Sunshine Act Meetings

Federal Register
Vol. 57, No. 140
Tuesday, July 21, 1992

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMODITY FUTURES TRADING COMMISSION

"FEDERAL REGISTER" CITATION OF PREVIOUS ANNOUNCEMENT: 57 F.R. 29761.

PREVIOUSLY ANNOUNCED TIME AND DATE OF MEETING: 2:30 p.m., Thursday, July 30, 1992.

CHANGES IN THE AGENDA: the Commodity Futures Trading Commission has added to the agenda an Application of the MidAmerica Commodity Exchange for contract designation in Three-Month Eurodollar Time Deposit futures.

CONTACT PERSON FOR MORE INFORMATION: Lynn K. Gilbert, 254–6314.

Lynn K. Gilbert,

Deputy Secretary of the Commission.

[FR Doc. 92–17321 Filed 7–17–92; 2:49 pm]

BILLING CODE 6351–01–M

BOARD OF GOVERNORS OF THE FEDERAL SYSTEM:

TIME AND DATE: 11:00 a.m., Monday, July 27, 1992.

PLACE: Marriner S. Eccles Federal Reserve Board Building, C Street entrance between 20th and 21st Streets, N.W., Washington, D.C. 20551.

STATUS: Closed.

MATTER TO BE CONSIDERED:

1. Personnel actions (appointments, promotions, assignments, reassignments, and salary actions) involving individual Federal Reserve System employees.
2. Any items carried forward from a previously announced meeting.

CONTACT PERSON FOR MORE INFORMATION: Mr. Joseph R. Coyne, Assistant to the Board; (202) 452–3204. You may call (202) 452–3207, beginning at approximately 5 p.m. two business days before this meeting, for a recorded announcement of bank and bank holding company applications scheduled for the meeting.

Dated: July 17, 1992.

Jennifer J. Johnson,

Associate Secretary of the Board.

[FR Doc. 92–17261 Filed 7–17–92; 2:14 pm]

BILLING CODE 6210–01–M

NATIONAL CREDIT UNION ADMINISTRATION

Notice of Meetings

TIME AND DATE: 9:30 a.m., Tuesday, July 28, 1991.

PLACE: Filene Board Room, 7th Floor, 1776 G Street, N.W., Washington, D.C. 20456.

STATUS: Open.

BOARD BRIEFING:

1. Insurance Fund Report.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of Previous Open Meeting.
2. Central Liquidity Facility Report and Review of CLF Lending Rate.
3. Pilot Program—Community Development Credit Unions.
4. Proposed Rule: Amendment to Part 741, NCUA's Rules and Regulations,, Requirements for Insurance.
5. Proposed Revision to the Operating Fee Scale for Federal Credit Unions.
6. Public Comment on Reduction of Regulatory Burden.

RECESS: 10:30 a.m.

TIME AND DATE: 11:00 a.m., Tuesday, July 28, 1992.

PLACE: Filene Board Room, 7th Floor, 1776 G Street, N.W., Washington, D.C. 20456.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

1. Approval of Minutes of Previous Closed Meetings.
2. Requests for Administrative Actions under Section 206 of the Federal Credit Union Act. Closed pursuant to exemptions (8), (9)(A)(ii), and (9)(B).
3. NCUA's Budget FY 93 and FY 94. Closed pursuant to exemptions (2) and (9)(B).
4. Personnel Actions. Closed pursuant to exemptions (2) and (6).

FOR MORE INFORMATION CONTACT: Becky Baker, Secretary of the Board, Telephone (202) 682–9600.

Becky Baker,

Secretary of the Board.

[FR Doc. 92–7267 Filed 7–17–92; 2:15 pm]

BILLING CODE 7535–01–M

NUCLEAR REGULATORY COMMISSION

DATE: Weeks of July 20, 27, August 3, and 10, 1992.

PLACE: Commissioners' Conference Room, 11555 Rockville Pike, Rockville, Maryland.

STATUS: Open and Closed.

MATTERS TO BE CONSIDERED:

Week of July 20

Monday, July 20

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of July 27—Tentative

Wednesday, July 29

9:30 a.m.
Periodic Briefing on EEO Program (Public Meeting) (Contact: William Kerr, 301–492–4665)
11:00 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)
1:00 p.m.
Briefing on National Research Council Report: Nuclear Power—Technical and Institutional Options for the Future (Public Meeting)
3:00 p.m.
Discussion of Litigative and Related Matters (Closed—Ex. 9B and 10)

Friday, July 31

10:00 a.m.
Periodic Meeting with Advisory Committee on Medical Uses of Isotopes (Public Meeting) (Contact: Larry Camper, 301–504–3417)

Week of August 3—Tentative

Tuesday, August 4

3:30 p.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Week of August 10—Tentative

Wednesday, August 12

11:30 a.m.
Affirmation/Discussion and Vote (Public Meeting) (if needed)

Note: Affirmation sessions are initially scheduled and announced to the public on a time-reserved basis. Supplementary notice is provided in accordance with the Sunshine Act as specific items are identified and added to the meeting agenda. If there is no specific subject listed for affirmation, this means that no item has as yet been identified as requiring any Commission vote on this Date.

To verify the status of meeting call (recording)—(301) 504–1292.

CONTACT PERSON FOR MORE INFORMATION: William Hill (301) 504–1661.

Dated: July 17, 1992.

William M. Hill, Jr.,

Office of the Secretary.

[FR Doc. 92–17306 Filed 7–17–92; 2:16 pm]

BILLING CODE 7590–01–M

federal register

Tuesday
July 21, 1992

Part II

Environmental Protection Agency

40 CFR Part 70
Operating Permit Program; Final Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 70

[FRL-4152-9]

RIN 2060-AD16

Operating Permit Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA is promulgating a new part 70 of chapter I of title 40 of the Code of Federal Regulations (CFR).

Title V of the Clean Air Act (Act) Amendments of 1990, Public Law 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 contains these provisions. It requires States to develop, and to submit to EPA, programs for issuing operating permits to major stationary sources (including major sources of hazardous air pollutants listed in section 112 of the Act), sources covered by New Source Performance Standards (NSPS), sources covered by emissions standards for hazardous air pollutants pursuant to section 112 of the Act, and affected sources under the acid rain program.

Title V establishes timeframes for developing and implementing the State permit programs. Within 3 years of enactment (i.e., no later than November 15, 1993), States must submit proposed permit programs to EPA for approval. The EPA must act to approve or disapprove a State program within 1 year of submittal by the State to EPA. In some cases, EPA can grant programs an interim approval for a period of up to 2 years. If a State fails to submit a fully-approvable program within the 3-year period (or by the end of the interim approval period), EPA will apply specific sanctions pursuant to the provisions of title V and, in any event, must establish a Federal program 2 years after the end of the 3-year program submittal period. Sources subject to the part 70 program must submit complete permit applications within 1 year after a State program is approved by EPA (including an interim approval) or, where the State program is not approved, within 1 year after a program is promulgated by EPA. In the case of new sources, complete permit applications would generally be due 12 months after the source commences operation, unless the permitting authority sets an earlier deadline.

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, permit application, and compliance reports will be available to the public, subject to any applicable confidentiality protection procedures similar to those contained in section 114(c).

In the proposal, EPA discussed issues connected with the regulations that will govern EPA's issuance of title V permits. The EPA will address these issues further when the Agency proposes Federal regulations.

DATES: The regulatory amendments announced herein take effect on July 21, 1992. This promulgation, however, does not affect the date by which States are to submit full permit programs to EPA for approval. The submittal deadline is set by section 502(d)(1) as 3 years after enactment of the Act Amendments of 1990. The deadline for full program submittal, therefore, is set by the Act as November 15, 1993. A slight variation to this rule can occur if EPA grants a program interim approval. An interim approval will be accompanied by a list of revisions or modifications necessary for the program to be fully approved. The State will then have until 6 months prior to the end of the interim approval to submit the program corrections, even though the November 15, 1993 date may have passed.

ADDRESSES:

Docket

Supporting information used in developing the proposed and final 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. The address of the EPA Air Docket is: Room M-1500, Waterside Mall, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Michael Trutna (telephone 919/541-5345) or Kirt Cox (telephone 919/541-5399), Mail Drop 15, United States Environmental Protection Agency, Office of Air Quality Planning and Standards, Air Quality Management Division, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: The contents of today's preamble are in the following format:

I. Background and Purpose
II. Implementation Principles
III. Summary of Final Rules
IV. Discussion of Regulatory Changes
  A. Section 70.1—Program Overview
  B. Section 70.2—Definitions
  C. Section 70.3—Applicability
  D. Section 70.4—State Program Submittals and Transition
  E. Section 70.5—Permit Applications
  F. Section 70.6—Permit Content
  G. Section 70.7—Permit Issuance, Renewal, Reopenings, 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. Administrative Requirements
  A. Docket
  B. Office of Management and Budget (OMB) Review
  C. Regulatory Flexibility Act Compliance
  D. 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 changes made to the proposed regulations to result in today's final rulemaking.

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

The second section mentions the principles EPA has followed while developing the regulations. These implementation principles and the positions on associated issues were discussed in detail in the May 10, 1991, preamble.

Section III of the preamble provides a summary of the requirements of the regulations being promulgated today.

A discussion of the regulatory changes from the proposed requirements is in section IV. In the preamble of the May 10, 1991, proposal, EPA explained the basis for its various proposed positions. Where the proposed regulations have not been changed in the final rules, EPA continues for the most part to rely on the rationale provided in the proposal notice. Where the regulations have changed in more than a minor way, this preamble states

the basis and purpose for the final regulations, including the reasons for the change. A separate document providing more detailed responses to comments on the proposal will be placed in the docket. The design of section IV follows the flow of the final part 70 regulations.

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

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 a 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" also applies, as defined in section 302(d), to the District of Columbia and territories of the United States, and may also include reference to a local air pollution agency. 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 "permitting authority" may also apply to EPA where the Agency is the permitting authority of record.

I. Background and Purpose

Title V was added to the Act on November 15, 1990, and introduces an operating permit program. It requires that EPA, within 12 months of enactment, promulgate regulations setting forth provisions under which States will develop operating permit programs and submit them to EPA for approval. The EPA proposed these regulations to be codified in a new part 70 of chapter I of title 40 of the CFR on May 10, 1991 [56 FR 21712]. The comment period for that action ended on July 9, 1991. Approximately 500 public comments were received on the proposal during the comment period. Copies of these comments appear in the docket for this action listed above under *Docket*. The following four public hearings were held on the proposal: June 4 and 5, 1991, in Washington, DC; June 6, 1991, in Chicago, Illinois; June 24, 1991, in San Francisco, California; and July 1, 1991, in Dallas, Texas.

The significant changes to the regulations resulting from public comments are contained in this preamble. A summary of all public comments, transcripts of the public hearings, and the response of EPA to all the significant comments are contained in a technical support document.

Sources subject to the permitting requirements of part 70 (part 70 sources) must obtain an operating permit; States must develop and implement the program; and EPA, after promulgating today's permit program regulations, must 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 or the relevant jurisdiction 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 Clean Water Act (CWA) and the Resource Conservation and Recovery Act (RCRA), both of which have permit requirements. 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. The program can also help implement market-based control strategies using improved monitoring and emissions tracking.

While title V generally does not impose substantive new requirements, it does require that fees be imposed on sources and that certain procedural measures be followed, especially with respect to determining compliance with underlying applicable requirements. The program will generally clarify, in a single document, which requirements apply to a source 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, therefore, it may be unclear which, and how, general regulations apply to a source. 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 understand better 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 program. 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 regulations promulgated under title IV of the Act.

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 the cost of developing and implementing the permit program. To the extent the fees are based on actual emission levels, the fees will create an incentive for sources to reduce emissions.

The EPA expects that this rule will promote several objectives which the Agency believes are essential to the long term success of environmental programs: market-based programs, coordination of control programs across media, and pollution prevention.

Market-Based Programs: The EPA is committed to using market-based principles to achieve the greatest level of environmental protection at the least cost. The title V operating permit program will lay the critical foundation for pursuing market-based programs under the Clean Air Act beyond the acid rain program under title IV, which

already provides for marketable emission allowances within an operating permit system. Before the permit program, there was no ready vehicle for quantifying and accounting for Federal air pollution control requirements at a particular facility. With a title V permit, those control requirements can be quantified by a facility, the first step in establishing the currency necessary for a market-based system. Moreover, title V permits will establish monitoring and compliance requirements which are essential to make a market system accountable.

Cross-Media Coordination: Of the major regulatory statutes EPA implements, the Act alone did not have a permit program as the basic vehicle for applying source-specific control requirements at regulated facilities. As a result, EPA could not readily include air pollution requirements in its efforts to coordinate control requirements across media. Now that EPA has available to it permits which reflect the requirements under the CWA, RCRA, and the Act, it will be easier to coordinate those programs in the future.

Part of the cross-media coordination EPA hopes to achieve using title V permits is a comparison of the relative impact of control requirements across media and risk-based analysis of the impact of pollution control requirements. Clearly, EPA must faithfully implement the requirements in each of its regulatory programs, but EPA hopes increasingly to balance control requirements across media according to risk-based analyses to the extent the relevant statutes provide EPA with flexibility. In the future, such comparisons across media will provide the information critical to an ongoing evaluation of EPA's regulatory programs, and may provide the basis for transforming the more media-specific structure of the Agency's programs into a more unified program that addresses the greatest risk first.

Pollution Prevention: Title V permits will also lead air pollution sources and regulatory agencies to evaluate their air pollution control strategies, both on a source-specific basis and across the regulatory program. Implementing title V presents an opportunity to pursue strategies that avoid pollution, rather than control it, and that eliminate pollution, rather than shift it from one medium to the other. Indeed, a cross-media analysis should highlight opportunities to avoid pollution shifting.

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 Act sets forth ambitious goals which can only be achieved through effective and expeditious implementation by EPA and State and local governments. Today's 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 in designing its May 10, 1991 proposal identified several principles to guide the design and implementation of title V regulations and related programs. These principles, which were discussed extensively in the proposal, were thought to be 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.

II. Summary of Final Rules

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 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 listed pursuant to 112(b); 25 tpy, or more, of any combination of hazardous air pollutants listed pursuant to 112(b); or a lesser quantity 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 [501(2)(B)]:

	TPY
(i) Ozone (VOC and NOx):[1]	
Serious	50
Transport regions not severe or extreme	50
Severe	25
Extreme	10
(ii) Carbon monoxide—serious (where stationary sources contribute significantly)	50
(iii) Particulate matter (PM-10)—serious	70

[1] For this purpose, title I treats volatile organic compounds (VOC) and oxides of nitrogen (NOx) sources somewhat differently. In areas qualifying for an exemption under section 182(f), NOx 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, NOx 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 section 184(b). Because section 182(f) does not refer to 184(b), the lower threshold in ozone transport regions applies to VOC sources, but not to NOx sources. Whatever its location, any 100 tpy source would be considered a major source under section 302.

[2] VOC only.

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 contiguous area in the same major group, two-digit, industrial classification). Once subject to the part 70 operating permit program for one pollutant, a major source must submit a permit application including all emissions of all regulated air pollutants from all emissions units located at the plant, except that only a generalized list needs to be included for insignificant events or emissions levels. The program (including combinations of partial programs) applies to all geographic areas within each State, regardless of their attainment status. The acid rain permit program requirements, however, apply only within the contiguous 48 States and the District of Columbia.

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 source or affected (i.e., acid rain) source. The EPA believes

that compliance by nonmajor sources with the permitting requirements during the early stages of the program would prove to be unnecessarily burdensome for nonmajor sources and impracticable and infeasible for permitting authorities as well. Therefore, to promote an orderly phase-in of the program, States can defer coverage temporarily for all sources which are not major. The EPA will complete a rulemaking to consider further deferral or permanent exemption for non-major sources within 5 years of the date EPA first approves a State program that defers such sources.

Any source whose obligation to obtain a permit is deferred may request a permit prior to the end of the 5-year deferral period. All deferred sources will be required to submit permit applications within 12 months after the completion of the future rulemaking, unless they are sources or source categories that receive a continued exemption (i.e., EPA determines that compliance with the permitting requirements for such categories would be impracticable, infeasible, or unnecessarily burdensome on the source categories) in the future rulemaking.

In addition, States may permanently exempt from review those nonmajor sources and source categories subject to title V solely because they are subject to the NSPS for new residential wood heaters or the National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos from demolition and renovation activities. The Administrator reserves the right to grant deferral or exemption to additional nonmajor source categories when they become subject to section 112, and thereby subject to title V.

B. State Permit Program Submittals and Transition

Title V requires EPA to promulgate regulations establishing the minimum 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 previously discussed, 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 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

As required by title V, today's regulations establish the minimum elements of a State operating permit program, including the following:

(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" [502(b)(5)(D)].

(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 participation, where applicable; for expeditious review of permit actions; and for 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, anyone else who participated in the public review process, and any other person who could obtain judicial review of such action under applicable law, to compel action on the application [502(b)(7)].

(k) Authority and procedures to make available to the public any permit application, compliance plan, 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)].

(m) Provisions required if a State allows sources to make certain changes that are not prohibited or addressed by the permit [502(a)].

(n) Provisions to require that part 70 permits include terms and conditions addressing alternative scenarios at the permitted facility and emissions trading provided for in the underlying applicable requirement [502(b)(6)].

2. State Program Development

Within 3 years of enactment, 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. 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 prompt 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 spend 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 today's 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 include:

(a) The commitment and capability to collect fees adequate to cover the costs of the interim permitting program and the development as appropriate of the whole program;

(b) The legal authority to assure that sources subject to the interim program comply with all applicable requirements of titles I, IV, and V under the Act;

(c) Fixed permit terms not to exceed 5 years;

(d) The opportunity for public participation in appropriate permit proceedings;

(e) The opportunity for EPA to review and object to the issuance, modification, or renewal of any permit and for affected States to review such permits consistent with section 505 of the Act;

(f) The requirement that a proposed permit will not be issued if EPA objects to its issuance;

(g) Adequate procedures for enforcing permits, including penalties;

(h) Provisions for allowing operational flexibility and alternative scenarios for sources, consistent with §§ 70.4(b)(12) and 70.6(a)(9);

(i) Streamlined procedures for issuing and revising permits and determining when applications are complete; and

(j) Application and reporting forms to be used in implementing the interim program.

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 (d) (2)–(3) and (g)]. Permits issued under a program with interim approval have full standing with respect to title V, and the 1-year time period for submittal of permit applications by subject sources 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)], subject sources are required to submit permit applications to the permitting authority within 1 year of program approval, whether full, partial, or interim. For title IV (acid rain) sources, however, specific superseding deadlines are provided for the submission of 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 permit program implementation. 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 from then on act on a completed application (i.e., issue or deny a permit) within 18 months after receiving the complete application. The permitting authority must 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 [503(c)].

C. Complete Permit Application

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 becomes incomplete 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 of completeness determinations. In the event that no notice is provided to the source within 60 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 this delay 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 with respect to title V to sources requiring both new title V and certain NSR permits. These sources must have a preconstruction permit consistent with the requirements of parts C and D of title I, and must have filed a complete application for a title V operating permit within 12 months of commencing operation, unless some earlier date is required by the permitting authority. In general, a complete application must be submitted according to the transition schedule approved within the part 70 program and in a timely way for subsequent renewals. "Timely" for renewals means 6 months prior to expiration of the permit, unless some greater time is needed (not to exceed 18 months) to ensure that the terms of the permit do not lapse before they are revised or renewed.

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. The permitting authority can, however, allow the application to cross-reference relevant materials where they are current and clear with respect to information required in the permit application. Such might be the case where a source is seeking to update its title V permit based on the same information used to obtain an NSR permit or where a source is seeking renewal of its title V permit and no change in source operation or in the applicable requirements has occurred. Any cross-referenced documents must be included in the title V application that is sent to EPA and that is made available as part of the public docket on the permit action.

