred from the program not be significant contributors to pollution impacts, many of them will still be covered by Federal regulations under the Act. Nonmajor sources will be subject to NSPS or existing national emission standards for hazardous air pollutants (NESHAP) regulations that generally

already contain many of the same monitoring, recordkeeping, and reporting requirements that would apply to major sources and represent one of the major benefits of the permit program. Therefore, permitting these sources is less urgent than permitting major SIP sources. As stated above, a State with an ozone SIP that relies on emission reductions from nonmajor sources will have to make a special showing to defer such sources from the program. Finally, it would be especially burdensome on small businesses and small governments to force them through this program during the time when the States and EPA are gaining experience in implementing new programs under Title V. Small businesses and small governments do not have the same legal and technical resources that are sometimes necessary to handle successfully a new program. Thus, EPA finds that permitting such nonmajor sources during the first 5 years of the program would be unnecessarily burdensome on those sources and impracticable to the States.

The EPA further proposes to end automatically the exemption for these nonmajor sources on or before a date 5 years from the effective date of the permit program in the State (approval of either a Part 70 or Part 71 program). In deciding which of these categories should continue to be exempted, the EPA will consider the relative administrative burden associated with reviewing the prospective category and whether and to what extent this burden would be acceptable. In determining acceptability, EPA will consider the possibility of using general permits or other alternatives to permitting each source individually. The EPA solicits comment and information concerning which source categories might be especially appropriate for permanent exemptions (notwithstanding the possible use of general permits), such as asbestos demolition and renovation operations under the NESHAP program and woodstoves under the NSPS program. The Agency also asks for comment on any other criteria that should be used to judge the effect of permanently deferring nonmajor sources, including the burden on sources and permitting authorities, and the aggregate effect on air quality of any permanent exemption.

Today's proposal to defer the initial applicability of nonmajor sources is limited in two important respects. First, the initial deferral does not automatically apply to sources which otherwise qualify as a subject source based on emissions of a pollutant for which its area of location is classified as nonattainment. Typically, this will involve ozone nonattainment areas. A permitting authority may exempt nonmajor VOC and NO_x sources from its program in those areas only if the authority submits to EPA an inventory of such sources and demonstrates that the State can assure compliance with its nonattainment area SIP obligations without permitting such sources during the first 5 years of the program. The EPA must approve the deferral for such sources. The EPA also solicits comment on the appropriateness of limiting the scope

of the nonattainment exemption demonstration to only the larger of the nonmajor sources (i.e., no demonstration is needed for deferred applicability if nonmajor sources are below a certain size) otherwise subject to Title V or only those that would not qualify for general permits.

The deferred applicability of certain sources would not preclude a source from requesting and receiving a Part 70 permit. The EPA proposes that States allow into the operating permit program sources wanting to participate. Some companies have business reasons to seek an operating permit. For example, a lender may wish to determine that air emissions from a facility are permitted under the law. As a result, there may be sources that a permitting authority determines does not need a permit for air pollution control purposes, but which have independent business reasons to seek operating permits. In such cases, the Agency also strongly urges the use of general permits (as discussed below) to minimize any undue burden.

Finally, the Administrator reserves the right to restrict the presumption for the deferred applicability of nonmajor sources for any sources subject to a standard under section 112 which is promulgated after the final date of these regulations. The EPA would decide during the rulemaking process for the new section 112 standard how the Title V program would apply to those affected sources which are nonmajor.

In connection with the deferral of nonmajor sources from the program for the first 5 years, EPA is soliciting comment on the waiver of EPA authority to review the permits for such sources if States choose to include them in the program. Some States may decide to include some or all nonmajor sources in their permit programs despite EPA's deferral. Section 506(a) authorizes States to adopt additional permitting requirements not inconsistent with the Act. Section 505(d) authorizes EPA to waive the requirement that the permitting authority notify EPA or neighboring States of each permit for nonmajor sources. The EPA could use this authority to reduce the administrative burden on the permitting authority, EPA, and the neighboring States. The EPA invites comments on the advantages and disadvantages of this approach. The proposed regulations do not provide for such a waiver, under the assumption that most States will take advantage of the deferral for nonmajor sources.

In no instance would affected sources under Title IV of the Act be eligible for an exemption from the permitting requirements since section 408(a) provides that permits shall be the vehicle for implementation of the acid rain requirements of the Act. The Agency anticipates that most affected sources under the acid rain program, with the possible exception of voluntary opt-ins or transfer sources, would be considered "major" under some other title of the Act

and would not be eligible for exemption from the operating permits program.

(3) Section 70.3(c) - Emissions Units and Part 70 Sources

This section requires that State programs assure in the permitting process that all emissions units at a major source will comply with all applicable Act requirements for their emissions of all pollutants regulated under the Act [504(a)]. Including all these emission units in the permit does not mean that permits must impose emission standards or limits on all such units. The permit must impose any "applicable requirements" that are federally enforceable and apply to those emission units. The permit application must identify all units in the major source, however, and the permitting authority's fee program should account for the emissions of regulated pollutants from all such units.

Accordingly, all the activities emitting regulated pollutants at the major source must be addressed in the application for a permit, even though only one emissions unit or subset of units has triggered the Title V permitting requirement. Conversely, the Title V permit need not contain limits for emission units not otherwise regulated under the Act (e.g., not regulated by the SIP and/or under sections 111-112).

Some States prefer to permit by emissions unit, especially at large sources with many emissions units. As long as the collection of individual emissions unit permits assure that all applicable requirements would be met which would be required under a permit for the whole source, and the State permits the entire source according to the Act's schedule, the State may permit each unit individually, or in groups within a source. Where feasible, the entire facility should be permitted at one time. States are encouraged to permit at least all logical or similar emissions units at the same time.

The determination of whether a source, or group of contiguous, commonly-controlled sources within the same 2-digit SIC code as described earlier, is a major source requiring a permit depends on the magnitude of emissions from the source or set of sources. If a source or group of sources has several emission units which the State does not regulate and subsequently permit, the State's application process must identify them if the regulated and nonregulated emissions of applicable pollutants together would make the source major, and the State's fee schedule must account for the cost involved with surveying the source's nonregulated emissions of regulated pollutants (see below). One way to implement such a program may be to issue each source a permit with sourcewide information and general requirements, and then incorporate more detailed individual emissions unit permits that are issued to cover those units specifically regulated under the Act. If a nonmajor source is required to get a permit solely

because it is regulated under an NSPS or a NESHAP, the permit must include only those units covered by the NSPS or NESHAP. For example, consider a saw mill containing an oil-fired boiler subject to an NSPS, an older wood-fired boiler, and various wood-working equipment. If emissions for the source as a whole are not large enough to meet the threshold for a major source, the permit must include only the NSPS boiler.

This section also clarifies which pollutants must be included in the permits of sources subject to Title V. As under existing EPA policy developed in the NSR program [45 FR 52676, August 7, 1980], if one or more regulated pollutants emitted by a source triggers the requirement to have an operating permit, the permit must account for all the pollutants regulated under the Act emitted from that source, even if those pollutants do not themselves meet the applicable "major" threshold under the Act. This is appropriate since Part 70 permits must assure compliance by the source with each applicable standard, regulation, or requirement under the Act and not just the ones for which the source has major emissions [504(a)]. For example, a VOC source in a severe ozone nonattainment area that has the potential to emit 30 tpy VOC is a major stationary source under Part D of Title I and required to obtain a permit. If that source also has a small process boiler which has the potential to emit only 25 tpy of SO_2 in an SO_2 attainment area, the boiler must also be included in the permit, at least for the purposes of emissions information and fee calculation, even in the unlikely event the SIP imposes no limits on that boiler's operation.

The EPA also wishes to clarify that NO_x emissions, as well as nitrogen dioxide (NO_2) emissions, are included under the definition of "regulated pollutant." The NSPS contains restrictions on NO_x emissions [40 CFR 60.44]. The acid rain program also regulates NO_x. Therefore, NO_x emissions are included in the definition of "regulated pollutant" under section 502(b)(3)(B)(ii) [40 CFR 50.11] and in determinations of a source's potential to emit, and fee calculations must account for all NO_x emissions.

(4) Section 70.3(d) - Fugitive Emissions

This section specifies that, once a source is found to be subject to the Title V permitting requirements, fugitive emissions at a subject source are to be included in the total emissions of a source for all purposes of permitting, including collection of fees.

The EPA is also proposing to consider fugitive emissions in determining if a source would be major with respect to section 302 for only those source categories that have previously been subjected to the rulemaking required in section 302(j) [45 FR 52676 (August 7, 1980)].

D. Section 70.4 - State Program Submittals and Transition

(1) Section 70.4(a) - Date for Submittal

This section of the regulations requires States to submit their operating permit programs to EPA for approval within 3

years of enactment (i.e., by November 14, 1993) [502(d)(1)]. This deadline is a fixed date and does not depend on the date EPA promulgates the regulations in this proposal. This section of the regulations also requires a State to revise the existing, approved operating permit program and submit it to EPA for approval within 1 year of any revision to the Part 70 permit program requirements that EPA determines would necessitate such a change. Permitting programs that would be implemented within a State, such as by local agencies, would have to be designated by the Governor and submitted within the 3 years after enactment.

(2) Section 70.4(b) - Elements of the Initial Program Submission

There are certain minimum critical elements that need to be included in an acceptable program when it is submitted to EPA for approval. The submittal must include the State-adopted regulations establishing the permit program and the procedures the permitting authority will use to apply the permitting regulatory requirements. The EPA also solicits comment on whether the State statutes that authorize the regulations and provide for judicial review of final permit decisions should also be part of the submittal.

The submittal must include a legal opinion that the permitting authority has the authority to carry out the program and perform the following tasks. First, the permitting authority must be capable of issuing permits and establishing a fixed term of 5 years for affected sources under the acid rain program, and a fixed term for each permit for all other sources, except certain municipal waste combustors, not to exceed 5 years. Second, permitting authorities must assure that the permit contains each of the emission limits and any other requirements that apply to the source from the SIP and other Act requirements. Specifically, the enabling legal authority must allow the permitting authority to impose and enforce all Federal requirements (including those to be implemented through any applicable FIP). Third, the permitting authority must be able to terminate the permit if necessary or revoke and reopen the permit to modify its content for appropriate reasons [70.7]. Fourth, the permitting authority must be able to enforce the requirement to obtain a permit, to enforce the provisions in the permit [70.11], to collect applicable permit fees applied to the source [IV.I.], to collect civil penalties assessed for each source's violation of its permit, and to apply appropriate criminal penalties as a result of permit violations. Fifth, the permitting authority must be able to provide public access to the permit application, the permit itself, the compliance plan, and reports, except that confidential information may be submitted separately and not be made available to the public. Sixth, the permitting authority must agree to comply with program-specific regulations such as those established under Title IV. No

permit program will be approved in whole or in part, unless it is adequate to ensure timely and effective implementation of, and compliance by, affected sources with all requirements established under the acid rain program. Program adequacy shall ensure adequate resources to support inspections necessary for ensuring compliance by affected sources with emissions monitoring requirements of Part 72 [502(f)]. Finally, the permitting authority must also be able to ensure that the source is notified that no Title V permit has been issued if EPA objects to it within the timeframe allowed for EPA review of permits.

The submittal must contain the permit application form or forms to be used, the criteria the State will follow in determining if a source has provided the required information and filled out the application completely, and the procedures the State will use in processing the applications in an expeditious manner. The Agency currently intends to require the use of forms for the acid rain program by States with approved permit programs. Forms can be revised periodically as the State program develops without the need to go through rulemaking every time (i.e., through implementation agreements). The EPA also recommends that the submittal contain certain procedures for insuring compatibility with the national data system; the Aerometric Information and Retrieval System (AIRS). The requirement for completeness criteria is in section 70.5. The procedures for processing applications must be in accordance with the requirements in section 70.7 for permit issuance, renewal, revision, and reopenings.

The submittal must contain a demonstration that the revenue collected under the permit fee program is sufficient to cover the reasonable direct and indirect costs of developing and administering the permit program. The demonstration should include sufficient revenue to fund air pollution control agencies which do not issue permits directly but carry out permit-related activities. The permit fee program is discussed under section 70.9. This demonstration must be accompanied by a statement from the Governor or his designee (e.g., local official in the case of a local agency program) that the program has adequate personnel and funding to implement the program. The statement need not provide certain details such as those related to the number of positions. The statement must describe the air quality program and where the permitting function fits in, details about the personnel who will administer the program, and a cost estimate for developing and administering the program for the years covered in the transition period after the program is approved.

The EPA is also proposing to require as part of the program submittal a commitment that the permitting authority submit to EPA, at least annually, information about enforcement activities relevant to the permit program. This information would include but not be limited to the number of

criminal and civil enforcement actions commenced and concluded by the permitting authority, the penalties, fines and sentences obtained in those actions and the number of administrative orders issued. This information is crucial for EPA to be able to fulfill properly its oversight duties regarding whether the program is being properly implemented and enforced.

The EPA is concerned that lapsing of permits or the conditions and terms of permits would cause serious enforcement problems and leave the State and EPA without important monitoring information that sources will be required to submit under the terms of the permit. For example, the particularized and detailed control requirements in the permit would become unenforceable the day the permit expired; States and EPA would be able to enforce only the requirements in the underlying regulations. Thus, if the source had submitted a timely and complete application, it could continue to operate in the event the State failed to act on the application in a timely manner, with possibly no clear control limitations applying to the source.

The EPA is proposing to address this potential problem in several ways. First, under the proposed regulations, sources are required to submit their application for a permit renewal 18 months before expiration of the permit. This is the maximum allowed time period for action on the permit by the permitting authority. This time limit should be reduced correspondingly to reflect permits with terms of less than 5 years or to reflect situations where the permitting authority must issue permit renewals in less than 18 months. In no event can the deadline for renewal applications occur so as to allow less than 6 months for processing. Second, the proposed regulations allow EPA to issue a permit itself if the permitting authority has failed to act on the permit during the time allowed to do so.

Finally, EPA is proposing to require that the State permit program include a requirement under State law that, in the event that a timely and complete application for a permit renewal is submitted to the permitting authority before expiration of the permit term, (1) the permit itself shall not expire until the renewal permit has been issued or denied, or (2) the permit can expire but all its conditions and requirements shall remain in effect until the renewal permit has been issued or denied. The first option within this third approach, which EPA encourages States to adopt, is consistent with the way that Federal permits issued under the Federal Administrative Procedure Act remain in effect if a timely and sufficient application for renewal has been submitted [5 U.S.C., section 558(c)]. The EPA is concerned, however, that having the permit itself remain in effect may not be allowed under some State administrative procedure acts. The EPA is therefore proposing to give States the option of adopting, under State law, a requirement that all terms and conditions

of the permit remain in effect after the permit itself lapses if a timely and complete application has been submitted. The substantive effect of choosing one option or the other should be minimal at most. The EPA solicits comment on these and other proposed ways of dealing with the lapsing permit problem.

The EPA believes that a transition plan for processing the first wave of permits is also a necessary part of the State program submittal. This plan should provide a phased schedule for acting on the initial submission of all permit applications during the first year after program approval. The EPA solicits comment on other acceptable strategies for initially processing permits and for keeping the original information current and appropriate for processing.

To meet the Title V requirements, the transition plan would need to provide that the initial permit applications be submitted no later than the first year after program approval, and that State action on them be spread out over a period up to 3 years after program approval, with approximately one-third of the applications being acted on in each of the 3 years. The State's transition plan will likely need to require some applications to be filed before EPA's approval of the program so that the State can act on the first third of the applications within the first year after program approval.

When the permitting authority plans their timetable for initial issuance of Title V permits, they should be aware that initial SO_2 permits for Phase II acid rain affected sources must be issued by December 31, 1997. Acid rain permit applications for NO_x are due on January 1, 1998 [408(d)(3)]. States should also be aware that EPA proposes to require that any permit application submitted which contains an early reduction demonstration for hazardous air pollutants according to Part 63, Subpart D regulations must be issued or denied within 9 months of receipt of the complete application. This proposed procedure is discussed further in section V.E.(4) of this preamble. In addition, EPA proposes to require States to submit a timetable for phasing in the reissuance of Part 70 permits in the future upon their expiration.

The EPA believes the most important first step in terms of program development is eliminating legislative impediments to meeting operating permit program requirements. New authority may be needed to develop regulations, issue permits to sources (including noncomplying ones), charge fees and retain them in the air agency, collect penalties, hire sufficient levels of personnel, and provide for adequate public participation (including the opportunity for public hearings). Since many State legislatures meet only periodically, the schedule for legislative sessions could be a critical factor in States obtaining the needed authority in the appropriate time period. States need to consider this possible constraint and take whatever action is necessary as

early as possible to obtain the needed authority and eliminate any complications that could be caused.

While in the process of developing legislative authority for an operating permit program, the State may also want to consider including legislative authority necessary to implement other titles of the Act. For example, to obtain approval for the acid rain portion of the operating program, State legislative authority must be sufficient to ensure that no permit will be issued that is inconsistent with the requirements of the acid rain program requirements of the Act, of Part 70, or of Parts 72 through 78 [408(A)]. State law or regulation should limit the State's authority to modify acid rain program requirements, and the State authority should ensure adequate inspection resources to ensure compliance with emissions monitoring and compliance program requirements. A certification from the Attorney General or other authorized official that adequate legal authority exists will be needed to support the permit program submission.

Another important aspect of a State operating permit program will be to ensure that the permitting authority is capable of carrying out the program. This will primarily involve hiring and training of personnel, along with support functions, such as larger office space and increased administration capabilities. States will face early program-building demands, the degree depending on the State's current involvement in operating permits. The demand for this infrastructure will increase when a State wishes to submit a program early. Efforts to ensure this capability is one of the first steps a State should make. Grant funds provided for by section 105 of the Act have been provided to support program build-up. These funds are meant to give programs in part the boost needed until permit fee provisions become effective and State permitting efforts become self-sufficient through the permit fee revenues. The EPA solicits comment on other ways to accomplish "ramp up" of State capabilities. These might range from interim program approvals to an initial registration of subject sources coinciding with an early partial fee collection [IV.I.].

In part, section 506 specifies that nothing in Title V shall prevent a State from establishing additional permitting requirements as long as they are not inconsistent with the Act. Accordingly, States may wish to include requirements from State control programs in an operating permit that are not required by Federal law. However, EPA does not intend to participate in any permit actions that do not arise from federally-recognized permit requirements. For example, the State may have a program designed to enforce specific ambient concentrations of toxic air emissions which as yet have no counterpart under Federal law. The question becomes whether, and to what extent, those provisions translated into more rigorous emissions

limits on the source become federally enforceable (i.e., enforceable under the Act by the United States or citizens) if the State includes them in a permit and EPA does not veto that permit.

The EPA is proposing that only those provisions of a permit identified as being required under the Act or necessary for its implementation will be federally enforceable. Each provision, required or needed under the Act, will have to be clearly marked for EPA to consider it federally enforceable. EPA does not intend to routinely sort out provisions relating to State programs included in operating permits, unless those provisions bear no reasonable relation to the purposes or provisions of the Act. To promote this result further, EPA is proposing to require an explicit statement of the regulatory basis for all Title V permit conditions.

The EPA does not believe that Congress intended Title V to be a forum for the State to establish any additional requirements that would become federally enforceable. The primary purpose of the Title V permitting program is to assure that subject sources comply with all requirements of the Act. State limits related to the requirements of the Act include transactions related to emissions trading or offsets for NSR or to an applicable Federal standard (e.g., those promulgated under section 111 or 112 of the Act). Additional State limits can clutter the Title V permit with conditions that may confuse enforcement activities and limit the operational flexibility of the source. The permitting authority should segregate those permit conditions that are federally enforceable so that EPA oversight can be focused on the most critical concerns in the limited time afforded for EPA's 45 day review.

On the other hand, a State may have an interest in maintaining a permit as a comprehensive statement of the source's air pollution control obligation. The proposed regulations allow a State to do this. If it wants to take this approach, it would be the option of the permitting authority to identify and attach to the Part 70 permit those provisions which are to be enforced by the State but not EPA.

Public comment is solicited on how to resolve two additional issues related to this principle. These two issues involve whether, and to what extent, EPA can or should approve, (1) more expansive source coverage than required by Title V; and, (2) State provisions which limit the flexibility of source owners or operators to less than that provided for in Title V.

The first issue may arise quite frequently, since most existing State and local operating permit programs typically apply more broadly than to just the major sources and others covered by Title V. The EPA proposes to approve a broader program containing more sources or source categories than

required by EPA if a State submits one, but EPA reserves the right to promulgate a narrower program for EPA implementation should the State default on its implementation obligation. The EPA believes that this proposal is fully consistent with section 116, which permits States to adopt more stringent air pollution requirements than required by the Act. It is also consistent with 506(a), which states that nothing in Title V shall prevent a permitting authority "from establishing additional permitting requirements not inconsistent with [the] Act." The EPA may also opt to waive review of some or all of the permits for the additional sources under a more inclusive State program, depending on the degree of administrative burden, or for other reasons [505(d)]. Comment is solicited on whether, and to what extent, EPA should approve broader State programs.

The second issue concerns whether State operating permit programs can differ from Act requirements aimed at protecting sources once they meet certain requirements. In other words, may States be "more stringent" than Title V by removing some protections that Congress apparently intended to ensure. Examples of these provisions include: (1) section 502(a) which shields sources from the requirement to have a valid Title V operating permit, if they have filed a timely and complete application but have not yet received their permits (i.e., application shield); and (2) section 502(b)(10) which contains the requirement for States to allow sources operational flexibility within permits.

As noted previously, section 116 of the Act authorizes States to be more stringent than EPA rules in their requirements, as long as they relate to control of air pollution. Section 506(a) perhaps may qualify this long-standing authority, however, by stating that nothing in Title V shall prevent a permitting authority from establishing additional permitting requirements "not inconsistent with the Act." Moreover, EPA believes that even section 116 would not allow the Agency to grant complete program approval of a State permit program that does not meet all the requirements of section 502(b), including the requirement in section 502(b)(10) that States allow certain changes within permitted facilities without requiring that the permit be revised.

(3) Sections 70.4(c), (d), and (e) - Partial Programs, Interim Approval, and EPA Review of Program Submittals

These sections of the regulations describe the type of approvals, other than full approval, that EPA may give a State permit program. These approvals are all subject to a public comment process, and EPA is required to take approval actions (as appropriate) within 1 year of State program submittal. There are three related concepts which EPA is

proposing to use for implementing the above position on partial program submittals: full approval, partial programs, and a whole program in the State.

Full Approval: The EPA will grant full approval only if a program meets all the requirements specified in the Part 70 regulations. For full approval, all program elements required by Part 70 will have to be met to an acceptable degree, and stronger elements of a program cannot compensate for one or more weak areas.

Partial Program: A partial program is one that does not cover all the sources in a State, because the program is limited geographically to a local program or the program does not cover certain source categories, or both. The EPA, in general, intends to grant full approval to partial programs which are limited in their geographic coverage if they meet all the requirements of Part 70. However, States must provide compelling reasons for not taking review responsibility for all subject source types in order for EPA to grant approval for a source category-limited program. In no event does EPA intend to approve as a partial program one which would permit the source for some but not all of the applicable requirements under the Act.

Under section 502(f), for EPA to approve a partial program, minimum requirements must be met, specified in section 502(f), with regard to Titles I, III, IV, and V. A partial program, at a minimum, must apply and ensure compliance with "this title" (i.e., Title V) and each of the following: (1) all requirements established under Title IV applicable to 'affected sources.' (2) all requirements established under section 112 applicable to 'major sources,' 'area sources,' and 'new sources.' (3) all requirements of title I (other than section 112) applicable to sources required to have a permit under this title." The EPA thus interprets the language in section 502(f) to mean that a "partial" program is one that is a full program (i.e., standard application, permit fees, public participation, inclusive permit provisions, fixed term, etc.) for those sources or areas to which the program applies.

Whole Program: A whole program is a program that meets the requirements of Part 70 and covers all the Part 70 sources in the entire State. For the State to avoid sanctions under section 502, the State must have an approved whole program [502(d)(2) and (3)]. It is possible for a State under this proposal to obtain approval for a whole program by submitting several fully-approvable partial programs. The combination of these programs must permit all the Part 70 sources in the State consistent with Part 70. This interpretation of section 502(f) avoids the confusion created when two permitting authorities permit the same source for different Act requirements. In a State relying on a combination of partial programs, EPA will not approve a

whole program until it has approved all the partial programs covering all the Part 70 sources in the State.

The EPA will act on any partial program as it is submitted, consistent with the 12-month deadline in section 502(d)(1). The EPA will fully approve a partial program if it meets Part 70. A State may submit a partial program, but fail to submit a whole program. If EPA approves the partial program or several partial programs within the State, those programs define the permitting authority for the sources they cover. The State remains subject to sanctions, however, for failure to submit a whole program. Ultimately, section 502 provides that EPA will become the permitting authority for those sources not covered by any of the partial programs in the State.

Interim Approvals: Section 502(g) allows the Administrator to grant interim approval by rule to a State permit program if it "substantially meets" (but not fully) the requirements of Title V. Interim approvals automatically expire on a date set by the Administrator not later than 2 years after such approval and may not be renewed. At the time of interim approval, the Administrator shall specify the changes that must be made before the program can receive full approval. The 1 year for permit application submittal and 3 years for permit processing do not start until the program receives full approval.

The EPA sees interim approval as being a good mechanism to allow States to gain early permitting experience while working on the final fully approvable program; to begin acquiring, through fee collection, the necessary resources for developing and implementing a full program; and to expedite the implementation by States of certain Act requirements (e.g., the granting of MACT extensions for early reductions) [V.E.]. Interim approvals are appropriate, however, only where the relevant deficiencies are not critical over the 2-year (or less) period of time before a fully approvable program is due. If a program is not sufficient to receive interim approval, EPA will disapprove the program. The EPA's interim approval or disapproval will take place within 1 year of program submittal as indicated by section 70.4(e). Like full or partial approval, interim approval triggers the 12-month requirement for submission of permit applications and a 3-year phase-in for processing the applications [IV.D.(2)].

The EPA believes that the "substantially meets" test allows the Agency considerable discretion in judging where a State program could fail to fully meet Title V yet still be adequate to produce viable permits. The EPA believes, as a minimum, the purposes of the permit program could be fulfilled if the following minimum criteria for interim approval are met:

(a) Adequate Fees. A program must have the capability to collect adequate fees [presumptively $25/ton per

regulated pollutant per year (1990 basis)] to fund development of the State's permit review program and its capabilities to implement it.

(b) Applicable Requirements. The State must have the legal authority to assure that those sources in the interim program will comply with all applicable requirements under the Act. This must include, at a minimum, some type of monitoring and reporting provisions. Otherwise inadequate permits issued could be a damaging legacy over the term of the permits.

(c) Fixed Term. The program must provide for a fixed permit term that would not exceed 5 years.

(d) Public Participation. The program must provide for public notice of and an opportunity for public comment and a hearing on draft proposed permits.

(e) EPA Review. The program must allow EPA an opportunity to review each proposed permit and to object to its issuance.

(f) Permit Issuance. The program must provide that the proposed permit will not be issued if EPA objects to its issuance. A State might qualify for this by formally agreeing to "reopen for cause" any State-issued permit when EPA would object to it from a Title V standpoint after the State had issued the permit pursuant to its existing procedures.

Public comment is solicited on which of those critical program elements that are required for full approval need not be met for interim approval. Any additional criteria beyond the six proposed should represent a deficiency that this approach is consistent with section 502(f). Operating permits are intended to incorporate the provisions in the existing applicable SIP (including those in a FIP) at the time the permit is under review. The EPA will approve permits with certain more stringent provisions than the explicit emissions limitation contained in the SIP, provided that these provisions implement other applicable federal requirements (e.g. tighter limits to achieve emissions offsets or early reductions pursuant to section 112(i)(5) of the Act). The Agency will not require the State to correct SIP deficiencies in permits. As explained in more detail in section V.B., a SIP demonstration must be periodically updated as needed to reflect reliance on any tighter conditions of permits to show attainment and maintenance. As indicated previously, States under one option can expedite the process where this would be accomplished by a SIP revision including several permits in one public notice and through the use of the SIP processing reforms announced in 54 FR 2214 on January 19, 1989.

(4) Section 70.4(f) - State Response to EPA Review of Program

The State must correct the deficiencies in programs EPA disapproves and submit the corrections to EPA within 180

days of the notice by EPA that the program was disapproved, or within another time period specified by the Administrator. For interim approvals, the State must submit corrections to EPA no later than 6 months before the end of the period for which the approval is granted. These provisions apply even though the State may submit a program before the end of the 3-year period provided by Title V.

(5) Section 70.4(g) - Effective Date

The State program becomes effective on the date of EPA's full, interim, or partial approval.

(6) Section 70.4(h) - Individual Permit Transition

This section addresses how EPA would implement a permit program, in whole or in part, under a new Part 71 in the event a State fails to submit or adequately implement an approvable program. The EPA will issue permits under such circumstances under a permit program as will be promulgated in Part 71. Once EPA approves the State program and it is implemented, EPA will cease issuing permits. Any permits under review or issued under the Part 71 program will continue under EPA's jurisdiction until they are replaced by permits issued under the approved State program. However, after EPA approves a Part 70 program, States can request delegation of authority to maintain and enforce previously issued Part 71 permits before their expiration. If such delegation is granted by the Administrator, the State can then collect appropriate fees from those sources consistent with section 70.9.

(7) Section 70.4(i) - Program Revisions

A program must be revised if EPA determines sometime after approval of a State operating permit program that the program inadequately implements the Part 70 program. The State will have 180 days, or a longer time period established by EPA, to revise the program and submit the revisions to EPA. The Agency might set a longer time up to 2 years where legislative action is required at the State level to address problems.

E. Section 70.5 - Permit Application

(1) General

The procedural elements of an approvable permitting program are essential to its success. The Act provides important direction with respect to how the permitting process should be implemented. This section of the preamble, and the two that follow it, describe EPA's proposed regulations for addressing these activities. Generally, they are described in the order in which they arise in implementing the program: the permit application submitted by the source, the drafting of the permit by the permitting authority, and the procedural aspects for issuing and managing permits.

Title V sets forth explicit requirements regarding the application process. Sections 502(b)(5) and (6) require that State programs have standard application forms,

criteria for determining their completeness in a timely fashion, and procedures for processing them. The EPA suggests that States provide procedures for transmittal of permit application data in a manner compatible with the national data system. Section 503(b) requires compliance plans for noncomplying sources to be submitted along with the permit applications. A complete application must be submitted according to the transition schedule approved within the program and in a timely way for subsequent renewals. "Timely" for submittal of renewal applications has been presumptively defined as 18 months prior to the permit expiration date, unless some other time is approved by the Administrator (e.g., situations where the permitting authority is required to issue permits sooner than 18 months or where the fixed term of the permit is less than 5 years). Any complete application must contain information which identifies the source and its emissions, the requirements applicable to it, the compliance status of the source and its intended operating regime, and a certification verifying the truth, accuracy, and completeness of the submitted information. More information may be required later by the permitting authority in writing as needed to complete the development of the Part 70 permit. The applicant must respond in a reasonable and timely way to maintain a complete application and the protection that it provides [see additional discussion in IV.E.(5) and IV.G.(1)].

Additional information may be required for other program-specific purposes at a later date (e.g., pursuant to specific substantive program requirements such as for certain sources of VOC's and NO_x subject to the emissions statement requirements for nonattainment areas as stated in Part D of Title I). Sources of hazardous air pollutants subject to section 112 attempting to comply with alternative emissions limits may also need to submit additional information. In addition, States may require information to enable implementation of their additional program requirements related to the Act.

(2) The Permit Application Form

The EPA recognizes that a great range of factors bear upon what a good application form is and takes an approach which ensures the submittal of the wide-ranging information needed to issue a good permit. On the other hand, EPA recognizes that the amount of information needed can vary greatly depending upon type of source or pollutant and State and local air quality requirements. Moreover, the EPA has a philosophy of minimizing program disruption, to the extent possible. Most States already have application forms, and some of them are very comprehensive. Requiring an inflexible national form would likely be disruptive. The approach to application forms being proposed today recognizes appreciable flexibility for State programs. This flexibility extends to the format of the information

submitted, as long as the minimum data elements are collected. In certain instances, however, needs for national consistency for purposes of oversight and good data management should prompt the use of standard units for source parameters. Furthermore, use of the AIRS as a State's data management system for the operating permits program may influence application format. A discussion of this is included in section IV.E.(6).

For these reasons, EPA will not prescribe any one, or few, forms that address all situations.[3] Consequently, EPA is proposing a list of minimum data elements that States must collect with the permit application forms. As long as these data are included in State forms, the forms will be found to satisfy these provisions.

The permit application provisions contained in section 70.5 were developed to balance these competing concerns. The key point is that States have considerable discretion, within a framework that is rigorous with respect to the types of information required, to develop application forms that best meet their particular program needs and policy choices. Some States may meet these requirements through relatively slight revisions of their current application forms.

The following is a brief discussion, organized by regulatory paragraph, of the types of minimal information prescribed by section 70.5:

General company information: The applicant must list appropriate contacts and general background information (e.g., company name, location, responsible official, or designated representative).

Plant description: A description of the plant in terms of the processes and products involved (including identification by SIC code) can provide important perspective to the permitting authority regarding the applicable regulatory requirements.

Emissions related information: Emissions data are of critical importance to permitting. Section 70.5(b)(3) describes the core information needed for permitting. This includes, of course, direct emissions data regarding the

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[3]The acid rain program, however, will develop application forms likely to be required for all affected sources nationally. If so, the permitting authority will have to adopt these forms to have an approvable program for acid rain. The Agency believes that national consistency in application requirements is important for equality in the allowance-trading market and to ensure that all affected sources are subject to the same reporting burden. The Agency plans to encourage the use of electronic reporting, and may develop "expert" systems to assist permitting authorities in developing uniform, consistent acid rain permit requirements. These requirements will be promulgated in a subsequent rulemaking.

pollutant's emitted, and their quantities over appropriate periods, and the points from which these emissions are produced. An adequate description of emissions necessarily entails submission of emissions related information on fuel and raw material use, a detailed description of air pollution control equipment (and citations to the relevant emissions standards), and limitations on source operator. Finally, the calculations on which these data are based must be included to assist the permitting authority in reviewing the application.

There are, in addition, a variety of decisions to be made with respect to how these data are addressed in the application. For example, the inclusion of the list of 189 pollutants, or groups of pollutants, in section 112(b) presents additional issues regarding the reporting of regulated pollutants. The EPA does not propose to mandate submittal of emissions information in the permit application for nonmajor sources of noncriteria pollutants. Many States may, of course, choose to require information about such pollutants, for example, in implementing their air toxics programs.

A description of emissions points is relevant to a variety of requirements (e.g., whether emissions are fugitive or stack), but EPA believes the regulations will allow application forms to reasonably limit the detail of this requirement where such is appropriate. For example, VOC emissions might be produced at many places in a chemical process facility, but an application might describe these adequately without individually describing minor emissions points such as valves and flanges.

A significant issue involves whether the application must include the information needed for ambient impact assessments. This includes stack parameters (e.g., height, diameter, plume temperature) and building height. The EPA does not interpret compliance with the NAAQS to be an "applicable requirement" of the Act. Therefore, EPA is not including such information within the minimum data elements for applications unless it is required by an underlying regulation of the Act (e.g., regulations to ensure good engineering stack height consistent with section 123 of the Act). As explained further in section IV.F.(3)(a) below, EPA does not believe that any one permit can enforce the NAAQS, except perhaps in very limited circumstances. The State should be able to assess the cumulative impact of permitted sources on attainment and maintenance of the NAAQS (and increment consumption under the PSD program). To do this, the State may choose to collect emissions data related to the source's ambient impact. However, EPA is not proposing to require States to collect such information.

All applications under current State operating permit programs must require sufficient emissions information to allow a State to write a complete and enforceable permit.