The compliance plan describes how the source plans to comply or achieve compliance with all applicable air quality requirements under the Act. The exact contents and detail required in the compliance plan depend on the compliance status of the source with respect to each applicable requirement. This 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 where applicable. Each source must submit a compliance certification report at least once a year in which it certifies its status with respect to each requirement, and the method used to determine the status. Specific requirements for acid rain affected sources regarding compliance schedules, progress reports, and compliance certifications will be contained in regulations promulgated under title IV of the Act.

The minimum data elements required in all standard application forms, as well as the basic requirements for compliance plans and compliance certifications, are presented in § 70.5 of the regulations. With exception of certain Federal programs (e.g., acid rain), EPA will not specify that any particular 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 § 70.5.

Additional information may be required from some subject sources. For example, those located in nonattainment areas under part D of title I may be required to fulfill the emissions statement requirements for certain sources of VOC 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.

D. Permit Content

The State program is required in § 70.6 to 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) may 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 implementation plan [504(a)] and title IV.

3. A schedule of compliance (where applicable), which is defined as a schedule of remedial measures [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 sections 504(b), 114, and 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 the change is not a "modification" (as defined in title I of the Act), that it does not exceed the emissions allowed under the permit or under any applicable requirement, and that 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)]. 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.

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 under the acid rain program [408(b)].

9. A provision ensuring that all alternative operating scenarios identified by the source are included in the permit [502(b)(6)].

All terms and conditions in a part 70 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act. Consistent with EPA's discretion under the Act, the final rules require the permitting authority to identify those provisions in the permit which are not required under the Act or under any of its applicable requirements (i.e., State origin only) as not being federally enforceable. Like all other permit terms, a term which the permitting authority fails to designate as not federally enforceable will not be subject to challenge after 90 days.

Section 504(f) of the Act defines the permit shield provision of title V, which enables States to provide sources with greater certainty as to their legal obligations under the Act. This section authorizes the permitting authority to 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. This determination or a concise summary thereof must be 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 may alter the scope of the permit shield by rule. 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). Sources seeking to obtain or renew a part 70 permit cannot be shielded from enforcement actions alleging violations of any applicable requirements (including orders and consent decrees) that occurred before, or at the time of, permit issuance. In addition, sources may not be shielded from requests for information pursuant to section 114 of the Act. The EPA has also provided that the shield will not extend to minor permit modifications (and to some changes made under the operational flexibility provisions pursuant to § 70.4(b)(12) and to most administrative permit amendments).

E. Permit Issuance and Review

Regulations concerning the processes for permit issuance, review, renewal, revision, and reopening are found in §§ 70.7 and 70.8. Briefly, these include:

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

The permitting authority is required to notify all affected States of each permit application that must be forwarded to EPA. Affected States are those whose air quality may be affected and that are contiguous to the State in which the source is located, or those within 50 miles of the 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 affected 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 affected 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 under the acid rain program.

2. The Agency Review and State Response

The Act authorizes EPA to object to any permit that would not be in compliance with the applicable requirements of the Act. If EPA objects within 45 days after receiving either the proposed State permit or the notice that the permitting authority has refused to adopt an affected 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 a valid title V permit if EPA has objected unless the permitting authority revises the permit to meet EPA's objections. The permitting authority has 90 days after EPA's objection to revise the permit. If the permitting authority fails to do so, EPA must issue or deny the permit [505(c)].

3. Judicial Review and Public Petition

An approvable program must provide for judicial review in State court of the permit action. Such review must be available to the applicant, anyone who participated in the public participation process, and any other person who could obtain judicial review of the action under State law [505(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 public participation 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 does not postpone the effectiveness of a permit that has been issued.

The Administrator must grant or deny a petition within 60 days after it is filed. If the permit has not been issued, 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. If the permitting authority has already issued the permit and the petition is granted, EPA will modify, terminate, or revoke the permit, and the permitting authority may issue a revised permit only if it meets EPA's objection [505(b)(3)]. 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)].

4. Reopenings

Any approvable program, at a minimum, must require that the permitting authority will revise all major source permits with a remaining life 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 revision procedures that meet the requirements for permit revision 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)]. Approvable programs also must require that the permitting authority may terminate, modify, or revoke permits for cause [502(b)(5)(D)]. "Cause," as defined in the rule, may exist when the permit contains a material mistake made in applying the emission standards or limitations, or in other permit requirements.

Phase II acid rain permits will need to be reopened to incorporate NO_x provisions. Excess emission offset plans and all allowance allocations and transfers, however, must 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)].

5. Permit Revisions

Taking the above into account, the EPA today outlines the mechanisms for permit modification and administrative amendments that are needed to revise the part 70 permit to accommodate changes which would otherwise violate terms and conditions of the permit. While States are required to provide for expeditious permit revisions, they have considerable flexibility in doing so. The State shall provide adequate, streamlined, and reasonable procedures for expeditiously processing permit modifications. States may meet their obligation by adopting the approach outlined by EPA in today's final rules or one which is substantially equivalent.

Administrative amendments are those defined in § 70.7(a) which can be accomplished by the permitting authority without public or EPA review. These permit revisions include correction of typographical errors or changes in address or source ownership. Another type of administrative amendment inolves the incorporation of requirements established under State preconstruction review that meets procedural requirements that are applicable and substantially equivalent to those contained in §§ 70.7 (discussed below) and 70.8 and the compliance requirements contained in § 70.6 (e.g., monitoring, recordkeeping, reporting, and compliance certification).

The EPA's description of the most streamlined process it would approve for all other types of permit revisions is set forth in § 70.7(e). It employs two types of permit modification procedures:

(a) Minor permit modifications, and

(b) Significant permit modifications.

These are for changes that go beyond the activities allowed in the original permit or that increase the total emissions allowed under the permit.

The model provision contained in § 70.7(e) defines the types of permit modifications that a State could decide to process through minor permit modification procedures. They include

modifications that reflect increases in permitted emissions that do not amount to modifications under any requirement of title I an that do not meet certain other requirements. Minor permit modification procedures required that a source provide advance notice of the proposed change, but allow a change to take effect prior to the conclusion of the revision procedures.

Under EPA's model procedures for minor permit modifications, changes may be made by the source after it files a complete application with the permitting authority. The proposed modification will be available for review by EPA, affected States, and the permitting authority. The State may approve the proposed modification at any time. The EPA has 45 days from the date the Agency receives notice from the State to review the proposed modification, and the permitting authority cannot finally issue the permit until after EPA's review period has ended, or until EPA has notified the permitting authority that EPA will not object to the issuance of the permit modification, although the permitting authority may disapprove the modification prior to that time. The modification procedures must generally be completed and final action taken by the permitting authority no later than 90 days following the filing of a complete application.

The regulation also provides an opportunity for the permitting authority to modify the minor permit modification procedures to process in groups applications for changes at the lowest levels of emissions increases (as defined in the regulation). The regulation provides that a source may request in its application that changes, below a set threshold, be aggregated during a 90-day period, or until they reach the applicable threshold level, whichever comes first. These changes would then undergo the minor permit modification process, including review by the permitting authority, affected States, and EPA.

Under the minor permit modification option outlined by EPA, a source that makes a change before a permit revision has issued, does so at its own risk. It is not protected from underlying applicable requirements by any shield. It is afforded only a temporary exemption from the formal requirement that it operate in accordance with the permit terms that it seeks to change in its modification application. Should the permitting authority or EPA ultimately reject the sources proposed permit modification, the source would be subject to enforcement proceedings for any violation of these requirements. The permit shield under § 70.6(f) does not apply to minor permit modifications issued by the permitting authority.

The other type of permit modification procedures described are for significant modifications. After receipt of an application for a significant permit modification, a permitting authority would review only the specific changes proposed in the application and their impact on the continued compliance of the part 70 source 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 be incorporated into the source's permit as a matter of law, without following either the permit modification or amendment procedures described above.

6. 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 for a compliance plan 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. To maintain the protection afforded by having a complete application, the source applicant still must respond in a timely 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 timely and complete application, the source's right to operate is terminated unless and until a part 70 permit is issued by the permitting authority [503(d)]. The application must be deemed to be complete 60 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 National Pollutant Discharge Elimination System (NPDES) program under the CWA, where the fixed term of a permit has expired, the permitting authority must provide either that the permit remains effective or that the conditions of the permit remain enforceable until the permit is reissued, except as provided in regulations promulgated pursuant to title IV for the acid rain portions of a permit.

F. Fee Determination and Certification

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 § 70.9.

An approvable permit must require part 70 sources 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)]. All fees required to be collected under title V must be used solely to support the permit program [502(b)(C)(iii)]. The EPA has ruled that these fees must cover a range of costs, including:

1. Preparing generally applicable regulations or guidance regarding implementation of the program or its enforcement.

2. Reviewing and acting upon any title V application.

3. General administrative costs of running the permit program, including information management activities to support and track permit applications, compliance certifications, and related data entry.

4. Implementing and enforcing the terms of the permit, excluding any court costs or other costs associated with an enforcement action and including adequate resources to determine which sources are subject to the program.

5. Emissions and ambient monitoring.

6. Modeling analyses and demonstrations.

7. Preparing inventories and tracking emissions.

8. Development and administration of the State small business stationary source technical and environmental compliance assistance program as it applies to the title V permitting obligations of part 70 sources [502(b)(3)7(A) (i)–(vi)].

The program will be presumed adequate if it would collect in fees an amount equal to or greater than the presumptive minimum program cost, which is $25 per ton per year (tpy) (1989 baseline) for the actual emissions of each regulated pollutant (for presumptive fee calculation). Regulated pollutants (for presumptive fee

calculation) mean all regulated air pollutants, with the exception of carbon monoxide, pollutants subject only to section 112(r), and pollutants which are solely regulated as chlorofluorocarbons (CFC) under section 602 [502(b)(3)(B) (i) and (ii)]. In addition, 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 emissions that are already accounted for within the emissions of another regulated pollutant (although the State is not precluded from doing so). The State need not collect the presumptive minimum program cost if it demonstrates that a lesser amount will adequately support the direct and indirect costs of the program [502(b)(3)(B)(iv)]. Conversely, States must make a sufficient showing of fee adequacy if commenters present evidence to the Administrator during the program approval process which rebuts the presumption that $25/tpy is adequate to support the program. The permitting authority must provide for a periodic accounting of how the required fees were used solely 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 as it applies to part 70 sources. The $25/tpy used to calculate the presumptive minimum program cost 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). 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 under section 404. The Agency interprets this provision to mean that EPA may not approve part 70 programs that offset required permit program costs using emissions-based fees collected from affected units, under section 404, from 1995 to the year 2000.

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.

G. Federal Oversight and Sanctions

Federal activities for oversight of State operating permit programs 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)] applicable to certain nonattainment areas. A 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 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 program is not approvable or that a permitting authority is not adequately administering an approved program, the EPA will promulgate 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)].

H. Required Enforcement Authority

Section 70.11 sets forth the enforcement authority required for an approvable part 70 program. It requires permitting authorities to have authority to seek and impose civil penalties and criminal fines as well as injunctive relief.

I. 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 permits must incorporate emission limitations and other requirements of the SIP, all SIP provisions applicable to a particular source will be defined and collected into a single document. The applicable requirements in the permit would include any recent SIP changes, whether as a result of a State or local SIP revision or of a FIP action by EPA. The EPA intends to assist in the implementation of the permit program through the use of model permits for numerous source categories, including model general permits as discussed below in section I.V.F. addressing general permits.

As previously discussed, title V affords significant operational flexibility. The relationship between title V permits and SIP's 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. The EPA recognizes that it will take time to complete the transition from a regulatory system where SIP's are the

primary tool for implementing and enforcing the Act, to one where operating permits ultimately assume primary responsibility for implementation and enforcement.

The EPA is considering what means will aid in ensuring a smooth transition to increasingly general, and thus more flexible, SIP's, which may allow permits rather than the SIP's to specify the details of how SIP limits and objectives apply to subject sources. In particular, EPA will be seeking to develop information in the following areas:

1. The most efficient ways of implementing requirements of SIP's through permits, such as moving detail from SIP's to permits;

2. Flexible ways for sources to demonstrate compliance with reasonably available control technology (RACT) limits, such as through the use of protocols for defining equivalency or through the development of equivalency determinations in the permitting process (as discussed below); and

3. Expanded use of emissions trading and marketable permits to achieve SIP objectives as well as providing a stable accounting mechanism for tracking and enforcing emissions reductions at a source.

The EPA encourages the development of more flexible SIP's. For example, in the final rule, § 70.6(a)(8) provides that no permit revision is required for emission trades in economic incentive or marketable permit programs, providing that the permit contains a program or process for implementing the trade. Thus, a SIP containing a generic trading rule and a replicable procedure for implementing the rule through a permit may allow trading to occur without a permit revision, provided the permit contains the replicable procedure. This is similar to the way in which permits allow sources to shift among alternate scenarios that were initially provided for in the permit. If States choose to implement trading in this manner, the provisions of the permit allowing the trades must incorporate all of the procedural protections contained in the underlying SIP.

As discussed in the section on operational flexibility, States may also elect to develop SIP's that set forth trading and compliance provisions that sources could use to comply with SIP limits after 7-days notice. The SIP would have to include compliance requirements and procedures for the trade which are sufficiently specific to demonstrate compliance. Such provisions can prove useful to sources in cases where permits do not already provide for emission trades.

J. New Source Review/Title V Relationship

Decisions made under the NSR and/or PSD programs [e.g., best available control technology (BACT)] define certain applicable SIP requirements for the title V source. 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)].

Under today's final rule State and local permitting authorities have the option, but not a mandate, to integrate requirements determined during preconstruction review with those required under title V. Such integration would be consistent with the previously stated implementation goals of combining programs and building on existing State programs which typically have already accomplished such integration at the State level. As discussed above, if NSR is integrated with the procedural and compliance-related requirements contained in §§ 70.6, 70.7, and 70.8 (including opportunity for EPA and affected State review), an existing title V permit can be administratively revised to reflect the results of the integrated NSR process.

K. 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 and municipal waste incinerators, EPA has allowed States to temporarily defer the title V permitting obligation of all nonmajor sources which would have been otherwise subject to title V provisions. This deferral will continue for such categories of nonmajor sources until the Agency has completed a rulemaking to consider whether a permanent exemption, continued deferral, or applicability of the permit program would be appropriate. In addition, States can exempt from review on a permanent basis those nonmajor sources and source categories which are subject to title V solely because they are subject to NSPS for new residential wood heaters and the NESHAP for asbestos demolition and renovation activities.

For those small businesses still required (or 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 participation and EPA and affected State review must be provided by the permitting authority before issuing 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 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) 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 and economic feasibility of the regulations when developing a CTG [507(h)].

L. Relationship With Section 112 (Air Toxics)

The operating permit program will implement standards issued under section 112 as it existed prior to the Act amendments of 1990, as well as future standards to be promulgated under section 112 as it was revised by the Act amendments of 1990 which describe requirements for the use of maximum achievable control technology (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 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.

The State permit program submittal is required to contain a legal opinion affirming the adequacy of existing legal authority to implement and enforce section 112 provisions. Each title V permit must in part assure compliance

with these provisions as it must with all other applicable requirements of the Act. State law must allow a State to accept delegation of authority to implement and enforce MACT standards; to impose 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)]. Section 112(g) of the Act requires the Administrator to "establish reasonable procedures for assuring that the requirements applying to modifications are reflected in the permit." The EPA will establish these requirements in the upcoming section 112(g) rulemaking.

EPA notes that some States may have certain procedural requirements they must satisfy before the State has the ability to impose Federal Clean Air Act requirements in a State-issued permit. Although some States may be able to take delegation of Federal requirements for MACT standards very freely, others may have to go through State rulemaking or other administrative approval processes before having authority to impose Federal requirements in a permit. The EPA encourages States to examine their procedures for implementing current and newly promulgated Federal requirements. In most cases new Federal standards, such as new MACT standards, will be promulgated with sufficient notice and sufficiently long compliance schedules that a State will have time to follow reasonable procedures implementing the standard. As long as the State is able to issue in a timely manner permits that assure compliance with the applicable requirements of the Act, the program is approvable under title V and these regulations. If a State's procedures are such that the State is not able to implement Federal requirements in time to issue complete permits, the EPA must determine whether the State is properly implementing the title V program.

The operating permit program will also be the principal long-term mechanism for implementing alternative emissions limitations for sources under section 112(i)(5) of the Act. This section provides an extension for existing sources to comply with otherwise applicable standards for hazardous air pollutants, provided certain criteria concerning early reductions are met. The Administrator or a State acting pursuant to a title V permit program is required to 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 complying with a standard under section 112(d) within the time period provided in the standard. 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 prior to proposal make a federally-enforceable commitment to achieve the reductions, can have until January 1, 1994, to achieve the reduction. For permit applications to ensure effective implementation of section 112 without placing sources in undue jeopardy of violating a hazardous air pollutant standard involving early reduction demonstrations according to section 112(i)(5) of the Act, the permitting authority is required to issue the permit within 9 months of receipt of a complete application.

M. Relationship With NPDES Program

The proposal solicited comment on whether there should be a presumption for resolving title V implementation issues consistent with relevant experience in the NPDES program. Commenters stated that, although NPDES experience is in many cases useful, the creation of a presumption is not a sufficiently flexible approach given the dissimilarities between the two programs. The EPA recognizes the significant dissimilarities between title V and the NPDES program. While EPA will continue to look to the NPDES program for guidance, EPA agrees with commenters that NPDES precedent should not be presumed binding for purposes of decisions made in the implementation process for the title V program.

N. Relationship With Title IV (Acid Rain)

Eventually title IV mandates implementation of an acid rain control program to be carried out through operating permits issued under title V as modified by title IV. Final rule promulgation for regulations to implement the entire acid rain program is required within 18 months after enactment. The acid rain permits regulations are expected to cover a wide range of topics, including:

1. Acid rain specific requirements for permits and compliance plans (emissions limits, deadlines, monitoring);

2. Additions to State part 70 program approval criteria specific to the acid rain program;

3. Requirements for alternative compliance methods (e.g., phase I extensions, reduced utilization, substitution units, energy conservation, phase II repowering, etc.);

4. Compliance certification reporting requirements;

5. Requirements for designated representatives.

In addition, acid rain emissions monitoring requirements, and excess emissions offset planning and penalty requirements, must be specified in the permit.

The general relationship between titles IV and V is governed by three important provisions of the Act. Sections 506(b) and 408(a) state that the requirements of a title V program will apply to the permitting of affected sources under the acid rain program, except as modified by title IV. In addition, as provided in section 403(f), compliance with the acid rain program requirements will not exempt or excuse the owner or operator of any source subject to those requirements from compliance with any other applicable requirements of the Act (e.g., SIP, PSD/NSR, NSPS).

Permits will be issued to affected sources under the acid rain program in two phases. EPA will issue phase I permits in 1993, which will become effective on January 1, 1995. These permits, and all permits issued to acid rain affected sources, will have an effective permit term of 5 years. Regulations describing phase I Federal permit issuance procedures are required to be promulgated within 18 months of enactment. Phase II permits will be issued by States with approved title V programs beginning in 1997. State-issued permits will be issued in accordance with the procedures defined in this part, as supplemented by the future acid rain regulations. Should a State fail to adequately administer the phase II program, EPA will take back the entire permit program. The EPA will then implement the Federal title V regulations for permit issuance, as supplemented by Federal acid rain permit issuance procedures, and will issue permits to acid rain sources within that State.

During phase I, approximately 110 affected sources, having more than 261 individual units, will have to be permitted. The units at these sources will receive marketable allowances for SO_2 emissions, as specified in section

404, Table A of the Act. In addition, other units may become subject to phase I under one of several phase I compliance options. Phase I permit applications are to be submitted to the EPA Regional Office by February 15, 1993. Phase I permits will become effective on January 1, 1995. It is likely that many part 70 State programs will be approved after EPA has issued phase I permits.

Under part 70, within 3 years after EPA approval of a state permit program, the State will be required to issue permits covering all applicable requirements of the Act, to all sources in its jurisdiction, including sources subject to the acid rain program. If a State does not have an approved part 70 program by July 1, 1996, EPA is required to issue the first round of phase II SO_2 permits by January 1, 1998. If a State receives program approval after July 1, 1996, and EPA determines that the State can satisfactorily review and issue phase II SO_2 permits by the end of 1997, EPA may delegate this responsibility to the State. The effective date for phase II SO_2 permit requirements will be January 1, 2000. Phase II NO_x applications are due on January 1, 1998. The permitting authority (the State or EPA) will have to reopen the previously-issued phase II SO_2 permit before January 1, 2000, to add those limits to the permit.

IV. Discussion of Regulatory Changes

This portion of the preamble is organized according to the sections of part 70, and discusses the principal regulatory changes made in the final rules in response to public comments. This portion of the preamble focuses on the rationale for these changes.

A. Section 70.1—Program Overview

This section of the regulation introduces certain concepts underlying the regulatory requirements of part 70. These concepts include implementation principles utilized in regulatory development.

Few comments were received on this proposed section; however, several commenters supported EPA's recognition of the implementation principles contained in the proposal and urged that the final regulation be as consistent as possible with them. One commenter suggested that environmental protection occur in conjunction with enhancing the productive capacity of the nation.

The Administrator agrees that enhancement of the nation's productive capacity is an important concept that should be incorporated into the first implementation principle. This is consistent with section 101(b)(1) of the Act which states that among its goals is one to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population. The Administrator expects these principles to guide subsequent implementation of these final regulations as they have governed regulation development.

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 created in conjunction with developing the part 70 regulations are defined in this section. These new definitions include terms necessary to communicate effectively the new regulatory requirements.

Several significant comments were received on how the definitions would be applied in various sections of the regulation. In responding to these commenters, some important changes to key definitions have occurred. Important changes were made to definitions of "applicable requirement" and "regulated pollutant." Several new terms, "section 502(b)(10) changes," "emissions allowable under the permit," "permit program costs," "part 70 program," and "regulated pollutant (for presumptive fee calculation)," were added to the definitions. Separate discussions of those changes are contained in the sections describing the program areas where these definitions are primarily used. In addition, some terms have either been moved from the proposed definitions or added in response to comment for exclusive use in a particular section. These include administrative amendment (§ 70.7), actual emissions. (§ 70.9), and complete application (§ 70.5).

C. Section 70.3—Applicability

1. Five-Year Exemption for Nonmajor Sources

Section 502(a) of the Act provides the Administrator the discretion to exempt one or more source categories (in whole or in part) from the requirement to obtain a permit "if the Administrator finds that compliance with such requirements is impracticable, infeasible, or unnecessarily burdensome on such categories." The Act specifies that major sources may not be exempted from these requirements.

The EPA initially proposed, consistent with the authority given in section 502(a), to allow States to exempt all nonmajor sources (other than acid rain affected sources) from the requirement to obtain a permit for 5 years from the date of State program approval. The proposal made the exemption for nonmajor sources in nonattainment areas contingent upon a showing by the permitting authority that title V operating permits were not necessary for the State to assure compliance with the implementation plan obligations applicable to defined sources. The EPA also reserved the ability to determine in future rulemakings whether permitting obligations should be deferred for nonmajor sources which become subject to new section 112 standards.

Section 70.3(b)(1) of the final part 70 regulations retains most of the provisions of the proposal and provides States the option of exempting all nonmajor sources (except for affected sources and solid waste incineration sources) from the requirement to obtain a permit until EPA completes the rulemaking described below on applying the permitting program to non-major sources. As discussed below, EPA will complete this rulemaking within five years of the date it first approves a State program that defers such sources. A State may choose to provide the 5-year temporary deferral to all "nonmajors" or to nonmajors only in selected source categories. The deferral may not be extended to any major source, as this is explicitly prohibited by section 502(a) of the Act. As proposed, the final rule also specifies that no affected source under the acid rain program can be exempted from the requirement to obtain a title V permit, since section 408(a) provides that permits shall be the vehicle for implementation of the acid rain requirements of the Act.

One change in the proposal is that solid waste incineration units that are nonmajor sources can be deferred only until the time they are required to obtain permits under section 129(e) of the Act. States should not be allowed to override the Act's specific schedule for permitting this specific source category.

The EPA finds that without this deferral, compliance with the permitting requirements would be "impracticable, infeasible" and "unnecessarily burdensome on these source categories" within the meaning of section 502(a). Two independent and sufficient reasons support EPA's determination. The first was presented in the preamble to the proposal, i.e., the burden on the permitting authorities and EPA will make permitting all nonmajor sources in the early stages of the program impracticable and infeasible. The second reason, which by itself justifies deferral, is that the requirement for nonmajor sources to obtain a title V permit during the early stages of the

program would be "unnecessarily burdensome" for these sources. This is because the anticipated burden on permitting authorities and EPA, as described in the preamble to the proposal, would translate into a significant, additional, and unnecessary burden on nonmajor sources if they were required to be permitted.

Nonmajor sources will be disproportionately affected by the administrative difficulties faced by the permitting authorities. The great majority of nonmajor sources are small businesses, and many are not currently subject to State air permit programs. Nonmajor sources will require more assistance from permitting authorities and EPA because of the relative lack of technical and legal expertise, resources, as well as inexperience in dealing with environmental regulation that characterizes most small businesses. If permitting authorities become overburdened due to a backlog of thousands of permits to be processed, nonmajor sources will be unable to obtain additional technical and procedural assistance from permitting authorities. Although the small business technical assistance program should help these sources, the small business program staff will also be assisting small businesses that are major sources and will face the same problems as permitting staff.

Difficulty in obtaining assistance will unnecessarily burden nonmajor sources in various ways. For example, difficulty in obtaining assistance from permitting authorities could make it problematic, if not impossible, for some nonmajor sources to submit a timely and complete application. If they fail to submit a timely and complete application, they would lose the "application shield," thereby forcing them to close or run the risk of operating without a permit in violation of the Act. Nonmajor sources' inexperience with permitting and their relative lack of technical and legal resources also make it more likely that such sources will require more permit revisions soon after permit issuance. If permitting authorities are overburdened, it will be difficult for nonmajors to obtain permit revisions early in the process. This will prevent them from promptly making what they believe are necessary changes.

The EPA notes that some nonmajor sources would already be permitted at the State level, and therefore would have some experience with the permitting process and completing permit applications. A State need not extend the deferral to these sources. However, even these sources will have to deal with the increased burdens flowing from the requirements of other titles of the Act. The EPA also notes that an alternative to deferral under section 502(a) exists in the form of general permits. However, even for source categories well-suited to general permits there will likely be some burden in complying with these requirements.

As stated above, EPA expects that the great majority of nonmajor sources will be small businesses. Some nonmajor sources will in fact be either adjuncts to large corporations possessing significant technical and legal expertise, or will have independently acquired such resources and expertise. It is therefore likely that there will be certain nonmajor sources for which the requirements of the part 70 program may not be unnecessarily burdensome.

While the permitting requirements will be significantly less burdensome for these sources, EPA has determined that it is not feasible to subject these sources to different treatment for purposes of this deferral. This is primarily because the class of sophisticated nonmajor sources described above bears little or no relation to the delineation of source "categories" as that term is used in section 502(a). Rather, EPA believes that these sources typically represent a small percentage of each of the various categories of nonmajor sources. Given the anticipated lack of resources discussed above, it is not reasonable to expect permitting authorities to sift through the large number of nonmajor sources and select those for which the permit program requirements will not be unnecessarily burdensome. Indeed, the requirement to conduct such a survey would to a great extent undercut the benefits intended by this deferral, and would not be justified by the minor gains in emission controls resulting from the permitting of these few nonmajor sources.

As already mentioned, States are free to apply the deferral only to certain categories of nonmajor sources. The part 70 regulations therefore do not prevent a State from drawing distinctions based upon which nonmajor sources have the resources and expertise necessary to comply with the permit program.

Compelling States to permit nonmajor sources during the early stages of the title V permitting program is not only extremely burdensome for these sources, it is unnecessarily so. Requiring nonmajor sources to be permitted at the beginning of the program would not provide major benefits to air quality and might actually hinder implementation of the Act. The temporary exemption for nonmajor sources poses few risks to progress in improving air quality. By definition, these sources emit less than major sources and are less significant contributors to air quality problems. Furthermore, deferring permitting requirements does not defer a source's obligation to comply with the underlying substantive air pollution control requirements. Nonmajor sources may be subject to NSPA or existing NESHAP regulations that in general already contain many of the same monitoring, recordkeeping, and reporting requirements that would apply to major sources.

Requiring nonmajors to obtain permits at the start of a permitting program could hinder implementation of the Act. It would stress the system by greatly increasing the number of permits required to be processed. This additional stress would make it more likely that errors would occur in permitting major sources, which could adversely affect air quality. Concentrating State permitting resources on major sources during the first phase of the program will make more efficient use of those resources.

Furthermore, deferring permitting requirements for nonmajor sources temporarily does not just delay the permitting burden on these sources, it will significantly decrease the burden. Once the programs have been operating for several years and the initial wave of permitting is completed, permitting staff will have the time and experience necessary to assist nonmajor sources which become subject to the permitting process.

Thus, the temporary exemption of minor sources furthers important policy goals. The failure to defer nonmajors would greatly increase the burden on those sources, would probably not provide significant environmental benefits, would stress the permitting system at its most vulnerable time, and might actually hinder achievement of air quality gains. Deferring the applicability of title V requirements to nonmajor sources temporarily might even have a net air quality benefit to the extent it facilitates bringing more major sources into compliance earlier.

The EPA believes that the preceding analysis of the burden on nonmajor sources is ample justification for the exemption under section 502(a) being implemented here. This is particularly so in light of the principle expressed in the *Alabama Power* decision that a deferral of the applicability of Act provisions requires far less justification than an outright exemption [636 F.2d at 360, n. 86].

The burdens of the permitting program identified above, including the lack of adequate resources and technical and legal expertise on the part of sources, as well as the potential difficulty in obtaining technical and legal assistance from permitting authorities, are likely to continue for some significant number of nonmajor sources beyond the early stages of the program. Accordingly, EPA believes it would be unduly burdensome, and in some cases onerous, to subject all such sources to the full panoply of procedural and substantive requirements embodied in the permit rules being promulgated today. Although the Agency anticipates that many nonmajor sources will qualify for general permits and thereby avoid the greater burdens associated with obtaining specific permits, EPA also believes it likely that a certain number of categories of nonmajor sources should be permanently exempted from the permit program. For others, a continuation of the deferral of program applicability may well be appropriate. This is so despite the support that will be offered through the Small Business Technical Assistance Program established under section 507. While that program will be beneficial to nonmajor sources, the extraordinary number of nonmajor sources that could conceivably enter the permit system at the expiration of the 5-year period, as many as 350,000 sources, could overwhelm the capacities of the State technical assistance programs.

To address these serious concerns, EPA will, within 3 years of the first approval of a full or partial State permit program that defers nonmajor sources, initiate rulemaking to determine whether to grant a further deferral from the permit program to all or some specific categories of nonmajor sources. In addition, the rulemaking will consider whether to grant permanent exemptions to any source categories for which there is a sufficient record to support such an exemption. As part of this rulemaking, EPA, in conjunction with affected sources, will gather information which will enable the Agency to make exemption or deferral determinations as appropriate. Moreover, the rulemaking will consider whether the permitting program should be structured more effectively for nonmajor sources that may be brought into the program at that time. The Agency believes that after several years of experience with the title V program, both EPA and the States will be in a better position to determine whether the program may be structured more effectively for the large number of small sources that may be covered by the program. The EPA will propose such a rule no later than 4 years following approval of the first full or partial State permit program with a deferral, and promulgate the rule prior to EPA's first approval of a State program that defers such sources.

2. Nonattainment Area Demonstration Requirement for 5-Year Exemption

As mentioned above, the proposal made the 5-year deferral for nonmajor sources in nonattainment areas contingent upon a showing by the permitting authority that the State could effectively enforce its SIP obligations on such sources without using federally-enforceable operating permits. State representatives opposed having to make a demonstration for deferring nonmajor sources in nonattainment areas.

The final rules do not include this requirement because such a showing is not required by the Act. Section 502(a) of the Act makes no distinction regarding treatment of exemptions in attainment areas versus nonattainment areas. The EPA also determined that the proposed provision was impractical and unnecessary. It would have demanded a significant amount of resources from State agencies at a critical period in program development. States said that it would have taken almost as much effort to make the demonstration as it would to permit the nonmajor sources. The purpose of allowing States to defer permitting obligations for nonmajor sources would have been dramatically undercut if a special showing were required for nonattainment areas.

3. Permanently Exempted Source Categories

The proposed rules solicited comment on individual source categories recommended for permanent exemptions. While several industry commenters supported the exemption of source categories from title V permitting, there was no consensus among these commenters concerning which particular sources should be exempted. The most frequently suggested source categories for exemption included wood stoves and asbestos demolition/renovation sites.

The EPA today is exempting two source categories: All sources subject to regulation under the demolition and renovation provisions of the NESHAP for asbestos (40 CFR part 61, subpart M, § 61.145); and all residential wood heaters subject to regulation under the NSPS (40 CFR part 60, subpart AAA). As with the 5-year deferral for nonmajor sources, there are two reasons for exempting asbestos demolition and renovation operations and residential wood heaters. Each reason provides an independent justification for the exemptions. First, as described in more detail below, permitting such sources would be impracticable and infeasible for permitting authorities. Second, permitting such sources poses an unnecessary burden for these sources. Additionally, exempting these source categories furthers an important goal of the Agency's implementation of the Act: It minimizes disruption of many existing State programs. Several State permitting programs already exempt both categories from their own permitting programs. The EPA has typically deferred the responsibility for addressing situations involving the regulation of residential sources to State and local agencies. In addition, requiring permits from both of these source categories would involve the practical problem of determining who would be permitted. Would EPA require permits from each individual demolition operation or wood heater owner, or from demolition/renovation contractors and wood heater manufacturers? Either way presents numerous practical problems. Additional support for exempting these specific source categories is provided below.

(a) Asbestos demolition and renovation operations. Many owners and operators of asbestos demolition and renovation operations may have "ownership" of such a source only briefly. It would be difficult and burdensome for individual owners and operators to obtain permits for one-time demolition and renovation operations with which they are associated. Conversely, other owners or contractors may be associated with many temporary operations during the term of any permit, and this scenario would involve the difficulties related to permitting temporary sources. Permitting asbestos demolition and renovation operations would also be difficult because these activities often commence at a particular site after relatively short notice. Waiting for a title V permit to undergo the entire permit issuance process could cause serious disruptions for owners and operators.

The burden imposed by requiring permits for asbestos demolition and renovation sources is unnecessary because it would provide few additional environmental or enforcement benefits. The EPA and delegated States under the NESHAP receive advance notice of all regulated demolition or renovation operations. Enforcement personnel are able to target and prioritize inspection resources and monitor compliance with NESHAP work practice standards. The EPA and the States also receive waste

disposal documentation verifying proper disposal at EPA-approved disposal sites. Because of the temporary nature of these sources, permits issued to them would likely only require compliance with the NESHAP work practice standards because additional reporting or recordkeeping requirements would be unnecessary. No monitoring in the traditional sense would be required because the asbestos NESHAP is a work practice standard, not an emissions limitation.

(b) New residential wood heaters. The EPA finds that a permanent exemption for new residential wood heaters subject to the NSPS is appropriate because of the burden that federal permitting would place on homeowners, distributors, manufacturers and permitting authorities alike. First, requiring permits from all subject residential wood heaters (likely numbering in the hundreds of thousands) in attainment and nonattainment areas across the country would require a significant allocation of resources from both homeowners and permitting authorities to achieve relatively minimal air quality benefits in some areas. Because the problems associated with particulate matter and hazardous air pollutant emissions from wood heaters tend to be very localized in nature, the EPA believes that a requirement to obtain a permit for owners of residential wood heaters subject to the NSPS is unnecessary in some areas and should remain in the discretion of State and local agencies. Some local agencies in nonattainment areas have already successfully employed permitting programs for these sources as part of their attainment strategies.

Second, if homeowners were required to obtain a title V permit, they would likely be required to provide verification that they were in compliance with certain installation and/or fuel quality requirements. This might involve expensive inspections or laborious recordkeeping. It would be unnecessarily burdensome for private citizens to comply with such requirements. The frequent transfers of residential ownership could also complicate compliance efforts. If wood heater manufacturers or distributors were the permittees, there would be no practical way for wood heater performance in residential locations to be monitored. Third, the permitting of new residential wood heaters by permitting authorities could prove to be extremely resource intensive. The large number of permittees affected would likely experience problems in obtaining technical assistance from the permitting authority, which would make obtaining a permit more burdensome for homeowners. Effectively determining the number and location of all wood heaters in a given jurisdiction would be a complicated task. There are hundreds of thousands of such sources throughout the country. Many State and local agencies in areas where wood stoves are a significant concern have already developed non-regulatory public information, outreach, and voluntary control programs. Adding the additional burden of permitting these numerous sources would likely not be an efficient use of agency resources.

4. Definition of "Regulated Air Pollutant"

The proposal defined "regulated pollutant" to mean substances for which a standard has been promulgated under the Act. The term regulated pollutant was used in the proposed regulation in describing what information is required in permit applications and permits. This caused confusion because the Act defines the term "regulated pollutant" differently and uses it specifically for calculating fees. To avoid this confusion, the final part 70 regulations use the term "regulated air pollutant" to describe the information required for permit applications and permits, and the term "regulated pollutant (for presumptive fee calculation)" for use in calculating fees.

The term "regulated air pollution," as now defined, accurately reflects all pollutants subject to a standard, regulation, or requirement. This term is used specifically in the regulations to describe what information is required in a permit application and in a permit. As now applied in the regulations, the revised definition will ensure that the permitting authority receives complete information on all pollutants which are "regulated" under the Act and emitted by a source. By having this information, the permitting authority can properly determine which requirements under the Act apply to the source, and include these requirements in the permit. Only by including all requirements applicable to a source in the permit can a permitting authority ensure that the permit assures compliance with the Act.

Several changes were made to the definition of "regulated air pollutant" (which was "regulated pollutant" in the proposal). First, substances regulated under title VI of the Act (protection of stratospheric ozone) were added to the list of regulated pollutants. As a general rule, regulatory requirements under the stratospheric ozone program should be included in a source's permit. However, because of the nature of some title VI regulations, the Administrator may determine by future regulation that some CFC regulations need not be in an operating permit. For example, the Administrator may decide that a title V permit need not contain production limits that apply on a company-wide, rather than facility-specific, basis.

Second, the final part 70 regulations clarify when a substance regulated under section 112 becomes a "regulated air pollutant." The term "regulated air pollutant" includes any pollutant subject to a standard or other requirements under section 112 of the Act, including section 112(r) of the Act. As applied to an individual source only, the definition includes any pollutant for which a case-by-case MACT determination is made under section 112(g)(2) of the Act, which requires such a determination to be made specifically in response to a modification or new construction by the source. This type of MACT determination, which is to be made by the permitting authority if EPA has not established any applicable emissions limitation previously, will apply only to the individual source for which it was developed. Because the requirement to make such a MACT determination is triggered by action by a single source, EPA believes that such a determination should not require the substance to be treated as a regulated pollutant for the entire regulated community at the time the determination is developed for a single source.