Emissions rates must be supplied for averaging periods appropriate to program needs and consistent with all applicable requirements. Depending upon the specific emissions limitation that applies to a source, emissions information may need to be collected on hourly, daily, and annual bases in order to assure compliance with emissions requirements or guarantee that emissions will stay below particular applicability thresholds for other regulatory requirements. The form of the required emissions data can also be influenced by other program needs. For example, all affected units under the acid rain program must install CEMS to monitor their SO_2 and NO_x and other emissions [412].

Other information may also be needed in the permit application to define: 1) control requirements, such as requirements that will become effective during the term of a permit, and applicable test methods (70.5(b)(a); and 2) reasonably anticipated alternative operating scenarios (70.5(b)(6).

The EPA recognizes that comprehensive permit applications for some industrial facilities can be quite large. For this reason, EPA proposes that States be granted more discretion with respect to what information is needed and when. For example, the Agency believes that States may want to permit, and therefore, receive several discrete applications from certain large complex sources (e.g., chemical plants) in order to keep the information current and the review process focused.

The preceding discussion outlines the approach to obtaining general information for most regulatory provisions. There are, however, several specific air program functions that might require additional specialized information. Examples include alternative emissions limits with respect to MACT, and acid rain allowance provisions. Even more common program requirements, such as the NSPS and NESHAP, might require certain additional information. It is unlikely that a State will wish to develop a single application form that addresses every possible air regulatory requirement. The EPA suggests that States follow the example of numerous current air programs and take a modular approach to application forms. Under this approach, all sources would complete the same basic application form, containing the information on the source and its emissions, as described in this section. To the extent that specialized regulatory requirements must be met, additional forms appropriate to those programs could be prepared and appended to the basic form.

(3) Testing, Monitoring, and Reporting Procedures, and Compliance Certification

(a) Test Methods

To establish initial compliance with each air pollution control requirement, each permit application must presumptively specify a test method. This requirement is

contained in section 70.5(b)(4)(ii). A similar requirement also appears in section 70.5(b)(8)(ii). This latter and somewhat redundant requirement that the permit application specify a method for determining initial compliance may be satisfied by section 70.6(c), and merely appears in the regulation again to emphasize that there may be different test methods used for determining compliance [IV.E.(3)(c)].

The test method for establishing initial compliance will be the test method in the underlying regulation. If the underlying regulation is deficient in that it does not contain a test method, the permit application must suggest a test method. This is in accordance with section 504 of the Act which requires that permits assure compliance with the applicable regulation [IV.E.(3)(c)].

(b) Information Necessary for Implementation and Enforcement

To implement and enforce air pollution requirements, it is necessary that all permit applications specify the underlying monitoring, recordkeeping, and reporting requirements. This is broadly required by the language in section 70.5(b)(4)(i), and also by the compliance certification requirements under section 70.5(b)(8). Note that section 504 of the Act and section 70.6(a)(3)(ii) require that reporting of any required monitoring be submitted at least semiannually.

(c) Test Methods, Monitoring, and Reporting for Compliance

Section 70.5(b)(8)(ii) requires the permit application to state methods to be used for initially determining compliance monitoring and for determining compliance throughout the term of the permit, including a description of the monitoring, recordkeeping, and reporting requirements and test methods to be used. The method used for initially demonstrating compliance must be the test method or work practice specified in the underlying regulations (e.g., the SIP, NSPS, NESHAP, and the acid rain regulations) as discussed in section IV.E.(3)(a) above. If the underlying regulation is silent as to the appropriate test method, the permit, and therefore the permit application (where possible), must still include, and the reviewing authority must select, a test method. The EPA will evaluate any new test methods during its 45-day review period. This review will focus on any relevant information upon which the State relied in demonstrating attainment and maintenance of the NAAQS. In the event that an underlying Federal regulation is later revised to incorporate a specific test method or monitoring/reporting procedure, the permit must be revised to incorporate these requirements upon renewal, unless more than 3 years remains on the term of the permit, in which case the permit must be reopened.

Also, to ensure compliance with all the requirements of the permit throughout its term, the permit, and therefore

the permit application, must specify an appropriate method to be used for determining compliance. This "compliance method" may be CEMS, frequent compliance calculations, stack tests, or surrogate monitoring parameters, such as incinerator temperature or scrubber pressure drop. In some cases, the compliance techniques will be the same as the technique used to determine initial compliance. Periodic monitoring of the operation of the source or pollution control device may typically be appropriate, compliance techniques. In the case of a work practice standard, the compliance technique could consist of a record which documents continual application of that work practice. In many cases, the monitoring requirements in the underlying regulation will suffice for assessing compliance. If the regulation is silent regarding monitoring techniques, the reviewing authority will need to specify one, taking into account cost, availability, reliability and accuracy of the technique, and the averaging time of the ambient standard. Where the underlying standard is unclear, an additional consideration would be consistency of the averaging time of the technique with the applicable ambient air quality standard.

Where surrogate monitoring parameters are used for determining compliance, the permit application should provide an acceptable operating range of monitoring values based on values achievable during a performance test (i.e., during the initial compliance test) or based on best engineering judgment. Operation of the facility outside of these specified monitoring values would be a violation of the permit and any good operating practice requirements, if applicable, such as contained in 40 CFR 60.11(d) for NSPS-affected sources.

Where CEMS or emission calculations are chosen for the compliance method, the resulting data could be used directly to enforce the emission limit. Therefore, recorded CEMS emissions, or VOC emission calculations, for example, in excess of the emission limit would constitute a violation of the emission limit. Of course, CEMS are not appropriate for use with respect to some source categories. For other source categories, CEMS are appropriate or are mandated by the Act (e.g., for acid rain sources). For those cases, States should explore the possibility of requiring compliance calculations. Further, until EPA specifies enhanced monitoring techniques, the choice as to the appropriate compliance technique remains the primary responsibility of the permit reviewing authority. In the case of a work practice, the compliance technique could consist of a record which documents continual application of that work practice.

After a source has demonstrated initial compliance in accordance with the underlying regulations, either the initial or the compliance technique may be used in the

periodic (at least annual) compliance certifications. It is, however, necessary that a compliance technique be specified and used to establish whether compliance throughout the reporting period was continuous or intermittent, in accordance with the statutory requirements in Titles V and VII for compliance certification [IV.E.(3)(d)].

(d) Compliance Certifications

As required by section 70.5(b)(8)(iii), the permit application must contain a schedule for submission of compliance certifications. The Act requires that similar certifications be submitted at least annually. States should require certifications more frequently for sources or source categories with a recent history of compliance problems. The required frequency of certifications should also consider the frequency of any other reporting requirements, such as excess emission reports and the Title V requirements in section 504(a) for at least semiannual compliance reporting. Under section 503(b)(1), all sources must monitor and report every 6 months. The State should consider a combined report as opposed to submission of separate reports.

Section 70.5(b)(10) provides that the certification, as well as all other documents required under Part 70, must state that "to the best of the signer's knowledge, information and belief formed after reasonable inquiry, the statements and information in the compliance certification are true , accurate and complete." This language is similar to that in Rule 11 of the Federal Rules of Civil Procedure, upon which it was modeled. The provision makes clear that the signer must make a reasonable (under the circumstances) inquiry before attesting to the truth, accuracy, and completeness of the information and statements.

(4) Compliance Plans for Noncomplying Sources

In accordance with section 503(b), each permit application for sources that are out of compliance with applicable requirements of the Act must be accompanied by a compliance plan which describes how the source will comply with the applicable requirements of the Act for which it is not in compliance[4]. Submission of these compliance plans is also required for permit renewals and permit

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[4]. Sources subject to the acid rain program are required to submit compliance plans that show in detail how they intend to meet their Title IV requirements. Title IV regulations are likely to supersede the Part 70 compliance plan requirements in certain respects. Specifically, they will modify and limit what provisions sources may be required to include in the acid rain portion of their compliance plans. Title IV [section 408(b)] also provides that nothing in it regarding compliance plans or in Title V shall be construed as affecting allowances.

modifications, in accordance with section 70.7. Compliance plans must describe the techniques used to achieve compliance.

As required in section 70.5(b)(7), a compliance plan consists of the following elements:

(a) Description of How Source Will Achieve Compliance

Sources that are out of compliance at the time of application must describe how they will comply with the underlying Act requirements. The plan must specify the requirement for which the source is not in compliance [as already required by section 70.5(b)(7)(iii) and described in section IV.E.(4)(c)], describe the equipment and/or changes in operation necessary to come into compliance, and include a schedule of compliance [IV.E.(4)(d)]. Note that neither the plan nor the permit will alter the source's legal liability for any violation of the SIP or Act.

This requirement in section 70.5(b)(7) should not be confused with the provision of section 70.5(b)(8) that requires the permit application to specify the test methods and monitoring to be used for determining compliance. Rather, the compliance plan specifies the means that will be used to achieve compliance. It should be noted that adoption of compliance plans and the ensuing schedules of compliance do not protect a source from enforcement action or penalty assessment for existing or previous violations of the applicable requirements. While permit applications and compliance plans (for noncomplying sources) for general Title V sources will focus on the information necessary to enforce the applicable requirements under the Act, permit applications and compliance plans for sources receiving acid rain permits under Title IV of the Act will have to meet independent requirements to be specified in future rulemakings to implement the Title IV permit program.

While the Agency is proposing that the general requirement for a compliance plan only apply to noncomplying sources and affected sources under the acid rain program, including sources which are in compliance with applicable requirements, must submit compliance plans with their permit applications detailing how each unit will comply with the acid rain requirements of the Act [408(b)]. Requirements for acid rain compliance plans will be set forth at Part 72. Depending on the method of compliance chosen, acid rain compliance plans will include, for example, deadlines for obtaining design engineering and construction contracts, and information on the type of technology proposed. In addition, requirements for operation and maintenance of CEMS or alternative monitoring methods for acid rain affected sources will be promulgated at Part 75 and will be included in each source's permit.

(b) A Description of How the Source Will Monitor Compliance With Those Requirements

All permit applications must describe how the source will monitor compliance. Section 70.5(b)(8)(ii) regarding permit application requirements for compliance certification specifies that each permit application specify the monitoring method to be used.

(c) A Schedule of Compliance

Section 70.5(b)(7)(iii) defines "schedule of compliance" as a schedule of remedial measures including an enforceable sequence of actions with milestones, leading to compliance with all applicable requirements of the Act for sources that are not in compliance. This schedule must specify a date by which the source must achieve compliance, and interim milestones for all remedial measures necessary to meet that compliance date. Examples of interim milestones for cases where new equipment is necessary to come into compliance include the award date for the contract to obtain the control device, the date of initiation of on-site construction and/or installation of the device, the date of completion, and the date of testing/calibration. Similar deadlines could be established for installation of monitors. For a work practice standard, interim milestones could pertain to training of personnel. All schedules of compliance must be contained in the permit.

(d) A Schedule for Submission of Progress Reports, To Be Submitted No Less Frequently Than Every 6 Months

Within section 70.5(b)(7)(iv) and in accordance with section 503(b), each permittee which is not in compliance with all applicable requirements of the Act is also required to submit progress reports to the permitting authority no less frequently than every 6 months. These reports must describe the source's progress in meeting the requirements of the compliance plan, and the ensuing schedule of compliance. [The required content of the progress report is specified in section 70.6(c)(5).] The compliance plan must set forth the schedule for submission of these reports.

(5) What Is a Complete Permit Application?

A determination by the permitting authority that an application is complete is important to the source. Submittal of a timely and complete application protects the source (except to the extent construction or modification is involved) from enforcement for failure to have an operating permit [503(d)], and begins any prescribed periods for agency action on issuing a permit, including automatic denial in some States. (A more detailed account of the importance of this action can be found in section IV.G.). Furthermore, a complete acid rain permit application and compliance plan is binding on the source and is enforceable until the permit has been issued. The importance of this determination, combined with the fact that it can be difficult to make, has traditionally made the completeness determination the subject of dispute in the issuance of

permits. The Act, probably for these reasons, requires that permitting programs contain "criteria for determining in a timely fashion the completeness of applications" [502(b)].

The basis for determining the completeness of an application should be the information contained in the permit application itself. An approved State standard application form or forms should provide for the submittal of all information necessary to process the application and incorporate the applicable regulatory requirements into a permit. However, this determination is also a function of the type of source, the applicable requirements, and SIP or attainment status. Thus, depending on the circumstances, the permitting authority may need more information than that specified on the application form.

The permitting authority should also assure that certain supplemental information is included with the application before ruling that it is complete. The application should be accompanied by the compliance plan, to the extent that one is required, and a certification of whether the source is in compliance. Pursuant to section 503(c), the application must be signed by a responsible official (the designated representative for acid rain affected sources), who shall certify the truth, accuracy, and completeness of the information submitted after reasonable inquiry. In addition, an application should include the calculations upon which the application data are based to facilitate review of the application.

Various procedural disputes could arise from these determinations. For example, while permit review is under way, it sometimes becomes apparent that more information is needed. The State must be able to request it, without being bound by its initial determination. The EPA is proposing that the determination of completeness and the associated protection provided to the source to operate without a permit would remain in effect during this process, assuming an adequate and reasonably timely response by the source. Similarly, EPA is proposing that if a source has submitted a timely application which it, in good faith, believes to be complete, but which is later determined by the permitting authority to be incomplete, the protection would not be lost if the source cured the defect within the expeditious time period specified by the permitting authority.

The regulations being proposed today would require notification to the applicant of the completeness determination. It further states that where this notification is not provided within 30 days of receipt of the application by the permitting authority, the application shall be deemed complete. This date also marks the time from which the permitting authority has a maximum of 18 months to process the permit. Failure by the source to respond in an adequate and timely manner to written requests for additional required information would subject the source

to penalties for operating without a Title V permit [502(a), 503(d), 40 CFR 70.5(c)].

(6) Data Management

Because considerable information will be necessary to implement the permitting requirements of the Act, data management is important. The EPA is considering changes to the Air Facility Subsystem of its AIRS data management system to meet State and national permitting needs. If such a system were developed, States will be charged with ensuring that AIRS contains the minimum permitting data elements identified by EPA. Separate data bases will be developed for acid rain sources to facilitate the tracking of emissions and allowances and to provide information to the market on compliance choices.

Data management concerns will influence what information States collect and the format in which it is collected. The effect on types of information required in standard application forms should be relatively slight. The information included in the current AIRS system is of the type normally required by a State to write a permit for a source. The influence on format is likely to be more significant. For this system to work efficiently, the data must be presented in units and a format that are readily incorporated into the data system. The EPA is investigating data processing enhancements that would expedite the permitting process generally. Examples include electronic permit application and data submissions.

The EPA solicits comments on the data management aspects of the permit program, particularly the potential use of AIRS for this purpose, and any enhancements the system might need.

F. Section 70.6 - Permit Content

Permits issued by the permitting authority must include provisions that assure that the source will meet all of its obligations under the Act. Permits should include, therefore, emission limitations and standards; a schedule of compliance; requirements for conducting monitoring and data analyses and providing emissions statements; provisions for inspection, entry, monitoring and reporting; and a process for public access to these data, consistent with available protection from disclosure pursuant, to section of 114 of the Act. The permit must also provide for periodic progress reports with respect to any applicable compliance plan for noncomplying sources, as well as periodic reports concerning compliance with the permit requirements. The reports must be signed by a responsible official (designated representative for acid rain) who must identify the requirements applicable to the source; verify the truth, accuracy, and completeness of any submitted information; and certify whether the source has complied with them.

(1) Core Permit Elements

A Part 70 permit will typically contain certain core elements: an introductory section providing the source's name, address, key contacts, and various standardized conditions; a description of the source and its processes and emissions; a statement of the applicable regulatory requirements, including monitoring, recordkeeping, and reporting; and provisions relevant to their enforcement. The requirements with respect to permit content, located in several parts of Title V, are consolidated in section 70.6. This preamble addresses them under the following three topic areas.

(a) Emission Limitations, Standards, and Other Necessary Conditions

Section 504(a) states that each permit "shall include enforceable emissions limitations and standards" and "such other conditions as are necessary to assure compliance with the applicable requirements of this Act, including the requirements of the applicable implementation plan." The basis or citation of each of these requirements (e.g., NSPS, PSD) should be included with them. This will reduce confusion as to the origin of any limitation standard, or other condition, and insure that EPA, the source, and the general public agree on the regulatory requirements that apply to the permit. For example, changing a restriction on operating hours might subject the source to the "source obligation" provisions of the PSD program, but this result might not be obvious if the operating permit had included the origin of the limitation.

The regulations also require the permit to identify any difference in form between the emission standard in the permit and the regulation that is the basis for the standard. This will allow EPA and citizen groups to readily identify these types of permits for heightened review. This requirement should not be too burdensome for permitting authorities since these types of permits should be relatively rare.

The EPA notes that section 504(a) of the Act requires that each permit "shall include enforceable emission limitations and standards...and such other conditions as are necessary to assure compliance with applicable requirements of this Act." Thus, Congress seemed to contemplate that for some types of applicable requirements, the requirements might not have to be incorporated wholesale into the permit; rather, "conditions" that would assure compliance with those requirements might suffice. While EPA expects that in the ordinary case the requirements would have to be included in the permit, there may be some cases where this would make no sense. For example, new section 112(r) requires certain facilities to prepare and implement a risk management plan to prevent or minimize accidental releases of certain hazardous substances. It would be of little benefit to mandate that the entire plan be incorporated into the

permit, requiring revisions to the permit whenever a minor change were made to the plan. The plan is to be submitted to States and local planning entities and is to be made available to the public. The plan would be a public document anyway, and would be enforceable independent of the permit. The EPA, therefore, is considering requiring only that the permit state that the source must have and comply with a section 112(r) plan, and shall make it available to the public under section 114(c).

The EPA solicits comment on what other types of requirements might not be addressed in the permit. If EPA determines it is appropriate to allow permits to include conditions in lieu of certain applicable requirements, the Agency would plan to specifically list such requirements either in the Part 70 regulations or in future guidance, whichever is appropriate.

The EPA wishes to stress the importance of good permit writing to the enforceability of a permit. If permit provisions are not clearly written and carefully specified, compliance may well be thwarted, regardless of how well the direct compliance measures already discussed are addressed. Failure to use consistent or appropriate units in emissions limitations or failure to adequately describe the facility or unit to which an emission limitation applies, such that application of the emissions limitation is unclear, can thus be grounds for an EPA objection to the permit. Useful guidance as to what makes a permit enforceable is contained in EPA's September 23, 1987 document entitled "Review of State Implementation Plans and Revisions for Enforceability and Legal Sufficiency." That guidance provides a checklist of key areas to consider in assuring enforceability, including applicability, compliance date, specificity of conduct, any incorporation by reference, recordkeeping requirements, and exemptions and exceptions.

Other emissions-related issues include appropriate provisions for startup and shutdown procedures, and scheduled maintenance. A permit might also contain provisions regarding upset conditions.

The determination of what are the "applicable requirements" that must be addressed by the permit is an important matter that is addressed separately in section IV.F.(3).

(b) Compliance Certifications, Monitoring, and Reporting Requirements

The provisions of section 504(a)-(c) underscore the emphasis that Title V places on demonstrating compliance with all terms of operating permits. Specific elements for noncomplying sources include a schedule of compliance, a requirement that the permittee submit the results of any required monitoring no less often than every 6 months, and "such other measures as are necessary to assure compliance" with all applicable requirements under the Act [504(a)]. In

addition, each permit shall set forth inspection, entry, monitoring, compliance certification, and reporting requirements to assure compliance with the permit terms and conditions [504(c)].

Certifications of compliance are required by both Title V and Title VII (Enforcement). Section 504 specifies that each permit must contain compliance certification requirements, and section 703 of Title VII further requires submission of compliance certifications for all major stationary sources and other sources as specified by the Administrator. The enforcement agency will evaluate these certifications to determine if further inspection or enforcement activity is warranted. Certifications, as discussed in more detail below, must include any periods of noncompliance, reasons for the noncompliance, how noncompliance was corrected, and how it will be prevented in the future. Certifications are required by the statute to be submitted at least annually, and are required to identify whether compliance has been continuous or intermittent. Certifications and all reports must be signed by a responsible official who shall certify its truth, accuracy and completeness.

The operating permit itself must require periodic certifications of compliance. The minimum content of these certifications is specified in section 70.6(c)(6)(iii), which are, for the most part, self-explanatory. The compliance certification must document not only the current compliance status at the time of preparation of the report, but also whether compliance over the reporting period was continuous or intermittent (i.e., whether there were periods of noncompliance). These compliance certifications place the responsibility to monitor compliance on the source. Also, the certified report should identify periods of missing data and the cause for the missing data.

A compliance certification must be submitted for each emission standard, work practice, or operating restriction. However, it is not necessary to submit separate reports. One report certifying all the contents therein would suffice. As indicated by section 70.6(c)(6), the permit must specify the frequency of the required submittals of the certifications and the method for assessing compliance, and require that all such reports be certified by a responsible official.

If appropriate, requirements for testing of compliance must be contained in the permit itself.
Section 70.6(c)(6)(ii) further requires inclusion of a compliance technique. To make the applicable standards enforceable, all permits must specify both an initial compliance testing method, and a method to assess compliance with applicable requirements of the Act. The source must keep records of this required testing and monitoring and periodically report to the permitting authority. Affected

sources under the acid rain program will be required to comply with nationally promulgated monitoring and reporting requirements. Performance certifications, quality assurance reports, monitoring, recordkeeping requirements, and electronic reporting options will all be established nationally. These requirements will be promulgated in a subsequent rulemaking at Parts 72 through 78, and States must have the authority to incorporate the requirements into their approved programs.

The term "monitoring" refers to many different types of data collection. It could include, but is not limited to, periodic stack sampling, continuous emission or opacity monitoring, ambient air monitoring, or measurements of various parameters of process or control devices (e.g., temperature, pressure drops, voltages). Monitoring, recordkeeping, and reporting provisions are also essential to make standards enforceable. Hence, section 70.6(a)(3) requires these provisions, including the section 503(b)(2) requirement for prompt reporting of deviations from permit conditions.

Section 504(a) of the Act and section 70.6(a)(3) of the proposed regulations require permittees to submit the results of all required monitoring at least every 6 months. These reports must be certified for truth, accuracy, and completeness by a responsible official. The data must be submitted in a format consistent with the underlying standard. For example, if the SIP limitation for a coating facility is 2.9 pounds of VOC per gallon of coating, that is how the information should be presented in the monitoring report. Enforcement personnel should not have to do any calculations or conversions of raw monitoring data to the applicable standard to be able to determine compliance.

(c) Other Permit Provisions

The permit should also contain various other provisions, not directly related to emissions requirements or their enforcement, that are important to permit management. For example, permits should specify their expiration dates and procedures for renewal. The permitting authority would also be likely to include requirements that become applicable at a future date. These include such matters as the transition from the Federal Phase I permitting to the State Phase II permitting of sources subject to acid rain requirements. Fee amounts and provisions for their payment must also be included.

(2) Program Specific Elements

(a) General

The preceding discussion of core permit elements described the range of items to be contained in an operating permit. In many cases, these will fully satisfy the permitting provisions. It is important to keep in mind, though, that Title V permits can be used to support a wide range of air quality management functions. For example,

emissions inventory updates will be an important component for VOC nonattainment plans. The permitting program and the nonattainment plan should be developed in coordination with one another. At the discretion of the permitting authority, operating permits could require additional information that could be used in inventory development. The EPA solicits comment on whether, and how, such coordination should occur.

There are procedures for the development of alternative emissions limits under the NESHAP program [V.E.]. Additional permitting information is necessary for the early implementation of those standards. Permit conditions must also be structured so as to provide for an orderly transition to Act requirements that are not yet established, such as MACT requirements.

(b) Acid Rain

Notwithstanding section 506(a), no permit shall be issued that is inconsistent with the requirements of the acid rain program, or of Parts 72 through 78.

State legislative or regulatory authority should contain this limitation. The Agency plans to rely on its permit oversight authority to ensure national consistency with the acid rain program to allow approval of State permit programs that contain more general provisions, and to facilitate the allowance trading program.

Title IV requires that certain provisions be included in all acid rain permits issued by EPA or the States. Specifically, all permits issued to affected sources under the acid rain program shall prohibit (1) annual emissions by affected units in excess of the applicable emissions limitation for NO_x; (2) annual emissions of SO_2 by affected units in excess of the number of allowances to emit SO_2 held by the owner or operator, or the designated representative, for use in that year by each such affected unit; (3) any person from holding, using, or transferring any acid rain allowance, except in accordance with regulations at Part 73; (4) the use of any allowance prior to the calendar year for which it was allocated; and (5) contravention of any other provision of Title IV, Parts 72 through 78, or of the permit [403(f),(g)].

(3) Applicable Requirements of the Act and the SIP

Title V requires that operating permits assure compliance with each applicable standard, regulation, or requirement under the Act, including the applicable implementation plan [502(b)(5)(A), 504(a), and 505(b)(1)]. Efficient operation of the permit program requires that the permitting authority and EPA clearly understand and agree on what requirements under the Act apply to a particular source. The EPA expects to oversee the inclusion of the Act's applicable requirements in the operating permits. Where there is a question with the permitting authority over what requirements of the Act or SIP apply to a source, EPA will exercise its authority under section 505(b)(1) to

object to permits that fail to assure compliance with the applicable requirements as clarified in the available record. The EPA proposes the following guidance for defining applicable requirements:

(a) NAAQS

The EPA interprets "applicable requirements" of the Act and the SIP to mean limitations, standards, and/or requirements directly applicable to sources. Typically, EPA will enforce the requirement that the States implement the NAAQS through SIP's. For example, Title I requires that certain ozone nonattainment areas demonstrate a 3 percent reduction in VOC emissions each year. That is a planning obligation on the State, which the State may implement in any number of ways. For example, it could require a 3 percent reduction from each VOC emitting source in the State, or it could place stringent controls on some categories while not controlling other categories. The EPA is not planning to review VOC limits in individual source permits to determine whether the State is meeting the 3 percent reduction requirement, although EPA in its SIP review may look at the collection of permits the State has issued under Title V to determine if the State has met its 3 percent reduction obligation.

In the case of SO_2, lead, or perhaps PM-10, however, a particular source (such as a power plant or smelter) may be located such that whether the SIP will assure attainment or maintenance of the NAAQS will depend entirely on the limits placed on that source. Even in such cases, EPA solicits comment on EPA's proposed position not to require that permits assure attainment and maintenance of the NAAQS. The permit would not be required to assure protection of the NAAQS even in those cases where EPA has issued a notice of SIP deficiency.

The EPA will, therefore, not object to a permit (that otherwise complies with the applicable SIP) on the grounds that the permit does not assure attainment of the NAAQS. Where more than one source substantially contributes to the NAAQS violation, EPA will not use individual permit actions to impose limits on sources beyond those required in a SIP. It is the State's responsibility to decide what limits the SIP should impose on the various sources. While the State may choose to remedy the inadequate SIP using a series of individual permits, EPA's review of individual permits will not be the appropriate forum for reviewing the adequacy of such planning decisions. The EPA must, however, review these planning decisions when the permitting authority, as required by the Act, updates the attainment demonstration or incorporates individual permit limits into the SIP. The EPA emphasizes that, for the preceding case to be grounds for potential objection, the relationship between the single source's emissions and the NAAQS violation must be very direct and clear.

(b) SIP Ambiguity

Some SIP requirements will be vague as to a significant provision (e.g., averaging time, monitoring, and/or reporting requirements), requiring considerable time during the permitting process to make the operating permit enforceable. In such cases, the SIP will be ambiguous when applied to a particular source, and the State must judge how to define the enforceable permit conditions. Where the State's interpretation of a requirement is both inconsistent with the State's demonstration of attainment and maintenance of the NAAQS and undermines the level of emissions reduction EPA anticipated the rule would achieve, EPA will object to the permit. In making this decision, EPA will look to the available record, including the assumptions the State made in the SIP.

The narrative description accompanying the SIP is not directly enforceable on sources, but it is reasonable for EPA to look to the assumptions made in the SIP in deciding how an ambiguous SIP should be applied to a particular source. For example, if the State grants the source an extended averaging time for compliance demonstrations that is inconsistent with the underlying SIP narrative, EPA will object to that permit, unless the SIP is changed to accommodate the longer averaging times. These State interpretations of ambiguous SIP regulations may need to be incorporated into the SIP if they critically affect the NAAQS demonstration. As discussed more extensively in section V.B, EPA believes that this might be accomplished periodically through the SIP revision process. Failure on the part of the State to revise the SIP may result in the issuance of a notice of SIP deficiency by EPA to the State.

The permit requires certain information to make it enforceable. There are situations in which a SIP, standing alone, is an inadequate basis on which to issue an approvable (i.e., enforceable) permit. For example, the SIP may contain gaps as to test methods or averaging times. The operating permit process should, at least temporarily, fill these gaps to the extent required by Title V. However, this does not relieve the State of any obligation it might have to revise the applicable SIP in response to an EPA SIP call.

To promote and expedite permit decisions by State review authorities that address SIP ambiguity, EPA believes that the concept of a model permit appears promising. Under this concept, conditions for various source types would be developed by EPA. These conditions would incorporate all relevant standards and requirements in enforceable terms, address any gaps in applicable SIP limit(s), and would agree with the assumptions concerning the SIP control strategy demonstration. Permitting authorities could adjust the conditions of the "model," as necessary, during the permit process. While a model permit would not define the only acceptable means to avoid an EPA veto, it could streamline

EPA permit review on aspects that do not differ from the model conditions. The EPA solicits comment on this concept and on how best to develop and implement it.

(c) SIP's and FIP's

When a State fails to submit or implement a SIP, EPA may have to impose a FIP under section 110(c) of the Act. When a FIP applies to an area, operating permits for sources in that area must assure compliance with the FIP measures. Failure of a permitting authority to implement the FIP requirements in its permits will be cause for EPA to find that the State failed to administer the permitting program under section 502(i). The EPA may choose to issue permits for sources subject to the FIP and to collect the permit fees.

Other important concerns arise regarding permit program approval and implementation of an inadequate SIP. These issues are discussed in detail in section V.B.

(d) New Source Review

The requirement under Title V that operating permit programs assure compliance with all applicable requirements under the Act includes the requirements imposed in any NSR permit. Any requirements established during the preconstruction review process also apply to the source for purposes of implementing Title V. If the source meets the limits in its NSR permit, the Title V operating permit would incorporate these limits without further review. The intent of Title V is not to second-guess the results of any State NSR program.

Operating permits may conveniently help States implement their NSR programs. If a source "nets out" of NSR by restricting operations at the facility, it may seek an operating permit revision to make that restriction federally enforceable. If a new source needing offsets finds a facility to provide them, the donor facility's permit may be modified to enforce the offsets.

(e) Tighter or Equivalent Requirements

The determination of whether a permit provision relaxes an applicable requirement is an issue, since section 505(b) subjects to EPA veto permits that are not in compliance with the applicable requirements of the Act, including those of the SIP. To minimize concerns about potential relaxations of SIP requirements, permitting authorities are required to express new limitations in terms consistent with those in the SIP (e.g., averaging times) to facilitate comparison with the existing SIP requirement. Where the SIP allows expressing the permit limitation in terms other than those used in the SIP, the burden of demonstrating equal or greater stringency rests with the State. This demonstration must accompany the draft proposed, proposed, and final versions of any permit.

(f) National Emergencies

There are several provisions in the Act authorizing the President to waive applicable requirements of the Act to meet national emergencies or address the national security interest [110(f) and 112(i)(4)]. The EPA does not believe it is reasonable for the Title V permit program to restrict the operation of these emergency waiver provisions. For example, where the President has made a finding under section 110(f) that it is necessary to suspend a part of a SIP because of a national energy emergency, requiring all the permits that implement the suspended SIP provisions to go through a time consuming reopening procedure would defeat the urgency of the President's finding. Therefore, EPA will interpret such provisions to allow a waiver not only of the applicable requirement under the Act, but also as it appears in any permit implementing the requirement. Obviously, the waiver of the requirement as it appears in the permit will be coextensive with the waiver of the underlying applicable requirement in the Act, and will only be effective after the underlying requirement has been waived according to the procedural requirements in the Act.

(4) Relationship Between the Permit and the Application

The permit application must provide the information necessary for the permitting authority to process the permit. Much of the application need not be incorporated into the permit, however, even though it was needed for preparing the permit. Key elements of the application (e.g., emission limits, the compliance plan and the schedule of compliance for noncomplying sources, and monitoring methods) are not federally enforceable unless repeated or incorporated into the permit (except in the case of acid rain applications).

Nevertheless, existing State practice typically considers most, if not all, of the permit application to be enforceable. In many States, a permit refers to the entire application, and sometimes incorporates it by reference. This practice makes all the source's assertions in the application enforceable, even if they are not critical to implementation of the permit.

Under Title V, this practice is not required. Instead, the draft rule requires the permitting authority to determine which details are necessary for incorporation into a Part 70 permit because they assure compliance with applicable requirements. Any provisions of the application incorporated in the permit must be readily available to the public and do not qualify for protection as confidential information.

Public comment is solicited as to what type of information contained in the application should be incorporated into the permit. In addition, EPA solicits comment on whether applications (as well as permits) can

cross reference applicable regulations and other requirements instead of repeating them.

Regardless of the balance between the information contained in the application and that contained in the permit, certainly some portion of the application will be referenced by the permit and therefore will be made federally enforceable. Because determining this balance can be difficult, and because it is important to the Title V permitting process that a source's air pollution control obligations be clearly defined, the permitting authority should specifically address in the permit the status role of the assertions made in the application.

(5) Operational Flexibility

The operational flexibility provisions in section 70.7(d) of the regulations are discussed in section G(7) of the preamble.

(6) General Permits

Section 70.6(f) reflects section 504(d), which authorizes permitting authorities to issue a "general permit covering numerous similar sources." The EPA anticipates that States will use this authority to reduce the administrative burden of the Title V permitting program for both the permitting authority and the permitted sources. General permits may be especially useful in easing the burden of the program on small businesses. Therefore, the Agency wishes to clarify its understanding of how this authority will operate in the context of operating permit programs generally.

(a) Determining Where To Use General Permits

In most instances EPA intends to allow those permitting authorities with approved programs to determine whether to issue general permits, and for what source categories. If, however, a permitting authority determines that a general permit should apply to a category of major sources or a category of affected sources under the acid rain program, the permitting authority must submit the general permit to EPA as a program modification. Prior to issuing the general permit, the permitting authority must determine whether there are source categories for which general permits might be appropriate. Criteria in any such determination are source size and similarity of sources within the category; categories made up of numerous, small, and nearly identical sources, are ideal. Initially, EPA does not anticipate issuing any nationally applicable general permits. In the future, EPA intends to develop model general permits for appropriate categories of sources subject to Federal standards. The permitting authorities may then adopt these models as appropriate to the circumstances in their States. The EPA solicits comment on which categories would be most appropriate for the development of general permits. In particular the EPA solicits comment on the idea that such permits be prepared for woodstoves, gas stations, dry

cleaners, and several the source categories subject to the radionuclide NESHAP to the extent that these sources would not be exempt from review.

Permitting authorities may also choose to develop general permits for categories of numerous, identical emissions units within larger sources. For example, a general permit for degreasers could specify standard operating conditions or maintenance requirements. A general permit for a large manufacturing operation with numerous permitted emissions units could specify the terms of the model permit for the type of degreaser the facility uses, along with the terms specific to that source.

(b) Issuing General Permits

Title V requires that the permitting authority provide notice and an opportunity for a public hearing when issuing a general permit. In contrast to section 502(b)(6), governing issuance of standard permits, section 504(d) does not explicitly require an opportunity for public comment with respect to individual sources when issuing a general permit. Nonetheless, the EPA suggests that permitting authorities provide the public an opportunity to comment on general permits. Otherwise, the interested public may insist on a public hearing, even if only for the satisfaction of submitting a comment. The notice for the general permit must allow the public an opportunity to review the scope of the source category under the permit (but not necessarily a listing of specific source sites that might be covered), the terms and conditions which the permit will impose on that category, and the application process by which individual sources will receive the right to operate under the general permit.