5. Definition of Major Stationary Source

Evaluation of the requirements of the Act with respect to the outer continental shelf (OCS) program has prompted the Agency to delete the reference to vessels in the definition of major stationary source. Specifically, section 328(a)(4)(C)(iii) requires that emissions from vessels servicing or associated with the OCS source be considered direct emissions from the source. The promulgated definition will allow permitting of these sources consistent with the requirements of the OCS program.

Commenters also raised concerns about flexibility of research and development (R&D) operations. Although EPA is not exempting R&D operations from title V requirements at this time, in many cases States will have the flexibility to treat an R&D facility as separate from the manufacturing facility with which it is co-located. Under such an approach, the facility would be treated as though it were a separate source, and would then be required to have a title V permit only if the R&D facility itself would be a major source.

D. Section 70.4—State Program Submittals and Transition

1. Approval of Program Elements

Many State and industry commenters strongly supported various existing State programs and suggested that these programs should be approved with minimal change; one of these commenters suggested that EPA should be responsible for identifying what would have to be changed in the submitted program for the State program to be approved. Several commenters further suggested that EPA allow "equivalent" programs where they achieve the same results as the title V program.

The EPA has no leeway to accept current programs other than to judge them against he criteria for program content specified in section 502(b). However, in promulgating these regulations, the Administrator has provided for as much flexibility as possible in approving State programs in an effort not to disrupt them unduly. The provisions in section 502(g), however, provide for interim approval of programs for a period of up to 2 years if the program "substantially meets" the program content criteria in 502(b). The criteria for determining if a program substantially meets title V and is eligible for interim approval was proposed in § 70.4(d) and public comment was considered in establishing the final criteria.

Furthermore, EPA wishes to note that, consistent with its implementation goals for title V, it will attempt to be flexible in determining whether a State program meets the required minimum elements. This will be particularly true where the State has an established track record in implementing an air operating permit program.

In some cases, certain provisions within the final rules directly provide flexibility to States in meeting the minimal program requirements. For example, § 70.4(b)(13) requires in part for State program approval "provisions for adequate, streamlined, and reasonable procedures for expeditious review of permit revisions, including permit modifications." This section states further that the State may meet this obligation by "using procedures that meet the requirements of § 70.7(e) of this part or that are *substantially equivalent*." (Emphasis added.) Here, EPA has provided a model for the State to follow and will approve different but effective State approaches which accomplish the same statutory and regulatory objectives. At the same time, however, the Administrator will ensure that State programs meet the requirements of section 502(b).

2. Underlying Regulations

The proposed § 70.4(b)(2) required that the State include in the program submittal the regulations that comprise the program and evidence of their correct adoption, including the notice of public comment and significant comments received by the State. States commented that this type of evidence may no longer be accessible. One State commented that it is unreasonable to require evidence that existing regulations, some of which were adopted 20 years ago, were correctly adopted and that, for new regulations, States should only need to make a demonstration that the general adoption process was procedurally correct, with a statement from the Attorney General that the regulations followed proper procedures.

The Administrator agrees with the concern that proper regulatory adoption evidence may be unavailable. Section 70.4(b)(2) in the final regulations leaves it up to the State to provide the evidence of proper adoption that is available. Added to the final regulations is the requirement also to submit any regulations or statutes that could restrict the effective implementation of the permit program. The EPA needs to see any such regulations, and needs the Attorney General's opinion as to their validity, to be able to judge if any regulatory changes need to be made before full approval of a program submittal is warranted.

3. Opportunity for Judicial Review

Section 502(b)(6) of the Act requires that a part 70 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 was reflected in § 70.4(b)(3)(x) of the proposal.

The final rule clarifies that the State must allow the denial, as well as the issuance, of a permit to be challenged in State court. The final regulation provides that the source and the public have the right to bring an action if the permitting authority fails to issue or deny the permit in the time required by the State program, as required by section 502(b)(7). If a State fails to act on initial permit applications, EPA may impose sanctions or withdraw program approval.

The final regulation also was modified to accommodate changes in permit modification procedures under § 70.7(e) of this part. A provision was added requiring States to allow judicial review if the permitting authority fails to act on a permit modification application and the source has already made the requested change. In that case, an action could be brought against the permitting authority for failure to act (seeking a court order requiring the permitting authority to act finally on the application).

No time limits on challenging a permit in State court were included in the proposal, but comments were solicited on the need for such limitation. No adverse comments were received and some commenters indicated permitted sources need assurance of stable permit conditions after a reasonable time for challenge has passed. Two industry commenters suggested that any permit challenge limitations that EPA establishes should include provisions allowing challenges to the permit after the time for the challenge has lapsed. Such provisions are especially important, they argued, as new grounds may arise after the period for challenge has lapsed, and as the government's interpretation of a permit may not be known until an enforcement action is commenced.

An additional provision addressing the opportunity for judicial review has been added to the final regulations. Section 70.4(b)(3) requires that this opportunity for State court review of the final permit action must be the exclusive means for obtaining judicial review of the permit, and that all such petitions for judicial review must be filed no later than 90 days after final permit action, or such shorter time as the State requires. If new grounds for challenge arise after the 90-day review period has ended, the party may challenge the permit on such new grounds within 90 days after the new grounds arise. Such new grounds must be based on new information which was not available during the review period. New grounds specifically do not include a government interpretation of a permit of which the source claims in an enforcement action to have been unaware. After this period for review no permit may be challenged in court, including any State or Federal enforcement action. Section 307 clearly establishes this rule for circumstances in which EPA is the permitting authority. Any dispute over interpretations of a permit may be resolved in an enforcement action, if any.

One of the primary goals behind title V is 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 certainly, the terms of the permit cannot be subject to challenge in enforcement actions. Limiting judicial review of permits has advantages for the permittee, the permitting authority and EPA. The advantage for permittees is the added certainty and stability gained by their permit no longer being subject to challenge. Enforcement at the State and Federal level should also benefit significantly. Currently, many enforcement actions are hindered by disputes over which Act requirements apply. Under the permit system, these disputes will no longer arise because any differences among the State, EPA, the permittee, and interested members of the public as to which of the Act's requirements apply to the particular source will be resolved during the permit issuance and subsequent review process.

In the preamble of the May 10, 1991, proposal, EPA suggested that, to ensure national consistency in the acid rain program, it might be appropriate to require that challenges to acid rain requirements in part 70 permits be reviewed only in Federal courts. The EPA wishes to clarify that it did not mean that action on the State-issued permit itself is subject to judicial review in Federal court. As is more fully explained in the preamble to the recently-proposed acid rain regulations, only certain specific decisions of the Administrator that are incorporated into part 70 permits will be reviewed in Federal court. Final action on the permit itself will be subject to review in State court, as is provided for in section 502(b)(6).

4. "Act On" Permits

Section 503(c) establishes the requirement that sources submit permit applications within 1 year of the date they become subject to the permit program, and that the permitting authority issue or deny permits within 18 months of the application submittal. Initially, the date that sources become subject to the program is upon program approval. The language in section 503(c) goes on to establish an exception to this schedule by allowing the permitting authority to develop a 3-year phased schedule for "acting on" the first set of permit applications submitted within 1 year of program approval. Section 503(c) requires such phased schedule to provide that at least one third of the permits be "action on" annually in each of the 3 years.

One State proposed that the requirement for a permitting authority to "act on" a permit [as discussed in the transition plan requirement in § 70.4(b)(11)] should mean "begin review" of, rather than issue or deny the permit. The EPA believes that the requirement of section 503(c) that at least one third of the applications submitted within the first year of a program be "acted on" annually after the effective program date must be read to mean that final action will be taken on those applications within the specified timeframe.

5. Operational Flexibility

(a) Proposal and Comments. The proposed regulations implementing section 502(b)(10) appeared in § 70.6(d) in the proposal, but now are found at § 70.4(b)(12). Industry comments generally approved EPA's regulatory proposal implementing section 502(b)(10), and supported the measures as necessary to allow American industry to remain competitive and adjust to changing market conditions. Some, however, wanted the final rules to provide more flexibility.

Environmental groups and a number of States strongly criticized the proposal's operational flexibility provisions. These critics maintained that the statute allows sources to shift among different operating scenarios (with different emissions) only if the various scenarios are set forth in the permit. Otherwise, they claimed, the source must obtain a permit revision before making the change at the facility. These critics stated that the extension of the permit shield to changes made pursuant to § 70.6(d) made matters even worse, because any changes made under the 7-day notice would receive no review from the permitting authority, EPA, or the public.

A number of State and local air pollution control agencies also strongly criticized EPA's view stated in the proposal that emissions or other practices not prohibited by a permit are allowed. They argued that this concept runs counter to the way State and local air permitting programs are run, and is far too open-ended. One permitting authority commented that allowing such "off-permit" activities would make it impossible to use a title V operating permit program as the basis for a market-based compliance system, because the permits would no longer necessarily reflect the total emissions from any facility. Several States have commented that mandating this interpretation as a program element would require such a fundamental restructuring of their existing operating permit programs that the State would not be able to adapt the State program to title V. Some also stated that this view is at odds with section 502(b)(10) of the Act.

(b) Structure of the general provisions. As a result of public comments and the Agency's further consideration of this controversial provision, EPA has changed the regulatory provisions implementing section 502(b)(10) in several ways. The regulations have been moved from § 70.6(d) (on permit content) to § 70.4(b)(12) (in the section on permit programs) because the requirement is one for the program itself.

Despite the views of some commenters to the contrary, EPA believes that the Act requires a State to meet the requirements of section 502(b)(10) in order for the Agency to approve the title V permit program. Section 502(b) states that "the minimum elements of a permit program * * * shall include each of the following." For reasons that will be fully set out in the detailed response to comments document, neither sections 506(a) nor 116 allow States to avoid this program element. As a result, the final regulation includes program elements for operational flexibility which the State is mandated to provide in its title V program.

The EPA has, however, reconsidered the question of exactly what this statutory provision contemplates. There was serious disagreement among the commenters concerning whether section 502(b)(10) allows sources to operate in ways that are not specifically addressed in the permit without obtaining a permit revision (as long as the changes meet the specifications stated in the provision), or whether it merely states that, if the various operating scenarios or provisions for increasing and decreasing emissions at various emitting units are stated in the permit, the source may shift among these operations or units without obtaining a permit revision. After careful analysis of the statute and legislative history, EPA concludes that the statutory language gives EPA broad authority to provide source operational flexibility. The EPA has structured its final regulation to give the States flexibility in meeting their requirements under section 502(b)(10), while ensuring that programs must provide operational flexibility consistent with title V and the underlying applicable requirements it implements.

In brief, the final regulation identifies three ways to provide operational flexibility:

(i) Programs must allow certain narrowly defined changes within a permitted facility that contravene specific permit terms without requiring a permit revision, as long as the source

does not exceed the emissions allowable under the permit.

(ii) The permit program may allow emissions trading at the facility to meet SIP limits where the SIP provides for such trading on 7-days' notice in cases where trading is not already provided for in the permit; and

(iii) The permit program must provide for emissions trading for the purposes of complying with a federally-enforceable emissions cap established in the permit independent of or more strict than otherwise applicable requirements.

The first and third ways of implementing operational flexibility are mandatory on the States; the second is available to States that wish to take advantage of it.

As noted above, a number of State and environmentalist commenters argued that section 502(b)(10) only allows operational changes without a permit revision if the flexibility is built into the permit itself (i.e., various operating scenarios or rules for allowing trading of emissions among different units are expressly set forth in the permit).

The EPA does not believe, however, that section 502(b)(10) is only a mandate to include alternate permitted scenarios in the permit. If a permit includes compliance terms for alternate operating scenarios, a source is simply complying with the terms of its permit when it operates under one or another scenario. If limited to this narrow reading, section 502(b)(10) would be rendered mere surplusage or an unnecessary gloss on a source's obligation under section 502(a) to comply with its permit.

On the other hand, EPA also disagrees with commenters who asserted that section 502(b)(10) authorizes sources to give a 7-day advance notice and then meet their permit limits using an average of all emissions across the "permitted facility," regardless of whether such averaging would be consistent with the underlying requirements of the Act. Nothing in title V or the Act allows permitted sources to violate applicable requirements. If a SIP emission limit applies to each emissions unit at a facility, a title V permit cannot authorize any one unit to violate that emission limit, even if the average emissions across the facility are equal to the emissions that are allowed at the facility under the SIP. As a policy matter, emissions averaging provisions are often complicated to implement and require careful review to ensure that the trading plan allows the same emissions as the otherwise applicable requirements. The EPA believes that a 7-day notice is not a reasonable amount of time to conduct such a review.

The EPA agrees, however, that one policy goal of the Act is to encourage responsible emissions trading plans and to reduce the costs of meeting the Act's requirements. The EPA's regulations implementing section 502(b)(10) are designed to encourage emissions trading as extensively as possible consistent with the requirement that title V permits comply with the applicable requirements of the Act and the need to ensure a reasonable review of the emissions trading provisions established in a permitting process.

Before discussing each of these three elements of EPA's final regulation on operational flexibility, there are provisions in the regulation that are applicable to any method for implementing operational flexibility. The regulations provide that the source must give at least a 7-day advance notice of any change made pursuant to the section 502(b)(10) process. The source, the permitting authority, and EPA must attach a copy of a 7-day advance notice describing the change to their copy of the relevant permit. These notices will be critical for determining how a source is complying with applicable requirements at any time, and therefore must accompany a permit.

Further, no change under this provision can exceed "emissions allowable under the permit." The EPA has defined this term to mean a federally-enforceable permit term or condition determined at issuance to be required by an applicable requirement that establishes an emission limit (including work practice standards) or a federally-enforceable emissions cap that the source has assumed to avoid applicable requirements. This definition clarifies that changes under this provision cannot increase emissions beyond what is provided for by the terms and conditions of the permit.

Nothing in this section is meant to imply any limit on the inherent flexibility sources have under their permits. A permittee can always make changes, including physical and production changes, that are not constrained under the permit. For example, a facility could physically move equipment without providing notice or obtaining a permit modification if the move does not change or affect applicable requirements or federally-enforceable permit terms or conditions. Or a painting facility with a permit that limits the VOC content of its paints can switch paint colors freely as long as each color complies with the VOC limit in the permit.

(c) Changes contravening certain permit terms or conditions, § 70.4(b)(12)(i). As noted above, a federal operating permit is not meant to prevent a source from making changes at the facility that are not constrained by the permit. Accordingly, the Act does not require 7-day notice for such changes under 502(b)(10). The agency believes that the term "changes" in 502(b)(10) is meant to apply to changes at the facility that may contravene the permit. Therefore, the first method for implementing operational flexibility requires each program to allow certain changes at a permitted facility that may contravene specific permit terms or conditions or make them inapplicable. The types of changes that are allowed are limited as discussed below. The program must provide that an owner or operator of a source could give a 7-day notice that it is making a change at the facility. The notice would, among other things, describe the change and identify any permit terms or conditions that would no longer be applicable as a result of the change. If that notice and the change qualify under this provision, the facility owner or operator would not have to comply with the permit terms and conditions it has identified that restrict the change. If it is later proven that the change does not qualify under this provision, the original terms of the permit remain fully enforceable.

Under the regulations, programs must allow "section 502(b)(10) changes" without requiring a permit modification. The regulations define "section 502(b)(10) changes" as those that contravene a permit term, but exclude from this definition any changes that violate applicable requirements or contravene permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements. This definition is designed to prevent changes to permit terms that are critical to determining the "emissions allowable under the permit."

An example of how this provision would operate would be a permit in which the federally-enforceable portion specifies a particular brand of coating, along with the emission limit applicable to that coating. This provision would allow the source to change that brand of coating using a 7-day notice. Of course, the new brand must comply with the emission limit.

(d) Emissions trading based on the SIP, § 70.4(b)(12)(ii). The second method for implementing operational flexibility would allow a source to trade emissions within the permitted facility to meet its SIP limits, where the permit does not already provide for such emissions trading but the SIP does. The SIP will identify which provisions allow this type

of operational flexibility. This method would allow a source which had not anticipated needing to trade emissions within the facility to take advantage of emissions trading provisions in the SIP after a 7-day notice without having to modify its permit to include new compliance provisions to enforce the emissions trade. Each permit for a source eligible for such emissions trading would include the applicable SIP emission limits. Upon giving the notice under 502(b)(10), the source could then meet the SIP limits using the applicable trading and compliance provisions approved into the applicable implementation plan. The notice accompanying the permit will then indicate that the source is complying with the implementation plan's trading provisions, rather than the compliance terms set forth in the permit. This mechanism should prove useful to those facilities where emissions trading might provide useful operational flexibility, but the source has not anticipated the need to trade emissions or is not sure enough about its need to warrant writing compliance provisions necessary to implement an emissions trading plan in its permit.

The EPA is not aware of any SIP's that are currently structured to allow sources to opt into an emissions trade based on a 7-day notice, EPA will encourage the States to develop such provisions as part of its efforts to promote market-based regulation under the Act. EPA has already begun to examine the relationship between SIP's and operating permits to identify opportunities for more flexible implementation of the requirements of title I of the Act. To aid the States in implementing this method of operational flexibility EPA will propose, within one year following this rulemaking, guidance for comment on how States may revise their implementation plans to meet these goals. EPA will issue the final guidance within two years.

Any such SIP would have to include compliance requirements and procedures for such trades. As outlined below, these procedures must assure that any such trade is quantifiable, accountable, enforceable, and based on replicable procedures for ensuring the emission reductions that the trading program was intended to provide, including necessary test methods, monitoring, recordkeeping, and reporting. These trading provisions must be specific enough so that any source authorized to use them has a clear method for demonstrating compliance without undergoing a permit revision, but must also be flexible.

Quantifiable: EPA and the State must be able to determine the emissions impact of the SIP requirement or emission limit. SIP's must specify measuring techniques, including test methods, monitoring, recordkeeping and reporting requirements with which to measure the emissions allowed under the trading program and for a compliance determination.

Enforceable: A SIP measure must include clear and unambiguous requirements which apply to the source pursuant to legal authority that States, EPA, and citizens may enforce under the Act. An emission limit must also be enforceable in practice; a regulatory limit is not enforceable if, for example, it is impractical to determine compliance with the published limit.

Accountable: The demonstration of reasonable further progress, attainment, or maintenance for the SIP must account for the aggregate effect of the emissions trades allowed under any such program.

Replicable: SIP procedures for applying the emission trading rules to specific sources should be structured so that two independent entities applying the procedures would obtain the same result when determining compliance with the emission trading provisions. For a SIP trading provision to produce replicable results, the SIP must clearly specify all the variables necessary for determining the baseline emissions for each source, and increases and decreases from that baseline.

The permit shield would not apply to any emissions trades made under the SIP pursuant to a 7-day notice, because the relevant compliance terms and trading provisions would be contained in the SIP, not in the permit. The regulations allow a source to implement non-operational changes, such as changes in monitoring, under this provision. If the emissions trading provisions in the SIP contain compliance provisions for the trading different from the compliance provisions already in the source's permit, the source must comply with the compliance provisions in the SIP rather than those in the permit. To the extent the source chooses to operate under its original permit terms rather than the SIP provision, the source must comply with the compliance provisions in its permit.

(e) Emissions trading under emissions caps, § 70.4(b)(12)(iii). The third method for implementing operational flexibility requires the permitting authority to provide for emissions trading in the permit for the purposes of complying with certain emissions caps. Where the permit establishes a federally enforceable emissions cap that is independent of the applicable requirements, the source may request such emissions trading. For example, to limit the source's potential to emit, a permittee may agree to an emissions cap in its permit that is lower than anything required under the SIP or other applicable requirements. If the permittee requests it, and proposes replicable procedures adequate to ensure that the emissions trades are enforceable, accountable, and quantifiable under the permit cap, the permitting authority shall include the emissions trading procedures in the permit. The source could then engage in emissions trading following a 7-day notice based on those procedures. Of course, the permit must also include the limitations with which each emissions unit must comply under any applicable requirements and must continue to ensure compliance with all applicable requirements, including the SIP.

If a unit is subject to requirements where the emissions impacts are not readily quantifiable, there is no requirement for the permitting authority to include such units in an emissions trading plan. For example, units subject solely to work practice standards with no quantifiable emissions limit are not likely candidates for such emissions trading plans. Of course, a source may agree to certain federally-enforceable terms or conditions to avoid any otherwise applicable requirement, even though trading under such permit terms or conditions may not be appropriate.

(f) Emission caps and emission allowances. EPA has received comments from several parties expressing concern about how to make changes in permit limits that are more strict than or below the level required in the Act's underlying applicable requirements. The commenters raise two scenarios. One is where the permitting authority sets an emissions limit or cap on an emission unit as a matter of State law. The other is where the source has agreed to make the lower limit or cap federally enforceable to reduce the source's potential to emit as a matter of Federal law.

In the first scenario, EPA wishes to clarify that these regulations do not require a State to use title V procedures to modify emission limits that are based solely on State law and do not implement an applicable Federal requirement. A State is free to establish its own procedures for modifying any such State limits which may be referred to in a title V permit. As explained below, pursuant to § 70.6(b), all permit terms which are not federally

enforceable must be identified as such in the permit.

In the second scenario, it is possible to use the combination of several provisions in these regulations to allow for operational flexibility around federally-enforceable emission limits or caps which are more strict than otherwise required by the Act's applicable requirements. A source may request that the permit provide for emissions trading under § 70.4(b)(12)(iii), as discussed above. For example, a source could structure its permit so that the emissions caps at the permitted facility created a pool of unused emissions under the voluntary limit on the source's potential to emit. The facility could then establish an emissions trading plan in its permit which would allow it to apply those unused emissions at any particular emission unit after a 7-day notice. The permit would contain the compliance provisions necessary to account for the application of emission allowances from this pool.

Obviously, the source may use this pool of emissions allowances to increase its emissions on any unit only as high as allowed by the applicable requirements for that emissions unit, if any. In addition, the source's total emissions must remain below any voluntary limit on its potential to emit. But within those limits, the source could cap its potential to emit, while maintaining the flexibility to shift emissions on short notice.

(g) Batch processors and operational flexibility. Batch processors, such as pharmaceutical or specialty chemical producers, raised particular concerns about operational flexibility under title V. Commenters also raised concerns about flexibility of research and development (R&D) operations. Although EPA is not exempting R&D operations from title V requirements at this time, in many cases States will have the flexibility to treat an R&D facility as separate from the manufacturing facility with which it is co-located. Under such an approach, the facility would be treated as though it were a separate source, and would then be required to have a title V permit only if the R&D facility itself would be a major source. In response, EPA has provided many opportunities for operational flexibility in these regulations, even beyond the requirements of 502(b)(1). More important, sources can always make changes that are not constrained under the permit. For example, as mentioned above, a facility could physically move equipment without providing notice or obtaining a permit modification if the move does not change or affect applicable requirements or federally-enforceable permit terms or conditions. In addition, the permittee and the permitting authority may craft permits to establish worst-case operational scenarios so that the ability of the source to increase its emissions from actual levels up to the permitted allowable emission limits will be inherent in the emission limits in such operating permits. The permittee can make such increases without submitting a 7-day notice. Also many emission limits are expressed in terms of emission rates, not total emissions. In this case the permit would not limit the production capacity of the facility, as long as it complied with the applicable emission rate.

Moreover, programs must allow certain changes that may contravene permit terms under § 70.4(b)(12)(i). In addition, pursuant to § 70.4(b)(12)(iii) the permitting authority will be required to include in the permit emissions trading provisions requested by the batch processor that are appropriate to comply with an emissions cap established in the permit. Under § 70.4(b)(12)(ii) the source may engage in emissions trading based on the implementation plan. Under § 70.6(a)(9) and (10) the permit must include alternative operating scenarios identified by the source or emissions trading provisions to the extent provided for in the underlying applicable requirements. Finally, these regulations allow a State to authorize "off-permit" operations, as explained in the decision below on § 70.4(b)(14) and (15).

6. "Off-permit" Operations

The permit program may allow changes at a facility that are not addressed or prohibited by the permit terms (so-called "off-permit" changes), provided they meet the requirements of § 70.4(b)(14), described below. Although many commenters challenged the legality of this concept under title V, EPA believes that title V was not intended to prohibit such changes. The Agency continues to believe that section 502(a) allows certain changes at a permitted facility that need not be incorporated into the permit until renewal. Section 502(a) prohibits a source from operating any of certain listed types of sources "except in compliance with a permit * * * *" EPA's view is that it does not violate this prohibition for a source to operate in ways that are neither addressed nor prohibited by the permit. Thus, new §§ 70.4(b)(14) and (15) of the regulations provide that a State may allow a permitted source to make changes that are not addressed or prohibited by the permit, without requiring a permit revision, as long as they are not modifications under any provision of title I, are not subject to any requirements under title IV of the Act, and meet all applicable requirements of the Act.

The EPA is limiting off-permit changes to those that do not constitute title I modifications for legal and policy reasons. Legally, the structure of the statute suggests that title I modifications should not take place entirely outside the permit process. Section 502(b)(10) explicitly excludes title I modifications from the class of changes that can be made without a permit revision. It would be anomalous for the Act to suggest that permits must be modified to reflect title I modifications in one place and then, by inference under section 502(a), allow off-permit changes above title I modification levels to take place without any permit modification. As a policy matter, the Act specifically identifies title I modifications under section 502(b)(10) because they represent significant changes to a facility. Other changes may implicate Federal standards, but title I modifications always do. Therefore, it is not reasonable to allow such modifications to be made outside the title V permit system.

The final regulations make a change in this section, however. EPA has deleted the language in the proposal, at § 70.6(d)(3)(iv), stating that notification to the permitting authority and EPA is not required for changes at the source that are not regulated or prohibited by the permit. After considering the public comments, EPA believes that it is critical that the permitting authority and EPA should receive contemporaneous written notification for these types of changes. This notice will provide a record of activity at the facility without inhibiting the sources ability to make the change. If notification were not required, sources could make substantial changes without notifying the permitting authority or EPA of changes that might implicate Federal requirements. This would defeat one of the purposes of an operating permit system. The final rule also requires the source to keep certain records of these changes. These records may consist of copies of the notices sent to EPA and the permitting authority when the change is made.

One inherent limitation on the changes a source can make under the off-permit concept is that off-permit changes are limited to those activities not "addressed" by the permit. Therefore, off-permit changes cannot

alter the permitted facility's obligation to comply with the compliance provisions of its title V permit, which under § 70.6 will be "addressed" in each permit. Such requirements include monitoring (including test methods), recordkeeping, reporting, and compliance certification requirements.

The regulations clarify that the permit shield under section 504(f) may not extend to changes made in this way. This limitation was clearly stated in the preamble to the proposal [56 FR 21746], but, as several commenters pointed out, was not stated in the proposed regulations.

Finally, the regulations made it clear that a State may choose to prohibit off-permit operations as a matter of State law. EPA believes, however, that off-permit operations are an important source of flexibility under title V. Therefore, the regulations provide that any State prohibition of off-permit operations will not be enforceable as a matter of Federal law under the Act. This means that if a State elects to prohibit off-permit operations, neither EPA nor citizens could enforce against the source for failure to have a Federal title V permit covering the off-permit change. Of course, the underlying requirements of the Act would remain federally enforceable if the off-permit change violates any applicable requirement.

If a State prohibits off-permit activity under State law, the State will likely require the source to use some State procedures to record the off-permit change so that the source's operating permit reflects the off-permit change. Where the State chooses to include off-permit changes in the portion of the permit that is not federally enforceable, the permitting authority must establish procedures which at least provide EPA with notice of the change. Obviously, such changes do not qualify for the permit shield under §§ 504(f) and 70.6(f).

It is possible, however, that States or EPA may conclude that a prohibition on off-permit operations must also be made federally enforceable to ensure that applicable requirements are met. For example, as mentioned above, a marketable permits program may be impossible to administer and enforce if an operating permit is not a complete representation of the permitted facility's emissions. To allow for such innovative uses of the title V permit program to implement the Act, a prohibition on off-permit operations can be made federally enforceable where the SIP or applicable requirement, such as a MACT standard, includes a prohibition of off-permit operations.

Section 70.4(b)(15) makes clear that certain changes to the federally-enforceable terms and conditions of a part 70 permit must go through permit revision procedures. As noted above, changes that are title I modifications cannot be made off-permit.

Also ineligible are changes subject to any requirements of title IV. The EPA believes that the allowance trading system provided for in title IV will not be feasible unless there is an accurate accounting of each source's obligations thereunder in the title V permit.

7. Partial Program Approval

Section 70.4(c) of the proposal contained provisions for approving a program that applies to a limited universe of sources. The proposal mirrored the language in section 502(f) that listed the minimum criteria a program must meet to get approval as a partial program. Several industry commenters said that partial approval for programs that issue permits that do not include all applicable elements should be avoided, since it would cause involvement by multiple permitting authorities and result in confusion. An environmental group commented that partial program approvals may not be legal if they do not cover the entire range of source categories to which title V applies; they would not fulfill all requirements of the Act. Several commenters supported the need for partial program approvals, however.

Approval of partial programs is provided for in section 502(d) and minimum criteria for approval are listed in section 502(f). The minimum criteria in section 502(f) cover title V, title I, title IV as applicable to affected sources, and section 112 as applicable to new sources, major sources, and area sources. Since a partial program can be part of a whole State program, EPA will grant full approval to a partial program only if it meets all the part 70 requirements. The EPA will, however, consider interim approval for partial programs that substantially meet the requirements of part 70.

Clarification is added to § 70.4(c) concerning source-category limited partial programs. A program that only addresses certain source categories based on the jurisdictional limits of a local agency will be approved as a partial program. This partial program approval can be interim if the program does not fully meet, but substantially meets, the criteria for a permitting program. A program that is limited because it does not address certain source categories (for reasons other than geographical jurisdiction of a local agency) will be given only an interim approval and must be modified within the interim approval period to cover all sources and meet all part 70 requirements before full approval can be granted. However, for EPA to grant interim approval to a source-category limited program (other than for geographical reasons), there must be compelling reasons why the State cannot address all sources in the interim. These reasons will be judged on a case-by-case basis.

One State commenter argued that EPA should approve permit programs on a district-by-district basis. The EPA will act on partial programs as they are submitted. The State retains the option to submit several partial programs to meet its obligation to submit a whole part 70 program.

8. Interim Approval of Programs

Section 502(g) of the Act allows interim approval of a State program for up to 2 years if it substantially meets the requirements of title V. Section 70.4(d) proposed six program elements that would be needed for a program to receive interim approval.

Several industry commenters stated that operational flexibility and permit revision procedures should be required aspects of the State's interim program, and that provisions for renewing permits granted under interim approval should also be made. Some State agency commenters, on the other hand, believed that the key elements included for interim approval should be kept to a minimum.

The criteria for allowing interim approvals is designed to provide for viable permits that will not have to be renewed upon full program approval other than when the term of the permit expires. The EPA believes the proposed criteria, with the addition of enforcement, certain operational flexibility provisions, streamlined permitting procedures, alternative operating scenarios, and permit application forms, discussed below, are sufficient to substantially meet the requirements of title V. Other suggested additions to the criteria were considered and only these provisions were judged to be of such importance as to be added.

The program elements that compose the criteria a program must meet to be granted interim approval have been modified to add enforcement authority. Section 70.4(d)(3)(vii) now requires interim programs to have "authority to enforce permits, including the authority to assess penalties against sources that do not comply with their permits or with the requirement to obtain a permit." Enforcement is an essential element of

any viable permitting program and therefore no program "substantially meets" the elements necessary for an approvable part 70 program without authority to enforce permits and the requirement to obtain a permit. Therefore, civil authority to enforce permit terms and conditions and the requirement to obtain a permit is necessary to qualify for interim approval. The EPA realizes, however, that many States do not currently have the criminal authority or the civil statutory maximum of $10,000 per day per violation required for full approval, and legislative changes will be necessary. Therefore, the civil statutory maximum would not have to be at the $10,000 per day per violation level and criminal authority would not be required until full approval.

The Administrator agrees with industry commenters that the ability to incorporate alternate scenarios into the permit, as well as certain provisions of operational flexibility, are important aspects of the permitting program that should be included in an interim program. In that permits issued under an interim program could be for a full 5-year term, sources would need these important provisions for that period to allow timely response to changes in market conditions. These elements are important minimum elements without which needless permit revisions could be required before changes critically important to the source could be made.

Balanced against this need for flexibility is the concern that States may not be ready to implement certain aspects of § 70.4(b)(12) at the time of an interim submittal. Accordingly, EPA is requiring as a minimum interim program element only the ability to generally implement this section.

The Administrator also agrees that any permit issuance or revision activity under an interim program should be carried out expeditiously. Streamlined provisions for revising permits issued under an interim program could be vital to industry if market conditions dictate that a permit revision is necessary. No specific timeframes are being provided as guidance for meeting this criterion because timeliness of action on permits and permit revisions will depend on the experience of the individual permitting authority and also because processing the first phase of permits could be more difficult due to the initial workload on an agency. The streamlined procedures will be judged on a case-by-case basis when a program submittal is reviewed and interim approval is considered. EPA also believes that an interim program should have application forms to ensure that any permit processing procedures are smoothly implemented.

9. Review of Program

Several groups suggested shortening the period of time allowed for States to resubmit their programs following EPA review and disapproval of the initial program submittal. The proposed regulations in § 70.4(f) allowed 180 days following notice of disapproval by the Administrator or such other time not to exceed 2 years for States to resubmit their programs with corrected deficiencies. The allowance for up to 2 years was proposed only for a situation where legislative changes would be needed and additional time would be required for the changes to be adopted. Several environmental groups endorsed a 180-day period to resubmit a program, stating that the Act at 502(d)(1) allows a period of that length. Two industry commenters indicated that the States should only have 1 year to submit their program revisions following EPA review.

Section 502(d)(1) stipulates that the State has 180 days after EPA notice of disapproval to resubmit a program and does not provide for any longer period. Section 70.4(f) has been revised to reflect only the 180 days and the provision for up to 2 years has been removed to be consistent with 502(d)(1).

10. Program Deficiency Correction

Section 70.4(i)(1) allows 180 days for a program revision when the Administrator finds, sometime after program approval, that a program has inadequate means of implementation or is inadequate in some other way. If the State demonstrates that additional legal authority is necessary to correct the deficiency, the period may be extended up to 2 years. The proposal did not, however, cover program revisions needed due to a change in part 70. This has been added to the final rules so that any program revision which must include additional legal authority necessary to implement a change to the part 70 rules can be accomplished over a period up to 2 years.

11. Confidential Information Submittal

A Federal agency requested that laws for classified or sensitive unclassified information be applied when such information is transmitted to the permitting authority and to EPA for permit review. A State commenter requested that EPA correspond directly with the permittee to get confidential information, and that EPA should not require States to share confidential information. One commenter indicated that State legal authority should not be required to transmit confidential data.

A stipulation is added to § 70.4(j) that a source may be required by the permitting authority to submit confidential information directly to EPA since some States cannot submit such information to EPA. Regardless of whether the submittal is made by the State or the source, the material will be submitted under 40 CFR part 2, which contains EPA's business confidentiality regulations. The regulations contain the requirements material must meet to be considered as business confidential. Qualifying information is entitled to protection under part 2 such that it will not be released to outside parties.

12. Computer-Readable Information

Section 70.4(j)(1) of the regulations addresses availability to EPA of information that is used in the administration of a State program. The final regulation specifies that such information is to be provided, to the extent practicable, in computer-readable files. Such language was not found in the proposal; therefore, no comments were received specifically on this issue. The EPA, however, supports further progress in the computerized exchange of information between itself and State and local agencies, as long as it is cost-effective and streamlines processing for the parties involved. Recent EPA workgroup meetings on data management issues have identified a strong interest on the part of State and local agencies in making their information systems more compatible with those at EPA. Representatives of EPA and permitting authorities alike recognize the potential for future administrative cost savings through well-designed permitting-related computer systems.

E. Section 70.5—Permit Applications

1. Submittal for Preconstruction Review

The proposal stated that any source required to have a preconstruction review permit pursuant to the requirements of the PSD program under title I, part C or the NSR program under title I, part D is subject to the part 70 permit program. The proposal did not address the timing of application submittal for these sources.

The final rule in § 70.5(a)(ii) now states that sources that must meet the requirements under 112(g) or for which part C or D permits are required must submit a part 70 permit application no later than 12 months after operations commence, unless the State requires an earlier submittal date. The final

requirements for section 112(g) will be established in the rulemaking under section 112(g). Where an existing part 70 permit would prohibit such construction or change in operation, the source must obtain a permit revision before commencing operation.

Section 503(c) of the Act states that an application with a compliance plan shall be submitted not later than 12 months after the date on which the source becomes subject to the permitting program and provides for State discretion in setting the exact deadline. These deadlines should be included in the part 70 program submittal for review and approval by EPA. Section 503(a) states that any source is subject to the permitting program on the later of two dates, the effective date of State's part 70 program approval or when the source is subject to section 502(a). Additionally, section 502(a) states that it shall be a violation for a source to operate without a permit. This implies that a source becomes subject to the operating permit program when operations commence. Therefore, a subject source may wait until 12 months after it begins operation or after State program approval, whichever date is later, to submit its operating permit application, provided that the State has not established an earlier date. Furthermore, section 503(d) allows a source subject to the permit program to operate and not be in violation prior to the time it must submit an application under section 503(c). Since section 503(d) is more specific on this point, it is clear that a source required to have a title I part C or D permit need not submit a part 70 application until after it commences operation or such earlier date as the permitting authority may establish. This prevents the source from being subject to an enforcement action during the 12-month period that it operates before it applies for an operating permit.

2. "Timely" Application Submittal for Permit Renewals

The proposal would have required permit renewal applications to be submitted 18 months prior to permit expiration. Furthermore, the proposal offered two examples where times less than 18 months would be approved by the Administrator (where the State issues permits with terms shorter than 5 years and where the State was required to act on permits in less than 18 months) and stated that in no case would a deadline be approved that was less than 6 months before the permit terms expired.

Several commenters interpreted the proposal to require all applications for permit renewals to be submitted 18 months before permit expiration. There was consensus among industry commenters that an 18-month lead time for submittal of permit renewal applications was too long and would lead to unnecessary application revisions before the permit was issued. Some of these commenters supported a 3–6 month deadline before renewal.

In response to these comments, the EPA states that the proposed regulation never required all sources to submit applications for permit renewals 18 months in advance. In order to ensure that the permit terms do not lapse, the renewal application must be submitted far enough in advance of permit expiration to allow for reissuance. This is consistent with section 502(a) of the Act, which states that a source shall not operate without a permit once it is subject to the permitting program. There is a competing concern in that these applications must be expeditiously processed by the State, consistent with 502(b)(6) of the Act. This concern has been addressed by changing the final regulation to provide permitting authorities the discretion to require renewal applications to be submitted not less than 6 months or more than 18 months before permit expiration. The States are now given flexibility to set these deadlines, but this flexibility is tempered by EPA's ability to audit State programs after approval to determine if permits are being renewed before the permit terms lapse. The States can require sources to submit applications within the time confines provided in the regulation, and it is then up to the States to ensure that the applications are processed and the renewal permits are issued as provided for in their program submittals.

3. Application Completeness Determination

(a) Deadline for States to determine completeness. In § 70.4(b)(6) of the proposed rule, a permitting authority had 30 days to determine whether the application was complete and to send the applicant, in writing, a notice of completeness or incompleteness, or the application would be deemed complete by default. This requirement was proposed by EPA in response to section 502(b)(6) that States have, as a program element, "[a]dequate, streamlined, and reasonable procedures for expeditiously determining when applications are complete, * * *".