There may be opportunities for States to consolidate the issuance of general permits with the adoption of SIP regulations. Section 110(a)(2) and (3) require that States provide reasonable notice and a public hearing for all revisions to its SIP. A State may determine that a new SIP regulation will apply to a source category for which general permits would be appropriate. The State could use the same notice and hearing for both the SIP rule and the general permit. After the State finalizes the SIP rule and is ready to issue the general permit, it could then submit the general permit to EPA for review under section 505.

Once the permitting authority has afforded opportunity for public input on issuing the general permit, it may permit individual sources under the general permit without additional opportunity for public input. Section 504(d) provides that sources covered by a general permit are not relieved of their obligation to file an application as otherwise required under Title V. Therefore, sources covered by a general permit will have to submit an application to the permitting authority, and may be asked to also submit an appropriate permitting fee. Depending on

the complexity of the source category under the general permit, such application processes could simply be a brief application (such as a form application) requesting a permit consistent with the general permit, or a more detailed statement establishing that the source qualifies for the permit. The EPA expects that applications for general permits will typically be quite simple, because the sources in each category will be very similar.

Within limits discussed below, it is for the permitting authority to balance the desire for a simple application against the flexibility gained by broadening a source category and introducing variables into the application process. Once the permitting authority accepts the application, it can issue the individual permit by mailing the applicant the appropriate permit. All general permits, and the individual permits issued under them, must conform to all requirements (e.g., they must have monitoring, recordkeeping, and compliance certification provisions of these regulations).

The EPA is also considering an alternative approach for applying general permits to individual sources. Under this alternative, rather than issue individual permits to applicants, the permitting authority might simply construct the general permit so that it applies automatically to any source within the source category covered by the general permit. The individual source must submit an application identifying and describing the source, so that the permitting authority and the public could determine whether the general permit applies to the applicant, but the authority would not need to notify the source through an individualized permit that the general permit applies. Of course, the permitting authority might still notify some applicants that the general permit did not apply to them. Beyond that, a source could opt out of this approach by requesting that the permitting authority issue a specific individual permit for the source.

The main advantage of this approach is that it would reduce the administrative burden associated with requiring the permit authority to issue individual permits to the potentially hundreds or thousands of sources that would be subject to general permits. The main disadvantage is that a citizen or inspector visiting the source would not be able to view, at the source, a permit issued by the State specifically for that equipment. Rather, he would need to rely on the wording of the general permit (residing, perhaps, only in the offices of the permitting authority) to determine whether the general permit indeed applied to the source. Moreover, the public would not be able to challenge the general permit's applicability to a particular source during the permitting process since the permitting authority would not make such an applicability determination as part of that process. The EPA solicits comment on whether it

should allow State programs to employ this or other streamlined methods of general permitting in light of their advantages and disadvantages, or whether individual permits need to be issued to each source covered by the terms of a general permit.

(c) Overseeing General Permits

The EPA will treat the issuance of a general permit as it would that of any other permit. Therefore, general permits will be subject to the review process under section 505, including neighboring State and EPA review. The general permit must include clear criteria for determining whether a source qualifies for the permit, the terms and conditions applicable to the source, and an application process for obtaining individual coverage under the general permit. As with regular permits, EPA will use its review opportunity under section 505(b) to determine whether the terms and conditions of the general permit assure compliance with the requirements of the Act applicable to that source category in the relevant State. Unlike regular permits, EPA must make a judgment at this stage in the process whether the general permit and its application process are reasonably structured to permit qualified sources and exclude unqualified sources. There may be cases where EPA must object to a general permit because the permitting authority is applying it to an inappropriate source category or is not asking for the information necessary to apply it accurately to specific sources.

After the permitting authority has issued the general permit, EPA will not engage in any direct review under section 505 of the permitting authority's approval of each source's application to operate under the general permit. The EPA must, however, continue to receive a copy of all final permits issued to individual sources. The Administrator may later determine by audit or inspection that, although a source is operating under a general permit, it does not in fact qualify for the permit.

The EPA then has several courses of action available. If the source has clearly misapplied the criteria for receiving the general permit, EPA may enforce against the source, under section 113, for a failure to meet the qualifying criteria, which must be included as terms of the general permit, as discussed above. The EPA may enforce as well for failure to meet any applicable requirement of the Act. The source may also be liable for filing a false application if it misrepresented its qualifications for the general permit. If the qualifying criteria as they apply to a particular source are unclear, EPA may use its authority under section 505(e) to terminate the general permit for that source, and require issuance of a regular permit. Finally, if EPA determines that a properly-issued general permit, when applied to its source category, proves to be

impracticable or fails to assure compliance with the Act, EPA may revoke or reopen the general permit under section 505(e).

G. Section 70.7 (and Section 70.6(d)) - Permit Issuance, Renewal, Reopenings, Operational Flexibility and Revisions

The Act sets forth detailed provisions with regard to the process by which permits are issued. This section of the preamble describes EPA's proposed regulations for permit issuance, renewal, and reopenings, including those requirements regarding essential permit issuance procedures necessary for obtaining approval for a State program. The requirements for permit revisions were discussed in the previous section of this preamble [IV.F.].

(1) The Application Process and State Review

As noted in section IV.E., the submittal of a complete application is a crucial part of the permit-issuance process. States are required to have procedures for both determining the completeness of applications and for expeditiously processing them. Because of the critically important nature of this step, the proposed regulations would require States to promptly notify sources of the results of the completeness determination [40 CFR 70.7(a)(2)].

Pursuant to section 503(d), the timely submittal of a complete application and the continued timely submittal of any additional information creates a legal "shield" from enforcement action if this source is also operating within the terms of a permit. For purposes of permit renewals, "timely" will mean submittal of the application 18 months prior to the expiration date of the permit, unless another time is approved by the Administrator. A correspondingly shorter time would be needed for permits with fixed terms shorter than 5 years, or where the State is required to act on the renewal application in less than 18 months. In no event will the time for submittal be less than 6 months before permit expiration.

It should also be noted that the complete application does not shield the source from compliance with substantive air pollution control requirements. [There is one specialized exception to this rule in the case of applications for acid rain permits. This is discussed in section IV.G.(5)(a) below.]

Despite the protection provided by the "shield" when a timely and complete permit application is filed, EPA believes that it makes no sense to deprive a source of such protection where an application is only slightly overdue. Otherwise, a permitting authority's failure to act on an application during the prescribed review period could shut down a source, even if the application were only a few days late. The EPA proposes to solve this problem by providing in section 70.7(b) that the shield will not be lost because

a complete application was submitted less than 3 months late. This proposal is supported by the language in section 503(d), which states that, under most circumstances, if a source has submitted a timely and complete application, "the source's failure to have a permit shall not be a violation of this Act." Nothing in the Act prohibits EPA from exercising its discretion to extend this application shield in other, appropriate circumstances. The proposed regulations make clear, however, that a source remains subject to enforcement action and penalties for failure to submit a timely and complete application for the entire period that the application was late.

The EPA also proposes that the application shield should still apply where a source submits a timely application that the permitting authority determines to be incomplete, regardless of whether there was "good faith" on the part of the source to file the required information. If the source cures any deficiency during the expeditious time period specified by the permitting authority (i.e., a few days), then the application shield can apply from the time when the "good faith" application was submitted.

State programs are required to have procedures for expeditious and efficient processing of permits. Pursuant to section 503(c), the permitting authority shall issue or deny the permit within 18 months of receipt of a complete application. [During the initial phase-in of the program, however, any shorter timetable specified in the transition plan will supersede the 18-month requirement.] The program must provide that failure of the permitting authority to act within this time period shall be treated as a final permit action solely for purposes of judicial review in State court of an action brought to require that action be taken by the permitting authority on the application without additional delay [502(b)(7)]. In other words, while the failure to issue a permit can be reviewed judicially, the permit cannot be deemed to be approved or disapproved at that time. One potential difficulty in obtaining program approval arises from provisions for default permit issuances under State law. Some State statutes provide that a permit based upon the submitted application will be automatically issued after the passage of a certain time period if the State permitting authority has failed to act. Such default issuance is inconsistent with the State permit-processing requirements of Title V and, obviously, with the requirements for Federal oversight contained in section 505.

Although section 503(d) of the Act makes it clear that existing sources can receive the shield from enforcement action for failure to have a permit, until final action is taken by the review authority on the application, the status of sources subject to preconstruction-review permitting is less clear. One reading of the section is that the application shield is not available to sources subject to

NSR permitting under the Act (e.g. PSD), and that those sources must have Title V operating permits before commencing operation. The EPA believes that a better reading consistent with the goals of section 503(d), and of Title V generally, is one that affords protection equally to existing and to new sources.

There are several reasons which support this proposal. First, sources that have recently undergone the careful scrutiny involved in obtaining a PSD or NSR permit present much less of a relative risk to air quality goals even if they are allowed the benefits of the shield, than would existing sources. Second, Title V provides a review process that, while efficient, could cause expense and delay to the initial operation of a source that typically will have excellent air pollution controls. There is nothing in the legislative history that indicates Congress intended such harsh treatment for new or modified sources. A third reason arises from the fact that the subsection specifies only NSR permits *required by the Act*. It would be anomalous to allow the application shield to new sources that have undergone State NSR procedures, which generally address smaller sources and are less rigorous than the NSR mandated by the Act. In view of these factors, EPA believes that section 503(d) should be interpreted as a reemphasis of the important, independent requirements of the Act with respect to NSR permits, rather than a denial of the application shield to these sources.

If EPA adopts the alternative position in its final rulemaking, all sources obtaining NSR permits will also be required to obtain Title V operating permits before commencing operation [i.e., it is not sufficient that the source submit a timely and complete application before operating] [503(d)]. This has prompted interest in the possibilities for integrating or coordinating these two permitting systems. The EPA is aware that some States currently integrate their processes for issuing construction and operating permits, and wishes to minimize disruption of existing practices. In addition, this practice might address the concern expressed by some industry representatives that early issuance of the operating permit would aid in qualifying for construction loans. The EPA concludes that such program integration would be consistent with Title V. States preparing such programs must, however, carefully scrutinize them so as to maintain consistency with the requirements of Title V. For example, the term of the operating permit would begin running immediately upon issuance of the integrated permit. Payment of emissions fees, submittal of compliance plan for noncomplying sources and certification, and future permit renewal must also be addressed.

(2) Public Comment

Title V emphasizes the importance of a well established, procedural basis for permit issuance. Public comment is a cornerstone of this, and the following discussion examines the provisions of Title V on this subject.

(a) Public Information and Notice

Pursuant to section 502(b)(6), State programs are to have formal procedures for providing public notice of certain permitting actions. Each permitting issuance, renewal and modification must be supported by an official record that is available to the public. The notice should include both substantive information, regarding the source itself, and procedural information, regarding the public's opportunities for participation. The extent of source-specific information required for the notice will vary, depending on the size and type of source and the applicable requirements, but should at least include the source's name and type of facility, size, regulated emissions, and principal regulatory requirements. The procedural information, which can be standardized, should describe the public's opportunity for comment, including the availability of the official record, the duration of the comment period, and the opportunity for a hearing. Notices for hearings should briefly describe the procedure by which the hearing can be requested.

The process for publishing public notices of permitting actions has always been of considerable practical interest to State agencies because extensive publications of notices in newspapers of general circulation can be time consuming and can entail appreciable expense. For this reason, State agencies have generally not used this form of publication, except for certain types of sources or regulations, or where specifically required by Federal law, most notably under the PSD and nonattainment NSR provisions of the Act [40 CFR 51.166(q)]. The proposed regulations require that the State provide public notice "by advertisement in the area affected" [70.7(i)(2)]. The EPA solicits comment on public notice procedures, including any currently used by State programs, that might be less administratively burdensome than individual newspaper publication, while still meeting the requirements of Title V. This issue is of particular importance to this program because of the large number of permits involved and the fact that most permitting actions incorporate SIP limits that have already undergone public review, and should therefore be noncontroversial. Options to be considered include the use of State publications analogous to the FEDERAL REGISTER and of bulk processing of notices.

Section 505(a)(1) requires that the permitting authority transmit to the Administrator "a copy of each permit application (and any application for a permit modification or renewal), or such portion thereof, including

any compliance plan, as the Administrator may require" as necessary to carry out EPA's responsibilities under the Act, and a "copy of each permit proposed to be issued and issued as a final permit." The potential use of various approaches to streamline or focus the process of State information submittal to EPA has been a topic of considerable interest, given the number of permits and amount of information involved.

Mechanisms for waivers of the EPA notification requirements are discussed in section IV.H. In addition, the notification requirement might be streamlined pursuant to section 505(a)(1)(A), which requires the submittal to EPA of permit applications "or such portion thereof ... as the Administrator may require" to carry out EPA's responsibilities. The EPA solicits comment as to the extent of this flexibility and how this information submittal process can be streamlined to agree with EPA's responsibilities as guarantor of the permitting process. Examples of such practices might include summary sheets with certifications (instead of comprehensive submittals) for certain routine permitting, or the use of electronic submittals. For acid rain, summary sheets with certifications will not be authorized in lieu of submitting complete applications and draft permits to EPA. The Agency, however, is considering the use of electronic submittals of applications and draft permits for acid rain affected sources to minimize the submission burden.

Section 505(a)(2) also requires the permitting authority to notify all States "whose air quality may be affected and that are contiguous" to the subject State, or that are within 50 miles of the source, of each permit application or proposed permit forwarded to the Administrator. This regulation would require that the same draft proposed permit for which the permitting authority offers public notice and an opportunity for public comment and hearing be provided to those affected States. The permitting authority shall provide an opportunity for those States to submit written recommendations. If those recommendations are not accepted, the permitting authority shall so notify that State and EPA in writing and provide its reasons. This process appears straightforward. Particular administrative details, such as how much of an application should be transmitted, may be appropriately addressed by agreements between the relevant States.

The one area where clarification might be necessary is in the definition of the term "may be affected" in section 505(a)(2)(A). The 50-mile geographic trigger, contained in section 505(a)(2)(B), appears to provide adequate protection for virtually any case and would be relatively simple to administer; compared, for example, to alternatives that attempt to define a significant ambient impact. The EPA solicits comment on whether any other

trigger would provide any further safeguard, beyond the 50-mile test, needed to implement the "may be affected" test for certain pollutants.

There has been some interest regarding whether State permitting authorities would be required to publish notice both of proposed State action on the permit (prior to EPA review) and of final permit issuance (following EPA review), or only the latter. The EPA proposes not to require the latter notice.

(b) Opportunity for a Hearing

The EPA believes the requirement in Title V for an opportunity for a public hearing can be implemented in an informal manner. It is not requiring States in its proposed rules to provide a full "trial-type" hearing with a verbatim transcript and opportunity for cross-examination. The Agency proposes that a public hearing for purposes of Title V be an open meeting for concerned parties to express their concerns. A summary of comments received should be placed in the public record.

The EPA also solicits comment as to the degree of discretion that State agencies should have to condition the opportunity for a hearing upon certain reasonable criteria. These might include the relevance of the issues presented by the requesters, and whether factual issues (in contrast to issues of law) are presented. The granting of a request for a hearing might also be linked to the quality of information provided by the requester to support the request [e.g., whether the request reflects comments of sufficient technical (or, possibly, legal) scope that they would benefit from the exchange of ideas afforded by the public hearing process].

(c) Publicly Available Records

Title V places considerable emphasis upon providing public access to permit information. Section 502(b)(8) requires that the permitting authority make available to the public any permit application, required compliance plan for noncomplying sources, permit, and monitoring or compliance report, subject to the provisions of section 114(c). [The EPA notes that section 114(c) governs information to be provided to EPA, not to a State, and thus the provision does not apply where the State is the permitting authority. The Agency interprets Congress's reference to section 114(c) as authorizing the States to use the same, or substantially similar, confidentiality criteria, otherwise the reference would be meaningless except where EPA is the permitting authority. The EPA solicits comment on this interpretation.]

Section 503(e) requires that each application, compliance plan for noncomplying sources (including the schedule of compliance), emissions or compliance monitoring report, certification, and each permit issued under this title shall be available to the public. The applicant may

separately submit material subject to State procedures which correspond to the section 114(c) confidentiality provisions of the Act. In no event will the contents of a permit be entitled to section 114(c) protection. To the extent the permitting authority chooses to make the application or other supporting material an enforceable part of the permit, these materials would also be publicly available.

(3) State Permit Appeals

The proposed regulations require State operating permit programs to contain appropriate appeals procedures. Many States currently provide an administrative process to consider appeals from permitting decisions, and EPA anticipates that these procedures will continue to be used under the Title V permitting program. For those cases in which a State does not offer such an administrative process, the Act still requires the State to provide for judicial review in the State courts. States may require that judicial review only be available to those petitioners who first have gone through the administrative appeals procedure [502(b)(6)]. Further discussion of this topic is provided in section V.D. It should be kept in mind that permits cannot be issued with respect to Title V until the Federal review is complete. Because of the statutory 18-month period for final action on permit applications, it is expected that State permitting authorities will generally issue final permits at the end of State and Federal review, regardless of any pending appeals of the permitting decision. However, the EPA does recognize that, in some cases, the nature of the appeal might prompt changes to the permit that could significantly affect commitments by the source. In such cases State programs should have the discretion to withhold final action on the permit while the administrative appeal is pending. The permit challenge procedures adopted by the States should limit the effect of permit challenges, as is done in the NPDES program. State authorities should provide that only the portions of a permit specifically challenged may be stayed during the challenge. All other provisions of the permit should remain in effect. The Agency is proposing that permit challenge procedures limiting the effect of challenges be criteria for State program approval.

To ensure the integrity of the various programs implemented through the permit, each permit should also contain a severability clause. This clause should be designed to ensure that challenges to portions of the permit do not affect the applicability of the unchallenged permit requirements. This provision, should further ensure that only those specific requirements being challenged may be stayed pending administrative or judicial review. The Agency is proposing that a severability clause be criteria

for permit program approval and expects to veto permits lacking this clause.

(4) Terminate, Modify, or Revoke and Reissue

Section 505(e) provides that if cause exists to terminate, modify, or revoke and reissue a permit under Title V, the Administrator shall notify the permitting authority and the source. The permitting authority then has 90 days to forward to EPA a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend this period for an additional 90 days if a new or revised permit application is necessary, or if additional information is needed from the source. The Administrator may review proposed determinations pursuant to the same section 505 criteria used to review any proposed permit issuance.

If the permitting authority fails to submit the required determination, or if EPA objects to it and the permitting authority fails to resolve the objection within 90 days, the Administrator may, pursuant to appropriate administrative procedures, terminate, modify, or revoke and reissue the permit. The criteria for Federal reopening of a permit for cause to terminate, modify, or revoke and reissue are essentially the same as required for State programs. These are discussed in the following preamble section.

(5) Permit Shield and Reopenings

(a) Shield

Once a permit is properly issued with respect to Title V (i.e., EPA does not object to the permit in its final form and adequate public participation has occurred), it is the comprehensive statement of the source's obligations under the Act. In accordance with section 504(f), the permit, upon issuance, shields the source from enforcement for failure to obtain a permit as set forth in section 502(a).

Section 504(f) states that: "Compliance with a permit issued in accordance with this title shall be deemed compliance with section 502. Except as otherwise provided by the Administrator, by rule, the permit may also provide that compliance with the permit shall be deemed compliance with other applicable provisions of this Act that relate to the permittee if (1) the permit includes the applicable requirements of such provisions, or (2) the permitting authority in acting on the permit application makes a determination relating to the permittee that such other provisions (which shall be referred to in such determination) are not applicable and the permit includes the determination or a concise summary thereof. Nothing in the preceding sentence shall alter or affect the provisions of section 303, including the authority of the Administrator under that section."

The Act describes a number of situations which are not protected by the permit shield. First, section 504(f),

which provides for the shield, precludes the shield from being applied when implementing section 303. Section 303 gives the Administrator emergency powers to respond to pollution that produces imminent and substantial endangerment to the health of persons. Second, section 504(f) gives the Administrator the authority to exempt, by rule, certain situations from the shield. Pursuant to this authority, the Administrator is proposing that a permit shield not afford any protection from liability to a source that is not in compliance with a standard or regulatory requirement of the Act at the time an operating permit is issued. Further, the EPA is proposing that the permit shield would apply to any permit provisions added or modified by any type of permit revision. For a minor permit amendment made under the "fast track" approach, the shield would apply immediately when the revision becomes effective, i.e., when the permitting authority fails to object.

In addition, if any applicable requirements were omitted from the permit during the permit issuance process (i.e., not addressed as opposed to misinterpreted), the source will not be shielded from enforcement of those requirements. Otherwise, emissions subject to omitted regulations, including hazardous air pollutants, could be emitted entirely unrestricted until the permitting authority or EPA reopens the permit. The Administrator is requesting comments on these proposals and any additional recommendations as to other situations which should be exempted from the shield, by rule, under section 504(f). The Agency is also proposing that the permit shield be disallowed with respect to the acid rain portion of the permit consistent with new section 408(h). Section 408(h)(2) modifies the effect of section 504(f), disallowing the permit shield to the extent the acid rain portion of the permit is inconsistent with Title IV. Each permit should, therefore, clarify that the shield does not apply to acid rain requirements, notwithstanding any generic shield language.

After a permit has been issued, any permit shield can be preempted by the permitting authority or the EPA only when the permit is reopened for cause. The Act contains several occasions for reopening an issued permit, and they are discussed below in this section.

While use of the shield remains discretionary with the permitting authority, EPA believes that the section 504(f) permit shield provision of the Act brings about certain benefits to a permittee, as well as to the permitting program. Therefore, the Administrator encourages the permitting authority to employ the shield to help stabilize the permit process and to give greater certainty to regulated sources. Because of the shield, unclear provisions or changes in interpretations will not affect a

shielded source after a permit has been issued, unless it is later reopened for cause. Uncertain regulatory provisions should therefore be resolved in a public forum during the permit processing stage. On the other hand, in nonattainment areas where the State anticipates new requirements becoming applicable to a permitted facility during the permit term, the permitting authority may choose to limit the scope of the shield for those provisions. Doing so would save the permitting authority and affected sources the inconvenience of reopening a series of permits to allow the State to implement its SIP obligations.

The EPA proposes that the permit shield under section 504(f) remain in effect, to the extent the source is entitled during the term of the expiring permit, until a renewed or modified permit is issued, except where inconsistent with State law or as provided in Parts 72 through 78 for the acid rain portions of a permit, provided the source submits a complete application for permit renewal in a timely manner.

The Agency also solicits comment on how comprehensively to interpret the scope of the shield. One approach is to interpret it quite broadly. For example, if all the applicable requirements of section 112 are met in a Part 70 permit at the time of permit issuance, and are explicitly identified in the permit as meeting section 112, the source could be shielded by the permitting authority from any future section 112 requirements for the term of the permit. Section 502(b)(9) provides support for this interpretation by calling for the automatic reopening of a major source permit with a term of 3 or more years in order to incorporate applicable new standards and regulations promulgated under the Act after the issuance of a permit. On the other hand, section 504(f) can be read to shield the source only from those requirements (read narrowly) that were the subject of the permit-issuance process and included in the permit. Under this interpretation, the section 502(b)(9) provision for reopenings would be viewed as a requirement to ensure the timely incorporation into the permit of major, new regulatory requirements in order to maintain the permit as the consolidated repository of all applicable Act requirements.

The EPA interprets the shield broadly by distinguishing between the applicable "provisions" of the Act and the applicable "requirements" of the Act. To expand on the example mentioned above, if the permit imposes the specific "requirements" of an applicable MACT standard, or determines that there are no such requirements under section 112, then the source is protected from application of the "provisions" of section 112 for the duration of the permit term.

The regulations as they are now structured follow this broad interpretation of the shield. The proposed shield provision in section 70.6(h) protects a source from new

requirements that become applicable after issuance of the permit.

(b) Permit Reopening

After a permit has been issued, any established permit shield under section 504(f) can be preempted by a permit reviewing authority or the EPA where the permit would be reopened for cause. The Act contains several occasions for reopening an issued permit, and provides several instances in Title IV where changes to the permit are to be incorporated without reopening.

One occasion for reopening a permit is in section 505(b)(3). It provides that if the EPA objects to a permit, the EPA shall, if a permit has already been issued, either modify, terminate, or revoke such a permit, and the permit reviewing authority may afterwards only issue a revised permit in accordance with section 505(c).

Another occasion for reopening a permit is for cause. Section 502(b)(5)(D) requires that a permitting authority must have adequate authority to terminate, modify, or revoke and reissue permits for cause. Both the permit-reviewing authority and the EPA can require a permit to be reopened for cause. The EPA interprets this to mean a compelling reason to reopen a permit, for example, where a substantial error has been made in permit processing or data submittal whose correction cannot wait until renewal, or where fraud on the part of the source has been found. Reopening of the permit "for cause" would also be appropriate in order to incorporate the NO_x limits for affected sources under the acid rain program. Permit applications for NO_x are not due from affected sources until after the statute requires States to have issued permits for these sources. To include NO_x limits in these permits prior to reissuance, the permits will need to be reopened. [States should be aware, however, that permit revision procedures for acid rain sources will be affected by Part 72 regulations.] Cause should not include trivial matters (i.e., changes in a permit which cause an inconvenience to a source but do not have a significant effect on assuring compliance with Act requirements). The EPA is requesting recommendations for events and situations which provide cause for both the EPA and a permitting authority.

The EPA proposes not to require a permit to be opened for cause until after a permitting authority has had an opportunity to act expeditiously under its own authority to reopen a permit for cause. If EPA notifies the State, pursuant to section 505(e), it will then get 90 days to make the appropriate change. The EPA further proposes that permit reopenings be processed under the permit issuance process, with one important exception: The EPA proposes to require the permitting authority to provide the source 30 days advance notice before reopening and revising a permit

for cause when it is reopened pursuant to section 502(b)(9), as discussed below.

Certain changes cause permits to be reopened automatically as defined in section 502(b)(9). The EPA believes that section 502(b)(9) should be read to require that the permitting authority reopen permits for major sources with 3 or more years remaining in the permit's life (rather than reopen all permits with original terms of 3 or more years) to incorporate standards and regulations promulgated under the Act which are promulgated after the issuance of such a permit. The EPA has rejected the alternative interpretation stated in the parenthetical because it would lead to absurd results. For example, a major source permit with a 35-month term, and 34 months remaining until expiration, would not have to be reopened upon promulgation of an applicable standard or regulations; yet a major source permit with a 40-month term, and 19 months remaining until expiration, would. Besides being unreasonable, this would create a strong incentive for States to issue permits with artificially short permit terms, thus creating much additional paperwork with no corresponding environmental benefit. It would also be disruptive of existing State permit programs because many now issue permits with 5-year terms. The EPA therefore believes that the alternative interpretation was not the result intended by Congress.

Revisions must be made as expeditiously as practicable according to section 502(b)(9), but no later than 18 months after the promulgation of such standards and regulations. The 30-days advance notice to affected sources is again proposed as a requirement for the permitting authority.

Finally, certain changes will cause a revision to the permit by operation of law without necessitating any sort of reopening of the permit. For example, all acid rain allowance allocations and transfers shall, upon recordation by EPA, and in accordance with section 403 of the Act and Part 73, be deemed a part of each unit's acid rain permit requirements, without any further permit review and revision [403(d)(1)]. In addition, excess emission offset plans shall be deemed included into the permit upon approval by the Administrator, but without any further permit review or revision [411(b)].

(6) Permit Renewals

Section 502(a) of the Act States that it is a violation for a source subject to Title V to operate without a permit. Furthermore, section 502(b)(5)(B) requires that permits be issued with a fixed term of 5 years for acid rain affected sources and with a fixed term not to exceed 5 years for all other sources, except for solid waste incineration units subject to section 129(e), which can have terms of up to 12 years. The section 502(a) requirement to have a valid permit is qualified in part by section 503(b) which states

the source is not in violation of section 502(a) if a complete and timely application for renewal has been filed by the source owner, unless the delay in final action was due to the failure of the applicant to submit any required information requested to process the application. The EPA proposes that a timely submittal must allow sufficient time, before the expiration date of the permit, for the permitting authority to review and reissue the permit. The EPA believes, at a minimum, that this time must include the 45 days for EPA oversight and adequate time for permit processing, including public participation. In some cases, additional time may be necessary to be consistent with other review procedures. Therefore, EPA proposes the timetable for application submittal by the source be included as a condition within the permit and be for a period of 18 months unless a different time period is approved by the Administrator. This time presumptively would be correspondingly reduced in the case of permits with fixed terms of less than 5 years or where the permitting authority is obligated to act on the application in less than 18 months.

Section 502(b)(5)-(7) requires applications for permit renewal and the subsequent permits to be subject to the same requirements as were the initial applications and permits with respect to permit content and processing. This includes allowing up to 18 months to process a complete application. Section 502(b)(5)(C) specifically requires that, upon renewal, all permits incorporate all applicable emission limitations and other requirements of the SIP. The EPA is proposing in section 70.7 to minimize the burden of processing permit renewals by taking advantage of the fact that, in many cases, much of the data and analyses pertinent to the earlier permit is still applicable for the permit renewal. Upon certification by the source owner or operator that no significant change has occurred at the source since the time the existing permit was issued, a permit-renewal application can, at the option of the permitting authority, reference the relevant material submitted in earlier applications as an alternative to resubmitting the material. In addition, the renewal application must contain, in accordance with section 502(b)(9), those items related to new regulatory requirements which have become applicable to the source, any other regulatory requirements which have been determined to apply to the source, any other changes which would ordinarily require or permit modification.

Although referenced material in the renewal application was at one time subject to public comment and EPA review under the permit-renewal process, it is again subject to all the provisions of the permit-review process. Section 505(a) requirements for the transmission and notice of permit applications specially affirm their applicability to

renewals as well as those applications processed during the original issuance of the permit.

If the term of a permit expires before a complete application is submitted, the source's right to emit is terminated. The source is subject to enforcement action if it continues to operate even though a complete application is eventually submitted until it receives a new permit. The EPA proposes that the permit shield described in section 504(f), remain in effect with respect to requirements addressed in the permit provided the source submits a complete and timely application for permit renewal. However, the permit shield will be disallowed if requirements are inconsistent with the acid rain title.

Issues arise as to what requirements are enforceable on the source after the fixed term of its current permit expires and the source owner has not received a new permit. The EPA proposes that expired permit terms should remain enforceable as they are in the NPDES program, except where inconsistent with State law or as provided in Part 72 for the acid rain portions of a permit. In addition, any new requirements, from which the source was previously insulated by the permit shield in section 504(f), would apply upon expiration of the permit [IV.G.(5)].

Section 502(b)(9) deals with the need for certain permits to be reopened in the event that applicable standards and regulations are promulgated after the issuance of such permit [70.7]. This type of permit revision must be treated as a permit renewal and is subject to all the requirements described today which address permit renewals.

Finally, as permits which were processed in the transition period are reviewed, EPA encourages reviewing authorities to establish new fixed terms (e.g., terms of 3, 4, and 5 years) in these permits that balance the future workload. That is, the reviewing authority should define new schedules for renewal within reissued permits which take advantage of the 5 year timeframe opportunity rather than the 3 years required for transition.

(7) Operational Flexibility and Permit Revisions

(a) General

During discussions preceding the proposal of these regulations, many in the regulated community expressed concern over the ability of states to make changes in permits to reflect routine operational changes. Several different aspects of the permit program provide substantial flexibility for industry to make changes in operations without having to obtain prior governmental approval in the form of amendments to the existing terms of their permit.

Sections 70.6(d) and 70.7 of this proposed regulation set forth the framework for operational flexibility and permit revisions. More specifically, they establish minimum procedures for four classes of changes at sources: 1) changes under the CAA section 502(b)(10) that require no

prior revisions to the permit (see section 70.6(d)); 2) changes classified as "minor permit amendments" (see section 70.7(f)); 3) changes classified as "administrative permit amendments" (see section 70.7(e); and, 4) changes classified as "permit modifications" (see section 70.7(d)). The last three of these are grouped together under the term "permit revisions" (see section 70.2(v)). These changes are discussed below.

(b) Flexible Source Operation Under CAA section 502(b)(10)

The first, and perhaps the most important, source of flexibility is the general principle, articulated elsewhere in this preamble, that emissions or other practices not specifically prohibited by a permit are allowed if otherwise legal under the SIP and applicable federal or state law (see preamble discussion at section IV.E.5.b). Air permits summarize existing restrictions; a permit change is not affirmatively required to authorize every change in practices which are otherwise legal under the SIP or federal law merely because an existing permit does not address the practice. Thus, changes in industrial practices and procedures that do not run afoul of the terms of a permit can be made without seeking any change to the terms of the permit. For example, an industry would be free to alter its production processes in ways that alter its emissions unless some term of the permit (or other provision of the law) prohibits the change. Permits should be drafted with this principle in mind, so that they do not include unnecessary detail or restrictions which might unduly hamper industrial flexibility to change operations at a later date. See discussion of designing flexible permits in section (f) below. The states do, of course, have the ability to devise permit programs that would enable sources to choose between: 1) making changes that do not violate the permit without including them in their permits; and, 2) including such changes in the permit pursuant to the procedures established by the state. In the latter case, the sources would have the benefit of a permit shield.

If the explicit terms of the permit do prohibit a practice (for example, if a compliance plan for a noncomplying source contains specific provisions regarding how a source plans to comply which it then not wishes to change), the operational flexibility provisions under section 502(b)(10) of the Act (Section 70.6(d)) provide a "fast track" process for changing the terms of the permit without undue delay provided that the changes do not involve

an increase in the level of regulated emissions allowable under the permit.[5]

Although section 502(b)(10) avoids having the States and EPA continually repeat the full permit-review process for minor changes in operation, it does not alter a source's obligation to comply with any requirements of the Act that apply to its operations. This conclusion is suggested by the interaction of the "permit shield" provisions in section 504(f) with the "operational flexibility" provisions in section 502(b)(10). The permit shield provides that compliance with a permit is deemed to be compliance with the requirements of the Act to the extent the permit contains those requirements of the Act or contains a specific finding that a requirement does not apply. To the extent a permit does not address requirements that apply to a change in operations at a facility, those requirements are necessarily outside the scope of the protection provided under the permit shield provision, unless the permit has been revised.

Where the change would not be allowed in the permit but would not allowable emissions under the permit, EPA interprets section 502(b)(10) to require that the source give at least 7 days advance written notice to both the permitting authority and EPA. This notice must contain sufficient information to determine what new requirements of the Act apply (if any) to the changed operations. Of course, the permitting authority must incorporate any new requirements upon renewal. The EPA is therefore taking comment on its proposal to require an update of the permit after notification has occurred, provided that the new version of the permit be made publicly available.

The EPA believes that this proposal gives certainty as to what requirements are applicable to the source and assures the permit is consistent with section 502(b)(10), which specifies how sources may act without the need for a permit revision to incorporate changes not anticipated during permit issuance. In any case, upon renewal, the new conditions would be eligible for protection by the shield.

(c) Minor Permit Amendment

There remains a class of changes in facilities that would result in emissions above what is allowed in the

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[5]. Section 502(b)(10) requires that Title V programs "allow changes within a permitted facility...without requiring a permit revision, if the changes are not modifications under any provision of Title I and if the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions)," provided that there is written notification at least 7 days in advance, unless the permitting authority provides in its regulations a shorter timeframe for emergencies. See the following footnote for what constitutes a "modification" under CAA Title I.

permit that do not rise to the level of "modifications" under Title I of the Act.[6] For example, a permit might include emission limitations based on a RACT requirement in a SIP. If the permittee changes operations so as to become subject to a less stringent RACT limit in the SIP, it cannot increase its emissions to levels authorized by the new RACT limit without a change to the permit emission limitation. EPA has extensively considered whether additional provisions might permit increased emissions above permit allowables, as long as such increases would not violate any applicable requirement.

The Clean Air Act provides procedures for changing or revising permits. Section 502(b)(6) requires:

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[6]. Title I of the Act includes several different definitions of "modification" for purposes of different programs. For purposes of the new source performance standards (NSPS), the statutory definition of "modification" is found at 11(a)(4), and EPA's implementing regulations are found at 40 CFR 60.14. For nonattainment new source review (NSR), see sections 171(a)(4), 182(c)(6) and 182(c)(7) of the Act, as well as 40 CFR 51.165(a)(1). Section 51.165(a)(1)(x), in particular, exempts from treatment as a modification (for NSR purposes) a change resulting in a net emissions increase below the following levels: CO - 100 tons/year; NOx, SO2 and VOC - 40 tons/year; lead - 0.6 tons/year. New section 182 of the Act, however, now sets lower de minimis levels for various ozone nonattainment classifications. For attainment area new source review (prevention of significant deterioration, or PSD), see section 165(a) and 169(1)(c) of the Act, and 40 CFR 51.166(b). Revised section 112(b)(6) of the Act provides that PSD shall not apply to the toxic air pollutants listed in revised section 112(b)(1). EPA plans to revise the NSR and PSD regulations to reflect these statutory changes. For sources of hazardous air pollutants, see section 112(a)(5) and 112(g)(1)(A), for which EPA has yet to develop implementing regulations.

Some States may have more expansive definitions of "modification" than required under Federal law, which the States use to impose BACT or other new source requirements. The EPA encourages States to examine whether they wish to use the State or the Federal definition of modification to require permitting under Title V. The EPA does not interpret Title V to require that the definition of "modification" must be identical as a matter of State law for the purposes of both reopening the permit and imposing substantive new source requirements. The State may use the Federal definitions of modification under Title I to trigger permitting, while retaining its own definition of modification for imposing new source requirements, which may be informal, such as those described below for permit amendments. For Title V permits, however, the State definition at least must be consistent with the definition of modification contained in the federally-approved SIP.

"adequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, for processing such applications, for public notice, including offering an opportunity for public comment and a hearing, and for expeditious review of permits actions, including....revisions...."

With regard to permit changes that are considered "revisions" for purposes of Sec. 502(b)(6), EPA notes that the statute does not mandate specific procedures to be used for making "revisions" to permits. The primary thrust of section 502(b)(6), as EPA reads it, is a pronounced Congressional concern that the procedures used to issue or revise permits should not result in undue delay, as evinced by Congress's use of the terms "streamlined" and "expeditious". Beyond that, section 505 does not clearly prescribe which, if any, types of permit modifications must undergo EPA review.

EPA believes that the statutory language leaves substantial discretion to the states, as permitting authorities, to devise appropriate procedural schemes for making expeditious revisions to permits, including "fast-track" procedures to facilitate operational flexibility. As a matter of policy, EPA believes that states should be encouraged to implement expedited review procedures for changes that result in emission increases above permit allowables, but that are not Title I modifications and do not violate any applicable federal requirements, as long as such procedures include a minimum of 7 days notice. (Today's proposal includes a minimum set of procedures incorporating this 7 day notice requirement; see Section 70.7 (f)). The notice would go to the permitting authority and the Administrator. After waiting the required 7 days, the source may make the change unless the permitting authority objects to the notice change within the 7 day period.

EPA will review the procedures for revising permits proposed by states in their permit programs in conjunction with EPA's review of the applicable implementation plan. No particular form of procedures for revising permits is required. The basic test is whether a state's procedural system, taken as a whole, can assure that the national ambient air quality standards and other substantive requirements of the Act will be maintained and enforceable. See section 110(a). If the state's procedures can be administered in a way that would provide adequate mechanism for tracking permit revisions (either ex ante or ex post) to ensure that the substantive standards of the Act are met, EPA should ordinarily approve them, rather than speculate that the procedures might be misapplied. If a state subsequently applies its procedure for revising permits in a way that results in violations of air quality standards or other requirements of the Act, EPA has adequate remedies available to it under the Act, see, e.g. section 110(k)(5)

(calls to order revisions to SIP found inadequate); section 502(i) (assure adequate permit programs).

EPA solicits comment on what are the appropriate criteria for EPA to use in approving state procedures for revising permits.

(d) Administrative Permit Amendments

The second type of permit revision is defined in Part 70 as an administrative permit amendment and includes administrative changes such as correction of typographical errors, changes in address, change of ownership, etc. [for a full list, see section 70.2(c)]. The EPA proposes that administrative permit amendments can be handled by direct correspondence from the permitting authority to the facility after the appropriate information related to the changes has been supplied by the facility. Administrative permit amendments will address only the items prompting the amendment(s). A copy of the amendments should be supplied to EPA and a copy also placed in the record, which is available to the public in accordance with section 503(e).

The EPA is proposing that the following types of changes can, at the discretion of the permitting authority, be handled as administrative permit amendments and that such changes should be reported to EPA, but no later than the date specified for the at least semi-annual reporting on the source's compliance status. These types of revisions include changes in mailing address, ownership of the source (or part of the source) unless restricted by Title IV, contact persons, changes in individuals who have assigned responsibilities, (including the responsibility to sign permit applications), and similar changes as determined by the permitting authority.

The Agency also believes that correction of typographical errors should be accomplished through the administrative permit amendment procedures, rather than the permit modification procedures. In addition, the Agency requests comments on whether the permit amendment procedures are appropriate for requiring more frequent monitoring, and for exempting a unit from permitting requirements where emissions from the unit have terminated, so long as the termination of emissions from that unit does not result in an increase in emissions from any other unit or units. The EPA invites the public to propose other types of changes that should be handled by the administrative permit amendment process and comment on these suggestions.

In addition, EPA is today proposing to treat one other type of change initiated by an existing source as administrative permit amendment and eligible for the mentioned expedited processing. Changes which have been processed under the preconstruction review process which has been approved by EPA into the SIP have already in a source-specific way been subjected to sufficient technical review and adequate opportunity for public participation. The

Administrator believes that to require the permit revision procedure described in section 502(b)(6) to be followed simply to incorporate the results of the NSR program is unnecessary and redundant. Moreover, subjecting sources to another review could subject vast numbers of sources to significant delay and uncertainty without any real environmental benefit. The EPA believes, therefore, that the permitting authority should be allowed to revise the Part 70 permit administratively to reflect NSR limits.

EPA also solicits comment on whether the reviewing authority could instead issue a separate permit incorporating both preconstruction review and Part 70 requirements for those activities involved in the modification. These requirements would be incorporated into the conditions of the permit of the entire source upon its renewal.

(e) Permit Modifications

The third type of permit revision is a "permit modification", which includes any proposed revision to reflect a change at the source that would constitute a modification under any provision of Title I of the Act (except as provided un section 70.2(c)(5). See section 70.7(d). For purposes of Title V, certain changes in monitoring procedures which could increase emissions would also be included in the definition of permit modification. Such changes are situations where the proposed monitoring technique, in conjunction with permit emission limits, will allow emission measurements to deviate from the actual emission levels allowed in the permit by more than the applicable thresholds that trigger Title I modifications. Before a permit modification can be issued, the proposed changes must be reviewed by the permit authority and submitted to the public and EPA for comment in accordance with the procedures proposed in section 70.8. The EPA stresses that only the subject material associated with, or affected by, the modification need be exposed to review and comment.

The Administrator proposes that a permit modification would not affect the expiration date of the permit. Adjusting the fixed term of individual conditions would place the permit renewal schedule on multiple tracks, and would be both confusing and resource intensive. The only parts of a permit that require change are those which relate directly to the material being modified. Of course, a State may choose to issue a new permit, rather than simply modify the existing one. Acid rain permits, however, must be issued for a fixed term of 5 years. In order to promote national consistency in acid rain permitting, the Agency is recommending that, when modifying provisions in a permit for an acid rain-affected source, the permit not be reissued.

(f) Designing Flexible Permits

Permits should allow the source reasonable operating flexibility while enforceably imposing the Act's requirements. Operational flexibility is often a concern to manufacturers who must respond quickly to changing economic conditions and market opportunities if they are to remain competitive in the global market place. It is also important to regulators. Processing unnecessary permit modifications for routine changes takes time and provides little environmental benefit. To the extent that permitting authorities can accommodate a source's anticipated emissions, the source will be less likely to have to reopen its permit, and the public will be better apprised of the requirements applicable to the facility over time.

The following examples of industrial operations underscore the need for operational flexibility. Various aspects of automobile plant operation frequently change, not only from one model year to the next but also within the model year. Pharmaceutical batch plants produce small quantities of chemicals to meet consumer demands for new or specialized products. Although the types of chemical feedstocks and corresponding emissions can generally be predicted over the longer run, short-run market demands are often unpredictable and the manufacturer must be able to respond quickly. Leasing of chemical and petroleum storage tanks at ports and pipeline terminals presents another challenge because of the wide range of chemicals handled, often on short notice.

Several State permitting authorities confront these issues now, and many regulatory agencies have found creative ways to give industry flexibility while ensuring that the underlying requirements of the program are still met. These approaches have been recognized by the affected parties as appropriately implementing and making enforceable the requirements of the Act, while providing industry with needed operational flexibility. The EPA is proposing a policy for incorporating flexibility that is consistent with existing State permitting practices.

While EPA believes that operational flexibility is important to the fair and efficient implementation of the permitting program, this practice must be carefully implemented if Title V permits are to ensure application of all regulatory requirements and reasonable enforcement of those requirements. Therefore, this relief is necessarily limited in several important ways.

First, it is clear that allowing sources flexibility is a way of meeting the applicable requirements, not of avoiding them. A source cannot be granted a level of flexibility in its Title V permit that would allow it to avoid application of applicable requirements of the Act, whether imposed by NSR, NSPS, NESHAP, or through implementation plans.

Second, any limits must be clearly enforceable. Any alternative limits can be issued only to the extent that they are allowed by the underlying applicable requirements.

Third, the degree of flexibility available to the source may vary with circumstances specific to the source or pollutant. For example, if carbon adsorption is used for emissions control, the permit may need to pay special attention to species of VOC's (e.g., some may "break through" the carbon bed, or a different type of carbon bed may be indicated for alcohols).

When developing a flexible permit that accommodates several operating scenarios within the terms of the permit, the permitting authority must assure that the permitted source monitor and record the operating scenario under which the source is operating at all times.

The EPA is evaluating administrative mechanisms that would provide for permit drafting such that a source could, in the course of normal operation, readily change production methods without needing to apply for a modified permit for each change. This exemption from permit revision would not, of course, exempt from permit review any operational changes that cause a source to be newly subject to any requirements of the Act. The permitting authority must ensure that any permit conditions designed to provide operational flexibility must be clearly identified as such to be highlighted for EPA review. Various types of candidate approaches are described below. Public comment is solicited on these and other approaches to implement the requirement to provide operational flexibility.

(i) Permit in the Alternative: The permit can list the pollutants and control requirements for the anticipated operating scenarios. The permit would specify the source's pollution control requirements for each anticipated process or product line to be used. For example, the permit for a chemical batch processing facility can allow for various configurations and operating practices that the facility plans to use, obviating the need for obtaining additional approval when the changes are made.

(ii) Permit by Classes of Chemical: State programs often provide that groups of chemicals can be treated interchangeably for certain purposes. For example, a State's requirements for VOC emissions from storage facilities may be based on classes of compounds, classified by vapor pressure, rather than single compounds, e.g., the most volatile compounds could be stored only in pressurized tanks, those of intermediate volatility could be stored in floating roof tanks with double seals, while those of lowest volatility could be stored in fixed roof tanks. One State reports that it uses this approach in addressing the needs for operational flexibility in permitting extensive tank farms providing contract storage of chemical and petroleum products at a port and pipeline terminal. The State clearly

specifies control requirements based upon five classes of chemicals, allowing the facility complete freedom to store any chemical in any tank with the required, or higher, level of control. This is enforceable because it allows a field inspector to determine compliance unambiguously for any chemical stored in any tank, without burdensome restrictions on the facility's freedom to manage its operations efficiently.

(iii) Permit in Anticipation of the Most Restrictive Case: A State may appropriately allow considerable flexibility if the worst case emissions scenarios are dealt with in the permit, or if the source agrees to specific controls or other limitations, such as those on capacity utilization. For example, a source might be given great flexibility in the type of VOC emitted, if it agreed to provide emissions controls consisting of both carbon adsorption and incineration. Another example reported by a State involves a chemical storage facility that routinely is asked to store any of numerous types of chemicals, often on short notice. The source and State came to an agreement whereby a very wide range of chemicals could be stored, if stored in pressurized tanks and the emissions were flared.

H. Section 70.8 - Permit Review by EPA and Affected States

(1) General

Under the permit review process spelled out in section 505(b), the Administrator shall object in writing to the issuance of any permit determined not to be in compliance with the applicable requirements of the Act, including the SIP. To minimize delay, the Act limits EPA's opportunity to object to 45 days after receipt of a proposed permit. To approve a proposed permit, EPA need take no action. A "proposed" permit, for purposes of sections 505(a)(1) and (b)(1), is one the State submits to EPA after the public notice period and after it considers any public comments. The submittal of the proposed permit must also contain any notice required in section 505(a)(2)(B) describing why the permitting authority failed to accept recommendations on the proposed permit from any affected State (i.e., one whose air quality may be affected and are contiguous to the State in which the emissions originate, or that is within 50 miles of the source). If the State so chooses, the permit will automatically be issued at the end of the 45-day review period, unless EPA has objected to its issuance. The objection must be accompanied by a written statement of the reasons for the objection, and both must be provided to the applicant.

Each permit must contain all provisions required by Title V, such as monitoring, reporting, and compliance certification requirements. Failure to include these provisions is a basis for EPA veto. All permits involving SIP-regulated sources must interpret, implement, and apply the SIP in an enforceable manner to the permitted source.

For example, if the SIP fails to specify a test method, the permitting authority must specify one in the permit. Failure to properly apply a SIP to the particular permitted source so that it is fully enforceable is a basis for EPA veto.

If EPA does not object, any person may petition the Administrator to do so within 60 days after the expiration of the 45-day review period [505(b)(2)]. If petitioned, the Administrator has 60 days to determine whether to grant or deny the petition, and he shall grant the petition if it demonstrates that the permit is not in compliance with the requirements of the Act, including those of the applicable SIP. If he denies a petition, the denial is subject to judicial review under section 307 of the Act. Regulations implementing this process are set forth in section 70.8(d). It should be noted that a petition does not postpone the enforceability of a permit that has been issued.

A timely EPA objection, unless withdrawn, is effectively a veto, for the State permitting authority may not issue the permit as a Part 70 permit, unless it is revised to satisfy EPA's objection and resubmitted for approval [505(b)(3) and (c)]. The EPA proposes that, once the Agency approves the revised permit in writing, the permit may be issued. Pursuant to section 505(c), if the permitting authority fails to make the necessary changes and submit the revised permit to EPA within 90 days of the objection, EPA must issue the permit with changes, or deny the permit. This action by EPA would be subject to judicial review [V.D.]. While the possible EPA objection to the issuance of a Part 70 permit is being resolved, all applicable requirements of the Act still apply, except for the section 502(a) requirement to obtain a Part 70 permit (assuming that the source has filed a complete application and any required supplementary material). The EPA intends to use the Part 71 process (discussed in section VI) in issuing any permit for which the Agency becomes the permitting authority.

Section 505(b)(1) provides that EPA has a duty to object to a permit when it "contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this Act." The EPA views this duty as a discretionary one, however, since it is predicated on a determination by the Administrator of noncompliance. That determination is discretionary. [cf. Sierra Club v. Train, 557 F.2d 485 (5th Cir. 1977) holding that section 113 enforcement is discretionary despite parallel construction.] In any case, any duty to object is not enforceable by citizen suit. That is clear from the structure of the statute, which provides in section 505(b)(2) a petition process for citizens who wish EPA to veto a permit, and from the legislative history, which shows that the petition process is a replacement for

the Senate bill's approach, which would have imposed on the Administrator a nondiscretionary obligation under section 304, to object to unlawful permits. Finally, a citizen suit would not lie under the applicable case law to compel a veto under section 505(b)(1), since no explicit statutory deadline is provided [see cf. Sierra Club v. Thomas, 828 F.2d 783, 791 (D.C. Cir. 1987)].

Even the petition process under section 505(b)(2) leaves the Administrator with an element of discretion. Although the Administrator must grant or deny any petition within 60 days, he must object only "if the petitioner demonstrates to the Administrator that the permit is not in compliance with the requirements of this Act, including the requirements of the applicable implementation plan." This language plainly puts the burden of showing a violation on the petitioner. It remains discretionary whether the Administrator should object in cases where the record does not clearly disclose failure to comply. The petitioner must also raise objections "with reasonable specificity" during the comment period before the state, or to demonstrate to the Administrator in the petition to object that it was impracticable to do so. The EPA believes that Congress did not intend for petitioners to be allowed to create an entirely new record before the Administrator that the State has had no opportunity to address. Accordingly, the Agency believes that the requirement to raise issues "with reasonable specificity" places a burden on the petitioner, absent unusual circumstances, to adduce before the State the evidence that would support a finding of noncompliance with the Act.

(2) Waiver of EPA Review

The statute provides two different mechanisms that allow EPA to waive the notification requirements discussed above. First, at the time of the approval of a State program, EPA may waive the notification requirements for any category of sources (including any class, type, or size within the source category), except that EPA cannot waive the requirement in the case of major sources [505(d)(1)]. The Agency will not waive its right of review of permits for acid rain affected sources. Second, EPA may waive the notification requirements on a nationwide basis, through the promulgation of regulations applicable to all permitting programs. The same restriction against waiving the requirements in the case of major sources applies to this option as well [505(d)(2)]. When EPA waives the notification requirements by either of these means, the Agency ordinarily will not perform the permit review generally required by section 505(b).

The EPA is not proposing any categories of sources for national waivers from review. Comments are invited, however, with respect both to potential categories for such a waiver and to the appropriate use of waivers at the State

level, and on means of implementing them, such as through agreements with the States. Similarly, EPA seeks information on the use of waivers on a State-specific basis and the use of various mechanisms, such as audits and agreements between EPA and the States regarding coordination of activities, to efficiently implement such waivers or to set priorities for EPA review of State permitting [V.A.].

The EPA also solicits comment on the potential use of various review practices for quality-assuring the permitting process and carrying out the Administrator's responsibilities under section 505. Although EPA wishes to minimize administrative burdens, the Agency takes seriously its responsibility for quality assuring permitting, for which it shares enforcement responsibility.

Public comment is also solicited on the legal availability and appropriateness of waivers of notification for particular classes of sources, on a State-specific basis, after approval of a permit program. Section 505(d)(1) provides that the Administrator may waive this requirement "at the time of approval of a permit program under this title." Although this clause could be read as referring only to initial approval of the State program, it seems consistent with good oversight practice and the spirit of Title V itself that such waivers could be granted through EPA rulemaking whenever appropriate. Such practice would not be inconsistent with any of the statutory safeguards and, indeed, waivers may be more effectively tailored once a State has established a track record and a working relationship with the EPA Regional Office with respect to permitting various types of sources.

(3) EPA Veto

The general framework for EPA's veto of State operating permits is set forth above. The following are various issues that may arise from the implementation of this process.

(a) Inadequate Information Provided by Permitting Authority

Although EPA's duty to object to permits that are inconsistent with the requirements of the Act is clear, EPA also believes that it can object to the issuance of a permit where the materials submitted by the State permitting authority to EPA do not provide enough information to allow a meaningful EPA review of whether the proposed permit is in compliance with the requirements of the Act (including the SIP). Although section 505 may not expressly provide for objection to a permit on this ground, EPA believes that not allowing the Agency to object under these circumstances could severely hamper its oversight role. Without adequate information, it will be impossible to determine whether a proposed permit conflicts with the requirements of the Act. Given Congress' clear intention that EPA veto permits conflicting with these requirements, EPA believes that this

form of objection is reasonable and necessary [301]. Of course, EPA needs to work with States to develop a clear understanding in advance as to the amount and type of information needed to exercise reasonable Federal oversight.

When EPA objects to issuance of a proposed permit because the State has not provided enough information, it will accompany the objection with a statement of what additional information is needed. The State would then be responsible for forwarding the additional information to EPA within 90 days. Once this needed information is supplied to EPA, the Agency's 45-day review period will begin anew. If the additional information is not supplied, EPA will deny the permit or issue it with whatever changes are necessary to ensure compliance with the Act. The EPA solicits comment on this approach to obtaining adequate information and its authority for so implementing it.

(b) Failure of a State to Issue

The Act requires that a permitting authority issue or deny a permit within 18 months of receipt of a complete application. Further, the State is required to provide the Administrator copies of proposed and final permits to be issued. Where the permitting authority fails to provide these permits to EPA due to failure to issue or deny within the 18-month timeframe, this may be considered grounds for an EPA objection. The EPA would then request a proposed permit from the State with any additional information needed. If the permit is not received within 90 days, the Administrator will issue the permit.

(c) Streamlining the Process Through Early Federal Participation

Some States have expressed concern that EPA objections could unnecessarily slow some permitting exercises. One implementation approach that might allay this concern could be early EPA participation in the State's permitting action. For example, a State and EPA could agree that, for certain permits or classes of permits, EPA would review draft permit materials submitted to EPA even prior to the State's release of the draft proposed permit for public comment on permit issuance. Alternatively, the Agency could require that summary forms with certifications be filled out to prioritize the need for more extensive EPA involvement. The EPA could indicate, either officially or informally, whether it would object to any aspect of the proposed permit based on the draft and/or summary form. This might prove to be an effective way to enhance State and EPA cooperation on permit issuance. Such procedures might be formally established in implementation agreements between EPA Regional Offices and the States.

(d) Status of Proposed Permit if EPA Objects

If EPA objects to a proposed permit, the permit, as proposed, does not get issued. During this period of review and negotiation, the previously-issued permit and all

applicable regulatory requirements continue to apply, except where inconsistent with State law or as provided in Part 72 for the acid rain portions of a permit. For acid rain affected sources, if the previously-applicable permit has expired, the permit application and compliance plan will be binding on the source until the new permit is issued [408(d)(3)].

(e) EPA Action Upon Veto

Pursuant to section 505(c), if the permitting authority fails to submit a revised permit meeting EPA's objection within 90 days of the objection, the Administrator shall issue or deny the permit. The EPA's issuance of permits will be made pursuant to the Federal permitting program to be contained in Parts 71 and 124 [VI.]. This program will be proposed at the same time that EPA takes final action on today's proposal regarding State programs and will closely parallel the permitting practice required for State programs. Part 71 will contain all necessary provisions for EPA to administer a State program where a State defaults, although EPA may choose to make it effective only for certain areas and/or sources in order to address areas of concern.

(f) Public Petitions Regarding Decisions Not To Veto

Given the brevity of the EPA review period and the complex nature of many permits, there will be occasions in which EPA may not recognize that certain permit provisions do not comply with the requirements of the Act. If this happens, the statute provides an opportunity for citizens to petition EPA to reconsider its decision not to object to issuance of the permit. Within 60 days after expiration of the 45-day EPA review period, any person may petition the Administrator to object. This petition must be in writing, and the petitioner must provide a copy to the State permitting authority and to the permit applicant [505(b)(2)].

The petition must specifically state why the petitioner believes that the permit conflicts with applicable requirements of the Act and cite the particular provisions alleged to be inconsistent. Moreover, section 505(b)(2) provides that "[t]he petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided by the permitting agency (unless the petitioner demonstrates in the petition to the Administrator that it was impracticable to raise such objections within such period or unless the grounds for such objections arose after such period)." This section of the statute specifically provides that filing of the petition does not postpone the effectiveness of the permit. Thus, the new permit remains in full effect, and the source may operate under its provisions pending EPA's consideration of the petition. Sources should be aware, however, that under these circumstances EPA may object to

the permit. Upon such objection, particular provisions of the permit may no longer shield the source from enforcement of certain other requirements of the Act. In other words, the source may become subject to revised or additional requirements. It therefore may be advisable for sources to await the outcome of the petition process before making changes that are consistent with the recently issued, but contested, permit.

The Administrator is required to grant or deny such a petition within 60 days after it is filed. If he grants the petition, he will object to the permit as not being in compliance with the requirements of the Act [505(b)(2)]. If the permit has already been issued, "the Administrator shall modify, terminate, or revoke such permit and the permitting authority may thereafter only issue a revised permit in accordance with paragraph (c)" [505(b)(3)]. In other words, the permitting authority must follow the same procedure as if EPA's objection had been made during the 45-day review period. In accordance with the proposed policy on reopening permits for cause, EPA is proposing not to require a permit to be modified, terminated, or revoked until the permitting authority has had an opportunity to act expeditiously under its own authority.

In the event that the Administrator denies the petition, the permit remains unaffected, as if no petition had been filed. Denials of petitions will be accompanied with a statement of the reasons for this action.

I. Section 70.9 - Fee Determination and Certification

(1) Section 70.9(a) - Fee Requirement

This section establishes the requirement for an owner or operator of a source subject to the requirement to obtain a permit to pay an annual fee sufficient, in aggregate, to fund the permit program. This provision is designed to ensure the permitting authority's ability to perform the necessary air quality permitting and associated management functions entrusted to it. The State is also charged in this provision with assuring that the revenue generated from permit fees be used solely to offset the appropriate costs associated with the permit program.

The Act provides that the State program must ensure that Part 70 sources pay fees sufficient to cover "all reasonable (direct and indirect) costs required to develop and administer the permit program requirements of this title, including [the small business stationary source technical assistance program] and including the reasonable costs of [certain enumerated activities]." A State fee program must also cover the development and implementation costs of any local agency program [502(b)(3)(A)].

The Act further provides that the fees "shall be utilized solely to cover all reasonable (direct and indirect) costs required to support the permit program" [502(b)(3)(C)(iii)]. The EPA wishes to confirm that this

restriction applies to State, as well as Federal, collection of fees. Although the restriction is located in section 502(b)(3)(C) [which primarily addresses EPA collection of fees], it references the general fee provisions "under this subsection." The legislative history confirms this interpretation. For example, the report of the Senate Committee on Environment and Public Works provides that fees shall be utilized to support the air pollution control program of the *State permitting authority*" (emphasis added) [S. Rep. No. 228, 101st Cong., 1st Sess. 351 (1989)].

If the State program fails to provide an adequate fee schedule, or does not implement its fee program properly, EPA is authorized in section 502(b)(3)(C)(i) to assess an amount appropriate to cover EPA's costs associated with administering an EPA-promulgated permit program. The EPA also solicits comment on whether the Agency may assess fees to cover other costs such as the State costs in developing and administering the permit program. The EPA also solicits comment on whether, additionally, EPA may assess and return to the State, a sum to cover air program costs related to the permit program (e.g., the portion of SIP-development costs related to Part 70 sources).

The EPA may undertake the action stated above regardless of whether it or a State agency ultimately issues the permit. Penalties and interest may be collected as appropriate.

(2) Section 70.9(b) - Fee Schedule Adequacy

Section 70.9(b) describes the criteria against which the adequacy of any fee schedule submitted to EPA by a State will be evaluated. Essentially, a fee schedule can be judged to be adequate if it meets one or both of two tests. A fee program is adequate if it results in the collection of revenues sufficient to recover all the reasonable direct and indirect costs of supporting the development and administration of the permit program, including those itemized in section 502(b)(3)(A). The alternative test for approval focuses on whether the proposed fee program would result in the aggregate collection of fees equal to or greater than an amount of $25 per ton per year (annually adjusted for CPI changes) for each regulated pollutant that the subject sources emit.

The critical issue associated with implementing the first test to be resolved by this rulemaking is defining the scope of program costs that can be recovered through fee collection. The specifically enumerated costs include: (1) reviewing and acting on permit applications; (2) implementing and enforcing permit terms and conditions (not including court or enforcement-action costs); (3) emissions and ambient monitoring; (4) modeling, analyses, and demonstrations; and (5) preparing inventories and tracking emissions [502(b)(3)(A)(i)-(vi)].

The EPA believes that the statutory provisions make clear that permit fees must recoup direct "permitting" costs, including costs of developing the permit program, reviewing permit applications, holding hearings, issuing new and renewal permits, and conducting inspections and other aspects of permit enforcement (except for enforcement actions or court costs). This includes activities performed by air pollution control agencies which do not issue permits directly and surveillance activities on certain smaller sources to ensure that they are not subject to the Title V permit program. For some sources (e.g., SO_2), these costs will include the costs related to ambient monitoring near the source, as well as source-specific modeling and attainment demonstrations to the extent that the costs are incurred as part of regulating the Part 70 sources.

The EPA further believes that indirect permit program costs include the costs arising from permitted sources for SIP development (e.g., for VOC sources, the portion of the costs for areawide monitoring, modeling, development of attainment demonstrations, and development of SIP regulations to be codified into permits that arise from regulation of Part 70 sources but not the portion of the additional costs arising from regulation of non-Part 70 sources). Indeed, each source, at the option of the permitting authority, could be subjected to a permit process that occurs concurrently with the SIP process and under which the applicable SIP requirements and support analyses would be accomplished with all costs directly borne by the source. However, defining applicable requirements and gathering relevant data can be viewed as more economical than requiring that Part 70 sources individually perform these functions to assure that acceptable permits can be issued. In addition, indirect permit program costs include the portion of overhead costs attributable to the above-specified activities, as well as information management activities to support and track permit application, compliance certifications, and related data entry.

Permit fees must also cover the costs to support development of programs under which the permitting authority assumes responsibility for administering regulations under sections 111 or 112, to the extent those costs are related to emissions from sources which may be subject to permitting. Permit fees required by the Act may not be used to recoup costs attributable to mobile or area sources as defined in section 110 (e.g., the costs of inventorying mobile or area sources, and the additional costs incurred as a result of including these sources in performing areawide monitoring, modeling, and attainment demonstrations). Conversely, fee revenues collected from non-Part 70 sources cannot be used to offset the costs of a Part 70 permit program and thereby reduce fees required to be collected from Part 70 sources.

Defining indirect permit program costs to include SIP development costs also makes sense from the standpoint of parity between sources of different types of pollutants. As noted above, permit fees cover the costs associated with monitoring and modeling for an SO_2 source when SO_2 NAAQS violations can be directly linked to that source's emissions and such monitoring and modeling that are part of the permit issuance or revision process. Although ozone NAAQS violations generally result from areawide emissions, not the emissions of a single source, emissions from individual sources contribute to the need for basinwide monitoring, modeling, and attainment demonstrations.

The EPA interprets the legislative history as consistent with EPA's position that permit fees must recoup not only direct permit costs, but also the SIP development costs arising from permitted sources. The Senate bill clearly treated SIP development costs as part of the permit program costs [S. Rep. No. 228, 101st Cong., 1st Sess. 351 (1989)]. Senate conferees emphasized that the Conference Agreement required fees to cover a broad range of direct and indirect permit program costs, including "the establishment of air emission standards" [136 Cong. Rec. 516, 941 (daily ed. Oct. 27, 1990) (Chafee-Baucus statement of Senate Managers, S. 1630, the Clean Air Act Amendments of 1990)]. The EPA interprets this as a reference to establishing emission standards or limits for permitted sources, which may be done through the SIP and subsequently codified into permits. In addition, the Senate conferees emphasized the primary role of the permit program in implementing the other requirements of the Act, including attainment of the NAAQS [136 Cong. Rec. 516, 938 (daily ed. Oct. 27, 1990) (Statement of Sen. Baucus)]. These statements indicate that the indirect costs of the permit program include SIP development costs. Although the Conference Agreement seemed to narrow the requirements of the Senate bill, it appears that the purpose of this was to assure that only permitted source-related costs, not mobile source-related or area source-related costs, were covered by permit fees [136 Cong. Rec. 516, 941 (daily ed. Oct. 27, 1990) (Chafee-Baucus Statement of Managers)].

The statements by the House Committee and House Conference members are less detailed on the scope of permit fees [H. Rep. No. 490, 101st Cong., 2d Sess. 343, 345 (1990); 136 Cong. Rec. E 3,712 (daily ed. Nov. 2, 1990) (Statement of Rep. Dingell)]. However, EPA does not read them to be inconsistent with the statements in the Senate. As a result, EPA interprets the legislative history to accord with its view that permit fees must recoup the portion of SIP development costs attributable to stationary sources.

The second option for fee schedule approval comes directly from section 502(b)(3)(B) which provides that

"[t]he total amount of fees collected by the permitting authority shall conform to the following requirements:... The Administrator shall not approve a program as meeting the requirements of this paragraph unless the State demonstrates that" the program will result in a collection, in the aggregate, from sources all subject to the requirement to obtain a permit, of at least $25 per ton of regulated pollutant, not including amounts of regulated pollutant emitted by any source in excess of 4,000 tpy of that regulated pollutant. The Administrator may determine that an amount less than $25 is acceptable if the Administrator "determine[s] that such lower amount adequately reflects the reasonable costs of the permit program." This latter procedure is addressed in the first option for fee schedule approval discussed above. A regulated pollutant is defined under section 502(b)(3)(B)(ii) to include VOC's, pollutants regulated under section 111 or 112, and each NAAQS pollutant (except for carbon monoxide).

The EPA takes the position that these provisions intended to establish a presumption that a fee program that collected from all subject sources, in the aggregate, the $25 amount on an annual basis would meet the requirements of covering the costs of the permit program. Accordingly, if a State submits a fee program that provides for collection of the $25 amount, EPA will presume that the fee program meets the Act's requirements, and will propose to approve it. However, if public comment, or other information brought to EPA's attention, reasonably suggests that the $25 amount is not adequate to recoup the required costs, then EPA will scrutinize the State's costs to determine whether the $25 amount is adequate.

The EPA believes this position is consistent with the Act because of the very presence of the $25 minimum amount provisions. Congress could have simply required permit fees to recoup permit program costs without specifying a minimum amount. The presence of the $25 minimum amount indicates that Congress presumed that this amount would suffice to recoup the costs. Indeed, several statements by Congressmen found in the legislative history indicate that they viewed the permit fee program as, in general, a $25/ton fee program. [136 Cong. Rec, 52107 (daily ed. March 5, 1990, (statement of Sen. Chafee); 136 Cong. Rec. E3674 (daily ed. Nov. 2, 1990) (statement of Rep. Bilirakis)]. The EPA takes comment, however, on whether it should interpret the Act to require a State to show that the fee amount recoups State costs.

To make an acceptable demonstration, several clarifications are needed. The statute is ambiguous as to exactly when a substance becomes a "pollutant regulated under section 111 or 112," as that phrase is used in section 502(b)(3)(B)(ii). For example, for hazardous pollutants, a pollutant listed in the statute under

section 112(b) might be considered to become a "regulated pollutant" for purposes of Title V at any of the following times: (1) at the time of enactment of the 1990 Act Amendments, (2) when EPA first promulgates a MACT standard for that pollutant, or (3) when a MACT standard for that pollutant first becomes applicable to the permitted source. The term "regulated pollutant" is susceptible to each of these readings, and neither the statute nor the legislative history of the Act Amendments provides guidance as to which of these three possibilities was intended by Congress.

The EPA is proposing to adopt the second of the above options, because it considers a substance to be truly regulated when a standard is first promulgated that addresses that pollutant. The EPA considers the other two options to be viable, however, and therefore solicits comment on whether it should instead adopt either one of them. Similarly, following the second option described above, EPA proposes that a pollutant becomes a "regulated pollutant" when it is first addressed by a section 111 standard, but solicits comment on whether it should be considered regulated for purposes of Title V only when the standard becomes applicable to the permitted source.

This same question does not arise for VOC's and the NAAQS pollutants (other than carbon monoxide), because the definition of those terms in section 502(b)(3)(B)(ii) does not include the qualifying term "regulated." Thus, EPA believes that fees must be assessed for emissions of all of these pollutants at the source. The EPA also believes that NO_x, as well as NO_2 (a NAAQS pollutant), is to be considered a regulated pollutant. The NSPS program currently contains standards relating to NO_x emissions [40 CFR 60.44].

The regulations also presume that the State will base a demonstration that it is meeting the cost-per-ton test on the actual emissions of all the Part 70 sources in the State. Using actual emissions to set fees in this fashion creates an incentive for sources to reduce actual emissions to reduce their fees. The State, however, must demonstrate that this method supports the program consistently and that the State can accurately determine the fee base. If the permitting authority can address the difficulties of determining its actual emissions fee base and supporting its program, the regulations give the State the flexibility to incorporate such incentives into its fee structure. The proposed definition of actual emissions in section 70.2 would presumptively use emissions actually emitted over the preceding calendar year. Thus, after the initial startup of the program, the permitting authority could rely on actual emissions data developed and reported by the permittees (presumptively required as a permit condition) to define the basis for assessing fees for the next year.