While many industry commenters supported the 30-day deadline for application completeness determination, several State groups suggested changing provisions for completeness by default to 60 days. States commented that 30 days per application was not long enough to ensure that all permit applications could be reviewed for completeness within the workload of the Agency, especially in light of the initial submittal of applications from all sources within 1 year after program approval. An environmental group interpreted the 30-day completeness determination to weaken the Act significantly by allowing sources to operate with incomplete applications.

Due to these comments and after further study, the Administrator has decided to change provisions for the determination of application completeness by default to 60 days [§ 70.5(a)(1)(iii)]. This result applies to all permitting actions, except for processing minor permit modifications where no completeness determination is required. The EPA believes that a "reasonable" time for this review as required by section 502(b)(6) of the Act is 60 days. This follows the precedents set in the NPDES program and in numerous States for processing permits for existing sources and should afford permitting authorities sufficient time for completeness determinations. Applications for major sources often involve hundreds of individual units and the States may not be able practically to perform this task in 30 days. Allowing a 60-day completeness review time should ensure that the States, especially at program commencement, do not issue blanket notices of incompleteness to permittees, due to an inability to perform this duty. This is important because a State's completeness determination starts the clock as of receipt of the application on any required deadlines for application processing. On the other hand, increasing this review time will prevent the sheer weight of the applications at the beginning of the program from, by default, allowing sources to operate and be shielded from enforcement action with incomplete applciations that the agency has not reviewed.

(b) Submittal of additional information after the completeness determination. The proposal stated that permitting authorities should have reasonable criteria for determining when additional information requested of a source after a determination of completeness must be submitted in order to retain the protection afforded by the timely submittal of a complete application.

Several industry commenters requested the ability to update their applications after the completeness determination but before the permit was issued, especially with reference to the possibility that there would be an extended delay in issuing the permit during the initial 3 year phase-in of the State programs.

In response to these comments and for additional reasons, the Administrator believes that additional information should be provided to the permitting authority to address requirements that become applicable during the period of time after the completeness determination but prior to release of the draft permit. Section 70.5(b) has been changed to require the submittal of this information. Not all information that might change during this period would be required to be submitted by the source; only that concerning new applicable requirements. This new information would not effect the determination of completeness. This information submittal requirement is consistent with the important principle of title V that these permits certainly the source as to its obligations. These applicable requirements would apply to the source regardless of the status of the permit application and regardless of whether a permit has been issued or not. However, for practical reasons, this requirement only extends until the time that the draft permit is issued. After the draft permit is issued but before the final permit is issued, new applicable requirements would have to be inserted by the permitting authority and the protection of the completeness determination would be preserved.

4. Exemptions for Insignificant Activities or Emission Units

The preamble to the proposal solicited comment on the comprehensiveness of the information to be required on application forms. The preamble section on applications was silent as to whether certain activities with emissions at or below certain levels could be exempted from having to be fully described and included in a complete part 70 permit application, although it was mentioned in regard to fee demonstrations in the proposed regulations.

Industry and many State commenters strongly supported the inclusion of provisions for exemptions for insignificant activities, so that the applications would not have to contain unnecessary information. Environmental groups, however, indicated that different exemption levels should be required for different compounds, and the EPA should establish uniform national exemptions for insignificant activities or emission levels.

In the final regulation at § 70.5(c), the Administrator has provided that exemptions for insignificant activities or emission levels can be developed by States individually as part of their part 70 programs, rather than being established on a national basis by EPA. The regulation limits the State's discretion by precluding such exemptions if they would interfere with the determination or imposition of any applicable requirement, or the calculation of fees. Applicable requirement in this context would include any standard or requirement as defined in § 70.2.

Furthermore, the Administrator receives the application to have a list containing information the insignificant activities that are exempted because of size, emissions levels, or production rate. An example might be a boiler which is exempt because it is below a specified size.This list need only contain enough information to identify the activities qualifying for an exemption. This list is important for both the source and the State as it provides information as to what activities are exempted. This list will also be helpful in the event that a future rulemaking results in a new requirement being applicable to the exempted activity, or in the event the State changes its fee structure to charge fees for the previously exempted activity. However, for these exemptions which apply to an entire category of activities, such as space heaters, the application need not contain any information on the activity.

These types of exemptions minimize unnecessary paperwork and reduce the need for sources to conduct analysis of all emissions regardless of the amount involved. Such a position is also supported by the *Alabama Power* decision, where the court found that emissions from certain small modifications and emissions of certain pollutants at new sources could be exempted from some or all PSD review requirements on the grounds that such emissions would be *de minimis*. In other words, the Administrator may determine levels below which there is no practical value in conducting an extensive review.

Rather than mandating national criteria for exempting insignificant activities or emission levels for all pollutants, the Administrator is allowing them on a case-by-case basis to be approved during rulemaking for each part 70 permit program. To require one test nationally would ignore several State programs which have already defined workable criteria for insignificant emissions activities. State discretion to apply these exemptions also allows title V to build upon rather than disrupt existing State programs.

In regard to hazardous air pollutants, the EPA is planning a rulemaking to establish exemptions based on insignificant emission levels for modifications under section 112(g), and the exemptions established by a State for such pollutants should not be less stringent than these levels.

5. Ambient Assessment Information

The proposed rule contained discussion on whether ambient impact assessment information should be required on all applications and stated that it should be required by a State in limited circumstances. Ambient impact assessment information here means source-specific data necessary for input to air quality impact dispersion models. Air quality modeling is not typically required for individual sources by the Clean Air Act (i.e., it is normally assumed that no individual source can affect attainment or maintenance of an ambient standard on an area-wide basis).

In the final rule, the definition of applicable requirement in § 70.2 now states that NAAQS standards and visibility and PSD increment requirements under part C of title I are applicable requirements as they apply to temporary sources. Furthermore, this definition affects the requirement in § 70.5(c)(3)(vii) that ambient impact assessment information would be required of temporary sources or any other source where such information is needed to meet an applicable requirement (e.g., regulation to ensure good engineering stack height consistent with section 123 of the Act).

6. Compliance Plans

(a) Compliance plans required of all sources. The proposal required that a compliance plan be submitted at the time of permit application only for sources not in compliance with all applicable requirements. In addition, the proposal stated that a compliance plan should include descriptions of how each applicable requirement will be met, descriptions of the compliance status of each requirement, a schedule of compliance, and a schedule for submission of certified progress reports.

Numerous State, environmental and public interest groups, as well as an association of State and local air pollution control officials, strongly opposed the requirement that compliance plans only be required from sources that are not in compliance and stated that these plans should be required of all sources. On the other hand, numerous industry commenters supported EPA's proposal to require compliance plans only from sources that are out of compliance at the time of permit issuance.

In response to commenters, the EPA has further reviewed the language of the statute and the legislative history, and

agrees that compliance plans containing schedules of compliance are required of all sources as part of the permit application.

Section 503(b)(1) of the Act establishes the requirement that application contain compliance plans and does not distinguish between sources in compliance or out of compliance with applicable requirements. Further evidence for requiring a compliance plan for complying sources is the reference in section 503(b)(1) to a compliance plan as a description of how the source will comply with applicable requirements. Additionally, section 503(c) of the Act clearly states that any person required to have a permit shall submit a compliance plan and an application for a permit.

The legislative history supports this conclusion. While the bill passed by the House required compliance plans from both complying and noncomplying sources, the bill passed by the Senate would have required compliance plans of only those complying sources subject to new requirements. S. 1630, section 352(b). In this regard, the statute reflects the provisions of the House Bill and does not contain the exception in the Senate Bill. It therefore appears that Congress considered and rejected even a limited exemption from the requirement to submit compliance plans for sources in compliance.

The proposal similarly required schedules of compliance only for sources not in compliance with all applicable requirements. As with compliance plans, the final rule requires schedules of compliance of all sources. This result is compelled by the language of section 503(b), which requires that each compliance plan include a schedule of compliance, as well as section 504(a), which states that each permit must contain a schedule of compliance.

However, EPA believes that the language of the statute suggests that schedules of compliance should receive different treatment where they are being applied to requirements for which the source is in compliance. Section 501(3) defines a schedule of compliance as "a schedule of *remedial measures*, including an enforceable sequence of actions or operations, *leading to compliance*" with applicable requirements (emphasis added). The phrases "remedial measures" and "leading to compliance" logically suggest the correction of a situation where a source is not in compliance. Further, it is unlikely that sources in compliance were intended to be subject to enforceable interim measures. In addition, complying sources have already demonstrated an ability to comply with applicable requirements. The EPA believes that it would be burdensome and serve no useful purpose for these sources to submit detailed schedules of compliance.

In the final rule, EPA requires schedules of compliance for sources in compliance with all applicable requirements at the time of permit issuance to contain only a statement that the source will continue to comply with such requirements. With respect to any applicable requirement effective in the future, the schedule of compliance must contain a statement that the source will meet such requirements on a timely basis, unless the underlying applicable requirement requires a more detailed compliance schedule. Similarly, for complying sources, certified progress reports are not required unless detailed compliance plans are required by an applicable requirement. In the final rule, a compliance plan is required to be included in the permit application, but not in the permit, for all sources.

(b) Applicable requirements effective in the future. The proposal required citation and description of applicable requirements, including requirements that become effective during the term of the permit, if such requirement has been promulgated at the time of permit application, but did not discuss such requirements in reference to compliance plans.

Several commenters maintained that failing to address future compliance dates in compliance plans is inconsistent with the Act requirement that SIP's contain such schedules.

The final rule requires that each schedule of compliance must contain information concerning future-effective applicable requirements. Furthermore, the definition of applicable requirement contained in § 70.2 has been modified to clarify that future-effective requirements that have been promulgated or approved by EPA at the time of permit issuance are applicable requirements for purposes of part 70 permits.

The Administrator agrees with commenters that subpart N of part 51 requires that SIP's contain legally enforceable compliance schedules for any requirements (including requirements with future-effective dates) applicable to stationary sources and that, therefore, these requirements are also applicable requirements for purposes of part 70 permits.

7. Compliance Certifications

(a) Content of certifications. The proposed rule stated that, to be considered complete, a permit application must include, among other elements, a compliance certification for all applicable requirements. The proposed discussion in some detail wha' is required of a source to meet these requirements. Commenting on the proposal, industry commenters requested several modifications of, or clarifications to, the compliance certification provisions regarding contents of certifications. The final rule regarding compliance certifications requirements for permit applications has been clarified in response to these comments.

Today's rule imposed two types of compliance certification requirements on part 70 sources. First, in § 70.5(c)(9), every application for a permit must contain a certification of the source's compliance status with all applicable requirements, including any applicable enhanced monitoring and compliance certification requirements promulgated pursuant to section 114 and 504(b) of the Act. This certification must indicate the methods used by the source to determine compliance. This requirement is critical because the content of the compliance plan and the schedule of compliance required under § 70.5(a)(8) is dependent on the source's compliance status at the time of permit issuance.

The second type of compliance certification is imposed by § 70.6(c)(5). This section states that every part 70 permit must contain a requirement for the source to submit a compliance certification at least annually throughout the term of the permit. The contents of this compliance certification are drawn from sections 114(a)(3) and 503(b)(2) of the Act. This certification must: Identify each term and condition of the permit that is the basis for certification; the source's compliance status with that requirement; whether compliance was continuous or intermittent; the method(s) used to determine compliance consistent with the monitoring requirements of § 70.6(a); and such other facts as the permitting authority may require to determine the compliance status of the source. The final rule differs from the proposal in that annual certification is now required with respect to the terms and conditions of the permit; the proposal required certification only with the applicable requirements. This change is necessary to conform to the express requirement of section 503(b)(2).

Each of the above compliance certifications must be certified by a responsible official for truth, accuracy and completeness, consistent with § 70.5(d).

(b) Responsible official for title IV sources. The proposed rule in § 70.5 required all part 70 sources subject to permitting requirements to submit a

complete and timely permit application, certified by a responsible official as to truth, accuracy, and completeness. Some commenters questioned who may certify compliance and requested further information on the term "responsible official."

Title IV contains independent requirements for compliance certification and section 403(26) already defines the term "designated official" as a responsible official designated to represent the owner or operator in matters pertaining to allowances and the submission of and compliance with permits, permit applications, and compliance plans for the unit. The final regulations have been clarified in § 70.2 to allow, but not require, the designated official for affected sources to be the responsible official for all part 70 purposes.

Industry commenters stated that the definition of "responsible official" should allow more latitude for designating a plant manager as a responsible official. In the final rule, the definition of "responsible official" has been expanded to allow for delegation of authority to a plant manager where the delegation has been approved in advance by the permitting authority.

8. The Application Shield

Section 503(d) of the Act provides that once a timely and complete application has been filed, the applicant is shielded from enforcement action for operating without a permit until such time as the permit is issued. Two provisions in the proposed regulations, §§ 70.7(b) (2) and (3), were related to this "application shield" in that they directly concerned the determination of whether a permit application submitted was timely or complete. One provision in the proposal provided a grace period of up to three months to submit applications or additional information requested by the State after the required submittal date. Another provision allowed the shield for timely applications that the permitting authority determined to be incomplete despite a "good faith" effort on the part of the source, provided that the source expeditiously cured the defect.

Several commenters criticized offering the protection of the application shield for late application submittals. The Administrator, upon consideration of these comments and after further study, has decided to delete from the final rule these two provisions, proposed §§ 70.7(b) (2) and (3). The 3 month grace period for submitting a timely application effectively extended the "application shield" to sources that did not submit a timely application, which would have been inconsistent with section 503(c) of the Act. This section does not allow any additional time beyond the deadlines specifically provided. Furthermore, the Administrator now believes that this provision would have violated section 502(a) of the Act by allowing a source to operate without a permit (given that the application shield would not have applied). Similarly, the "good faith" exception to the requirement that only timely and complete applications provide an application shield has been deleted from the final rule. This provision was deleted because it was not required by the statute and because it would have effectively shielded all sources from enforcement action for not submitting a complete application. In this context, a "good faith" determination would be too subjective to provide a clear standard for either industry or the permitting authorities.

F. Section 70.6—Permit Content

1. Applicable Requirements of the Act

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)]. Thus, the permitting authority and EPA should clearly understand and agree on what requirements under the Act apply to a particular source. Section 70.6(a)(1)(i) requires that the permit reference the authority for each term and condition of the permit. Including in the permit legal citations to the provisions of the Act is critical in defining the scope of any permit shield, since the permit shield, if granted, extends to the provisions of the Act included in the permit. Including the legal citations in the permit will also ensure that the permittee, the permitting authority, EPA, and the public all have a common understanding of the applicable requirements included in the permit. This requirement is satisfied by citation to the State regulations or statutes which make up the SIP or implement a delegated program. Under section 505(b)(1), EPA must object to permits that fail to assure compliance with the applicable requirements and will look to the available record for clarification as what these requirements should be. The following clarifies the EPA position with respect to several issues regarding applicable requirements.

(a) Requirements with future compliance dates. The proposal defined "applicable requirements" as the substantive requirements arising under other sections and titles of the Act. The definition in the final part 70 regulations clarifies that "applicable requirements" include not only those requirements that are in effect at the time of permit issuance, but also include those that have been promulgated prior to permit issuance and that have future effective compliance dates during the permit term. This furthers the Act's and EPA's goal that the permit embody all relevant requirements applicable to the source.

The EPA recognizes the potential for sources to have to repeat permit issuance procedures where an applicable requirement is promulgated close to permit issuance. This problem is to some extent inherent in any permit program which, like title V, attempts to make the permit the comprehensive document for requirements applicable to the source. Because this problem was not addressed in either the proposal or comments received on the proposal, it will need to be addressed in a revision to the part 70 regulations to be proposed in a future **Federal Register** notice.

The EPA plans to revise part 70 to allow for a system of grandfathering in which requirements promulgated after the close of the public comment period and within a certain time period (EPA intends to solicit comment on a range of from 90 to 150 days after close of the comment period) would not have to be incorporated into the permit prior to issuance. For requirements promulgated within the specified time period, but which the State is not required to include in the permit initially, the permit will need to be reopened pursuant to the requirements of section 502(b)(9). However, if the permitting authority fails to issue the permit within that time period, the permit could be issued after that period only if the applicant certified that no new requirement applicable to the source had been promulgated since the closing of the public comment period.

(b) Section 112(r) accidental release program. The definition of "applicable requirements" was also revised to clarify that requirements of section 112(r) of the Act, regarding the accidental release program, are applicable requirements. This would include any requirement under section 112(r)(7) to prepare and register a risk management plan (RMP). The EPA recognizes, however, that an RMP is not in any sense a "permit" to release substances addressed therein, and that section 112(r) was not intended to be primarily implemented or enforced through title V [112(r)(7)(F)]. The EPA therefore believes it sufficient for purposes of title V to require only that the source indicate in its permit that it has complied with any requirement to register an RMP, or alternatively to

indicate in its compliance plan and schedule of compliance its intent to comply with such requirement The RMP itself need not be included in the title V permit.

(c) NAAQS. The EPA proposed that the NAAQS is a SIP requirement, not an "applicable requirement" for title V permits. In the case of large, isolated sources such as power plants or smelters where attainment of the NAAQS depends entirely on the source, EPA proposed that the NAAQS may be an applicable requirement and solicited comment on this position.

An environmental group commented that excluding protection of ambient standards, PSD increments or visibility requirements as applicable requirements are unlawful and bad policy. It argued that section 504(e) expressly defines "requirements of the Act" as "including, but not limited to, ambient standards and compliance with applicable increment or visibility requirements under part C of title I." Although this provision applies only to temporary sources, the group asserts that it would be anomalous for Congress to impose more comprehensive permit requirements for temporary sources than for permanent sources.

The EPA disagrees with the comment that would apply section 504(e) to permanent sources. Temporary sources must comply with these requirements because the SIP is unlikely to have performed an attainment demonstration on a temporary source. To require such demonstration as on every permitted source would be unduly burdensome, and in the case of area-side pollutants like ozone where a single source's contribution to any NAAQS violation is extremely small, performing the demonstration would be meaningless. Under the Act, NAAQS implementation is a requirement imposed on States in the SIP; it is not imposed directly on a source. In its final rule, EPA clarifies that the NAAQS and the increment and visibility requirements under part C of title I of the Act are applicable requirements for temporary sources only.

(d) Preconstruction permits under regulations approved or promulgated under title I. This definition was changed in part to clarify that applicable requirements include terms and conditions of preconstruction permits issued pursuant to SIP's and other regulations approved by EPA in formal rulemaking after notice and an opportunity for public comment.

(e) Alternative scenarios and emissions trading. EPA believes that providing for permits with alternative operating scenarios, including emissions trading provisions to the extent provided for in the applicable requirements, will be a critical element of any part 70 program and useful in ensuring the implementation of all applicable requirements. If the permit contains approved alternative scenarios or emissions trading provisions, it will be a more complete representation of the operation at the permitted facility. Moreover, there will be less need for permit modifications to accommodate different operations at the facility. Therefore, EPA is requiring that alternative operating scenarios, including emissions trading provisions provided for in the applicable requirements, identified by the source be included in the permit as part of the mandate in section 502(b)(6) to include "[a]equate, streamlined, and reasonable procedures" for permit actions in these regulations.

Obviously, all such scenarios and emissions trading provisions must comply with the permit requirements of title V and the underlying applicable requirements. Under § 70.6(a)(9) for alternative scenarios, the source must keep a contemporaneous record of any change from one scenario to another. Under § 70.6(a)(10), the permit must assure that emissions trading provisions contain the appropriate compliance provisions required under these regulations. The permitting authority may extend the permit shield to any such scenario or emissions trading provisions, because they are provided for in the permit and the permit will include the compliance terms for those scenarios or trades.