Alternatively, EPA could use the definition of actual emissions used in EPA's NSR regulations. This definition

defines actual emissions with reference to emissions during the 2-year period preceding the relevant permitting date, or any 2-year period that falls within 5 years of that date, "upon a satisfactory determination that it is more representative of normal source operation." In the context of the PSD program, EPA is now exploring the option of allowing sources subject to Title IV to use any 2-year period falling within the 5-year period preceding the relevant date, without a showing satisfactory to the permitting authority that 2-year period is indeed more representative of the source's normal source operation. The EPA solicits comment on using this alternative, for at least affected sources under Title IV, to determine actual emissions for purposes of calculating fees under Title V.

The Act and regulations provide that the State can also choose other approaches for determining the total emissions, provided sufficient revenue will be raised to offset the applicable costs of developing and implementing the program. For example, the potential to emit of all Part 70 sources might be chosen. Relying on the sources' potential to emit (considering emissions limits or the requirement to use control equipment that are federally enforceable) may allow the State to predict total fee revenue with greater reliability. The State can determine its sources' potential to emit by examining their permits, and that potential will not vary as much a source's actual emissions from year to year. Also, relying on potential emissions creates an incentive for a source to reduce its potential emissions, thereby aiding the State in demonstrating attainment and maintenance of the NAAQS under its SIP.

The EPA also proposes that the calculation of revenue associated with the presumptive $25/ton number may, but is not required to, consider income from any regulated pollutant emissions beyond the 4000 tpy level from any Part 70 source. In addition, the Agency proposes that no double counting occur. That is, to the extent that the emissions of a source are regulated for more than one reason (e.g., toxics and VOC) in determining the amount of fee revenue, the permitting authority is not required to include any amount of regulated pollutant that is otherwise regulated and included in the fees owed by the Part 70 source.

As mentioned, the $25 per ton figure is to be used relative to the aggregate of all sources subject to the permitting program. That is, the State may differentiate among source categories and pollutants in assessing the fees, as long as the permitting authority demonstrates that the total fees collected are sufficient to support the permit program or meet the $25-per-ton amount in the aggregate. This ability to differentiate also includes affected sources subject to Title IV, notwithstanding section 408(c)(4). This section provides that during the years 1995 through 1999, no fee can be required to be paid

under section 502(b)(3) or under section 110(a)(2)(L) with respect to emissions from any unit which is an affected unit under Phase I of the acid rain program. The Agency interprets this provision to mean that EPA may not collect fees from Phase I-affected sources prior to January 1, 2000. States, however, are not precluded by that provision from fee collection at these facilities pursuant to other requirements of the Act.

(3) Section 70.9(c) - Fee Adjustment

In future years after the establishment of a permit fee program, fee schedules may need to be modified due to either inflation or to a substantial increase in program costs. For example, a future NESHAP may be promulgated covering source categories with large numbers of individually small sources in terms of how much of the regulated pollutant is emitted. Monitoring the compliance of these sources may substantially increase the resource demand on the State agency. The Amendments specifically require for recalculation of permit fees each year after enactment, by a percentage that is tied to the CPI. However, the EPA is concerned that the mechanism for modifying permit fees may not be in place. Of main concern is whether the State agency has authority to modify permit fees or, alternately, must the State legislature approve any revision. Accordingly, EPA urges States to provide enabling legislation that gives the agencies sufficient legal authority and flexibility to manage their fee structures. The EPA solicits comments on problems associated with providing State agencies with the authority up front to revise permit fees and on what factors should constrain future increases beyond those needed to account for CPI changes. Specifically, EPA would like information on the way permit fee revisions are currently handled and whether revisions to the permit fees required under this title should be handled in a similar fashion.

(4) Section 70.9(d) - Fee Demonstration

This section requires the State to provide a demonstration that program costs will be covered. A specific demonstration of the adequacy of permit fees in covering program costs would be required in two cases. The first case is where the fee amounts to less than $25 per ton per year. As indicated above, the lesser fee would be approved by EPA only if it can be shown that the revenues collected with this fee adequately support the program. The EPA believes that States seeking to collect less than the $25 amount must persuasively demonstrate that a lesser amount will adequately cover the required costs. To make this demonstration, the States must submit a detailed accounting of the required costs and anticipated fee collections. The EPA believes that the Act's provisions establish a strong presumption in favor of fees at least equivalent to $25/ton,

and that States seeking to collect less bear the burden of demonstrating that less is nevertheless adequate.

Section 502(b)(4) requires that State programs must also provide for adequate personnel and funding to administer the permit program. In the past, inadequate resources have often prevented State agencies from completely fulfilling their air quality management responsibilities under the Act. This requirement is designed to overcome that aspect of the resource problem.

(5) Legislative Authority

Appropriate legislative authority must exist for the permitting authority to have the ability to assess and collect fees. Many State agencies already have such authority and require at least a nominal payment for the processing of air permit applications. However, some States do not collect permit fees and will need to obtain from their legislatures the authority for the permit fee program. Further, many States with permit fee programs may need authority to substantially increase their fee structures.

After the appropriate authority has been established, a requirement for program adequacy is the demonstration that the fees collected will be retained to support the permitting program. This should include, where applicable, provisions for providing funding to other air pollution control agencies which perform air permit program activities but do not issue permits directly. In reviewing permit program plans, EPA will be looking for a system which tracks the payment and disposition of fees. It is vital that the permit fees not be diverted for some other use. However, EPA would like to give the States as much flexibility as possible in handling permit fee retention. For example, in some States it may not be possible for the air agency to administer the collection and distribution of the permit fees. In this case, EPA would consider it acceptable for the fees to be paid to a State general fund, rather than directly in the air agency fund, provided all such funds are assured to be returned to the air agency on an annual (or similar period) basis. In any event, EPA believes that periodically (e.g., every 2 to 3 years) a document summarizing the collection and subsequent use of permit fees should be provided to the Agency, as well as to the public.

(6) Transition Problems

State agencies will likely experience some transition problems as they convert to the air quality management program called for in the Act. With respect to the permit fee requirement, EPA would like to accommodate existing programs to the extent possible. Of particular concern are the discontinuities potentially caused in States where the State agency collects permit fees but a local agency carries out most of the permitting responsibilities. The EPA believes that an understanding on fee assessment and collection needs to be reached at the State level before

program submission, and that local agencies should be compensated in a manner commensurate with their level of permit activities. The EPA proposes that there does not need to be one uniform State fee structure, particularly where one would unnecessarily disrupt existing programs. Further, EPA feels that consultation with State and local agencies prior to plan submission will help to resolve potential problems. Given these concerns, comments are solicited on how EPA input should be coordinated.

Other types of transition issues relate to the early collection of fees. Section 502(b)(3)(A) requires that "sources subject to the requirement to obtain a permit" pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable (direct and indirect) costs required to *develop and administer* the permit program (emphasis added). The EPA proposes to interpret these provisions to authorize the imposition of fees on sources that State reasonably expects to be permit applicants, and to impose those fees prior to the date the source is required to submit an application. If these permit fees were restricted to the date the program becomes effective or the sources are required to submit an application, potentially insurmountable transition problems could exist for States trying to build up their capabilities to allow for effective implementation of the program. Given the clear mandate in Title V for the timely submittal of State permit programs, EPA believes that States should be allowed reasonable opportunities to collect fees which fund the development of their required Part 70 program. One approach might be to collect such fees during an early identification or registration of subject sources. Other reasonable strategies might involve fee payment by sources subject to a State program which has received interim EPA approval. The EPA solicits comment as to what approaches are appropriate for agencies to collect fees prior to program approval.

(7) Small Source Fees

The Act requires the establishment of a technical and environmental compliance program for small businesses. Part of the goal of this program is to alleviate the financial burden placed on small businesses by the new requirements embodied in the Act. The EPA is promoting, and solicits public comment on, establishing a relaxation or waiver in permit fees for small businesses where necessary. This $25 per ton is essentially an accounting technique, not a presumptive fee requirement. The EPA invites comments on other adjustments to the fee schedule for small sources that may be necessary.

J. Section 70.10 - Federal Oversight and Sanctions

The EPA periodically will audit State permit programs to ensure that the programs are being administered in accordance with EPA's regulations and the conditions under which they were approved.

As in the case where the State fails to develop and submit an approvable program, where EPA determines that a permitting authority "is not administering and enforcing" a permit program as required, the Agency may (and in some cases, must) apply sanctions against the State [502(i)]. Such a determination ordinarily will follow an EPA audit of the program. A consistent pattern or practice of failure by the State to adequately carry out its program, however, may give rise to an EPA determination that the State is not adequately administering and enforcing it, regardless of whether a formal audit has been conducted recently. A dispute over a single permit rarely will give rise to a general finding of failure to carry out the program on the part of the State. Moreover, the statute makes it clear that only EPA may make the determination that a permitting authority is failing to adequately administer or enforce the program.

When EPA makes such a determination, it must notify the permitting authority. For the first 18 months following this notification, EPA may apply any of the sanctions provided in section 179(b), but is not required to do so [502(i)(1)]. After 18 months, if the permitting authority has not corrected its program, EPA "shall apply the sanctions under section 179(b) in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 179(a)" [502(i)(2)].

The two sanctions provided for in section 179(b) are (1) a prohibition on the award of Federal highway funds or the approval of any Federal highway project by the Secretary of Transportation, other than for safety or mass transit, and (2) a requirement that sources subject to NSR requirements of section 173 obtain emission offset reductions in a ratio of at least two-to-one.
Section 502(i)(3) further provides that EPA shall not apply the section 179(b)(2) sanction (regarding the requirement to obtain two-to-one offsets) in any area for failure to administer and enforce the permit program unless the failure "relates to an air pollutant for which such area has been designated a nonattainment area." The EPA believes that failures to carry out a permitting program rarely will be pollutant-specific failures. If the failure does not relate to only one pollutant, EPA has the authority to apply the section 179(b)(2) offset sanction in any area that is designated nonattainment under section 107 for at least one pollutant.

As discussed above, the Act's legislative history on the operating permits title shows that EPA should take over permitting of sources only as a last resort. The States are far better equipped to issue operating permits. However, section 502(i)(4) requires EPA to step in and take over permitting if a State has not corrected the cited

deficiencies in its program within 2 years of the date that EPA determined the permitting authority was not adequately administering or enforcing its program. Thus, EPA shall promulgate, administer, and enforce a Federal permitting program for a State 6 months after the date that EPA is required to apply sanctions against the State. Part 71 will contain all necessary provisions for EPA to administer and enforce a Federal permitting program for a State. The EPA shall publish notice in the FEDERAL REGISTER that it intends to administer and enforce such programs for a State within 6 months after the date that EPA is required to apply sanctions against the State. Whenever EPA determines that the State has corrected the deficiencies in its program, the Agency will cease administering the Federal permits program and return permitting authority to the State.

K. Section 70.11 - Requirements for Enforcement Authority

This section was added to promote greater consistency with the NPDES program and to ensure that the basic framework for effective enforcement of Title V would be in place. This section contains specific requirements for enforcement authority consistent with those contained in 40 CFR 123.27, with appropriate adjustments to conform to the Act.

The EPA encourages State and local permitting authorities also to have administrative enforcement authority similar to section 113 of the Act as amended, although it is not required by section 70.11. Having administrative enforcement authority in addition to judicial enforcement authority has many advantages. First, administrative cases generally have lower forum for minor or straightforward violations. Reliance on the judiciary for all enforcement cases also may cause significant delays in pursuing violations considering how overburdened State and Federal judiciaries are. For both these reasons, more violations may be pursued if the permitting authority has administrative enforcement authority.

V. Additional Topics of Discussion

A. Implementation Agreements Between State Agencies and EPA

(1) General

The operating permits program set forth in Title V is designed to streamline the regulation of major sources by incorporating all of the various Act requirements to which a source is subject into a single document. The effective implementation of this new program will undoubtedly require a high level of cooperation and coordination between State and/or local air pollution control agencies and EPA. It is important, therefore, that directors of State and local air control agencies establish an implementation agreement with the appropriate EPA Regional Office. Such an agreement would define the manner in which the permits program is to

be administered by the permitting authority and reviewed by the EPA Regional Office.

An implementation agreement should be administrative in nature. It should establish the policies, responsibilities, and procedures to be followed by the two parties in administering Title V. It should define the relative program responsibilities and priorities regarding such topics as reporting and data requirements, administrative deadlines, enforcement of permits by the States, and procedures for permit and program review. It should not be used as a substitute for rulemaking (i.e., to make additions or modifications to the permit regulation) or the SIP.

Such an agreement should be developed during the period that the States are developing their Title V programs, and it should be submitted along with the State program submittal. Submittal of the agreement at this time is critical because it will require the permitting authority to analyze the administrative aspects of the program in an organized manner and show that such details have been considered before development of program requirements and agreed to before subsequent approval by EPA. Both the permitting authority and EPA will benefit from this in the long run. It is important to note that implementation agreements with State and/or local control agencies will be made publicly available in the EPA docket for this regulatory action but will not be subject to the Federal rulemaking process.

The concept for the implementation agreement stems from the use of a memorandum of agreement (MOA) between State agencies and EPA Regional Offices in the NPDES program under the CWA. The NPDES program provided the basic blueprint for the Title V legislation and has successfully used the MOA concept to enhance program implementation. Experience shows that the MOA has led to better State/Federal communications.

The implementation agreement identified in this section can come in any format and does not have to take the specific form of an MOA. It need only cover the types of issues described in the next section. The EPA solicits comments on the need for a model MOA and its anticipated usefulness.

The benefits associated with an implementation agreement are numerous. First, as previously noted, it will provide for better interagency communications. Second, State and local permitting authorities should gain greater certainty about EPA's oversight activities under the program. Third, an implementation agreement can complement section 105 grant agreements and conditions and can help define how EPA Regional Offices will relate to States. Fourth, the implementation agreement can be used to allow for minor program changes (e.g. changes on a State permit application form) in the future without rulemaking.

(2) Recommended Topics Within Implementation Agreement

The Administrator proposes for comment that a typical implementation agreement may include provisions relating to the following topics:

(a) Meetings between the Permitting Authority and EPA

Both parties agree that either can call meetings to review operating procedures, resolve problems, or otherwise enhance implementation of the permit program.

(b) Legal Authority

The permitting authority agrees to develop and maintain legal authority and resources for effective program implementation.

(c) Accounting Report

The permitting authority agrees to provide an accounting report to EPA covering the timeframe specified by the Agency which demonstrates how revenues from permit fees were spent by the agency and how they are used in meeting the designated air agency's maintenance of effort program requirements contained in section 105.

(d) Required Submission of Documents

Both parties agree to identify the kinds of documents and the frequency with which they are to be submitted by one party to the other. Examples include copies of permits the State has decided to revise, revoke, or terminate. The EPA agrees to keep the State agency informed about new regulations, reports, policies, and litigation settlements. State agrees to notify contiguous States and other States within 50 miles of all permit applications.

(e) Public File

The permitting authority agrees to maintain an adequate public file (excluding information entitled to protection from disclosure under section 114(c) of the Act) for each permittee. The types of reports to be included in each file are to be specified in the agreement. Public information will be made available to any party upon request for the applicable duplicating fee.

(f) EPA Funding

The EPA may provide additional section 105 funding support for the State program, particularly during the program transition period, where such funding is necessary and available.

(g) Technical Support and Assistance

The EPA agrees to provide technical support and assistance for interpretation of national regulations, automated transmission of data to EPA, and general technical assistance in processing permits.

(h) Information Management

State permit information systems should be compatible with the national operating system with regard to a set of minimum standard data elements, as well as standardized program procedures, including timely submittal of required data. These requirements are to be defined in subsequent guidance.

(i) Priorities for Permit Processing

Both parties agree to identify and implement priorities (e.g. sources subject to new source review) for permit processing.

(j) Enforcement

The State agrees to maintain a vigorous enforcement program, including the following:

(i) Quarterly reports of compliance information to EPA.

(ii) Annual reports of State enforcement activity.

(iii) An automated compliance monitoring tracking system.

(iv) Timely review of compliance records, monitoring reports, inspection reports, and compliance certifications.

(v) Compatibility with and/or use of AIRS, including information transfer procedures conforming with national requirements to be developed.

(vi) Certification of reports by a responsible official.

(vii) Appropriate enforcement actions taken in a timely manner.

(viii) Timely field inspections in accordance with approved procedures.

(ix) Procedures for receiving and properly considering information submitted by the public about violations.

(k) Program Review

The EPA will conduct the following activities to ensure that program objectives are met:

(i) Timely review all information submitted by the State agency.

(ii) Meet with State and/or local officials periodically to discuss program implementation.

(iii) Examine files and documents at the State agency for selected facilities to determine that permits are processed, issued, revised, renewed, and enforced in a manner consistent with Federal requirements.

(iv) Review and certify periodically the legal authority upon which the State's program is based and notify EPA of findings.

(v) Hold public hearings on draft proposed permits, as necessary.

(vi) Review the State and/or local agency's public participation policies and procedures as needed.

(vii) Respond promptly to proposed program changes.

(l) Program Changes

The permitting authority agrees to take the following actions regarding changes in its permitting program:

(i) Seek and adopt legislation (or other actions) to maintain compliance with the permitting program.

(ii) Notify EPA of any proposed substantial change in the program and transmit the text of any such change.

(iii) Notify the EPA within 10 days of any change to the program and transmit the text of such revisions.

B. Relationship of Permit Programs to SIP's

(1) General

Under the Act, the SIP remains the primary means of assuring attainment and maintenance of the NAAQS. Requirements in the underlying SIP will form the basis for the permit requirements. As previously mentioned, section 504(a) requires each permit issued under Title V to include, among other things, "such . . . conditions as are necessary to assure compliance with applicable requirements of this Act, including the requirements of the applicable implementation plan." Section 505 requires that EPA object to any permit that "contains provisions that are determined by the Administrator as not in compliance with the applicable requirements of this Act, including the requirements of an applicable implementation plan."

A previous section on applicable requirements [IV.F.] discusses various ways of ensuring that the permit would implement and not relax the applicable SIP requirements. Where SIP requirements are clear, the Part 70 permit must adopt these limitations and reestablish them as permit conditions that implement the SIP. Where the SIP requirements are ambiguous or absent, the permit could provide a way of resolving questions as to how the SIP applies and is enforced. Where the SIP is being changed, (e.g., in SIP-call areas) the permit must not unduly insulate the source from the future requirements.

The provisions in section 504(a) indirectly limit the flexibility offered by section 502(b)(10), which requires that State programs allow certain changes within a permitted source without a permit revision so long as, among other things, the "changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in terms of total emissions) . . . ." Since the permit must reflect the SIP, if the SIP does not authorize changes from unit-specific emissions limits or caps contained in the SIP without a SIP revision, the "operational flexibility" provision cannot be read to authorize such changes absent a SIP revision. (Congress's deletion of the Senate bill provisions authorizing permits to modify SIP's, in conjunction with its addition of the section 504(a) language requiring permits to reflect the SIP, suggest strongly that Congress rejected the view that permits could modify or otherwise override the applicable SIP.)

This limitation on the ability of permits to modify SIP's creates a dilemma for EPA. On one hand, if a SIP sets detailed unit-specific emissions limits that constrain the ability of the source to choose alternatives without submitting them as SIP revisions, then the permit for a source subject to those limits would have to reflect those

limits, and each time the source wanted to make a change to its plant that would require a change to those limits, it would first need to obtain a SIP revision and a permit revision. This would essentially add a permit-revision step to an otherwise cumbersome double-step process of obtaining SIP revisions (revision by the State followed by EPA approval of the revision). The resulting regulatory gridlock would be inconsistent with one of the apparent purposes of the permit program; to accomplish air quality management with less reliance on the SIP revision process.

On the other hand, Title I of the Act prescribes various minimum requirements that SIP's must meet to ensure attainment and maintenance of the NAAQS. Any effort to introduce into the SIP system enough flexibility to avoid the regulatory gridlock described above will need to respect those Title I requirements. Thus, the challenge EPA and the States face in this regard is to explore creative ways of implementing Title I so as to meet its requirements for SIP's while minimizing the need for processing SIP revisions to accommodate each and every permit and permit revision.

The starting point for meeting this challenge is section 110(a)(2)(A) which requires that each SIP "include enforceable emission limitations, and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights), as well as, schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements of the Act."

This provision makes the required contents of SIP's hinge on what is "necessary or appropriate" to meet the applicable requirements. Thus, any effort to explore the option of introducing flexibility into SIP's must focus on the other requirements for SIP's in Title I and elsewhere in the Act.[7] For example, SIP's for ozone nonattainment areas must include certain requirements concerning reasonably available control technology (RACT) [182(a)(2)(A) and (b)]. For all but marginal ozone nonattainment areas, the SIP must be revised to provide for certain prescribed amounts of emissions reduction [182(b)(1) and (c)(2)(B)], as well as emissions reductions necessary to provide for timely attainment of the ozone NAAQS [182(b)(1) and (c)(2)(A)]. The SIP's for PM_{10} nonattainment areas also must include both technology-based and attainment-based provisions [189(a) and (b)]. Under section 110(k) and (l), EPA has the responsibility for ensuring that each plan meets these requirements.

Resolution of this issue requires a thorough study of the SIP requirements in the Act. The EPA has begun this

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[7]Both Titles II and V contain some SIP-submittal requirements (See, e.g., sections 211 (M) and 507).

study and intends to publish later this year a discussion of its findings in the preamble for Title I SIP requirements. That notice will discuss how EPA will provide more flexibility in the SIP requirements.

In advance of the Title I notice, EPA wants to solicit comments on several ways to resolve this issue. The EPA's approach can be separated into three options. First, EPA will explore efficient ways to implement requirements of the current SIP's through Title V permits and seek means to keep unnecessary permit details out of SIP's. This will avoid the need for a SIP change for every change to a Title V permit. For example, a permit must sometimes contain details, such as descriptions of source-specific monitoring or reporting elements, on which the SIP is ambiguous. In many cases, requiring a SIP revision as well as a permit change would be unnecessary. In some instances, however, a SIP revision might be necessary to reflect more stringent permit limits imposed to meet, for example, a Title I milestone or progress requirement. As mentioned, EPA is taking comment on how the SIP might reflect the effect of tighter permit limits in a way that does not require an excessive number of SIP revisions.

Second, EPA will add more flexibility by developing ways for sources to demonstrate compliance with RACT limits. One way is through the use of protocols defining equivalent means of compliance. Two of these are in use, one for can-coaters (see 45 FR 80824, December 8, 1980) and one for automobile and light-truck topcoaters (see report no. EPA-450/3-88-018, December 1988). The EPA intends to develop equivalency protocols for other sources subject to RACT. These protocols, where possible, will provide sources with additional options for meeting RACT limits.

Third, EPA might allow the expanded use of emissions trading and marketable permits to achieve SIP objectives. EPA believes marketable permits could implement a SIP that contained both a source-specific limit and a general rule governing the trading of emissions. This approach would be similar to the allowance trading system EPA expects to adopt under the acid rain provisions and could afford trading opportunities without requiring SIP revisions or permit revisions.

The comparison between the acid rain trading system and a system of trading or marketable permits in ozone nonattainment areas deserves further discussion due to major differences between the two. The acid rain system allows nationwide trading; a nonattainment system would be limited to a metropolitan area, and to smaller areas if the SIP attainment strategy relied on a grid-based model. Compliance in the acid rain system is through CEMS. The absence of in-stack monitors for VOC's may require that compliance be determined through time-consuming recordkeeping calculations. Acid rain sources are of one

type: large utility boilers, which already are highly regulated. Sources of VOC span many source categories and can be very small, down to 10 tons per year, several of which are not familiar with complicated regulatory mechanisms. Trades in the acid rain system are incomplete until recorded by EPA. A system requiring a similar EPA oversight of each trade may be unworkable for VOC's.

The EPA takes comment on how it could structure a trading system for VOC's and NO_x in ozone nonattainment areas. The Agency also takes comment on how to create a system that could effectively track trading of allowances among numerous and disparate VOC and NO_x sources in a large ozone nonattainment area within the need for permit or SIP revision. In particular, the EPA solicits comment on how it should build enforceable conditions into Title V permits that maintain compliance with the permitted emission limits regardless of how a source's control measures or its allowance holdings may vary.

The timing of these options is important. Many sources will soon be faced with deadlines requiring compliance with line-by-line RACT limits, and if EPA is to implement one or all of these options, it must consider how these RACT limits could be made to fit with the three options. For instance, the scope of option three could be restricted if RACT limits (with or without equivalence protocols) were applied so as to require the same level of emissions reductions at each affected emissions source. Although EPA already has construed the statute to allow some degree of trading among emissions sources (see 51 FR 43814, December 4, 1986), the third option described above might expand that opportunity further. Thus, delaying that option for several years might restrict sources to the more limited options for purposes of any initial compliance dates. On the other hand, it may be difficult to implement the third option before approved State permit programs are in place.

The EPA solicits comment on all aspects of these options, particularly on whether EPA should adopt some, all, or none of the options outlined above. The EPA also solicits comment on how quickly EPA should move to accept any of the options and on what safeguards are needed to ensure that SIP objectives and Title I requirements are met. The EPA also solicits comments on other possible approaches.

The EPA also solicits comment on any practical questions related to putting an allowance trading system in place for VOC's and NO_x. Examples of such questions are: how to reconcile the need for a basinwide trading system with the requirement in certain areas for photochemical dispersion modeling, and whether it is practical for SIP-regulated sources to operate under emissions caps or allowances.

The preceding discussion on the three options applies only to the ozone precursors VOC and NO_x. The EPA does not

intend to apply such an approach to permitted stationary sources of SO_2, CO, PM_{10}, or lead. This is because any change that affects quantity or characteristics of emissions of these pollutants at a particular emissions unit can produce a corresponding change in air quality more significant than is the case for VOC or NO_x. Consequently, the permit could not be approved until the SIP has tested such changes for attainment of air quality standards. The preceding discussion also does not alter the Emissions Trading Policy Statement. That policy allows trading for SO_2, CO, PM_{10}, and lead if supported by an air quality modeling demonstration.

For illustration, the remainder of this section discusses one example of when States might issue permits that depart from the SIP without securing advance EPA approval of those permits as case-by-case SIP revisions, namely, the case of permits that establish new, more restrictive requirements on a subject source. For example, some States may include enforceable emission limits in their permit program derived from State an air quality initiative within the SIP to gain needed reductions from the permit program, or to implement an emissions trade proposed by the source. The State will want to rely these new tighter limits established in the permit program in its demonstration of attainment and maintenance of the NAAQS. Clearly, the tighter restrictions within these permits are federally-enforceable and can be relied upon by the SIP demonstration once incorporated into the SIP. Since SIP demonstrations must extend beyond the 5 year maximum fixed life of permits, the SIP itself may ultimately need to contain the new permit limits. That is, the SIP demonstration cannot depend for the longer term on more stringent permit restrictions which could be relaxed to the currently applicable SIP requirement and/or expire at the end of the fixed term identified in the permit (not to exceed 5 years). As explained above, the EPA has proposed that the latter not be allowed to occur. Under that proposal, the State's law would have to provide that the terms of the permit would remain enforceable, even after the fixed term of the permit expires, provided that the source has filed a timely and complete application for permit renewal.

The question then becomes how to incorporate the effect of these permits into the SIP's attainment demonstration without creating even a greater potential for regulatory gridlock similar to that mentioned previously. The EPA believes that the gridlock problem can in significant part be minimized while still addressed by relying upon the SIP revision process. First, the Agency believes that the process for inserting new limits established within permits into the SIP need only occur periodically and not for each permit upon its issuance. The envisioned process would be a

relatively straightforward incorporation of the new permit restrictions into the SIP as new applicable requirements [III.H.] that all future versions of the permit must meet. In addition, to the extent possible, EPA would utilize the SIP processing reforms outlined in 54 FR 2214 on January 19, 1989. This process would add only the time needed to accomplish one SIP revision addressing the permits of several sources and thus effectively preserve most of the added air quality management efficiency accomplished through the permit process. In addition, the State, presumably at the same time, would update its SIP demonstration under Title I based on the reductions and/or clarifications it has implemented using Title V permits. The EPA solicits comment on this approach for using permits to complement the existing SIP program.

Alternatively, EPA may be able to approve into the relevant SIP's provisions that, in advance of permit issuance, would credit the States for changes that, without further EPA SIP-revision approval, tighten the otherwise applicable source-specific limits in the SIP. If EPA approved such rules into a SIP, permit tightenings would accord with the SIP, and hence would satisfy section 504(a) without the need for EPA to approve each such tightening separately as a SIP revision. (As previously discussed, without such rules, EPA might eventually need to approve each tightening (e.g. an emissions offset) as a SIP revision to the extent that the State relies upon it in demonstrating attainment and maintenance with the applicable NAAQS.) Beyond that, the Agency takes comment on the possibility of approving into the SIP a provision which would ensure an aggregate effect from tightenings accomplished within the permit program, provided that no aspect of the underlying SIP would be relaxed. The provision would necessarily contain tracking requirements to assess the progress achieved, periodic and defined updates of the demonstration to verify results, and other safeguards as needed to guide EPA when to use its veto authority on an individual permit basis. The EPA solicits comment on use of such a generic permits provision.

The EPA solicits comment on these and any other options for streamlining SIP's so as to minimize the need for SIP revisions to accommodate permits and permit revisions.

(2) Other SIP/Permit Concerns

(a) SIP Calls

A State subject to a SIP call will have to coordinate carefully its operating permit program with its obligation to revise the SIP. Section 504(f) states that compliance with a permit issued in accordance with Title V, unless limited by EPA rulemaking, may at the discretion of the reviewing authority also represent compliance with other applicable requirements, subject to certain limitations. As discussed previously, at the discretion of the permitting

authority, EPA's proposed interpretation would generally protect a source from new requirements during the term of the permit, unless the permit were be reopened. Permitting authorities issuing operating permits in these areas therefore may choose to shield sources from changes in the SIP during the permit term. This action should be coordinated with the schedule for accomplishing areawide air quality requirements developed by the State or promulgated by EPA into the deficient SIP.

(b) Consolidated Actions

A State may choose to consolidate actions on permits and SIP's in some situations. In the case described previously, where a new SIP provision is promulgated during the first 2 years of a 5-year permit, the State may choose to process the reopening of the applicable permits along with the SIP revision to meet its obligation under section 502(b)(9). In the less likely case where the State is proposing to relax the SIP, the State may choose to reopen the applicable permits along with the SIP relaxation, specifying that the new relaxed permit limit is effective upon EPA's approval of the relaxation as a SIP revision. In both cases, States may be able to consolidate public participation procedures to save time and administrative resources.

C. Implications For Acid Rain Program

Title IV mandates a two-phased acid rain control program which will be implemented through operating permits. The acid rain title (Title IV) sets forth permitting requirements supplemental to the requirements of Title V addressed by today's proposal. Where discrepancies exist between requirements under Title V and requirements under Title IV, the acid rain requirements supersede those of Title V [506(b)]. Acid rain-specific permit content requirements must be included in operating permits under both phases. The permitting process will be different for Phase I and Phase II. Section 407 provides that Phase I of the acid rain program (1995 through the end of 1999) be implemented entirely through operating permits issued by the Administrator. Phase II (beginning in 2000) will be implemented by operating permits issued by States with federally-approved permit programs, or by EPA in the event a State defaults. Phase II permitting will be, thus, in accordance with the process established by the rules proposed today, as supplemented by acid rain-specific content regulations.

Today's proposal does not address specific supplemental permitting requirements for acid rain, provided for in Title IV. Those requirements will be addressed in a separate rulemaking, with final rule promulgation required 18 months after enactment. The acid rain permit regulations will include a description of the relationship of the acid rain program to other programs incorporated in the permits,

necessary definitions, applicability requirements, and necessary permit elements not included in the rule proposed today. These will include: (1) acid rain-specific requirements for permits and compliance planning, including requirements for affected sources relying on one or more alternative compliance methods authorized by the statute (e.g., extensions, substitutions, banking, pooling, purchasing of allowances at sale or auction, energy conservation or renewable energy, repowering, etc.), (2) compliance certification and reporting requirements, (3) requirements for affected source-designated representatives, and (4) excess emission offset planning and fee requirements.

Rules for Federal acid rain permitting during Phase I, and in the event of State defaults during Phase II, will be published at 40 CFR Part 71. In addition, acid rain permit content requirements, which must be included in permits issued by States with approved programs, will be proposed at that time, and will be added to (or incorporated by reference in) the Part 70 rules proposed here. Public comment is invited at this time regarding the impact of this general permit program rulemaking on the acid rain permit program. Public comment in response to the acid rain rulemaking proposal will, however, only be accepted with regard to the provisions proposed at that time. Comments will not be considered at that time reopening matters addressed by this rulemaking.

D. Judicial Review

The 1990 Act Amendments and the regulations proposed today provide an opportunity for judicial review of State and certain Federal final actions on a proposed permit. Generally, a final State action prior to submitting a proposed permit to EPA is reviewable in State court. An EPA issuance or denial of a permit, or an EPA denial of a petition to object to a permit, would be reviewable in the appropriate Federal court of appeals for the circuit where the State is located.

(1) Review of State Action

Section 502(b)(6) requires that a State operating permit program provide "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." This requirement for State program approval is repeated in section 70.4. A State must make a showing, through the submission of copies of State statutes or regulations, that such an opportunity for judicial review of the final State action on the permit is available in State court. This opportunity will not be available until after the permit has been issued (i.e., after the end of the EPA review period) or after it has been

denied by the State (in which case there will not be any EPA review).

State law will govern the effect a petition for judicial review of the State's final action on the proposed permit has on the action. For example, nothing in the Act or the regulations proposed today would prevent a State court from staying the effect of the State action in approving or disapproving the permit. States may also require that petitioners go through State Administrative appeals procedures before they may petition for judicial review in State court.

One of the primary goals behind Title V was to have greater certainty for sources and State and Federal enforcement personnel as to what requirements under the Act apply to a particular source. In order to achieve that certainty, the terms of permits should not be subject to challenge in enforcement proceedings. Section 307 clearly establishes this rule for circumstances in which EPA is the implementing authority. With this goal in mind, EPA solicits comment on whether permitting authorities should, as a minimum program element, be required to provide, through rule, legislation, or permit term, a comparable exclusive, time-related route for judicial review of permits. After this judicial review opportunity passes, no one, including the source, could challenge a permit. Permitting authorities would be granted flexibility regarding the length and structure of this review period. Sources would, in any case, specifically be precluded from challenging the requirements and conditions of their permits in State or Federal civil and criminal enforcement actions.

Section 502(b)(6) requires all approvable programs to provide "an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public comment process, and any other person who could obtain judicial review of that action under applicable law." Thus, EPA would, through this rule, only add that this mandated State judicial review process would be the exclusive means for challenging a permit.

This would have advantages for the permittee, the permitting authority, and EPA. The advantages for permittees would be the added certainty and stability of their permit gained by having their permit no longer subject to challenge. Enforcement at the State and Federal level would benefit significantly. Currently, many enforcement actions are seriously hindered by disputes with sources over which Act requirements apply. If the permit could not be challenged in enforcement actions, these disputes would no longer arise.

The EPA is particularly interested in comments from potential permitting authorities on whether it is advisable to require States to limit the time for challenging terms of

operating permits and what obstacles they would encounter in implementing such a requirement.

EPA also takes comment on the need for specific regulatory requirements in Part 70 regarding judicial review of acid rain requirements contained in Title V permits. An important principle of the acid rain program, embodied in Title IV and in section 506(b), is national consistency. Judicial review in State courts could have a significant impact on the acid rain program because it would result in inconsistent requirements being imposed on acid rain sources depending on the State in which they are located.