There is an important distinction between the mandate for emissions trading in this provision and the authorization in § 70.6(a)(1)(iii) for permits to establish alternative emissions limits equivalent to SIP limits where the SIP allows for such equivalency determinations. Under § 70.6(a)(10), the State will have developed and EPA will have approved the emissions trading program into the SIP or applicable requirement with the intention that it would allow trading without case-by-case review. The State and EPA would also assure that the SIP or applicable requirement provides replicable procedures to ensure that trades are accountable, enforceable, and quantifiable. Under § 70.6(a)(1)(iii), however, the SIP provision authorizing the alternative emission limits will not necessarily have established in advance the replicable procedures to ensure that the alternative limits are accountable, enforceable, and quantifiable. Section 70.6(a)(1)(iii) requires the permitting authority to establish such procedures in the permit itself as part of a full permit issuance, renewal, or significant modification process. Such alternative limits are not a mandatory part of a permit because it may be impossible to establish for some types of SIP limits equivalent limits that are accountable, enforceable, and quantifiable under replicable procedures. Therefore, the permitting authority must retain the discretion not to include alternate limits in the permit under § 70.6(a)(1)(iii).

(f) Equivalency Determinations. In order to take advantage of the flexibility provided by the title V permit program, EPA has added a provision [§ 70.6(a)(1)(iii)] which allows States to develop alternative emissions limits through the permit program. Under this section, a State may choose to adopt a SIP provision that would authorize sources to meet either the SIP limit or an equivalent limit to be formulated in the permit process. Such a provision would allow a State to build additional flexibility into its SIP program. A permit issued pursuant to such a provision would have to contain the equivalency determination, as well as provisions that assure that the resulting emission limit is quantifiable, accountable, enforceable, and based upon replicable procedures (see discussion above of these terms in the emissions trading context). The permit application must demonstrate that the permit provisions are equivalent to the SIP limit as well as quantifiable, accountable, enforceable, and based on replicable procedures. Consistent with these requirements, States may adopt such SIP provisions for all appropriate SIP requirements or only for specific requirements for which the State determines equivalency determinations are appropriate. The determination of what constitutes an equivalent limit could take place either during the permit issuance or renewal process or as a result of the significant modification procedures. The State retains discretion, subject to EPA veto, to decide if an alternative emission limit is justified in any particular case.

2. Permit Shield

(a) Scope of the permit shield. Section 504(f) of the Act states that, if certain conditions are met, the permit may provide that compliance with the permit shall be deemed compliance with other applicable provisions of the Act that relate to the permittee. This is referred to as the "permit shield." The proposed regulation allows the permitting authority to provide under certain circumstances that a source in compliance with the part 70 permit be considered to be in compliance with

other applicable provisions of the Act. For such a permit shield to be in effect, either the permit must include the applicable requirements of such provisions or the permitting authority must determine that the specified provisions are not applicable to the source. The permit must expressly state that a permit shield exists. A permit lacking such express statement is presumed to have no shield.

Provisions of sections 303 (emergency orders) and section 408(a) of the Act (the acid rain program), are applicable regardless of the existence of a permit shield. The owner or operator of a source is liable for violations prior to or at the time of permit issuance. The source cannot be shielded from the requirement to provide EPA information pursuant to section 114 of the Act.

In support of its proposal, the Agency cited that one of the objectives of the title V permitting program is to create a single document that serves as a comprehensive statement of a source's obligations for air pollution control. Through the use of a permit shield the document may, for a period of time, provide a degree of certainty to the source regarding its obligations. EPA's proposal suggested allowing a broad interpretation of the permit shield. Under this interpretation, a source would be protected from enforcement for noncompliance with any applicable requirement of the Act as long as the source was in compliance with all requirements of the source's title V permit. If the permit had misinterpreted applicable requirements, the source would not be obligated to comply with the correctly interpreted requirements. The source would also be shielded from any newly promulgated Federal requirements until the title V permit was reopened and the requirement(s) were incorporated into the permit.

Other goals of the title V program are to implement the Act and to generate improvements in air quality through the enforcement of existing regulations and the timely implementation of newly promulgated regulations. Thus, a balance must be struck between providing certainty to sources as to which requirements are applicable to them and how these requirements are interpreted, and achieving improvements in air quality. This balance can be achieved by appropriately defining the scope of the permit shield, when a shield expires, and when a permit must be terminated, modified, or revoked and reissued for cause.

The EPA received many comments on the permit shield provision. While industry commenters strongly endorsed the broad interpretation of the permit shield provision, State agency and environmental commenters argued for limits to the permit shield, or the elimination of the permit shield concept altogether. There was a strong opposition to requiring the permit shield as part of the permit content.

In response to comments received, and upon further analysis of the statutory provision at issue, the Administrator has modified the position set forth in the proposal. The EPA has decided to adopt a "narrow" interpretation, under which a source cannot be shielded from applicable regulations, standards, implementation plans, or other requirements promulgated after issuance of a title V permit.

In analyzing the strengths and weaknesses of the competing shield theories, EPA examined both the text and the structure of the statute. Section 504(f) of the Act provides two situations where a shield can be applied to applicable provisions of the Act other than those found in section 502. Section 504(f)(1) of the Act states that the shield can apply if "the permit includes the applicable requirements of such provisions." Section 504(f)(2) of the Act sets forth the other situation where a permit shield may apply: "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." It is clear from the language of the Act that only requirements that have been reviewed by the permitting authority and identified as such in the permit can be shielded against. Review by the permitting authority would include a determination of applicability and a determination of the source's obligation(s) under the provision(s). This review includes the opportunity for public participation, EPA veto, and judicial review.

Section 504(f)(1) cannot be the basis for mounting a shield against later-enacted requirements, since such requirements, having not been in existence at the time the permit was issued could not, perforce, have been included in it. A permit cannot contain "applicable requirements" that have not been adopted. The fact that Congress required, in order to shield against a provision, a permit to include all, as opposed to some, requirements of that provision, indicates that Congress intended an identity between what was contained in the permit and the provision shielded against.

If a permit does not qualify for the shield on the grounds that it includes applicable requirements of a provision, as provided under section 504(f)(1), then the only basis for shielding against a provision is pursuant to section 504(f)(2). To qualify under that section, the permitting authority "in acting on the permit application" must make a determination, specifically referring to the provisions at issue, that such provision is not applicable. The permitting authority must specify and refer to the provision. Such a determination cannot refer to a provision not yet in existence. And if it refers to a provision that exists, but is later changed, the determination would not be referring to the later provision, but to its predecessor. Further, this approach would be inconsistent with the intent of providing for public review of determinations of inapplicability. The public could not review a determination of inapplicability of a provision not yet enacted. Section 504(f)(2) of the Act is designed to set down in an authoritative and public fashion the way in which existing legal requirements apply to a source. Section 504(f)(2) is, therefore, not intended to prevent later-enacted requirements from being fully applicable to the source.

In addition to textual obstacles, there exists a powerful structural argument against the broad shield. Put simply, a broad shield would effectively abrogate specific Congressional mandates such as section 112 requirements for implementing MACT standards and would significantly handicap States in their planning for effectiveness of new requirements designed to meet other Congressional goals. In particular, the deadlines for air toxics were the focus of much debate during the amendment process, and Congress gave no indication that it intended EPA to revise these dates by expanding the permit shield. Compliance with new requirements designed to meet NAAQS progress and attainment deadlines would also be haphazard and completely dependent on the happenstance of individual permit issuance. It is inconceivable that Congress, with its overwhelming concern for the timing of requirements in title I, would, with no discussion and no explicitness, have placed such a roadblock in the path of State planning. A permit system that undermines the enforceability of other provisions of the Act would not vindicate Congressional purposes.

The EPA maintains its position that the shield cannot apply to provisions related to title IV of the Act, the acid

rain provisions. As the proposal noted, EPA believes that section 408 bars the permit shield for acid rain requirements [56 FR 21744] (sections 408(a) and 414). The EPA believes that shielding sources from acid rain requirements would disrupt effective implementation of that important new program.

(b) Terms of the permit shield. Industry suggested that the shield extend during the time a permit expires when action on permit renewal is delayed and that the shield should remain in force while a permit is reopened for cause.

State representatives and environmentalists suggested that the permit should be reopened if the permit is found to be in error as the shield cannot exempt a source from an effective provision of the Act. They also suggested that the permitting authority should be allowed to revoke the permit shield if information submitted is found to be false, incomplete or misleading.

The EPA's position is that the application shield applies if the permit lapses and the source has submitted a timely and complete application and there is a delay in issuing the permit renewal. The EPA's position with respect to the permit shield (as it applies to the terms and conditions of the permit) is that this type of shield continues to apply if the permit lapses. Under EPA's interpretation of the shield to exclude later promulgated requirements, these would of course continue to be applicable to the source.

3. Monitoring

Section 504(c) provides that every permit issued under title V shall contain monitoring requirements "to assure compliance with the permit terms and conditions." This statutory provision is implemented through § 70.6(a)(3)(i) of the regulations. If the underlying applicable requirement imposes a requirement to do periodic monitoring or testing (which may consist of recordkeeping designed to serve as monitoring), the permit must simple incorporate this provision under § 70.6(a)(3)(i)(A). If the underlying applicable requirement imposes no such obligation, under § 70.6(a)(3)(i)(B) the permit must require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring) which yields reliable data from the relevant time period that are taken under conditions representative of the source's operations and, therefore, representative of the source's compliance with its permit. Appropriate monitoring or testing may include noninstrumental monitoring or testing techniques such as opacity readings using an EPA approved method. Any monitoring or testing method or procedure approved by EPA for determining compliance may be used to satisfy the requirement of § 70.6(a)(3)(i)(B).

Examples of situations where § 70.6(a)(3)(i)(B) would apply include a SIP provision which contains a reference test method but no testing obligation, or a NSPS which requires only a one time stack test on startup. Any Federal standards promulgated pursuant to the Act amendments of 1990 are presumed to contain sufficient monitoring and, therefore, only § 70.6(a)(3)(i)(A) applies. EPA will issue guidance for public review within eighteen months addressing which applicable requirements contain insufficient monitoring and the criteria EPA will apply in determining the types of monitoring which would satisfy the requirement of § 70.6(a)(3)(i)(B). To the extent that EPA identifies any federally promulgated requirement with insufficient monitoring, EPA will issue a rulemaking to revise such requirement.

In some instances, a recordkeeping obligation will be sufficient to meet the requirement of § 70.6(a)(3)(i). An example would be a VOC coating source which uses complying coatings and relies on no control equipment to meet the applicable SIP limit. For this type of source, an obligation to keep records of and periodically certify and report the contents of all coatings used would be sufficient.

4. General Permits

The proposal reflected the language of section 504(d) of the Act, which allows States to issue a general permit covering numerous similar sources. Sources covered by general permits must comply with all part 70 requirements, including the requirement for submitting a permit application. General permits, however, do not apply to affected sources (acid rain), unless provided for under title IV regulations. The proposal solicited comment as to how the general permit should be applied to specific sources.

Commenters requested that EPA allow more flexibility for general permits and allow States to formulate their own general permit applications and general permits.

The final rule clarifies that once the general permit has been issued after an opportunity for public participation and EPA and affected State review, the permitting authority may grant or deny a source's request to be covered by a general permit without further public participation or EPA or affected State review. The rule further clarifies that this action of granting or denying the source's request will not be subject to judicial review.

The primary purpose of section 504(d) is to provide an alternative means for permitting sources for which the procedures of the normal permitting process would be overly burdensome, such as area sources under section 112. See H.R. 101-490, 101st Cong., 2nd Sess., 350 (1990). This purpose would be substantially frustrated if sources subject to a general permit were required to repeat public participation procedures at the individual application stage, or if each applicability determination were subject to judicial review.

To ensure that the general permit process is not abused, for example, by a source that misrepresents facts in its request for the general permit, this section provides that a source receiving a general permit shall be subject to an enforcement action for operating without a part 70 permit, notwithstanding the permit shield provisions, if the source is later determined not to qualify for coverage under the general permit. The EPA believes that this approach strikes the appropriate balance between the procedural advantages intended by section 504(d) and the need to protect the integrity of the permitting process.

In setting criteria for sources to be covered by general permits, States should consider all of the following factors. EPA may object to general permits that do not meet these factors. First, categories of sources covered by a general permit should be generally homogenous in terms of operations, processes, and emissions. All sources in the category should have essentially similar operations or processes and emit pollutants with similar characteristics. Second, sources should not be subject to case-by-case standards or requirements. For example, it would be inappropriate under a general permit to cover sources requiring case-by-case MACT determinations. Third, sources should be subject to the same or substantially similar requirements governing operation, emissions, monitoring, reporting, or recordkeeping.

Sources, including those emitting air toxics, may also be issued general permits strictly for the purposes of avoiding classification as a major source. For example, if sources above a certain emissions level are subject to stringent requirements, it may be feasible to cover sources below that level under a general permit that has, as its principal requirement, a condition that the emissions level is not exceeded.

Based on preliminary information, EPA intends to develop model general permits for certain source categories. In particular, the Agency is considering development of model general permits for degreasers, dry cleaners, small heating systems, sheet fed printers, and VOC storage tanks.

Individual sources covered under a general permit may be issued an individual permit, or alternatively, a letter, or certification may be used. Provided the individual permit, letter or certification is located at the source, the States need not require that sources also have a copy of the general permit; this can be retained on file at the permitting authority's office or at the source's corporate headquarters in the case of franchise operations. The permitting authority may also determine in the first instance whether it will issue a response for each individual general permit application and may specify in the general permit a reasonable time period after which a source that has submitted an application will be deemed to be authorized to operate under the general permit.

General permits may be issued to cover any category of numerous similar sources, including major sources, provided that such sources meet the criteria set out above. For example, permits can be issued to cover small businesses such as gas stations or dry cleaners. General permits may also, in some circumstances, be issued to cover discrete emissions units, such as individual degreasers, at industrial complexes. Such a unit at an industrial complex can be covered by a general permit if the requirements for a general permit are met and the change is one for which a new permit is appropriate. Where a general permit is issued to a discrete emissions unit at an industrial complex, the requirements of the general permit could be incorporated into the relevant title V operating permit at the next renewal.

5. Emergencies

The proposal did not specifically provide for the handling of emergencies that result in deviations from the terms of the permit. Comments were received requesting that the part 70 regulations make some provision for emergencies or "upsets" caused by the failure of emission control equipment. The EPA believes it is appropriate, consistent with the emphasis in the part 70 regulations on providing sources with adequate operational flexibility, to include such a provision in the final rule.

Section 70.6(g) now provides for an affirmative defense in the case where permit allowables have been exceeded due to an emergency. "Emergency" is in turn defined as a reasonably unforeseeable event beyond the control of the source that requires immediate corrective action to restore normal operation and that is not due to certain factors specified in the rule. To establish the defense, the permittee must prove each of the four factors enumerated in § 70.6(g)(3). Section 70.6(g) is modeled after the NPDES permit upset provision in 40 CFR 122.41.

Courts have held, in the Clean Water Act context, that a NPDES permit must contain upset provisions to account for the inherent fallibility of technology in technology-based standards. See, e.g., *Marathon Oil Co.* v. *EPA* 565 F.2d 1253, 1273 (9th Cir. 1977). Other cases have upheld EPA's decision not to promulgate upset provisions, reasoning that the exercise of enforcement discretion is adequate protection of the permittee's interests. *Corn Refiners Ass'n, Inc.* v. *Costle*, 594 F.2d 1223, 1226 (8th Cir. 1979); *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1056–58 (D.C. Cir. 1978). The idea that technology-based standards should account for the fallibility of technology has been affirmed in the context of New Source Performance Standards under the Act. See, e.g., *Essex Chemical Corp.* v. *Rickelshaus*, 486 F.2d 427 (D.C. Cir. 1973).

EPA believes that the emergency provision of § 70.6(g) is appropriate in order to provide permitted sources with an affirmative defense where an enforcement action is brought for exceedances of technology-based standards due solely to the unforeseeable failure of technology. Implicit in § 70.6(g) is that the affirmative defense will not be available for violations of health-based standards. This is appropriate because such standards, such as NAAQS or NESHAP, are formulated largely without regard to the limits of technology. The EPA believes that to excuse violations of these standards would be contrary to Congressional intent. In *Natural Resources Defense Council* v. *EPA*, the D.C. Circuit held that Congress did not intend to tie water quality-based limitations to the capabilities of any given technology. 859 F.2d 156 (D.C. Cir. 1988). This reasoning is at least as compelling in the context of health-based air quality standards.

This provision for emergencies does not limit the opportunity any permitted source might otherwise have to contact the permitting authority in the event of an emergency. Nothing in these regulations requires the permitting authority to respond to emergencies in any particular manner.

6. Voluntary Limits

Title V permits are an appropriate means by which a source can assume a voluntary limit on emissions for purposes of avoiding being subject to more stringent requirements. Section 70.6(b)(1) has been revised to clarify that such terms and conditions assumed at the request of the permittee for purposes of limiting a source's potential to emit will be federally enforceable.

The EPA recognizes that sources may wish to limit their potential to emit in this way prior to there being an approved State permit program. For sources of criteria pollutants, a method already exists by which a State preconstruction review program operating permit program approved into a SIP may be used to limit a source's potential to emit. See Final Rule: Requirements for the Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans, 54 FR 27274, June 28, 1989. However, sources emitting hazardous air pollutants listed in section 112(b), some of which may be subject to regulation prior to approval of State permit programs, may desire an alternate means of limiting their potential to emit hazardous air pollutants. Accordingly, EPA is considering allowing States to use programs approved under section 112(1) as a means of developing federally-enforceable limits on the potential to emit section 112(b) pollutants. Implementing this concept will require the resolution of many issues more appropriately addressed in the forthcoming guidance issued pursuant to section 112(1)(2).

Several commenters urged the Agency to adopt a simple procedure to allow sources voluntarily to restrict their potential to emit so as not to become subject to title V permitting obligations. As noted in the proposed rule, such a restriction must be federally enforceable in order to serve this purpose. In response to the concerns raised by these commenters, EPA has structured the final rule to provide several simple mechanisms that will allow sources to adopt federally-enforceably restrictions on their potential to emit. First, as discussed above, a restriction adopted under an existing State preconstruction review or operating permit program that has been approved into a SIP will be sufficient for this purpose. State programs approved under section 112(l) may also be available as methods to limit a source's potential to emit. In addition, as discussed above, States may issue general permits to sources

strictly for the purpose of allowing those sources to avoid classification as a major source. The EPA recognizes that it seems somewhat counterintuitive to rely on a general permit to relieve a source of other permitting obligations. However, EPA believes that general permits will provide a simple, straightforward mechanism for sources to adopt federally-enforceable restrictions on their potential to emit and therefore avoid more burdensome permitting obligations.

G. Section 70.7—Permit Issuance, Renewal, Reopenings, and Revisions

1. Permitting Authority's Action on Permit Application

Under § 70.7(a)(5), the permitting authority, in acting on a permit application, must transmit to EPA (and others upon request) a statement setting forth the legal and factual basis for the permit conditions included in the draft permit. Conversely, should the permitting authority deny the permit application, it should prepare a statement of the grounds for denial.

2. Permit Revisions

(a) General. The EPA proposed that the statutory language in section 502(b)(6) leaves substantial discretion to the States 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 encouraged (but did not require) States to implement minor permit 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 at least 7 days advance notice to the permitting authority and the Administrator. After waiting the required 7 days, the source could make the change unless the permitting authority objected to the noticed change within the 7 day period. If the permitting authority did not object to the change as a minor permit amendment, it would have 60 days from receipt of the notice to revise the permit.

The EPA proposed to review proposed State procedures for revising permits in conjunction with EPA's review of the State program. The basic test would be whether a State's procedural system, taken as a whole, could assure that the national ambient air quality standards and other substantive requirements of the Act would be maintained and enforceable. The EPA then solicited general comment on what criteria would be appropriate for EPA to use in approving State procedures for revising permits.