To maintain this national consistency, the EPA proposes to require that challenges to acid rain requirements be reviewed in Federal courts only, using Federal administrative and judicial appeals procedures. The basis for this approach is found in section 506(b) of the Act as well as 70.1(e) of these regulations, which states that the requirements of Part 70 shall apply to affected sources under the acid rain program, "except as provided herein or modified in Parts 72 through 78 of this chapter." The EPA solicits comment on whether it should adopt this approach.

(2) Review of EPA Action

Also subject to judicial review are EPA's final actions in (1) issuing or denying a permit where, following an EPA objection to a proposed permit, the State fails to submit a revised, acceptable permit, and (2) denying a petition to object to a proposed permit. Where EPA objects to issuance of a proposed permit under section 505(b) because provisions are not in compliance with applicable requirements of the Act, and then must actually issue or deny the permit itself, that latter action is subject to a judicial review under section 307(b) in the appropriate Federal court of appeals. The appropriate court will be the circuit in which the State is located. Section 505(c) expressly States that "no objection [by EPA] shall be subject to judicial review until the Administrator takes final action to issue or deny a permit under this subsection" following the permitting authority's failure to submit a permit revised to meet the objection. Thus, a petition for review of EPA's action may not be filed until that time; if one were filed before then, the court would lack subject matter jurisdiction.

The above-quoted language also makes clear that, where EPA objects to issuance of a permit, and the permitting authority revises the permit to address EPA's comments, EPA's objection is not subject to judicial review. Otherwise, Congress would have specified other circumstances when an EPA objection would be subject to judicial review. Where the State revises the permit, therefore, the finally-issued permit will be subject to judicial review only in State court. Where a petition for review of EPA's issuance or denial of a permit is filed in the Federal court of appeals, the judicial record shall constitute all

materials regarding the permit submitted to EPA and any other materials that the Agency relied upon in objecting to the permit forwarded by the State, as well as any materials relied upon in issuing or denying the permit.

Under section 505(b)(2), a person may under certain circumstances petition the Administrator to object to issuance of a permit if the Agency has failed to object to its issuance during the 45 day review period specified in section 505(b)(1). If the Administrator approves the petition, that action is not a final action subject to judicial review. Rather, as described above, only issuance or denial of the permit by EPA would be subject to judicial review.

A final decision by the Administrator to deny the petition is subject to judicial review, however. This opportunity for review is expressly granted by section 505(b)(2). Such review shall be under the conditions specified in section 307(b). A petition for review of the petition denial therefore must be filed within 60 days of the denial, in the Federal court of appeals for the circuit in which the State is located. The record for judicial review of this final decision shall constitute the petition submitted to the Administrator, all materials submitted by the State to EPA for review of the permit, and any other materials relied upon by EPA in denying the petition. When EPA's denial of a petition is challenged in court, the already issued permit, of course, remains in effect. The Agency is proposing to require, as a criterion for approval of the State operating permit program, that each State have a provision in their administrative procedures act placing a bar on when permits or conditions of permits may be challenged after issuance. This bar would disallow challenges to permit conditions after a specified period of time, such as 30 days. The purpose of the provision is to ensure that permittees do not attempt to escape liability for violations of permit conditions by challenging those conditions after they are in violation or after the State or EPA attempts to take an enforcement action. To provide States with flexibility, the Agency solicits comment on allowing time bars on permit challenges of up to 4 months.

E. Implications For Section 112

Section 112 includes a list of 189 hazardous air pollutants some sources of which will be subject to emissions standards under section 112. The EPA must publish a list of source categories or subcategories of major sources that emit these pollutants within 1 year after enactment. The EPA then must issue MACT standards for each listed source category or subcategory according to a prescribed regulatory schedule. For example, standards for 40 categories must be set within 2 years of enactment. The standards for new sources are to be based on the maximum

emissions reductions achieved on the best controlled similar source, while the standards for existing sources must, in general, be at least as stringent as the average of the best controlled 12 percent of the sources in the category. Companies that accomplish early reductions of emissions receive a 6-year compliance extension from meeting the MACT requirements, if they reduce their annual emissions of listed hazardous air pollutants by 90 percent over a given baseline (95 percent for particulate pollutants) subject to certain criteria. All sources subject to section 112 must obtain a permit issued pursuant to a Title V permit program.

(1) Applicability

The proposed Part 70 program would implement for subject sources existing section 112 standards as well as future section 112 standards requiring the use of MACT, GACT, any technologies to reduce unreasonable residual risk, and any accidental release requirements mandated under section 112(r). In the development of MACT standards, EPA intends to develop model permit conditions as guides to the implementation of these standards through permitting. All major sources as defined in section 112, and any other source subject to standards under section 112 (unless exempted through rulemaking by the Administrator) are subject to the Part 70 permit program. "Major source" is defined by section 112 as any stationary source (or group of stationary sources) located within a contiguous area, and under common control, that has the potential to emit, after considering controls, of 10 tpy or more of any hazardous air pollutant (defined initially as a list of 189 which is subject to change), or 25 tpy or more of any combination of these pollutants. The Administrator may also establish a lesser quantity for a major source on the basis of potency of the air pollutant, persistence, potential for bioaccumulation, other characteristics of the air pollutant, or other relevant factors.

As discussed under section 70.3, the Part 70 permitting process applies to all regulated emissions units on the premises of a "major" source. In addition, the Part 70 permit process applies to "area" sources (as defined in section 110) which have one or more aspects of its plant site subject to section 112 unless exempted by rulemaking. Once affected by the permitting process, compliance with all applicable requirements of the Act, including those contained in the SIP and section 112, must be assured within each Part 70 permit. In addition, where there is no applicable section 112 standard to implement, Part 70 permits must still impose any applicable control requirements described in sections 112(g) or 112(j).

(2) Section 112(l) Programs

Section 112(l) outlines a program for State implementation of section 112. A State may develop and submit to the EPA a program for the implementation and

enforcement (including a review of enforcement delegations previously granted) of emissions standards and other requirements for air pollutants subject to section 112, including requirements for the prevention and mitigation of accidental releases pursuant to section 112(r). These programs would be similar to the existing programs used by States to enforce existing section 112 standards and the program envisioned by Title V. Such a program may provide for partial or complete delegation of the Administrator's authorities and responsibilities to implement and enforce emissions standards (provided they would be no less stringent than those promulgated by EPA) and prevention requirements. The program should clarify the process by which delegation of authority is accomplished and whether it must be repeated for each new standard that is promulgated.

The EPA is required by section 112 (l)(2) to publish guidance within 12 months of enactment which, in part, should aid States in developing their programs.
Section 112(l)(5) States that the EPA shall disapprove the State's program under the following circumstances:

(a) The authorities are inadequate to assure compliance by all sources within the State with each applicable standard, regulation, or requirement established by the Administrator under section 112.

(b) Adequate authority does not exist, or adequate resources are not available to implement the program.

(c) The schedule for implementing the program and assuring compliance by affected sources is not sufficiently expeditious.

(d) The program is otherwise not in compliance with the guidance issued by the EPA, or is not likely to satisfy, in whole or in part, the objectives of the Act.

The EPA proposes that the procedural requirements in section 112(l) to review and approve/disapprove State programs will be met by the promulgation of Part 70. The requirements for an adequate Part 70 submittal [III.B., IV.D.] contain equivalent approval criteria which are substantially the same as those contained in section 112(l)(5). Part 70 also contains several additional and more specific requirements that assure implementation of all Act requirements, including MACT, applicable to subject sources through a permit program. The EPA also believes that State efforts to develop and implement a Title V permit program should not be diluted by encouraging the development of separate but similar programs to implement just section 112.

Where section 112(l) identifies additional program requirements [such as those relating to enforcement of MACT or GACT requirements at non-permitted sources or the handling or storing any substance listed pursuant to section 112(r)], States are free to submit these as provisions within their Title V permit programs in order to

meet section 112(l). Implementation of these provisions would then be a cost appropriate for recovery from the required fee schedule [IV.I.]. Accordingly, EPA solicits comment on today's proposal to consolidate section 112(l) programs with Title V permit programs.

(3) Statement of Adequate Legal Authority

The Part 70 submittal must contain a legal opinion from the State's Attorney General affirming the adequacy of existing legal authority to implement and enforce the program. With respect to section 112, the enabling legal authority should be adequate to accept delegation of authority to implement and enforce new MACT standards in a timely way. In the case where a State cannot immediately accept implementation responsibilities upon promulgation of a new MACT standard, then the impact of any delay associated with State implementation should not be significant. Moreover, any Part 70 permits issued to affected sources during the time before the State can accept implementation responsibility for a given standard should be issued in a manner which does not interfere with section 112 enforcement. One possibility would be for the State to disallow use of the section 504(f) "permit shield" in such circumstances.

The statement of adequate legal authority must also confirm that the State has the ability to implement sections 112(g) and 112(j). In the case of section 112(g), States acting as the Part 70 permitting authority must be able to develop and enforce a case-by-case determination of MACT, after the effective date of the permit program, on new, reconstructed, or modified sources where no applicable emissions limitations have been established by the EPA. These case-by-case MACT determinations must be consistent with EPA guidance due for publication not later than 18 months after the date of enactment.

Section 112(j) requires that in the event EPA fails to issue a standard for a major source category or subcategory within 18 months of the scheduled promulgation date for the standard, a permit must be issued that contains emissions limitations equivalent to the limitation that would have applied had the emissions standard been issued on time. Under section 112(j), the State must have adequate authority after the effective date of the permit program (but not prior to 42 months after the date of enactment) to develop and enforce these case-by-case determinations of MACT.

(4) Alternative Emissions Limitations for Early Reductions

Section 112(i)(5) provides an extension for existing sources to comply with otherwise applicable standards for hazardous air pollutants provided certain criteria concerning early reductions are met. This subsection requires that the Administrator or a State acting pursuant to a Title V permit program issue a permit allowing an

existing source (for which the owner or operator demonstrates that the source has achieved a reduction of 90 percent or more in emissions of hazardous air pollutants, 95 percent in the case of particulate hazardous pollutants, from the source) to meet an alternative emissions limitation reflecting such reduction in lieu of meeting a standard under section 112(d). This extension would apply for a period of 6 years from the compliance date for the otherwise applicable standard, provided that the reduction occurs before the standard is proposed. The one exception is specified in section 112(i)(5)(B) wherein existing sources that make a federally-enforceable commitment prior to proposal to achieve the reductions, can have until January 1, 1994 to achieve the reduction. The EPA is issuing regulations for determining when reductions are sufficient and verifiable.

Under this guidance, a source owner or operator wishing to qualify for a hazardous air pollutant standard compliance extension under the early reduction program must submit a permit application containing a demonstration that sufficient reductions have been achieved. The permitting authority would evaluate and either approve or deny the early reduction demonstration, normally as part of the permit review and issuance process. In most cases if a source is denied a compliance extension, the source will have to meet the applicable hazardous air pollutant standard within the normal compliance period specified in the standard. A problem would arise when a source which has applied for an extension receives word that the early reduction demonstration has been denied, and the denial comes only a short time before, or even after, the normal compliance deadline of the applicable hazardous air pollutant standard. Under this scenario, the source would not have adequate time to install appropriate controls to meet the standard.

Sources submitting complete permit applications to States may not be issued permits for as long as 3 years after the date of initial State program approval or for 18 months in all other instances. Review times this long can create problems for sources seeking such extensions.

An illustration of the potential problem can be made using the upcoming standard for ethylene oxide sterilizers. The EPA intends to promulgate a hazardous air pollutant standard under section 112(d) by April of 1993 for sterilizing facilities using ethylene oxide. The compliance period for this standard likely will range up to 24 months, with a subsequent final compliance date of April 1995. Under the early reduction program, a sterilizer source will have until December 31, 1993 to achieve reductions and qualify for a compliance extension. The source must submit by December 1, 1993 a permit application demonstrating reductions achieved and must submit any source test data to

complete the demonstration by March 31, 1994, which leaves approximately 1 year from the time the source submits a complete permit application to the time the source may potentially have to comply with the applicable hazardous air pollutant standard. Clearly, if the State takes 18 months (until September 30, 1995) to review the application and then denies the compliance extension, the source would already be in violation of the standard.

Therefore, for permit applications involving early reduction demonstrations according to section 112(i)(5) of the Act, it is proposed that the permitting authority be required to issue the permit within 9 months of receipt of a complete application. The EPA proposes a shortened permit review period for this special situation under authority provided in section 301 of the Act. The Agency urges permitting authorities to be sensitive to the need to propose this change in the permit review period to ensure effective implementation of section 112 without placing sources in undue jeopardy of violating a hazardous air pollutant standard. The early reduction provisions in section 112 offer a significant opportunity to achieve rapid improvements in air quality across the country. The Agency takes comment on this proposed position.

The Part 70 permit process, where available, is the intended implementation mechanism for granting all qualifying sources the extension for meeting otherwise applicable MACT standards including those referred to in the special case above. Questions arise as to how this process will occur in the time period before the effective date of a Part 70 State permit program. In the subsequent discussion of the Part 71 program [VI.], the process is outlined for EPA to issue Title V permits, including those for MACT extensions.

The EPA believes that actions required of sources before the Part 71 regulations can be promulgated (i.e., approximately 18 months after enactment) need not be incorporated into a permit before these regulations are in place. Instead, the Act allows the source to develop a federally-enforceable commitment which would be submitted to the appropriate EPA Regional Offices for review. If accepted and put in force, the federally-enforceable commitment registers the source's intent to participate in the early reduction program. When Part 71 regulations become effective, and after the source has achieved the required reductions, the source would submit a complete permit application, including the early reduction demonstration.

The EPA intends to delegate the technical and administrative responsibility where possible for developing enforceable agreements or Part 71 permits (as applicable) to States who request such authority prior to the approval of their Part 70 programs. The EPA solicits comments on how

this approach for accomplishing early implementation of the section 112(i)(5) requirement can be accomplished.

F. Information Management Support

The EPA acknowledges the importance of an integrated information management approach for the development and implementation of programs mandated by the Act Amendments of 1990. As partners in implementing the Act, it is recognized that State and local agencies have data needs that may, in some cases, be quite different from the Agency's. It is the Agency's intent to support an integrated information management approach that acknowledges individual needs and existing infra structure (including forms), yet enables EPA to address its national responsibilities. Accordingly, the information management activities associated with meeting the Act's requirements must seek to fulfill both national and individual program needs. In addition, they should be guided by a template that promotes compatibility with, if not direct use of AIRS, which is the Agency's principal data system for implementing the Act.

The following will accomplish this:

(1) Standard data elements needed for complete application will be identified to meet basic program needs.

(2) Standard information management procedures for program implementation and administration will be defined.

(3) Use of implementation agreements, supported by appropriate guidance, will be encouraged to identify appropriate information reporting requirements.

Nationally consistent information management is necessary to ensure the effective functioning of the allowance trading market under the acid rain program. In a separate rulemaking, the Agency will propose application requirements and forms to be used by all affected sources under the acid rain program. As a condition of approval of State operating permit programs, permitting authorities will be expected to use these forms.

The Agency solicits comments on how best to implement these objectives for data collection and management.

G. Relationship of Permit Fees to Section 105 Grants

Once fully established, a State's permit fee program should recover a significant portion, though not all, of its air program expenses. Section 105 of the Act continues to require States to contribute a specified percentage and maintain a certain level of overall air program support from year to year. Regardless of the continued stature of the Federal air grant program or the changing sources of State program support, EPA has interpreted the Act (Title VIII, section 802) as requiring States to continue to satisfy their maintenance of effort (MOE) provisions. States will, therefore, need to report that portion of their permit fee revenue that will be used to help meet their annual MOE obligation. EPA plans to provide further clarification through its upcoming revision of the air portion of the

Part 35 regulations governing financial assistance to State and local agencies for continuing environmental programs. The EPA is taking this opportunity to solicit comment on its interpretation of the interrelationship of permit-fees, grants and the MOE requirement.

H. Integration of NPDES Program Concepts

One of the principles previously identified for designing and implementing Title V programs is to promote, not preclude, reasonable integration of Title V permit programs with other permit programs. Accordingly, EPA has evaluated the NPDES regulatory provisions for possible inclusion of relevant concepts within the Part 70 regulation. The Agency is proposing to merge the programs where this incorporation would not interface with implementation of other important principles previously identified to preserve the legislative intent underlying the content of Title V [II]., such as maintaining, where possible, existing State operating permit programs and allowing reasonable flexibility in their future development and implementation.

There are numerous existing regulations which apply to the NPDES permit program under the CWA which have been reviewed to determine whether they have applicability to the Title V operating permit program. Based on the successful implementation of the NPDES program by the Agency and the States, and based on the Agency's future direction toward consolidated permitting programs, many of these regulations have been adapted for air and proposed for incorporation into Part 70. Those which have been included pose no great burden on either the permitting authority or the permittee. In fact, in many cases these requirements represent good business practices and will expedite review and implementation of the program and of individual permits. General provisions which are included relate to both program requirements as well as to permit requirements.

Program areas which have been addressed include enforcement authorities required of the permitting authority, compliance and enforcement tracking requirements, program submittal requirements including Attorney Generals' statements requirements, and information transfer requirements. Permit provisions addressed by the regulation include property rights, inspection and entry rights, standard recordkeeping requirements, signatory and reporting requirements.

The NPDES regulations in Parts 122-124 also include requirements regarding program approval/disapproval procedures, public review procedures, and EPA oversight requirements. Where appropriate, excerpts from these regulations have been extracted in whole or in part and incorporated into Part 70. However, at this time the specific requirements of Parts 124.10 through 124.14 have not been included. The Agency recommends that permitting

authorities consider these parts when developing their permit programs; and at this time the Agency is soliciting comments on including requirements regarding public notice, hearings, and comment periods on Title V permit actions.

The proposed incorporation of several specific features from the NPDES program adds to the considerable common ground already shared by the two programs as a result of their basic design (i.e., Title V was modeled in large part on the structure of the NPDES program). Based on this strong linkage between the air and NPDES programs, the EPA Administrator further proposes that a presumption for issue-resolution of Title V implementation concerns be established based on the relevant experience obtained from carrying out the NPDES program. Comment is solicited on the appropriateness of this approach and where it should be limited in its scope.

VI. Federal Operating Permit Program

A. Purpose

This preamble previously discusses the criteria for determining if a State operating permit program meets the requirements of Title V and the responsibility of EPA if the State-submitted program is not approvable or if a State does not adequately implement an approved program. The action EPA must take is discussed under sections III.C. and IV.J. In brief, EPA must establish and implement an operating permit program that meets the requirements of Title V for a State in either event of the State's not developing or implementing a program. The EPA intends to propose in a subsequent FEDERAL REGISTER notice a new Part 71 which would set forth the elements of an operating permit program which EPA would implement. Part 124 (containing procedural regulations on the issuance of EPA permits) will be amended to provide similar procedural rules for Federal issuance.

Also to be included in Part 71 would be provisions regarding the requirements for EPA issuing permits (1) for Phase I sources of acid rain precursors and (2) for sources of hazardous air pollutants which elect under section 112(i)(5) to demonstrate a 90/95 percent or greater early emissions reduction to receive an extension from MACT standards. Both of these permitting provisions are subsequently discussed in this section. These permitting requirements would fall on the EPA during the period prior to a State submitting and gaining approval for an operating permits program under Part 70. The Parts 71 and 124 regulations also would serve as the basis for EPA permitting sources on certain Indian lands. Although section 301(d) authorizes EPA to treat Indian tribes as States for certain purposes, including issuing Title V permits, EPA has not yet promulgated regulations on this matter. Many tribes probably will not seek to (1) to be treated as a State, or (2) run a Title V program. Where the tribe does not permit

sources on Indian lands, EPA plans to carry out the permitting itself.

When reviewing the proposed Part 70, the public is encouraged to also consider the possible provisions that would be in a Part 71 Federal permitting program. The EPA is soliciting comment on the concepts discussed in this preamble section concerning a Federal permitting program. These comments will be considered in developing a subsequent Federal permit program proposal notice.

B. Part 71 Default Program

The Part 71 program that EPA would implement if a State defaults on developing or implementing an acceptable Title V program must meet the same criteria that a State must meet for approval as part of the Part 70 program submittal. These Part 71 provisions could, therefore, act as a model for the regulation portion of a State operating permit program.

Under Part 70, States are asked to establish certain requirements or procedures within certain constraints, e.g., permit fee structure, standard application form, permit review phase-in, public participation. For a Part 71 program, EPA must spell out details of these requirements or procedures just as the State must do in its program submittal. The EPA solicits comments on preliminary thoughts as to the nature of the approaches that EPA would take on these items.

(1) SIP Ambiguity

A basic requirement of Title V is that permits are issued such that all applicable requirements of the Act are met. If an approved SIP has ambiguous provisions that are not clear or certain provisions necessary for a control strategy demonstration are missing, EPA does not typically intend to "fix" or revise the SIP in the permit. The permit will generally adopt the provisions of the approved SIP and any changes that are necessary will be achieved through the SIP call mechanism. The EPA will, however, prescribe any clarifications or new requirements as needed to ensure that the applicable requirements are written in enforceable terms. The EPA reserves the right to issue a source-specific FIP (in the event a State fails to correct SIP deficiencies) which would then be implemented in the subsequent permit. Public comment is solicited on this approach.

(2) Complete Application/Data Elements

The EPA will specify the elements of a standard application form and include such a form in an appendix to Part 71. Criteria will be provided for filling out the form and specifying what constitutes a complete application. Public comment is solicited on the contents of an application.

(3) Transition/Permit Review Phase-In

The EPA will phase in over a 3-year period the review of initial permit applications submitted under a Part 71 program. About one-third of the applications will be reviewed each of the 3 years. Public comment is solicited on the criteria for phase-in. The phase-in approach could be to review the largest, most serious sources first. The EPA does not recommend that the less serious, smaller sources be reviewed first, even though the review staff might obtain some experience before addressing the larger sources. An alternative approach could be to first address sources of hazardous air pollutants that are not necessarily presently regulated specifically for those pollutants. This approach would assist in preparation of better emission inventories. Another approach would be to address sources for which MACT standards have been set and leave to the last those sources for which MACT standards are likely to be set in the near future.

(4) Public Participation/Public Hearings

Public comment is solicited on the appropriateness of procedures for processing Part 71 permits similar to those found in 40 CFR Part 124. In particular, the Agency solicits comment on reasonable criteria for determining the need for a public hearing and on reasonable procedures for processing actions to reopen existing Part 71 permits.

(5) Permit Fees

The EPA is authorized to collect permit fees if a State defaults on its program and EPA must implement Part 71. The default fee schedule in Part 70 is based on a $25/tpy rate (1990 basis). The EPA would implement this rate on sources under a Part 71 program, based on the actual emissions of the subject sources over the preceding calendar year. Public comment is solicited on the appropriateness of this rate and on the possibility (notwithstanding the exemptions for small businesses) of charging higher rates on sources with lower emission rates (i.e., hazardous air pollutant sources of 10 to 25 tpy). These small sources will require permit process resources far in excess of the fees they would pay under a $25/tpy schedule. For these sources, EPA could charge a permit fee to cover reasonable costs for review time and for follow-up compliance activities. The EPA may not, however, collect fees for emission from affected sources under Phase I of the acid rain program [408(c)(4)].

(6) Compliance Plan for Noncomplying Sources/Certification

The permit application of a noncomplying source must be accompanied by a compliance plan and each application must contain a certification that the application contents are true, accurate and complete. The certification must be signed by a responsible official who is subject to criminal prosecution for false information in an application. All certifications for affected sources under the acid rain

program must be signed by the designated representative for that source. Criteria for eligibility as a designated representative will be promulgated in a separate rulemaking. Public comment is solicited on whether the selection of this official must meet similar criteria to that contained in the NPDES program [70.2(bb)]. The EPA will include in Part 71 the specifics for an approvable compliance plan for noncomplying sources.

(7) Permit Reopenings/Amendments

The EPA would reopen and revise a permit under certain circumstances. New MACT standards or revised SIP requirements on the source would cause an automatic reopening of permits with remaining terms of 3 or more years. The EPA believes that material error or inaccuracies should also represent cause for reopening. The reopened and revised permit would go through the full public participation procedures as if the permit were new or being reissued at the end of its normal lifetime. If a permit needed minor changes, such as some administrative error that did not affect the emissions or compliance, the changes could be made through an administrative amendment with no public participation or other formal procedures. Public comment is solicited on reasons for reopening a permit and on the process of administratively amending a permit.

(8) Operational Flexibility

The EPA intends to provide reasonable flexibility upon request to sources to operate in different modes without reopening and revising the permit. The various operating scenarios or worst case situation would have to be specified in the permit, including the corresponding level of control, after which the source could choose the most appropriate operation configuration at any specific time and be within the permit. The effect of any operational flexibility would have to be demonstrated to assure that all requirements of the Act would be met. In particular, EPA intends to make available the options described previously in the section 70.7 discussion on designing flexible Part 70 permits. Public comment is solicited on any restrictions to this possible practice.

(9) Geographic Applicability

If EPA implements a Part 71 program, it will be for the part of the State not covered by an acceptable program. If EPA approves a local agency operating permit program, EPA will cease implementation of the Part 71 program for that geographic area and the local agency will assume responsibility for issuing operating permits. Previously-issued Federal permits may be formally adopted and enforced by the local agency. If an approved local agency program is already in place when EPA adopts a Part 71 program, it will only be for the part of the State not covered by the local program. Public comment is solicited on this approach.

(10) Permit Shield

The EPA has the same option to institute a shield under Part 71 as the States have under a Part 70 program and would intend to use it wherever it would not be precluded in the Part 70 proposal. The permit shield will be disallowed to the extent that it is inconsistent with the acid rain program. Under a Part 71 Federal operating permit program, however, sources can still be subjected to State requirements enforced by the State outside the permit. This could also be the case under a State program. The EPA proposes to recognize and to enforce only the conditions of the federally-approved permit and to reopen for cause the permits of sources in SIP call areas as new regulations would otherwise become applicable. Public comment is solicited on the acceptability of EPA's position on this issue.

(11) Noncriteria Limits

The EPA will in general not implement the requirements of an air toxics program for the State under a Part 71 program. If sources of hazardous air pollutants were subject to only State rules, EPA would not adopt these in a Part 71 permit unless they were also part of a criteria pollutant control strategy. Any MACT standard would, of course, be adopted and a permit could be reopened for a new MACT standard. Public comment is solicited on this approach.

C. Acid Rain Program

In a subsequent FEDERAL REGISTER notice, EPA will propose its program for controlling sources of acid rain precursors as required by Title IV of the Act. That program will consist of two phases, the first to be implemented by an EPA permitting program and the second to be implemented by State operating permit programs. The specific requirements for which sources will be controlled and to what extent will be covered by the subsequent notice. The discussion herein addresses only the permitting portion of the acid rain program.

The Phase I permitting program would address the 107 largest sources of sulfur and nitrogen oxide compounds beginning 2 years after enactment. This would be before State operating permit programs are required. The EPA would, therefore, need to establish a permit program to address the Phase I sources. This program would be a component of Part 71 and would consist of those portions of Part 71 appropriate to fulfill the permitting requirements of the acid rain sources, e.g., standard application, public participation, compliance plan for noncomplying sources, and certification.

The acid rain regulations would establish the requirement for operating permits and emission reductions on the Phase I sources and also refer to the applicable sections of Part 71, rather than rewriting the same sections. Public comment is solicited on the appropriate

portions of Part 71 to apply to the acid rain sources in this permitting program. Specifically, comment is solicited on the following:

(1) Permit Content

The permits for Phase I would only address those emissions that contribute to acid rain and would be issued by EPA, rather than the States. Requirements of the Act other than those implementing Title IV would not be included in these permits. Phase II of the acid rain program will be implemented by States with approved operating permits programs. The Agency expects that States will include the Title IV requirements in the facility's operating permit under the Part 70 program which would also address all other requirements of the Act.

(2) Term

The term of all acid rain permits must be 5 years [408.(a)].

(3) Shield

Sources under a Phase I permit will, for Federal purposes, only address Title IV and applicable SIP requirements for sulfur or nitrogen oxide emissions. The shield in Title V will not apply beyond these requirements and would not apply with respect to Title IV-based requirements. States could, however, establish and enforce more stringent requirements on a source.

(4) Permit Fee

Acid rain precursor sources would be required to pay an annual permit fee during Phase II of the acid rain program. No fee requirements would be imposed by EPA for the Phase I acid rain permits. States may, of course, require permit fees for non-acid permitting prior to commencement of Phase II. Thus, States may impose fee requirements for SO_2 or NO_x if these pollutants are regulated at the source pursuant to provisions of the Act other than Title IV.

D. MACT Extensions

The section 112 program for establishing MACT standards includes provisions for a 6-year extension for MACT application if sources make certain demonstrations with respect to their emissions. To obtain an extension, the source must reduce emissions by 90/95 percent or greater over 1987 emission levels. The mechanism for the early evaluation of a demonstration from a proposed source will be a Part 71 permit. Any application for a MACT extension, therefore, would be accompanied by a permit application adopting emission limits at levels indicated in the demonstration so that they would become federally-enforceable [V.E.].

The program to issue permits for MACT extension purposes will be, as for the Phase I acid rain program, a separate portion of Part 71 which would refer to appropriate portions of the Part 71 program. These permits would only address those hazardous air pollutant emissions associated

with the MACT standard, would not have an associated permit fee, would not shield sources from other more stringent State requirements, and would be for a 5-year fixed term. Public comment is solicited on this approach.

VII. Administrative Requirements

A. Public Hearing

One public hearing and two public meetings will be held to discuss the proposed regulations. Persons wishing to make oral presentations at the public hearing should contact EPA at the address given in the **ADDRESSES** section of this preamble. If necessary, oral presentations will be limited to 15 minutes each. Any member of the public may file a written statement with EPA before, during, or within 30 days after the hearing. Written statements should be addressed to the Air Docket address given in the **ADDRESSES** section of this preamble.

A verbatim transcript of the public hearing, written statements, and a summary of the public meetings will be available for public inspection and copying during normal working hours at EPA's Air Docket in Washington, DC (see **ADDRESSES** section of this preamble).

B. Docket

The docket for this regulatory action is A-90-33. The docket is an organized and complete file of all the information submitted to or otherwise considered by, EPA in the development of this proposed rulemaking. The principal purposes of the docket are: (1) To allow interested parties a means to identify and locate documents so that they can effectively participate in the rulemaking process, and (2) to serve as the record in case of judicial review (except for interagency review materials) [307(d)(7)(A)]. The docket is available for public inspection at EPA's Air Docket, which is listed under the **ADDRESSES** section of this notice.

C. Office of Management and Budget (OMB) Review

Under Executive Order 12291 (E.O. 12291), EPA must judge whether a regulation is "major," and therefore subject to the requirement "to the extent permitted by law" to prepare a Regulatory Impact Analysis (RIA) in connection with each major rule. Major rules are defined as those likely to result in the following:

(1) An annual cost to the economy of $100 million or more.

(2) A major increase in costs or prices for consumers or individual industries.

(3) Significant adverse effects on competition, employment, investment, productivity, innovation, or international trade.

The total cost of implementing the operating permit programs in all States would incur annualized costs in excess of $100 million. The requirements for these costs

are contained in section 502(b)(3) of Title V. Although some of these costs represent some baseline costs, due to existing State permitting and not new costs, the Agency has declared these regulations to be major. Accordingly, a Regulatory Impact Analysis has been prepared.

Given the mandate within Title V to develop these regulations, the Agency has taken steps to provide for the timely accomplishment of the required objectives. In following the implementation principles previously described in section II., EPA has proposed to allow flexibility in permit design, use general permits to expedite the review process for certain smaller sources, and to phase-in implementation of certain requirements. The Agency has thus lowered the overall societal cost and any adverse economic impact associated with meeting the environmental objectives of Title V. In addition, with permit fee revenue collections from subject sources State and local agencies will have the resources to develop and implement an accountable and enforceable operating permit program.

These regulations and the draft RIA were submitted to OMB for review as required by E.O. 12291. Any written comments from OMB to EPA, and an
y EPA responses to those comments, will be included in Docket A-90-33.

D. Regulatory Flexibility Act Compliance

Under the Regulatory Flexibility Act, whenever an Agency publishes any proposed or final rule in the FEDERAL REGISTER, it must prepare a Regulatory Flexibility Analysis (RFA) that describes the impact of the rule on small entities (i.e., small businesses, organizations, and governmental jurisdictions). That analysis is not necessary, however, if an Agency's Administrator certifies that the rule will not have a significant economic impact on a substantial number of small entities.

The EPA has established guidelines for determining whether an RFA is required to accompany a rulemaking package. The guidelines state the criteria for determining when the number of affected small entities is "substantial" and whether there is a significant impact. The determination of significant impact for small businesses essentially depends upon compliance costs, production costs, and predicted closures. For small governments, the determination of significant impact depends upon compliance costs, operating costs, and recordkeeping costs.

A regulatory flexibility screening analysis was prepared to examine the potential for significant adverse impacts on small entities associated with specific permitting provisions. This analysis has revealed that without specific mitigation provisions, substantial numbers of small entities may be adversely impacted. Since potential adverse impacts could exist, EPA is proposing to use the concept of general permits and deferred

applicability of non-major sources to mitigate any such potential impacts. To the extent any remaining significant adverse impacts are probable, the small business assistance program provisions of Title V could provide further relief. Consequently, EPA does not believe that large numbers of small entities will be adversely affected or will experience disproportionate significant impacts. As such, the Agency proposes to certify that this rule, if promulgated, will not have a significant and disproportionate adverse economic impact on a substantial number of small business entities and thereby does not require an RFA. The EPA, however, solicits any information or data which might affect this proposed certification. The EPA will reexamine this issue any subsequent analysis of information received would also be avilable in the docket and will be taken into account before promulgation.

E. Paperwork Reduction Act

The information collection requirements in this proposed rule have been submitted for approval to OMB under the Paperwork Reduction Act, 44 U.S.C. 3501 et seq. An ICR document has been prepared by EPA and a copy may be obtained from Sandy Farmer, Information Policy Branch (PM-223), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460, (202) 382-2706.

The average annual burden hours for the collection of information is approximately 92 hours for large sources, 58 hours for small sources, and 32 hours per State/local agency response. The total annual burden is estimated to be around 1.5 million hours.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden by [60 days after publication] to: Chief, Information Policy Branch (PM-223), U.S. Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503, marked "Attention: Desk Officer for EPA." The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

F. Federalism Implications

The proposed Part 70 regulations reflect the congressionally-intended requirements in Title V of the Act for States to develop operating permit programs The basic elements required by these regulations are directly from Title V, such as standard applications form, public participation, permit content, monitoring and reporting requirements, and compliance plans.

The Work Group that developed these proposed rules received input from State and local air pollution agency representatives concerning the concept of building on existing State and local agency permit programs so as to

minimize the disruption, of, and maximizing the utilization of, existing practices.

For these reasons, a federalism assessment has not been prepared. The EPA, however, solicits comment on any perceived discretion it has in designing the program being proposed today and will consider the need for such an assessment based on comments received during the public comment period. Any information indicating the need for a federalism assessment will be available in the docket.

List of Subjects in 40 CFR Part 70

Air pollution control, Prevention of significant deterioration, New source review, Fugitive emissions, Particulate matter, Volatile organic compounds, Nitrogen dioxide, Carbon monoxide, Hydrocarbons, Lead, Operating permits.

(Date) APR 23 1991

(Signature of Acting Administrator)

The reasons set out in the preamble, Title 40, Chapter I of the Code of Federal Regulations is amended by adding a Part 70 as set forth below.

PART 70 - STATE OPERATING PERMIT PROGRAMS

Sec.

70.1 Program overview.
70.2 Definitions.
70.3 Applicability.
70.4 State program submittals and transition.
70.5 Permit applications.
70.6 Permit content.
70.7 Permit issuance, Renewal, Reopenings, Operational Flexibility and Revisions.
70.8 Permit review by EPA and affected States
70.9 Fee determination and certification.
70.10 Federal oversight and sanctions.
70.11 Requirements for enforcement authority.

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

§ 70.1 Program overview.

(a) The regulations in this part provide for the establishment of comprehensive State air quality permitting systems consistent with the requirements of Title V of the Clean Air Act (Act) (42 U.S.C. 7401, *et seq.*). These regulations define the minimum elements required by the Act for operating permit programs and the corresponding standards and procedures by which the Administrator will approve, oversee, and withdraw approval of State operating permit programs. This permitting process is a key element in the implementation of the Act's regulatory requirements to all stationary sources to which it applies.

(b) This permitting program is designed to promote timely and efficient implementation of goals and requirements of the Act. Such a system offers many benefits: a better organized and clearer process for implementing air pollution control requirements, improved information management, more efficient enforcement, greater certainty for sources and the public, reasonable operational flexibility for industry to respond to market-based demands, greater speed in addressing various source-specific actions that previously had to be processed as State implementation plan (SIP) revisions, and increased and more predictable funding for State air pollution permitting programs.

(c) All sources subject to these regulations must obtain a permit to operate that assures compliance by the source with all applicable requirements of the Act. While Title V does not impose substantive new requirements, it does require that fees be imposed on sources and that certain procedural measures be adopted especially with respect to compliance.

(d) Nothing in this part shall prevent a State, or interstate permitting authority, from establishing additional requirements not inconsistent with this Act. No permit, however, can be less stringent than the applicable provisions of the Act, including the applicable implementation plan. In the case of Federal intervention in the permit process, the Administrator reserves the right to implement the State program, in whole or in part, or the standard Federal program contained in Part 71 of this chapter (EPA expects to issue Part 71 regulations in May, 1992.)

(e) The requirements of Part 70, including provisions regarding schedules for submission and approval or disapproval of permit applications, shall apply to the permitting of affected sources under the acid rain program, except as provided herein or modified in Parts 72 through 79 of this chapter, or would otherwise be inconsistent with Title IV of the Act (EPA expects to issue regulations in Parts 72 through 79 in May, 1992.)

(f) Issuance of State permits under this part may be coordinated with issuance of permits under the Resource Conservation and Recovery Act, the National Pollutant Discharge Elimination System, and section 404 permits, whether issued by the State, the Environmental Protection Agency (EPA), or the Corps of Engineers.

§70.2 Definitions.

The following definitions apply to Part 70. Except as specifically provided in this section, terms used in this part retain the meaning accorded them under the applicable requirements of the Act.

(a) "Act" means the Clean Air Act, as amended, 42 U.S.C. 7401, *et seq.*

(b) "Actual emissions" means the actual rate of emissions in tons per year of any regulated pollutant emitted from a Part 70 source over the preceding calendar year or any other period defined by the permitting authority to be consistent with the fee schedule approved pursuant to section 70.9 of this part. Actual emissions shall be calculated using the unit's actual operating hours, production rates, and in-place control equipment, types of materials processed, stored, or combusted during the preceding calendar year.

(c) An "administrative permit amendment" is a permit revision that accomplishes one or more of the following changes:

(1) Corrects typographical errors.

(2) Identifies a change in the name, address, or phone number of any person identified in the permit, or provides a similar minor administrative change at the source.

(3) Requires more frequent monitoring or reporting by the permittee.

(4) Allows for a change in ownership or operational control of a source where the permitting authority determines that no other change in the permit is necessary, provided that a written agreement containing a specific date for transfer of permit responsibility, coverage, and liability between the current and new permittees has been submitted to the permitting authority.

(5) Incorporates into the Part 70 permit the requirements from preconstruction review permits or exemptions authorized under an approved new source review program in the applicable implementation plan.

(6) Any other change that the permitting authority determines to be similar to those in section 70.2 (c)(1) - (4), above.

(d) "Affected source" means a source that includes one or more affected units under Title IV of the Act.

(e) "Affected States" are all States:

(1) Whose air quality may be affected and that are contiguous to the State in which a Part 70 permit, permit modification or permit renewal is being proposed; or

(2) That are within 50 miles of the permitted source.

(f) "Affected unit" means a "unit" as that term is defined in Title IV of the Act, that is subject to the emission reduction requirements or limitations of Title IV of the Act.

(g) "Applicable requirements" or an "applicable requirement" of the Act include all of the following as they apply to emissions units in a Part 70 source, unless the context of the regulation requires otherwise:

(1) Requirements of the applicable implementation plan approved or promulgated by EPA under Title I of the Act that implement the relevant requirements of the Act, including any revisions to that plan, in Part 52 of this chapter.

(2) Terms and conditions of any preconstruction permits issued pursuant to Title I, Part C or D of the Act.

(3) Requirements of any standard and any other requirements promulgated under section 111 of the Act.

(4) Requirements of any standard promulgated for hazardous air pollutants and any other requirements under section 112 of the Act.

(5) Requirements of the acid rain program under Title IV of the Act and Parts 72 through 79 of this chapter.

(6) Any monitoring, reporting, and certification requirements established pursuant to section 504(b) or section 114(a)(3) of the Act.

(7) Standards and regulations governing solid waste incineration, under section 129 of the Act.

(8) Standards and regulations for consumer and commercial products, under section 183(e) of the Act.

(9) Standards and regulations for tank vessels, under section 183(f) of the Act.

(10) Requirements of the program to control air pollution from Outer Continental Shelf sources, under section 328 of the Act.

(11) Requirements of the program to protect stratospheric ozone, under Title VI of the Act.

(h) A "complete application" is one that the permitting authority has determined, consistent with the criteria in section 70.5(c) of this part, to contain all the information needed to begin to process the application. A determination that an application is complete continues in effect, provided that the source submits by the date(s) specified by the permitting authority any additional information reasonably determined by the permitting authority in writing to be necessary for developing and issuing the Part 70 permit.

(i) "Designated representative" means a responsible person or official authorized by the owner or operator of an affected unit, in accordance with Title IV of the Act and Parts 72 through 79 of this chapter, to represent the owner or operator in matters pertaining to the holding, transfer, or disposition of allowances allocated to the unit, and the submission of and compliance with permits, permit applications, and compliance plans for the unit. For purposes of acid rain program permit requirements, whenever the term "responsible official" is used in this part, it shall refer to the "designated representative" of the affected source or affected unit, for whom a certificate of designation has been submitted in accordance with Part 72 of this chapter.

(j) A "draft proposed permit" is the version of a permit for which the permitting authority offers public notice and an opportunity for public comment and hearing.

(k) "Emissions unit" means any part of a stationary source which emits or has the potential to emit any regulated pollutant. This term is not meant to alter or affect the definition of the term "unit" for purposes of the acid rain program.

(l) The "EPA" or the "Administrator" means the Administrator of the U.S. EPA or his designee.

(m) "Federally-enforceable limitation" means all limitations and requirements enforceable by the Administrator.

(n) A "final permit" is the version of a Part 70 permit issued by the permitting authority that has completed all administrative concurrence and procedures at the State and Federal levels.

(o) "Flexible source operation refers to any change provided for in section 70.6(d).

(p) "Fugitive emissions" are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

(q) A "general permit" is a standardized Part 70 permit that may be made applicable to numerous similar sources.

(r) "Major source" means any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person or persons under common control) belonging to a single major industrial grouping and that is any of the following:

(1) A major source as defined in section 112 of the Act for the following:

(i) For pollutants other than radionuclides, any stationary source or group of stationary sources located within a contiguous area and under common control that emits or has the potential to emit, in the aggregate, 10 tons per year (tpy) or more of any hazardous air pollutant which has been listed pursuant to section 112(b) of the Act, 25 tpy or more of any combination of such hazardous air pollutants, or such lesser quantity as the Administrator may establish by rule.

(ii) For radionuclides, such term shall have the meaning specified by the Administrator by rule.

(2) A major stationary source of air pollutants, as defined in section 302 of the Act, that directly emits or has the potential to emit, 100 tpy or more of any air pollutant (including any major source of fugitive emissions of any such pollutant, as determined by rule by the Administrator). The fugitive emissions of a stationary source shall not be considered in determining whether it is a major stationary source for the purposes of section 302(j) of the Act, unless the source belongs to one of the following categories of stationary source:

(i) Coal cleaning plants (with thermal dryers).
(ii) Kraft pulp mills.
(iii) Portland cement plants.
(iv) Primary zinc smelters.
(v) Iron and steel mills.
(vi) Primary aluminum ore reduction plants.
(vii) Primary copper smelters.
(viii) Municipal incinerators capable of charging more than 250 tons of refuse per day.
(ix) Hydrofluoric, sulfuric, or nitric acid plants.
(x) Petroleum refineries.
(xi) Lime plants.
(xii) Phosphate rock processing plants.
(xiii) Coke oven batteries.
(xiv) Sulfur recovery plants.
(xv) Carbon black plants (furnace process).
(xvi) Primary lead smelters.

(xvii) Fuel conversion plant.
(xviii) Sintering plants.
(xix) Secondary metal production plants.
(xx) Chemical process plants.
(xxi) Fossil-fuel boilers (or combination thereof) totaling more than 250 million British thermal units per hour heat input.
(xxii) Petroleum storage and transfer units with a total storage capacity exceeding 300,000 barrels.
(xxiii) Taconite ore processing plants.
(xxiv) Glass fiber processing plants.
(xxv) Charcoal production plants.
(xxvi) Fossil fuel-fired steam electric plants of more than 250 million British thermal units per hour heat input.
(xxvii) All other stationary source categories regulated under section 111 or 112 of the Act.

(3) A major stationary source as defined in Part D of Title I of the Act including:

(i) For ozone nonattainment areas, sources with the potential to emit 100 tons or more per year of volatile organic compounds or oxides of nitrogen in areas classified as "marginal" or "moderate," 50 tons or more per year in areas classified as "serious," 25 tons or more per year in areas classified as "severe," and 10 tons or more per year in areas classified as "extreme;" except that the references in this clause to 100, 50, 25, and 10 tons per year of nitrogen oxides shall not apply with respect to any source for which the Administrator has made a finding, under section 182(f)(1) or (2) of the Act, that such source shall not be subject to any requirement otherwise applicable to such source under section 182(f) of the Act.

(ii) For ozone transport regions established pursuant to section 184 of the Act, sources with the potential to emit 50 tons or more per year of volatile organic compounds.

(iii) For carbon monoxide nonattainment areas (1) that are classified as "serious," and (2) in which stationary sources contribute significantly to carbon monoxide levels as determined under rules issued by the Administrator, sources with the potential to emit 50 tons or more per year of carbon monoxide.

(iv) For particulate matter (PM_{10}) nonattainment areas classified as "serious," sources with the potential to emit 70 tons or more per year of PM_{10}.

A stationary source or group of stationary sources shall be considered as part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources belong to the same Major Group (i.e., which have all the same two-digit code) as described in the Standard Industrial Classification Manual, 1972, as amended by the 1977 Supplement (U.S. Government Printing Office stock numbers 4101-0066 and 033-055-00176-0, respectively). Notwithstanding the other provisions of this subsection, the

activities of any vessel shall not be considered part of a major source.

(s) A "minor permit amendment" is a revision to a Part 70 permit that meets the requirements of section 70.7(f).

(t) A "Part 70 permit" is any permit issued, renewed, amended, or revised pursuant to this part.

(u) A "Part 70 source" is any source subject to the permitting requirements of this part, as provided in section 70.3(a) and 70.3(b) of this part.

(v) A "permit modification" is a revision to a Part 70 permit that meets the requirements of section 70.7(d) of this Part.

(w) A "permit revision" is any permit modification, administrative permit amendment, or minor permit amendment.

(x) "Permitting authority" means either of the following:

(1) The Administrator, in the case of EPA-implemented programs.

(2) The State air pollution control agency, local agency, other State agency, Indian tribe or other agency authorized by the Administrator to carry out a permit program under this part.

(y) "Potential to emit" means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation is federally-enforceable. This term does not alter or affect the use of this term for any other purposes under the Act, or the term "capacity factor" as used in Title IV of the Act.

(z) A "proposed permit" is the version of a permit that the permitting authority forwards to the Administrator for review after closure of the public notice period and after considering any public comments (including those from any affected State).

(aa) "Regulated pollutant" means the following:

(1) Nitrogen oxides or any volatile organic compound.

(2) Any pollutant for which a national ambient air quality standard has been promulgated.

(3) Any pollutant that is addressed by any standard promulgated under section 111 or 112 of the Act.

(bb) "Renewal" is the process by which a permit is reissued at the end of its term.

(cc) "Responsible official" means one of the following:

(1) For a corporation, a president, secretary, treasurer, or vice-president of the corporation in charge of

a principal business function, or any other person who performs similar policy- or decision-making functions for the corporation; or the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars), if authority to sign documents has been assigned or delegated to the manager in accordance with corporate procedures.

(2) For a partnership or sole proprietorship, a general partner or the proprietor, respectively.

(3) For a municipality, State, Federal, or other public agency, either a principal executive officer or ranking elected official. For the purposes of this part, a principal executive officer of a Federal agency includes the chief executive officer having responsibility for the overall operations of a principal geographic unit of the agency (e.g., a Regional Administrator of EPA).

(dd) The term "State" includes all non-Federal permitting authorities, including local agencies and interstate associations as well as statewide programs. The term "State" also encompasses those Indian tribes that the Administrator has determined, pursuant to section 301(d) of the Act, to treat as States. "State" shall have its conventional meaning where such meaning is clear from the context. For purposes of the acid rain program, the term "State" shall be limited to authorities within the 48 continuous States and the District of Columbia as provided in section 402(14) of the Act.

(ee) "Stationary source" means any activity or piece of equipment at a building, structure, facility, or installation that emits or may emit any air pollutant.

(ff) "Whole program" means a Part 70 permit program, or any combination of partial programs, that meet all the requirements of these regulations and cover all the Part 70 sources in the entire State. For the purposes of this definition, State does not include local permitting authorities, but refers only to the entire State, Commonwealth, or Territory.

§ 70.3 Applicability.

(a) Sources subject to permitting: Part 70 Sources. A State permitting program under this part must provide for permitting of at least the following sources:

(1) Any major source as defined in section 70.2(q) of this part.

(2) Any source, including an area source, subject to a standard or regulation promulgated under section 111 of the Act.

(3) Any source, including an area source, subject to a standard or regulation promulgated under section 112 of the Act.

(4) Any affected source subject to Title IV of the Act and the acid rain program requirements of Parts 72 through 79 of this chapter, including any election source as defined in Title IV of the Act.

(5) Any source in a source category designated by the Administrator pursuant to this section. These source categories include [reserved].

(b) Source category exemptions. A State permitting program under this part may provide for exemptions of source categories from the requirements of this part consistent with the Administrator's designations pursuant to this section.

(1) Except as provided in paragraphs (b)(2) and (4) of this section, all sources listed in paragraph (a) of this section that are not major sources, as defined in section 70.2 of this part (i.e., nonmajor sources) or affected sources under the acid rain program in Parts 72 through 79 of this chapter, and for which the State has made and the Administrator has approved the showing desccribedin paragraph (b)(2) of this section, may be exempted from the obligation to obtain a Part 70 permit for a period of 5 years from the effective date of the Part 70 or Part 71 program, as applicable, in the State.

(2) In the case of sources covered in paragraph 3(a) of this section that are not a major source that emit any pollutant or precursor to a pollutant for which the area in which such sources are located is designated nonattainment, the State shall submit both of the following:

(i) An inventory or quantification of such sources in nonattainment areas which would be exempted from the program.

(ii) A demonstration that the State can assure compliance with the State's nonattainment area applicable implementation plan obligations applicable to such sources without relying on the Part 70 permit program for the first 5 years of the program.

(3) In the case of nonmajor sources subject to a standard promulgated under section 112 of the Act after [date of promulgation], the Administrator shall determine whether to exempt any or all applicable sources at the time that the new standard is promulgated.

(4) Any source listed in paragraph (a) of this section exempt from the requirement to obtain a permit under this section may opt to apply for and receive a permit under a program approved pursuant to these regulations.

(5) The following source categories are exempted from the obligation to have a Part 70 permit: [reserved]

(c) Emissions units and Part 70 sources.

(1) For Part 70 sources subject to the Part 70 program because they are major sources under section 70.2(q) of this part, the permitting authority shall include in the permit

all applicable requirements for all regulated emissions units in the major source.

(2) For any nonmajor Part 70 source subject to the Part 70 program under paragraphs (a) and (b) of this section, the permitting authority shall include in the permit all requirements of the Act applicable to emissions units which trigger classification as a Part 70 source.

(3) The emissions of regulated pollutants from any units not directly subject to applicable requirements must be described for fee purposes, unless the permitting authority pursuant to section 70.9(b)(2)(v) of this part has exempted it from the collection of fees.

(d) Fugitive emissions. Fugitive emissions from a Part 70 source shall be reviewed and included in the permit in the same manner as stack emissions, regardless of whether the source category in question is included in the list of sources contained in the definition of "major source" in section 70.2(q)(2) of this part.

§70.4 State Program Submittals and Transition.

(a) Date for submittal. Not later than November 15, 1993, the Governor of each State shall submit to the Administrator for approval a proposed whole permit program, under State law or under an interstate compact, meeting the requirements of this Part. If Part 70 is subsequently revised such that the Administrator determines that it is necessary to require a change to an approved State program, the required revisions to the program shall be submitted within 12 months of the final changes to Part 70, unless the Administrator authorizes some other time.

(b) Elements of the initial program submission. Any State that seeks to administer a program under this Part shall submit to the Administrator a formal letter of submittal from the Governor or his designee requesting EPA approval of the program and at least three copies of a program submission. The submission shall contain the following:

(1) A complete program description describing how the State intends to carry out its responsibilities under this part.

(2) The regulations that comprise the program, evidence of their procedurally correct adoption (including any required notice of public comment and any significant comments received), and copies of all applicable State or local statutes and regulations that authorize the Part 70 regulations, including those governing State administrative procedures.

(3) A legal opinion from the Attorney General for the State, or the attorney for those State, local, or interstate air pollution control agencies that have independent legal counsel, stating that the laws of the State, locality, or interstate compact provide adequate authority to carry out all aspects of the program. This statement shall include

citations to the specific statutes, administrative regulations, and, where appropriate, judicial decisions that demonstrate adequate authority. State statutes and regulations cited by the State Attorney General or independent legal counsel shall be in the form of lawfully adopted State statutes and regulations at the time the statement is signed and shall be fully effective by the time the program is approved. To qualify as "independent legal counsel" the attorney signing the statement required by this section must have full authority to independently represent the State agency in court on all matters pertaining to the State program. The legal opinion shall also include a demonstration of adequate legal authority to carry out the requirements of this part, including authority to carry out each of the following:

(i) Issue permits that assure compliance with each applicable standard, regulation, or requirement under the Act by all sources required to have a Part 70 permit.

(ii) Incorporate appropriate monitoring, recordkeeping, reporting, and compliance certification requirements into Part 70 permits.

(iii) Issue permits for a fixed term of 5 years in the case of permits with acid rain provisions and issue all other permits for a period not to exceed 5 years except for permits issued for solid waste incineration units combusting municipal waste subject to section 129(e) of the Act.

(iv) Issue permits for solid waste incineration units combusting municipal waste subject to section 129(e) of the Act for a period not to exceed 12 years and review such permits no less than every 5 years.

(v) Incorporate into permits emission limitations and all other applicable requirements, conditions, and prohibitions under the Act, including those in an applicable implementation plan.

(vi) Terminate, modify, or revoke and reissue permits for cause.

(vii) Enforce permits, permit fee requirements, and the requirement to obtain a permit, as specified in section 70.11 of this part.

(viii) Make available to the public any permit application, compliance plan, permit, and monitoring and compliance report under section 503(e) of the Act, with the exception of that information entitled to confidential treatment pursuant to section 114(c) of the Act.

(ix) Not issue a permit for the purposes of Part 70 if the Administrator timely objects to its issuance pursuant to section 70.8(c) of this part.

(x) Provide an opportunity for judicial review in State court of the final permit by the applicant, any person who participated in the public comment process provided pursuant to section 70.7(i) of this part, and any other

person who could obtain judicial review of such actions under State laws.

(xi) Ensure that the acid rain portions of permits for affected sources meet the requirements of Parts 72 through 79 of the Act.

(xii) Ensure that the authority of the State/local permitting Agency is not used to modify the acid rain program requirements.

(xiii) Issue and enforce general permits if the State seeks to implement the general permit program.

(4) Relevant permitting program documentation not contained in the State regulations, including the following:

(i) Copies of the permit form(s), application form(s), and reporting form(s) the State intends to employ in its program.

(ii) Criteria for monitoring source compliance including inspection strategies and inspector training certification.

(5) A complete description of the State's compliance tracking and enforcement program, unless the State has an agreement with EPA that provides this information.

(6) A showing of adequate authority and procedures to determine within 30 days of receipt whether applications (including renewal applications) are complete, and to take final action on such applications within 18 months. Any failure to take final action in a timely manner shall be treated as a final permit action solely for purposes of obtaining judicial review in a State Court to require that actions be taken by the permitting authority on such application without additional delay.

(7) A demonstration, consistent with section 70.9 of this part, that the permit fees required by the State program are sufficient to cover all reasonable (direct and indirect) costs required to develop and administer the Part 70 permit program.

(8) A statement from the Governor that adequate personnel and funding have been made available to develop and administer the program. This statement shall include the following:

(i) A description in narrative form of the scope, structure, coverage and processes of the State program.

(ii) A description of the organization and structure of the State agency or agencies that will have responsibility for administering the program,including the information specified in this paragraph. [If more than one agency is responsible for administration of a program, each agency must have jurisdiction over a class of activities.] The responsibilities of each agency must be delineated, their procedures for coordination must be set forth, and an agency may be designated as a "lead agency" to facilitate communications between EPA and the other agencies having program responsibility.

(iii) A description of the State agency staff who will carry out the State program, including the number, occupation, and general duties of the employees. The State need not submit complete job descriptions for every employee carrying out the State program.

(iv) A description of applicable State procedures, including permitting procedures and any State administrative or judicial review procedures.

(v) An estimate of the costs of establishing and implementing the program for the first 4 years after approval, and a description of how the State plans to meet those costs.

(9) A commitment from the State to submit, at least annually to the Administrator, information regarding the State's enforcement activities including, but not limited to, the number of criminal and civil, judicial and administrative enforcement actions commenced and concluded; the penalties, fines and sentences obtained in those actions; and the number of administrative orders issued.

(10) A requirement under State law that, if a timely and complete application for a permit renewal is submitted to the permitting authority, then one of the following shall occur:

(i) The permit shall not expire until the renewal permit has been issued or denied.

(ii) All the terms and conditions of the permit shall remain in effect until the renewal permit has been issued or denied. These terms and conditions do not include the permit shield contained in section 70.6(h) of this part.

(iii) The renewal permit shall be issued or denied before the expiration of the Part 70 permit.

Notwithstanding this paragraph, if the permitting authority fails to act in a timely way on a permit renewal, EPA may invoke its authority under section 505(e) of the Act to terminate, revoke, and reissue the permit.

(11) A transition plan providing a schedule for submittal and final action on initial permit applications for all Part 70 sources. This plan shall provide for submittal of permit applications by all Part 70 sources by no later than one full year after the effective date of the permit program (or a partial or interim program), and assure that at least one third of such applications will be acted upon annually over a period not to exceed 3 years after such effective date, and provide that any complete permit application containing an early reduction demonstration under section 112(i)(5) of the Act shall be acted upon within 9 months of receipt. It shall also provide for the submission of permit applications, whether for initial permits or permit renewals, and for the permitting of affected sources under the acid rain program in accordance with the deadline provided in Parts 72 through 79 of this title.

(12) Any permitting programs, such as those of local air pollution control agencies, providing for the issuance of permits by a permitting authority other than the State, shall be consistent with all the elements required in paragraphs (b)(1) through (11) of this section.

(c) Partial programs. The EPA may approve a partial program if, at a minimum, it applies and ensures compliance with Title V of the Act and with all the requirements following, as they apply to the source categories covered by the partial program:

(1) All requirements of Title V of the Act and of these regulations.

(2) All requirements established under Title IV of the Act applicable to affected sources.

(3) All requirements established under sections 111 and 112 of the Act applicable to major sources, area sources, and new sources.

(4) All other requirements of Title I of the Act (other than section 112 of the Act).

Approval of any partial program does not relieve the State from its obligation to submit a whole program or from application of any sanctions for failure to submit a fully approvable whole program.

(d) Interim approval. If a program (including a partial permit program) submitted under this part substantially meets the requirements of this part, but is not fully approvable, the Administrator may by rule grant the program interim approval. The EPA will not grant interim approval to any program unless it meets each of the following minimum requirements:

(1) Adequate fees. The program must provide for collecting permit fees adequate to meet the requirements of section 70.9 of this part.

(2) Applicable requirements. The program must provide for adequate authority to issue permits that assure compliance with all applicable requirements of the Act, including the requirements of the applicable implementation plan, for those sources covered by the program.

(3) Fixed term. The program must provide for fixed permit terms, consistent with paragraph (b)(3)(iii) and (iv) of this section.

(4) Public participation. The program must provide for public notice of and an opportunity for public comment and a hearing on draft proposed permits.

(5) EPA review. The program must allow EPA an opportunity to review each proposed permit and to object to its issuance.

(6) Permit issuance. The program must provide that the proposed permit will not be issued if EPA objects to its issuance.

In the notice of final rulemaking granting interim approval, the Administrator shall specify the changes that

must be made before the program can receive full approval and the conditions for implementation of the program until that time. Such interim approval shall expire on a date set by the Administrator (but not later than 2 years after such approval), and may not be renewed. Sources will become subject to the program according to the schedule approved in the State program. Permits granted under an interim approval shall expire at the end of their fixed term, unless renewed under a fully- or partially-approved program.

(e) EPA review of permit program submittals. Within 1 year after receiving a program submittal, the Administrator shall approve or disapprove the program, in whole or in part, by publishing a notice in the FEDERAL REGISTER. Any EPA action disapproving a program, in whole or in part, shall include a statement of the revisions or modifications necessary to obtain approval. The Administrator shall approve State programs that conform to the applicable requirements of this part.

(1) Within 30 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete. If EPA finds that a State's submission is complete, the 1-year review period (i.e., the period of time allotted for formal EPA review of a proposed State program) shall be deemed to have begun on the date of receipt of the State's submission. If EPA finds that a State's submission is incomplete, the 1-year review period shall not begin until all the necessary information is received by EPA.

(2) If the State's submission is materially changed during the statutory review period, the one-year review period shall begin again upon receipt of the revised submission.

(f) State response to EPA review of program.

(1) Disapproval. The State shall submit to EPA changes to the program that address the revisions or modifications required by the Administrator's action disapproving the program, or any part thereof, within 180 days of receiving notification of the disapproval or such other time as specified by the Administrator, but not to exceed 2 years.

(2) Interim approval. The State shall submit to EPA changes to the program addressing the deficiencies specified in the interim approval no later than 6 months prior to the expiration of the interim approval.

(g) Effective date. The effective date of a permit program, or partial or interim program approved under this part, shall be the effective date of approval by the Administrator.

(h) Individual permit transition. Upon approval of a State program, the Administrator shall suspend the issuance of Federal permits for those activities subject to the approved State program. After program approval, EPA shall

retain jurisdiction over any permit (including general permit) that it has issued unless arrangements have been made with the State to assume responsibility for these permits. Retention of jurisdiction shall include the processing of any permit appeals or modification requests; the conduct of inspections; and the receipt and review of monitoring reports. If any permit appeal or modification request is not finally resolved when the federally-issued permit expires, EPA may, with the consent of the State, retain jurisdiction until the matter is resolved. Upon request by a State, the Administrator may delegate authority to implement all or part of a permit issued by EPA, if a Part 70 program has been approved for the State. The delegation may include authorization to the State to collect appropriate fees, consistent with section 70.9 of this part.

(i) Program revisions. Either EPA or the State with an approved program may initiate a program revision. Program revision may be necessary when the controlling Federal or State statutory or regulatory authority is modified or supplemented. The State shall keep EPA fully informed of any proposed modifications to its basic statutory or regulatory authority, forms, procedures, or priorities.

(1) Mandatory. If the Administrator determines that a State is not adequately administering the requirements of this Part, or that the State's permit program is inadequate in any other way, the program, or its means of implementation by the State, shall be revised to correct the inadequacy. The program shall be revised within 180 days, or such other period as the Administrator may specify, following notification by the Administrator, or within 2 years if the State demonstrates that additional legal authority is necessary to effectuate the program revision.

(2) Revision of a State program shall be accomplished as follows:

(i) The State shall submit a modified program description, Attorney General's statement, or such other documents as EPA determines to be necessary under the circumstances.

(ii) Whenever EPA determines that the proposed program revision is substantial, EPA shall issue public notice and provide an opportunity to comment for a period of at least 30 days. The public notice shall be mailed to interested persons and shall be published in the FEDERAL REGISTER and in enough of the largest newspapers to provide appropriate coverage. The public notice shall summarize the proposed revisions and provide for the opportunity to request a public hearing.

(iii) The Administrator shall approve or disapprove program revisions based on the requirements of this part and of the Act.

(iv) A program revision shall become effective upon the approval of the Administrator. Notice of approval of any substantial revision shall be published in the FEDERAL REGISTER. Notice of approval of non-substantial program revisions may be given by a letter from the Administrator to the Governor or his designee.

(v) Any permitting agency with an approved program shall notify EPA whenever it proposes to transfer all or part of the program to any other agency, and shall identify any new division of responsibilities among the agencies involved. The new agency is not authorized to administer the program until the revision has been approved by the Administrator under this paragraph.

(3) Whenever the Administrator has reason to believe that circumstances have changed with respect to a State program, he may request, and the State shall provide, a supplemental Attorney General's statement, program description, or such other documents or information as he determines are necessary.

(j) Sharing of information.

(1) Any information obtained or used in the administration of a State program shall be available to EPA upon request without restriction. If the information has been submitted to the State under a claim of confidentiality, the State must submit that claim to EPA when providing information to EPA under this section. Any information obtained from a State accompanied by a claim of confidentiality will be treated in accordance with the regulations in Part 2 of this chapter.

(2) The EPA shall furnish to States with approved programs the information in its files which the State needs to implement its approved program. Any such information submitted to EPA under a claim of confidentiality will be subject to the conditions in Part 2 of this chapter.

(k) Administration and enforcement. Any State that fails to adopt a complete, approvable Part 70 program, or that EPA determines is not adequately administering or enforcing such a program, shall be subject to certain Federal sanctions as set forth in section 70.10 of this part.

§70.5 Permit applications.

(a) Duty to apply. Any person who owns or operates a Part 70 source required to have a permit under this part shall submit a timely and complete permit application in accordance with this section. For a source applying for a Part 70 permit for the first time, a timely application is one that is submitted 12 months after the source becomes subject to the permit program or such earlier date as the permitting authority may establish. For purposes of a permit renewal, where a State in its program approval has not met either section 70.4(b)(10)(i) or (ii) of this part, a timely application is one that is submitted 18 months

prior to the date of permit expiration, or such other time as may be approved by the Administrator. The Administrator shall approve a corresponding reduction in the 18 months requirement if the permitting authority is required to issue Part 70 permits for terms less than 5 years or to act on Part 70 permits in less than 18 months, execpt that in no event shall a time less than 6 months before permit expiration be approved.

(b) Standard Application Form and Required Information. The State program under this part shall provide for a standard application form or forms. The permitting authority may use its discretion in developing application forms that best meet program needs and administrative efficiency, but the forms and attachments chosen shall include, as a minimum, the key elements specified below:

(1) General company information, including company name and address (or plant name and address if different from the company name), owner's name and agent, plant site manager/contact.

(2) A plant description in terms of the processes and products (including identification by Standard Industrial Classification Code).

(3) The following emissions related information:

(i) All emissions of regulated pollutants and all emissions of pollutants subject to regulation for which the source is major.

(ii) Identification and description of all emissions points in sufficient detail to establish the basis for fees and applicability of requirements of the Act.

(iii) Emissions rates in total tons per year and in such other terms as are necessary to establish compliance consistent with the applicable standard reference test method.

(iv) Fuels, fuel use, and raw materials used.

(v) Identification and description of air pollution control equipment.

(vi) Limitations on source operation affecting emissions or any work practice standards, where applicable for all pollutants regulated at the Part 70 source.

(vii) Other information required by any applicable requirements (including information related to stack height limitations developed pursuant to section 123 of the Act), such as the location of emissions units, flow rates, building dimensions, and stack parameters (including height, diameter, and plume temperature) for all pollutants regulated at the Part 70 source, except for VOC's.

(viii) Calculations on which the above items are based.

(4) The following air pollution control requirements:

(i) Citation and description of applicable State and Federal air pollution control requirements, including

requirements that will become effective during the term of a permit, if such requirement has been promulgated at the time of permit application.

(ii) Description of any applicable test method for determining compliance with each requirement.

(5) Such other information, specific to particular program requirements of the Act, as may be necessary to implement and enforce those other requirements of the Act.

(6) Additional information as necessary to define reasonably anticipated alternative operating scenarios, which must be included in the Part 70 permit.

(7) A compliance plan for sources that are not in compliance with all applicable requirements. With respect to the requirements for which the source is not in compliance, such a compliance plan shall include the following:

(i) A description of how those requirements under the Act will be achieved.

(ii) A description of the compliance status of the source with respect to such requirements.

(iii) A schedule of compliance that includes a schedule of measures, including an enforceable sequence of actions with milestones, leading to compliance with all such requirements of the Act. The compliance schedule shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject.

(iv) A schedule for submission of certified progress reports no less frequently than every 6 months or such other shorter period as specified in the underlying applicable requirement.

(v) An explanation of any proposed exemptions from otherwise applicable air pollution control requirements.

The compliance plan content requirements specified in this paragraph shall apply and be included in the acid rain portion of a compliance plan for an affected source under Title IV of the Act, except as specifically superseded by Part 72 of this chapter, with regard to the schedule and method(s) the source will use to achieve compliance with the acid rain emissions limitations.

(8) Requirements for compliance certification, including the following:

(i) A certification of compliance by a responsible official consistent with paragraph (b)(10) of this section that addresses all air pollution control requirements applicable to the source, except, in the case of an affected source under the acid rain program, the designated representative of the source shall make this certification.

(ii) A statement of methods used for determining compliance, including a description of monitoring, recordkeeping, and reporting requirements and test methods.

(iii) A schedule for submission of compliance

certifications during the permit term, to be submitted no less frequently than annually or for such other shorter period as specified by the underlying applicable requirement.

(iv) A statement that the source is in compliance with any applicable enhanced monitoring and compliance certification requirements of the Act.

(9) The use of nationally standardized forms for acid rain portions of permit applications and compliance plans, as required by Part 72 of this chapter.

(10) Any application form, report, or compliance certification submitted pursuant to regulations under this part shall require certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this part shall state that, to the best of the signer's knowledge, information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

(c) Completeness determination. The program shall provide criteria and procedures for determining in a timely fashion when applications are complete. To be deemed complete, an application must provide all information necessary pursuant to paragraph (b) of this section to begin to process the application for the particular source. This information must be sufficient to evaluate the subject source and determine applicable regulatory requirements. The program shall require that a responsible official certify the submitted information consistent with paragraph (b)(10). Unless a determination that an application is not complete is made by the permitting authority within 30 days of receipt of the application, an application shall be deemed to be complete. If, during the processing of an application after it has been determined to be complete, the reviewing authority determines that additional information is necessary in order to evaluate or take final action on that application, such information may be requested in writing from the source. The source's ability to continue operation without a permit as set forth in section 70.7(b) of this part shall remain in effect from the time that the permitting authority determines that the application is complete until the final permit is issued, as long as the applicant submits such requested additional information by the deadline specified by the permitting authority.

(d) Duty to supplement or correct application. If the applicant becomes aware that he failed to submit any relevant facts or submitted incorrect information in a permit application, he shall promptly submit such supplementary facts or corrected information.

§70.6 Permit content.

(a) Standard permit requirements. Each permit issued under this part shall include the following elements:

(1) Emission limitations and standards, including those operational requirements and limitations that are applied to assure compliance with all applicable requirements of the Act, including the requirements of the applicable implementation plan as are necessary to ensure compliance with applicable requirements of the Act, at the time of permit issuance.

(i) The permit shall specify and reference the origin of and authority for each requirement incorporated therein, and identify any difference in form as compared to the regulation upon which the limit or requirement is based.

(ii) The permit shall state that where another applicable requirement of the Act is more stringent than any applicable requirement of Parts 72 through 79 of this chapter, both provisions shall be incorporated into the permit and shall be federally-enforceable.

(2) Permit duration. The permitting authority shall issue permits for a fixed term of 5 years in the case of affected sources under Title IV of the Act, and for a term not to exceed 5 years in duration in the case of all other sources. Notwithstanding this requirement, the permitting authority shall issue permits for solid waste incineration units combusting municipal waste subject to section 129(e) of the Act for a period not to exceed 12 years and review such permits no less often than every 5 years. Permit requirements shall not remain in effect where inconsistent with State law or as provided in Part 72 of this chapter for the acid rain portions of a permit.

(3) Monitoring and related recordkeeping and reporting requirements:

(i) The permit shall set forth monitoring, recordkeeping, and reporting requirements that are required to assure compliance with requirements of the Act that are applicable to the source, including those implementing Parts 72 through 79 of this chapter. Such requirements shall assure use of consistent terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable emissions limitations, standards, and other requirements contained in the permit.

(ii) To meet the requirements of paragraph (a)(3)(i) of this section with respect to monitoring, the permit shall:

(A) Incorporate all applicable emissions monitoring and analysis procedures or test methods required under the Act, including any procedures and methods promulgated pursuant to section 504(b) or 114 of the Act.

(B) Specify required monitoring including type, intervals, and frequency sufficient to yield data that are representative of the monitored activity.

(C) The permit shall, as necessary, specify requirements concerning the proposed use, maintenance, and,

when appropriate, installation of monitoring equipment or methods.

(iii) To meet the requirements of paragraph (a)(3)(i) of this section with respect to recordkeeping, the permit shall require the following:

(A) Records of monitoring information that include the following:

(*1*) The date, place as defined in the permit, and time of sampling or measurements.

(*2*) The date(s) analyses were performed.

(*3*) The company or entity which performed the analyses.

(*4*) The analytical techniques or methods used.

(*5*) The results of such analyses.

(B) A record of changes made at the source that result in emissions of a regulated pollutant subject to an applicable requirement, but not otherwise regulated under the permit and the emissions resulting from those changes.

(C) The permittee to retain records of all monitoring data and support information for a period of at least 5 years from the date of the monitoring sample, measurement, report, or application. Support information includes all calibration and maintenance records and all original strip chart recordings for continuous monitoring instrumentation, and copies of all reports required by the permit.

(iv) To meet the requirements of paragraph (a)(3)(i) of this section with respect to reporting, the permit shall:

(A) Require reports of any required monitoring to be submitted no less often than every 6 months. All instances of deviations from permit requirements must be clearly identified in such reports. All required reports must be certified by a responsible official consistent with section 70.5(b)(10) of this part.

(B) Require prompt reporting of deviations from permit requirements including those attributable to upset conditions as defined in the permit, the cause of such or deviations, and any corrective actions or preventive measures taken.

(4) A condition prohibiting emissions exceeding any allowances that the source lawfully holds under the acid rain program, pursuant to Title IV of the Act.

(i) No permit revision shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program and that do not violate any other permit term or condition.

(ii) No limit shall be placed on the number of allowances held by the source. The source may not, however, use allowances as a defense to noncompliance with any other requirement under the Act.

(iii) Any such allowance shall be accounted for according to the procedures established in Parts 72 through 79 of this chapter.

(5) A severability clause to ensure the continued validity of the various permit requirements in the event of a challenge to any portions of the permit.

(6) Provisions stating the following:

(i) Duty to comply. The permittee must comply with all conditions of this permit. Any permit noncompliance constitutes a violation of the Act and is grounds for enforcement action; for permit termination, revocation and reissuance, or modification; or for denial of a permit renewal application.

(ii) Need to halt or reduce activity not a defense. It shall not be a defense for a permittee in an enforcement action that it would have been necessary to halt or reduce the permitted activity in order to maintain compliance with the conditions of this permit.

(iii) Permit actions. This permit may be modified, revoked and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(iv) Property rights. This permit does not convey any property rights of any sort, or any exclusive privilege.

(v) Duty to provide information. The permittee shall furnish to the permitting authority, within a reasonable time, any information that the permitting authority may request in writing to determine whether cause exists for modifying, revoking and reissuing, or terminating the permit or to determine compliance with the permit. Upon request, the permittee shall also furnish to the permitting authority copies of records required by the permit to be kept.

(7) A provision to ensure that a Part 70 source pays fees to the permitting authority consistent with the fee schedule approved pursuant to section 70.9 of this part.

(8) Emissions trading. A provision stating that no permit revision shall be required for increases in emissions allowed through emissions trading to the extent such trades are authorized by the applicable requirements of the Act, including any applicable implementation plan.

(b) Federally-enforceable requirements. All applicable requirements under the Act in a Part 70 permit are enforceable by the United States and citizens under the Act. The State permitting authority shall specifically designate as not federally enforceable any State provisions in the permit which are more stringent than the applicable requirements under the Act.

(c) Compliance Requirements. All Part 70 permits shall contain the following elements with respect to compliance:

(1) Requirements for monitoring and analysis of pollutants regulated under the Act, including any prescribed by rule by the Administrator, sufficient to determine if each emissions unit of the source complies with any applicable emission limits, standards or requirements. States may establish testing requirements based on level of emissions expected, testing of similar units, likelihood of noncompliance, or other criteria submitted to and approved by the Administrator.

(2) Compliance certification, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit. Any document (including reports) required by a Part 70 permit shall contain a certification by a responsible official or, for requirements under Title IV of the Act a designated representative, of the permittee consistent with section 70.5(b)(10) of this part.

(3) Inspection and entry requirements that, upon presentation of credentials and other documents as may be required by law, the permittee shall allow the permitting authority, or an authorized representative (including an authorized contractor acting as a representative of the Administrator), to perform the following:

(i) Enter upon the permittee's premises where a regulated facility or activity is located or conducted, or where records must be kept under the conditions of the permit.

(ii) Have access to and copy, at reasonable times, any records that must be kept under the conditions of the permit.

(iii) Inspect at reasonable times any facilities, equipment (including monitoring and control equipment), practices, or operations regulated or required under the permit.

(iv) Sample or monitor at reasonable times, for the purposes of assuring permit compliance or as otherwise authorized by the Act, any substances or parameters at any location.

(4) For sources covered by section 70.5(b)(7) of this part, a schedule of compliance.

(5) For sources covered by section 70.5(b)(7) of this part, progress reports consistent with an applicable schedule of compliance to be submitted no less frequently than semiannually, or such other more frequent period as specified in the underlying applicable regulation and contain the following:

(i) Required and actual dates for achieving the activities, milestones, or compliance required by the schedule of compliance.

(ii) Where appropriate, an explanation of why any deadlines were not met, and any preventive or corrective measures adopted.

(6) Requirements for compliance certification with applicable requirements relevent to the source, including emission limitations, standards, or work practices. Permits shall include:

(i) The frequency (not less than annually or such more frequent periods as specified in the underlying requirement) of submissions of certifications.

(ii) A means for assessing or monitoring the compliance of the source with its emissions limitations, standards, and work practices.

(iii) A requirement that the compliance certification describe the following:

(A) The applicable requirements that are the basis of the certification.

(B) The current compliance status.

(C) Whether compliance was continuous or intermittent.

(D) The methods used for determining compliance, currently and over the reporting period, and whether the method used is the test method for initial compliance or a means for determining continuing compliance.

(E) Such other factors as the permitting agency may require.

(iv) A requirement that all compliance certifications showing noncompliance be submitted to EPA as well as the permitting authority.

(v) Such additional requirements as may be specified pursuant to section 114(a)(3) of the Act.

(7) Such other provisions as the permitting authority may require.

(d) Flexible source operation.

(1) The permitting authority shall issue permits that allow changes to a Part 70 source without requiring a permit revision before the source makes such changes, if those changes are not modifications under any provision of Title I of the Act and do not exceed the emissions allowable under the permit, whether expressed therein as a rate of emissions or in terms of total emissions for any timeframe addressed in the permit.

(2) If a part 70 source wishes to make a change that would increase any emission above a level allowed in the permit, and such change is not a modification under any provision of Title I of the Act and would not be prohibited by any applicable requirement under the Act, then the source shall be required to revise its permit pursuant to procedures established by the State. Such procedures may provide for maximum operating flexibility, provided they meet the requirements set forth inder 70.7(f).

(3) The permitting authority shall meet the requirement contained in paragraph (d)(1) of this section by the following.

(i) Issuing a permit that would identify reasonably anticipated operating scenarios provided by the source as

long as each such operating scenario is not prohibited by applicable requirements under the Act. This shall include the identification of all applicable emissions limitations, standards, other requirements and prohibitions that would apply to each emissions unit, so as to ensure enforceability under each scenario. Any changes, including emissions increases, which are included in such reasonably anticipated scenarios, shall be allowed without requiring a permit revision.

(ii) For pollutants regulated at the source, allowing changes in the operation of a facility which are not included in the permit as a reasonably anticipated operating scenario that would not increase either the rate of emissions or total emissions beyond what are allowed under any timeframe addressed by the permit. For any such change, the source shall provide the permitting authority and EPA with 7 calendar days advance written notification. Such notification shall describe the proposed changes, including changes in emissions, and any requirements that would be applicable as a result of the changes.

(iii) Not allowing changes that would constitute modifications or reconstructions under sections 110, 111, or 112 under the Act without requiring a permit revision pursuant to section 70.7 of this part, or requirements under the acid rain program without appropriate review under those programs and permit revision procedures under this section.

(iv) Neither notification nor permit revision is required for changes at the source that are allowed for and regulated by the permit, or that are not regulated or prohibited by the permit.

(v) Accomplishing the timely update of the Part 70 permit pursuant to the same procedures for processing administrative permit amendments contained in section 70.7(e) of this part.

(e) Reopenings. Each permit shall address reopenings, consistent with the requirements of section 70.7(g) of this part.

(f) General permits. The permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to conventional Part 70 permits. Any source covered by a general permit must apply to the permitting authority for use of the general permit. General permits shall not be authorized for affected sources under the acid rain program unless otherwise provided in Parts 72 through 79 of this chapter.

(g) Temporary sources. The permitting authority may issue a single permit authorizing emissions from similar operations by the same source owner or operator at multiple temporary locations. The operation must be temporary and involve at least one change of location during the term of

the permit. No such permit shall be issued unless it meets the following conditions:

(1) It contains conditions that will assure compliance with all applicable requirements of the Act at all authorized locations.

(2) It contains a requirement that the owner or operator notify the permitting authority at least 20 days in advance of each change in location.

(3) It contains conditions that will assure compliance with all other provisions of this section.

(4) It does not address any affected source under Title IV of the Act.

(h) Permit shield.

(1) The permitting authority may provide that compliance with the Part 70 permit shall be deemed compliance with other applicable provisions of the Act if, for each such provision, either of the following conditions is met:

(i) The permit includes all the applicable requirements of such provisions.

(ii) The permitting authority in acting on the permit application makes a determination relating to the permittee that the specified provisions referred to in such determination are not applicable to the source and the permit includes the determination or a concise summary thereof.

(2) A Part 70 permit that does not expressly state that a permit shield exists shall be presumed not to provide such a shield.

(3) Nothing in this subsection or in any Part 70 permit shall alter or affect the following:

(i) The provisions of section 303 of the Act (emergency orders), including the authority of the Administrator under that section.

(ii) The liability of an owner or operator of a source for any violation of applicable requirements prior to or at the time of permit issuance.

(iii) The applicable requirements of the acid rain program, consistent with section 408(a) of the Act.

(iv) The ability of EPA to obtain information from a source pursuant to section 114 of the Act.

(i) Property limitation. The issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.

§ 70.7 Permit issuance, renewal, reopenings, operational flexibility and revisions.

(a) Action on Application.

(1) A permit modification, renewal, or reopening may be issued only if all of the following conditions apply:

(i) The permitting authority has received a complete application for a permit, except that a complete application

need not be received before issuance of a general permit under section 70.6(f) of this Part.

(ii) The permitting authority has complied with the public participation procedures for permit issuance specified in paragraph (i) of this section.

(iii) The conditions of the permit provide for compliance with the applicable requirements of the Act, and regulations promulgated under Act.

(iv) The Administrator has received a copy of the permit and any notices required under sections 70.8(a) and 70.8(b) of this part, and has not objected to issuance of the permit under section 70.8(c) of this part within the time period specified therein.

(2) Except as provided under the initial transition plan provided for under section 70.4(b)(11) of this part or in Parts 71 and 72 of this chapter for the permitting of affected sources under the acid rain program, the program shall provide that the permitting authority take final action on each permit application (including request for permit modification or renewal) within 18 months after receiving a complete application.

(3) The program shall also contain reasonable procedures to prioritize action on applications for construction or modification under Title I, Parts C and D of the Act.

(4) The permitting authority shall promptly provide notice to the applicant of whether the application is complete. Unless the permitting authority provides an applicant a notice of incompleteness (outlining additional information requirements, within 30 days of receipt of an application, the application shall be deemed complete.

(5) The permitting authority shall develop a statement that sets forth the legal and factual basis for the draft permit conditions (including references to the applicable statutory or regulatory provisions). The permitting authority shall send this statement to EPA and any other person expressing an interest.

(6) The submittal of a complete application shall not affect the requirement that any source have a preconstruction permit under sections 110, 165, 172, or 173 of the Act.

(b) Requirement for a permit.

(1) Except as provided in the following sentence, no Part 70 source may operate after the time that it is required to submit a timely and complete application under an approved permit program except in compliance with a permit issued under a permit program approved under this part or Part 71 of this chapter. The program shall provide that if a Part 70 source submits a timely and complete application for permit issuance (including for modification or renewal), the source's failure to have a Part 70 permit is not a violation of this part until the permitting

authority takes final action on the permit application, except as noted in paragraph (b)(1)(i) through (iii) of this section.

(i) This protection shall cease to apply if the applicant fails to submit by the deadline specified by the permitting authority any additional information needed to process the application and requested in writing by the permitting authority subsequent to the completeness determination made pursuant to paragraph (a)(4) of this section to process the application.

(ii) This process shall not affect the requirement that any source have a preconstruction permit under sections 110, 165, 172, or 173 of the Act.

(2) The protection provided by paragraph (b)(1) of this section to operate without a permit shall also apply if the application or requested additional information is submitted less than 3 months after the required submittal date. Nothing in this paragraph shall be deemed to prevent the permitting authority or EPA from bringing an enforcement action and assessing penalties against a source for failing to submit a timely application. In such case, penalties may be assessed for the entire period from the time the application was required to be submitted to the time a complete application was actually submitted.

(3) The protection provided by paragraph (b)(1) of this section to operate without a permit shall also apply if the source submits a timely application and if the permitting authority determines it to be incomplete despite good faith effort on the part of the source; provided that the source cures the defect during an expeditious time period specified by the permitting authority. Nothing in this paragraph shall be construed to limit the exception to such protection that is set forth in the introductory text of paragraph (b)(1) of this section.

(c) Permit renewal and expiration. The program shall provide the following:

(1) Permits being renewed are subject to the same procedural requirements, including those for public participation and Federal oversight, that apply to initial permit issuance.

(2) Permit expiration terminates the source's right to operate unless a timely and complete renewal application is submitted consistent with paragraph (b) of this section.

(d) Permit modifications.

(1) A permit modification includes any proposed revision to address a change at the source, including monitoring, that would constitute a modification under any provision of Title I of the Act, as provided in 70.2(c)(5).

(2) Notwithstanding section 70.6(d) of this part, and paragraph (e) of this section, any relaxation in the reporting requirements or to milestones with the schedule of compliance for a noncomplying source in the current version

of the Part 70 permit are subject to paragraph 70.7(d) as a permit modification.

(3) Permit modifications shall be subject to the same procedural requirements, including those for public comment and Federal oversight, as original permit issuance, except that the required review shall cover only the proposed changes rather than the unchanged activities of the permittee. Nothing in this provision shall limit the authority of the permitting authority or EPA under paragraphs (g) and (h) of this section.

(e) Administrative permit amendments. An Administrative permit amendment shall be made by the permitting authority administratively and consistent with the requirements of paragraph (f)(3) of this section without being subject to advance notification or the procedural requirements applicable to a permit modification. The principles governing what constitutes administrative or minor permit amendments for purposes of the acid rain portion of permit shall be governed by Part 72 of this chapter.

(f) Minor permit amendments.

(1) Applicability. The permitting authority may treat any proposed revision to a Part 70 permit as a minor permit amendment in accordance with this subsection if the proposed revision:

(i) Does not constitute a modification under any provision of Title I of the Act; and

(ii) Complies with all applicable requirements of the Act relevant to the source.

(2) Notice.

(i) At least 7 calendar days before making the proposed change, the source applicant shall submit a notice to the permitting authority and the Administrator. The permitting authority may provide in its regulation a different timeframe for notices involving emergencies.

(ii) Such notification shall describe the proposed changes, including changes in emissions, any requirements that would be applicable as a result of the changes, and the revised permit language under which the source proposes to operate.

(iii) The source may implement the proposed change unless the permitting authority notifies the source within the period for prior notice, established pursuant to 70.7(f)(2)(i), that the proposed change does not qualify as a minor permit amendment or would not meet all applicable requirements of the Act. In the event that the source fails to demonstrate to the satisfaction of the permitting authority that the proposed change qualifies for processing as a minor amendment under this paragraph, the proposed change shall be processed as a permit modification under the procedures set forth in paragraph (d) of this section. In

such event the change shall not occur until the permit is revised following the EPA review period.

3. Permit revision.

(i) The permitting authority shall take no more than 60 days from receipt of the notice required in paragraph (f)(2) of this section to revise the Part 70 permit and may use administrative procedures to incorporate the changes comprising the minor permit amendment, provided that it designates any such permit revisions as having been made pursuant to this paragraph.

(ii) The permitting authority shall submit a copy of the revised permit to the Administrator and make it readily available at the offices of the permitting authority.

(g) Reopening for cause.

(1) Each issued permit shall include provisions addressing the conditions for revision prior to the expiration of the permit. Such revisions shall be made as expeditiously as practicable. Reopenings shall be performed for the following reasons:

(i) Additional requirements under the Act become applicable to a major Part 70 source and for which 3 or more years remain on the original term of the permit. Such revisions shall be made not later than 18 months after the promulgation of relevant standards or regulations. No such revision is required if the effective date of the requirement is later than the date on which the permit is due to expire.

(ii) Additional requirements (including excess emissions requirements) become applicable to an affected source under the acid rain program. Excess emissions offset plans shall be deemed to be incorporated into the permit upon approval by the Administrator.

(iii) The permitting authority or EPA determines that the permit contains a material mistake made in establishing the emissions standards or limitations, or other requirements of the permit.

(iv) The EPA determines that the permit must be revised to assure compliance with the applicable requirements of the Act.

(2) The permitting authority shall terminate, modify, or revoke and reissue permits for cause.

(3) Proceedings to reopen a permit shall follow the same procedures as apply to initial permit issuance and shall affect only those parts of the permit for which cause to reopen exists.

(4) Reopenings under paragraph (g)(1)(i) of this section shall not be initiated before a notice of such intent is provided to the affected Part 70 source by the permitting authority at least 30 days in advance of the date that the permit is to be reopened, except that the

permitting authority may provide a shorter time period in the case of an emergency.

(5) The permitting authority shall reopen a Part 70 permit pursuant to this section 70.7(g) whenever the permitting authority or the Administrator determine that any permit revision accomplished pursuant to section 70.7(f) does not assure compliance with all applicable requirements of the Act or did not qualify for processing under 70.7(f).

(h) Reopenings for cause by EPA.

(1) If the Administrator finds that cause exists to terminate, modify, or revoke and reissue a permit pursuant to paragraph (g) of this section, the Administrator shall notify the permitting authority and the permittee of such finding in writing.

(2) The permitting authority shall, within 90 days after receipt of notification, forward to EPA a proposed determination of termination, modification, or revocation and reissuance, as appropriate. The Administrator may extend this 90-day period for an additional 90 days if he finds that a new or revised permit application is necessary or that the permitting authority must require the permittee to submit additional information.

(3) The Administrator shall review the proposed determination from the permitting authority within 90 days of receipt. The permitting authority shall have 90 days from receipt of an EPA objection to resolve any objection that EPA makes.

(4) If the permitting authority fails to submit a proposed determination pursuant to paragraph (h)(2) of this section or fails to resolve any objection pursuant to paragraph (h)(3) of this section, the Administrator shall terminate, modify, or revoke and reissue the permit after taking the following actions:

(i) Providing at least 30 days' notice to the permittee in writing of the reasons for any such action. This notice may be given during the procedures in paragraph (h)(1), (2) and (3) of this section.

(ii) Providing the permittee an opportunity for comment on the Administrator's proposed action and for a hearing, which shall be held after exhaustion of the procedures in paragraphs (h)(1), (2) and (3) of this section.

(5) The EPA's decision to terminate, modify or revoke and reissue the permit shall constitute final action for purposes of judicial review under section 307 of the Act.

(i) Public participation in permit issuance. All permit issuance proceedings, including renewals, modifications, and reopenings, shall provide an opportunity for public participation on the draft proposed permit. The State shall develop such procedures after considering the requirements of Part 124 of this chapter and the adopted procedures shall at a minimum include the following:

(1) Availability for public inspection in at least one location in the community in which the source is located of the information submitted by the applicant, and the permitting authority's analysis of the proposed action as set forth in the statement of basis.

(2) A public notice, by advertisement in the area affected, of the opportunity for submittal of public comment and for a public hearing with a copy of the notice to the Administrator, unless EPA agrees not to require the notice for some or all permits.

(3) A period of no less than 30 days for submittal of public comments.

(4) A public hearing, as deemed appropriate by the permitting authority because a request for such has been made that raises significant issues affecting the terms and conditions of the permit and such hearing would contribute to the permitting exercise.

(5) Such notice and opportunity for participation by other States as is provided for by section 70.8 of this chapter.

§70.8 Permit review by EPA and affected States

(a) Transmission of information to the Administrator.

(1) The permit program shall require that the permitting authority shall provide, or require the applicant to provide, to the Administrator a copy of each permit application, including the compliance plan, and each proposed permit and final permit. If the permitting authority and Administrator so agree, the permitting authority may submit to the Administrator a permit application summary form and any relevant portion of the permit application or compliance plan, in place of such full application and compliance plan specified in this paragraph.

(2) The Administrator may waive the requirements of paragraphs (a)(1) and (b)(1) of this section for any category of sources (including any class, type, or size within such category) other than major sources according to the following:

(i) At the time of approval of a State program pursuant to this Part.

(ii) By regulation.

(3) Any State permitting authority shall keep for 5 years such records and submit to the Administrator such information as the Administrator may reasonably require to ascertain whether the State program complies with the requirements of the Act or of this part.

(b) Affected State review.

(1) The program shall provide that the permitting authority give notice of each draft proposed permit to any affected State on or before the time that the permitting authority provides this notice to the public under section 70.7(i) of this part.

(2) The program shall provide that the permitting authority, as part of the submittal of the proposed permit to the Administrator, shall notify the Administrator and any affected State in writing of any refusal by the permitting authority to accept all recommendations for the proposed permit that the affected State submitted during the public comment period. The notice shall include the permitting authority's reasons for not accepting any such recommendation.

(c) EPA objection.

(1) The Administrator shall object, pursuant to section 505(b) of the Act, to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements of the Act including requirements of the applicable implementation plan. No permit shall be issued for the purpose of Part 70 if the Administrator objects to its issuance in writing within 45 days of receipt of the proposed permit and notice pursuant to paragraphs (a) and (b) of this section.

(2) Any EPA objection under paragraph (c)(1) of this section shall include a statement of the Administrator's reasons for objection and a description of the terms and conditions that the permit must include to respond to the objections. The Administrator shall provide the permit applicant a copy of the objection.

(3) Failure of the permitting authority to do any of the following also shall constitute grounds for an objection:

(i) Submit the required items and notices under paragraphs (a) or (b) of this section.

(ii) Submit any information necessary to adequately review the proposed permit.

(4) If the permitting authority fails, within 90 days after the date of an objection under paragraph (c)(1) of this section, to submit a proposed permit revised to meet the objection, the Administrator shall issue or deny the permit in accordance with the requirements of Part 71 of this chapter. If the permitting authority submits a revised permit within this time period that only partially meets the Administrator's objection, the Administrator may grant further time for revision of the permit, not to exceed an additional 90 days.

(d) Public petitions to the Administrator. The program shall provide that if the Administrator does not object in writing pursuant to paragraph (c) of this section, any person may petition the Administrator within 60 days after the expiration of the Administrator's 45-day review period to take such action. Any such petition shall be based only on objections to the permit that were raised with reasonable specificity during the public comment period provided for in section 70.7(i) of this part, unless the petitioner demonstrates that it was impracticable to raise

such objections within such period, or unless the grounds for such objection arose after such period. A petition for review does not stay the effectiveness of the permit or its requirements. If EPA objects to the permit as a result of petition filed pursuant to this paragraph, the permitting authority shall suspend the permit until EPA's objection has been resolved.

(e) Prohibition on default issuance. Consistent with section 70.4(b)(3)(ix) of this part, for the purposes of Federal law and Title V of the Act, no State program may provide that a Part 70 permit (including a permit renewal or modification) will issue until affected States and EPA, have had an opportunity to review the proposed permit as required under this section. When the program is submitted for EPA review, the State Attorney General or independent legal counsel shall certify that no applicable provision of State law requires that a permit be issued after a certain time if the permitting authority has failed to take action on the application (or includes any other similar provision providing for default issuance of a permit), unless EPA has waived such review for EPA, affected States, or both.

§70.9 Fee determination and certification

(a) Fee Requirement.

(1) The program shall require that the owners or operators of sources subject to the requirement to obtain a permit under this part pay an annual fee, or the equivalent over some other period, sufficient to cover all reasonable direct and indirect costs of developing and administering the permit program. Procedures for determining this sum are set forth in this section.

(2) The State shall provide that the revenue generated from permit fees will be used solely to support the reasonable cost of the development and implementation of the air pollution control program in all areas relevant to the permit program, including support of local agencies that do not issue permits directly, but that support permit issuance or enforcement.

(b) Fee Schedule Adequacy. The State program shall establish a fee schedule that meets either of the following tests:

(1) Program support test. The fee program shall result in the collection and retention of revenues sufficient to support the reasonable direct and indirect costs of developing and implementing the permitting program (considering any associated overhead charges for personnel, equipment, buildings, and vehicles), including but not limited to the following activities:

(i) Reviewing and acting on any application for a permit or permit revision.

(ii) Implementing and enforcing the terms of any Part 70 permit, (not including any court costs or other costs associated with any formal enforcement action).

(iii) Emissions and ambient monitoring, including adequate resources to audit and inspect source-operated monitoring programs.

(iv) Preparing generally applicable regulations, or guidance.

(v) Modeling, analyses, or demonstrations.

(vi) Preparing inventories and tracking emissions.

(vii) Providing support to Part 70 sources under the Small Business Stationary Source Technical and Environmental Compliance Assistance Program contained in section 507 of the Act.

(2) Cost-per-ton test. The fee program shall result in the collection and retention, from all sources subject to the permitting program, of an amount not less than $25 per ton in the aggregate, as adjusted pursuant to the criteria set forth in paragraph (c) of this section, of each regulated pollutant that the Part 70 sources emit.

(i) For the purposes of determining the required minimum fee amount, carbon monoxide shall be excluded from the definition of "regulated pollutant."

(ii) In determining the required minimum fee amount, the permitting authority is not required to include any amount of a regulated pollutant that:

(A) The Part 70 source emits in excess of four thousand (4,000) tons per year of that regulated pollutant:

(B) The emissions of such pollutant are otherwise regulated and already included in the fees owed by the Part 70 source.

(iii) For those regulated pollutants emitted by Part 70 sources, but to which no State or Federal air pollution control requirements are applicable, the emissions fee requirements contained in this section remain applicable. The plan may, at the State's discretion, include criteria (such as de minimis amounts) to exclude any such emissions of regulated pollutants from the fee requirement, to the extent that such exemptions are consistent with the resource adequacy determination required by section 70.4(b)(7) of this part.

(iv) For the purpose of determining the total tons of regulated pollutants that the Part 70 sources in the State emit, the State shall base its calculation on the actual emissions of each regulated pollutant.

(v) Nothing in the cost-per-ton provisions of this paragraph shall restrict a permitting authority from collecting more or less than the amount determined under this paragraph from any one Part 70 source or any class or category of Part 70 sources, as determined by the permitting authority, provided the permitting authority collects a total amount of fees sufficient to meet the program support requirements of paragraph (b)(1) of this section. For example, States may reduce fee amounts for small businesses as authorized by section 507(f) of the Act.

(c) Fee adjustment.

(1) The program shall provide that the fees collected pursuant to this section shall be increased (consistent with the need to cover reasonable costs) in December of each year by the percentage, if any, by which the Consumer Price Index for that calendar year exceeds the Consumer Price Index for the calendar year 1989.

(i) The Consumer Price Index for any calendar year is the average of the Consumer Price Index for all-urban consumers published by the Department of Labor, as of the close of the 12-month period ending on August 31 of each calendar year.

(ii) The revision of the Consumer Price Index which is most consistent with the Consumer Price Index for the calendar year 1989 shall be used.

(2) The Administrator reserves the right to adjust the fees required pursuant to this test upward if significant amounts of toxic pollutants are subject to permit review.

(d) Fee demonstration. The permitting authority shall provide a demonstration that the fee schedule selected will result in the collection and retention of fees in an amount sufficient to satisfy the applicable tests specified in paragraphs (a) and (b) of this section. The Administrator will not approve a demonstration pursuant to paragraph (b) of this section unless it contains an initial accounting (and periodic updates as required by the Administrator) of how fee revenues are used to cover the costs of meeting the various functions of the permitting program.

§ 70.10 Federal oversight and sanctions

(a) Failure to submit an approvable program. If a State fails to submit a fully approvable whole Part 70 program, or a required revision thereto, in conformance with the provisions of section 70.4 of this part, or if an interim approval expires and the Administrator has not approved a whole Part 70 program.

(1) At any time the Administrator may apply any one of the sanctions specified in section 179(b) of the Act.

(2) Within 18 months after the date required for submittal or the date of disapproval by the Administrator, the Administrator shall apply such sanctions in the same manner and with the same conditions as are applicable in the case of a determination, disapproval, or finding under section 179(a) of the Act.

The Administrator shall promulgate a whole program or a partial program as appropriate for such State if full approval of a whole Part 70 program has not taken place within 2 years after the date required for such submission.

(b) State failure to administer or enforce. Any State program approved by the Administrator shall at all times be conducted in accordance with the requirements of this part and any agreement between the State and the Administrator concerning operation of the program.

(1) Whenever the Administrator makes a determination that a permitting authority is not adequately administering or enforcing a Part 70 program, or any portion thereof, the Administrator shall notify the authority of the determination and the reasons therefore. The Administrator shall publish such notice in the FEDERAL REGISTER.

(2) If, after 90 days from issuing the notice under paragraph (b)(1) of this section, the permitting authority fails to take action to assure adequate administration and enforcement of the program, the Administrator may take any one or more of the following actions:

(i) Withdraw approval of the program or portion thereof using procedures consistent with section 70.4(e) of this part.

(ii) Apply any of the sanctions specified in section 179(b) of the Act.

(iii) Promulgate, administer, or enforce a program or partial program.

(3) Whenever the Administrator has made the finding and issued the notice under paragraph (b)(1) of this section, the Administrator shall apply the sanctions under section 179(b) of the Act within 18 months after that notice. These sanctions shall be applied in the same manner and subject to the same deadlines and other conditions as are applicable in the case of a determination, disapproval, or finding under section 179(a) of the Act.

(4) Whenever the Administrator has made the finding and issued the notice under paragraph (b)(1) of this section, the Administrator shall, unless the State has corrected such deficiency within 18 months after the date of such finding, promulgate a whole or partial program within 2 years of the date of such finding.

(5) If the permitting authority's failure is a failure to act on one or more timely and complete applications (including renewal applications) within 18 months of the date that a complete application was filed, the Administrator may issue or deny the permits as appropriate.

(6) Nothing in this section shall limit the Administrator's authority to take any enforcement action against a source for violations of the Act or a permit issued under rules adopted pursuant to this section in a State that has been delegated responsibility by EPA to implement a Part 71 program.

(c) Criteria for withdrawal of State programs.

(1) The Administrator may withdraw program approval when the approved program no longer complies with the requirements of this part, and the permitting authority fails to take corrective action. Such circumstances, in whole or in part, include the following:

(i) Where the permitting authority's legal authority no longer meets the requirements of this part, including the following:

(A) Failure of the permitting authority to promulgate or enact new authorities when necessary.

(B) Action by a State legislature or court striking down or limiting State authorities.

(ii) Where the operation of the State program fails to comply with the requirements of this part, including the following:

(A) Failure to exercise control over activities required to be regulated under this part, including failure to issue permits.

(B) Repeated issuance of permits that do not conform to the requirements of this part.

(C) Failure to comply with the public participation requirements section 70.7(i) of this part.

(D) Failure to collect, retain, or allocate fee revenue consistent with section 70.9 of this part.

(iii) Where the enforcement program fails to comply with the requirements of this part, including the following:

(A) Failure to act on violations of permits or other program requirements.

(B) Failure to seek adequate enforcement penalties or to collect administrative fines when imposed.

(C) Failure to inspect and monitor activities subject to regulation.

(d) Federal collection of fees. If the Administrator determines that the fee provisions of a Part 70 program do not meet the requirements of section 70.9 of this part, or if the Administrator makes a determination under paragraph (b)(1) of this section that the permitting authority is not adequately administering or enforcing an approved fee program, the Administrator may, in addition to taking any other action authorized under Title V of the Act, collect reasonable fees from Part 71 sources or Part 70 sources or both to cover the Administrator's costs of administering the provisions of the permitting program promulgated by the Administrator, without regard to the requirements of section 70.9 of this part.

§70.11 Requirements for Enforcement Authority

All programs in order to be approved under this part must contain the following provisions:

(a) Any agency administering a program shall have available, as remedy for violations of program requirements, the following authority:

(1) To restrain immediately and effectively any person by order or by suit in court from engaging in any activity in violation of a permit and which is presenting an imminent and substantial endangerment to the public health or welfare, or the environment.

(2) To sue in courts with jurisdiction to enjoin any violation of any program requirement, including permit conditions, without the necessity of a prior revocation of the permit.

(3) To assess or sue to recover in court civil penalties and to seek criminal remedies, including fines, according to the following:

(i) Civil penalties shall be recoverable for the violation of any permit condition; any fee or filing requirement; any duty to allow or carry out inspection, entry or monitoring activities or, any regulation or orders issued by the permitting authority. These penalties shall be recoverable in a maximum amount of not less than $10,000 a day for each violation. State law shall not include mental state as an element of proof for civil violations.

(ii) Criminal fines shall be recoverable against any person who knowingly violates any applicable standards or limitations; any permit condition; or any fee or filing requirement. These fines shall be recoverable in a maximum amount of not less than $10,000 a day for each violation

(iii) Criminal fines shall be recoverable against any person who knowingly makes any false statement, representation or certification in any form, in any notice or report required by a permit, or who knowingly renders inaccurate any monitoring device or method required to be maintained by the permitting authority. These fines shall be recoverable in a maximum amount of not less than $10,000 for each instance of violation.

(b) (1) The civil penalty or criminal fine(s) [as provided in paragraph (a)(3) of this section] shall be assessable for each instance of violation and, if the violation is continuous, shall be assessable up to the maximum amount for each day of violation.

(2) The burden of proof and degree of knowledge or intent required under State law for establishing violations under paragraph (a)(3) of this section, shall be no greater than the burden of proof or degree of knowledge or required under the Act.

(c) A civil penalty assessed, sought, or agreed upon by the permitting authority under paragraph (a)(3) of this section shall be appropriate to the violation.