Industry commenters supported proposed § 70.7(f), the "minor permit amendment" provision. They stated that this provision is necessary to accommodate inevitable, but unforeseeable, changes in production and to compete successfully in international markets.

State commenters, on the other hand, noted that § 70.7(f) appeared to violate section 502(b)(6), which requires public notice and an opportunity for judicial review. These commenters also stated that it would be impossible to resolve any issues within the 7-day period, or to give an adequate review within the allotted time frame. A national group of State and local agencies suggested that if the minor permit amendment remains, EPA should set a specific *de minimis* threshold of 5 tons or 20 percent of the major source cut-off, which is more stringent.

Environmental groups argued that the law clearly requires public comment and agency review, and opportunity for judicial review for permit revisions. They argued further that a permit whose terms can be changed at will by the source is not enforceable, which violates the basic requirement of title V that permits be enforceable.

Section 70.7(f) as proposed appeared to authorize a source, in a very expedited process, to make changes resulting in an increase in emissions above the emissions allowable under its permit, provided that the changes did not constitute modifications under title I, merely upon providing a 7 day notice to the permitting authority and EPA. It is not entirely clear from the proposal as written whether EPA intended the 7 day notice to the permitting authority and EPA to be merely a necessary, as opposed to a necessary and sufficient, requirement. There is some dissonance between the text of the proposed regulation and the preamble, which expresses uncertainty about what additional procedures may be required for an approvable "procedural system" for fast-track revisions, and solicits comment on the appropriate criteria for EPA to use in approving State revision procedures [56 FR 21747].

For the reasons set out in detail below, the Administrator is today promulgating a rule that calls for review by the permitting authority, affected States, and EPA before part 70 permits can be revised, but does not require public notice and comment for those permit modifications qualifying for minor permit modification procedures. It bears repeating that title V permitting cannot relax any applicable requirements, including those contained in the SIP. The final part 70 regulations therefore directly address not only those substantial comments that called for a process allowing reasonable time for State review, an adequate opportunity for public comment and a hearing, and an opportunity for EPA and affected State review, but also those who voiced concerns over the ability of a source to rewrite its permit to avoid enforcement.

The EPA's final regulations governing permit revisions balance several, sometimes conflicting, goals of the permit program. First, as explained above, the procedures for revising a permit should provide appropriate opportunities for the permitted source, permitting authority, EPA, affected States, and, where appropriate, the public to determine that the permit faithfully applies the Act's requirements. Second, any revision process must be tailored so that the procedural burdens on the permitted facility and permitting authority are reasonable in relation to the significance and complexity of the change being proposed in the permit. Third, the process must provide permittees with a reasonable level of certainty and ability to plan for change at the facility. Finally, the regulations must be flexible so that States may adapt their existing programs to meet part 70 requirements without unnecessarily displacing procedures that have operated before the advent of the Federal operating permit program.

To accommodate these goals, EPA will allow States to develop different types of review procedures that match the procedural elements to the significance of the change. These options are in addition to the considerable flexibility provided elsewhere in the regulation, which accommodates many types of operational changes without the need for a permit revision. Today's rule suggests two possible approaches that employ the minimum procedures required by the Act for different types of changes. The track for significant changes essentially mirrors the permit issuance process. In this track, the public, the permitting authority, affected States, and EPA will review the revision in the same sequence they will use at permit issuance. The other track, which the Agency has named "minor permit modification procedures," is designed for smaller changes at a facility. Such changes will not involve complicated regulatory determinations. In this track, in certain cases, a source may make a change after notice, but prior to the time

the permitting authority, affected States, and EPA review the revision. The permittee may make a requested change immediately after filing the application.

The minor permit modification procedures set forth the most streamlined process that would be approved by EPA. The EPA would not approve a more streamlined process that did not provide an opportunity for review by the permitting authority, EPA, or affected States.

In each track, EPA has provided the permitting authority, affected States, and EPA an opportunity to review the proposed revision. What distinguishes the two tracks is: (1) Whether public review is required; and (2) the point in the process at which the permittee may make the change after proposing it to the permitting authority. In reviewing comments from industry, it is clear to EPA that industry's primary concern is that quickly changing business conditions require changes in operation on little or no notice. This could not be accommodated by a process of indeterminate length that could delay any decision on even the most routine or noncontroversial changes, despite the permittee's good faith efforts to pursue the revision process. Industry comments do not dispute the fundamental obligation that any permit revision must comply with the applicable requirements, but maintain that the process should not unreasonably delay a decision to allow a facility to comply with the Act under revised permit terms. The minor permit modification procedures are designed to address these concerns within the framework of title V.

(b) Legal basis for minor permit modifications. The issues surrounding whether public notice and procedure are necessary for minor permit modifications proved to be among the most controversial issues raised by the proposal. These issues engendered many comments from affected sources, the States, environmental groups, and others. For these reasons, EPA also sought and received a legal opinion (dated May 27, 1992) from the Department of Justice concerning the extent of EPA's discretion to allow States to adopt procedures allowing minor modifications to permits without public notice and comments.

EPA has carefully considered the issues in light of the public comments received and the opinion from the Department of Justice, and has decided to adopt the reasoning provided by the Department. Briefly, EPA is adopting final rules that allow States to adopt procedures for making minor permit modifications without public notice or comment. There are two alternative bases for this action. First, EPA believes that the statute and legislative history can be properly construed to allow such an approach, and second, this approach can also be based upon the general judicial doctrine that permits *de minimis* departures from statutory requirements.

(i) Statutory Construction. The Supreme Court established a two-step approach to analyzing such legal questions in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council*, 467 U.S. 837 (1984). The first inquiry is whether Congress has "directly spoken to the precise question at issue." *Id.* at 842. This standard is exacting: It requires a "clear indication of Congress' intent with respect to the precise issue at hand." *Natural Resources Defense Council* v. *EPA*, 859 F.2d 156, 201 (D.C. Cir. 1988). If there is such a clear indication, that ends the analysis because a court "must give effect to the unambiguously expressed intent of Congress," as revealed through application of the traditional tools of statutory construction. *Chevron*, 467 U.S. at 842–43 & n.9.

If, however, the statute is silent or ambiguous on the precise question at issue, the reviewing court will determine whether the proposed regulation "is based on a permissible construction of the statute." *Id.* at 843. Under this second step of *Chevron*, the courts must uphold the EPA interpretation provided it is "reasonable and consistent with the statute's purpose." *Chemical Mfrs. Ass'n* v. *EPA*, 919 F.2d 158, 162–3 (D.C. Cir. 1990). Under the second step of *Chevron*, a court will substantially defer to the EPA's exercise of its discretion and will generally confine its analysis to whether the EPA's proposed rule is reasonable and consistent with the statutory scheme of title V. *See Chemical Mfrs. Ass'n*, 919 F.2d at 162–63; *Natural Resources Defense* v. *EPA*, 822 F.2d 104, 117 (D.C. Cir. 1987). Moreover, where the question under step two of *Chevron* involves the formulation of procedures by the Agency, the deference accorded the Agency's decisions is especially broad. *See Chemical Mfrs. Ass'n*, v. *Natural Resources Defense Council*, 470 U.S. 116, 131 (1985). Where the interpretive issue is procedural, the Supreme Court's ruling in *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council*, 435 U.S. 519 (1978), requires courts to be especially deferential to the agency's interpretation.

In *Vermont Yankee*, the Court articulated the presumption that "[a]bsent constitutional constraints or extremely compelling circumstances the "administrative agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties." 435 U.S. at 543 (quoting *FCC* v. *Schreiber*, 381 U.S. 279, 290 (1965), and *FCC* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940). Subsequently, the Court has made clear that *Vermont Yankee*'s presumption is a reason to grant even more deference to any agency's interpretation of a statute under *Chevron* where the issue ultimately concerns whether administrative action may be taken through particular procedural means. *Chemical Mfrs. Ass'n*, 470 U.S. at 131 (where a dispute involves an argument over the procedural means to be used by the agency, "these are particularly persuasive cases for deference to the Agency's interpretation. Cf. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 543 (1978)."). See American Trucking Assn's v. *United States*, 627 F.2d 1313, 1321 (D.C. Cir. 1980) (Wright, J. (the D.C. Circuit "has repeatedly stated that an agency 'should be accorded broad discretion in establishing and applying rules for * * * public participation"; (ellipsis in original) (citing several cases).

Following the framework established by *Chevron*, the first question is whether Congress has "*directly spoken* to the precise question at issue." *Chevron*, 467 U.S. at 842 (emphasis added).

In the present case it is significant that, while Congress referred to public notice in section 502(b)(6), it did not expressly tie that notice to permit revisions. Section 502(b)(6) requires the EPA to establish "adequate, streamlined, and reasonable procedures" for four elements of any permitting program:

(1) "For expeditiously determining when *applications* are complete,"

(2) "For processing such *applications*,"

(3) "For public notice, including offering an opportunity for public comment and a hearing, and"

(4) "For expeditious review, of *permit actions, including applications, renewals, or revisions*, and including 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."

42 U.S.C. 7661(a)(b)(6) (emphasis added).

Unlike the other three elements, the "public notice" element—element (3)—

does not indicate to what actions it applies. The text of section 502(b)(6) does not directly tie the "public notice" element to any of the Agency actions referred to in elements (1), (2) or (4). That a procedure for public notice is referred to in element (3) thus does not alone determine the types of actions to which such notice applies: Rather, it could be read simply as a requirement that to the extent public notice and comment are required or provided, the EPA must establish adequate, streamlined, and reasonable procedures for the States to use to obtain public comment. Alternatively, even if one were to consider it unambiguously clear that public comment is necessary for initial permit "applications," the statute remains ambiguous as to whether public notice is necessary for the various permit actions listed in element (4), including not only "applications" but also "renewals" and "revisions". Congress thus did not clearly require public notice and comment for all "permit actions."

Where Congress has required public notice and an opportunity for comment in title V, it has applied the requirement directly to the specified agency action. Subsection (d) of section 504, for example, provides that "[t]he permitting authority may, after notice and opportunity for public hearing, issue a general permit covering numerous similar sources." 42 U.S.C. 7661c(d). See also, e.g., 42 U.S.C. section 7661f(c)(2) ("Upon petition by a source, the State may, *after notice and opportunity for public comment*, include as a small business stationary source for purposes of this section any stationary source which does not meet the criteria [for a small business] but which does not emit more than 100 tons per year of all regulated pollutants.") (emphasis added).

Numerous provisions in the Act itself and in other environmental statutes setting forth notice and comment requirements demonstrate that Congress can and does formulate and apply explicit provisions for public comment to particular types of activities. For example, section 169A of the Act requires "notice and opportunity for public hearing" before the EPA may exempt a major stationary source from a retrofit requirement if that source is contributing to visibility impairment. 42 U.S.C. 7491 (b), (c)(1). Similarly, section 165 of the Act requires that construction permits issued for new major emitting facilities be subject to "a public hearing * * * with opportunity for interested persons * * * to appear and submit written or oral presentations on the air quality impact of such source." *Id.* section 7475(a)(2). The Clean Water Act requires the EPA to provide an "opportunity for public hearing" before issuing a pollutant discharge permit, 33 U.S.C. 1342(a)(1), and the Resource Conservation and Recovery Act requires public notice and, if requested, an "informal public hearing (including an opportunity for presentation of written and oral views)" prior to the issuance of any hazardous facility permit, 42 U.S.C. 6974(b)(2).

These examples all reinforce the basic conclusion that if Congress meant to require a comment period for all permit revisions, Congress would have directly so stated. The absence in title V of any explicit provision for public comment on permit amendments suggests that Congress did not intend to require such notice.

We note that the opportunity for judicial review in element (4) is extended to, among others, "any person who participated in the public comment process." It could be argued that this language implies the need for public notice and opportunity for comment in all permitting actions.

However, EPA notes that element (4) established an opportunity for judicial review, not public comment. It would be both awkward and unusual for Congress to specify in such an indirect manner that the public notice and comment element must apply to precise categories of permit actions. Thus we do not think it is plain that element (4) is to be read in conjunction with element (3) as a refinement on the public comment provision. Rather, it can be argued that under element (3), the extent of the public comment process is to be determined by the State permitting agency under guidance from the EPA, see *Natural Resources Defense Council* v. *EPA*, 859 F.2d at 175–76, and the only *clear* statutory imperative governing the EPA's implementation of element (3) is that any procedures for public notice and comment be "[a]dequate, streamlined, and reasonable."

It is not anomalous that judicial review may be available, but notice and comment were not provided. There will be available a record for judicial review that will include the application for minor permit modification filed by the permittee, the proposed permit, the statement of basis for the proposed permit, and the State's final action. Courts will conduct review based on that administrative record, without having to create a new administrative record through trial *de novo*, a result rejected by courts in the past. See generally *Camp* v. *Pitts*, 411 U.S. 138, 141–42 (1973).

EPA has also examined the language and structure of section 505 of the Act. Section 505 of the Act sets forth, *inter alia*, a procedure under which EPA will receive copies of permit applications as well as applications for permit modifications or renewals. See 42 U.S.C. 7661d(a). This section also establishes procedures whereby the EPA may object to the issuance of any permit, *id.* section 7661d(b)(1), and for notice to affected and contiguous States of permit applications and proposed permits received by the EPA. Section 505(b)(2) provides that any person may petition the EPA to veto a proposed permit on the basis of objections raised in "the public comment period provided by the permitting agency." *Id.* section 7661d(b)(2).

The EPA's initial proposal defined "permit modifications" and "minor permit amendment" as separate subclasses of "permit revision." The logical implication of such a distinction would be that minor permit amendments would not be subject to any section 505 review procedures (*e.g.*, 45-day EPA review), which apply to permit applications, "modifications," and renewals. However, if the terms "modification" and "revision" are used interchangeably, then minor permit modifications are modifications within the meaning of section 505(a). The statute, however, is unclear on the question of whether Congress used the terms "modifications" and "revision" interchangeably in title V.

Neither "modification" nor "revision" is defined in title V. Courts presume that "the use of different terminology within a statute indicates that Congress intended to establish a different meaning," *National Insulation Transp. Comm.* v. *ICC*, 683 F. 2d 533, 537 (D. C. Cir. 1982). Interpreting "modifications" as a subset of "revisions," as the EPA proposed rule did, is also consistent with the dictionary definitions of "revise" and "modify." To "revise" is defined generally as to change, amend, alter, or to correct, improve, update. See *Webster's New World Dictionary* 1130 (rev. ed. 1982). Although one dictionary we have examined does define "revise" to mean a "[t]o change or modify," *The American Heritage Dictionary* 1112 (New College ed. 1976) (as in to "revise an earlier opinion"), "modify" is usually defined more narrowly as to limit, regulate, moderate, qualify, change or alter partially, reduce in degree, or make less extreme, severe, or strong. See *Webster's* at 914; *Random House* at 858; *American Heritage* at 844. Accordingly,

EPA believes that the requirements of section 505 do not necessarily apply to permit revisions as distinct from permit modifications.

Even if EPA were to conclude that a minor permit modification constitutes a "permit modification" within the meaning of section 505(a), that would not resolve the question whether section 505 would permit EPA the discretion under the mandate of section 502(b)(6) to create a procedural distinction between permit modifications that involve a title I modification and those that do not. In this regard, section 502(b)(10) expresses Congress's conclusion that changes in a source's operations or practices that (i) do not constitute a title I modification and (ii) do not increase emissions above existing allowables will require no permit revision at all and only minimal administrative review. From this, EPA concluded that the two types of changes identified in section 502(b)(10) are in Congress's view the most important in determining the procedural treatment to be afforded any change affecting permit terms or conditions. And because, under existing regulations, a modification within the meaning of title I will by definition involve emissions increases that trigger the application of new substantive requirements under title I, there would appear to be strong basis for the EPA to require more elaborate procedures for proposed revisions involving title I modifications. Even for minor permit modifications, EPA concludes that it is appropriate to retain the key elements of section 505—the 45 day EPA review and veto opportunity and notice to affected States.

Section 505(b)(2) allows objections to be raised for the first time before the Administrator if "it was impracticable to raise such objections within such period or unless the grounds for such objection arose after such period." If the State has provided *no* opportunity for public comment, it would obviously be impracticable to raise objections to the proposed permit modification during the most recent public comment period. Similarly, the petitioner could plainly substantiate a claim that the grounds for objection arose "after such period." Thus, under the section 505(b)(2) parenthetical the public can petition the Administrator regarding minor permit modifications in cases where the permitting authority has not provided for a prior public comment period on the proposed modification. Based on the language of the statute, therefore, it appears that in section 505 Congress, has not "directly spoken to the precise question at issue" so as to foreclose EPA's exercise of discretion. *Chevron*, 467 U.S. at 842.

(ii) Reasonableness of minor permit modification procedures under *Chevron*. The EPA believes the procedures adopted in this rule for minor permit modifications strike a careful balance between the competing statutory goals, set forth in section 502(b)(6), that permit procedures be "streamlined," "expeditious," "adequate," and "reasonable." Further, the approach taken in the final rule is a reasonable and fair accommodation of the comments received both criticizing and supporting the revision procedures in the proposed rule.

EPA received many comments from industry documenting the need to make operational changes expeditiously in response to market demands. For example, comment IV–D–160 stated that the automobile industry must be able to respond quickly to market and technological changes in order to maintain its market share relative to foreign competitors, and that provisions for expeditious permit revisions for minor emissions increases were crucial to this effort.

Certain industries, including the pharmaceutical industry, pointed out that, owing to the multi-purpose nature of both the equipment and processes used, and the wide variety of products produced, the need for adequate operational flexibility and the ability to revise permits expeditiously is of central concern in the design of the operating permits rule. See, e.g., IV–D–132. In fact, some industry commenters asserted that the proposal's minor permit amendment provisions did not go far enough in providing for operational flexibility. See, e.g., IV–D–241 (seven-day waiting period for minor permit amendments could economically weaken many companies).

EPA believes that the procedures for minor permit modifications in the final rule accommodate these industry concerns to the extent possible while maintaining a careful balancing of the above-mentioned statutory goals and preserving the integrity of the permit process. The minor permit modification procedures achieve the goals of being "streamlined" and "expeditious" because they allow States to adopt procedures under which sources may make permit revisions related to operational needs without delay and without the need to submit those revisions to public notice and comment. For changes resulting in increases in emissions below *de minimis* threshold levels set by the permitting authority and approved by EPA, the permitting authority may group these revisions on a quarterly basis for purposes of EPA and affected State review. For changes resulting in emissions increases above these threshold levels (but below title I modification levels) the source may implement the change immediately after filing a complete application, unless the permitting authority establishes a waiting period. In either case, permitting authority, EPA and affected State review may occur after the change has been made.

In contrast to the industry approval of the proposal's minor permit amendment procedures, State and environmental commenters were generally critical of these provisions. A group of Northeastern States (IV–D–192) asserted that seven days was an insufficient period to review a proposed permit revision. An environmental group (IV–D–158) stated that the minor permit amendment provisions would allow sources to increase emissions without legal limit. The general theme of these and similar comments was that, by allowing certain permit revisions to take place without the same public notice and comment procedures required in permit issuance and renewal, the regulations would undermine the effectiveness of the permit program in implementing and enforcing the requirements of the Act.

EPA disagrees with these commenters. Although the final rule allows approval of State programs that omit public notice and comment for certain permit revisions, the various protections associated with minor permit modification procedures assure that these procedures will be "adequate" and "reasonable" and will not undermine the permitting authority's ability to implement and enforce the Act. To begin with, the rule places several significant restrictions on the types of revisions eligible for treatment as minor permit modifications. Among these is the restriction that these procedures not be used for significant changes to existing monitoring, reporting, or recordkeeping requirements. Section 70.7(e)(2)(i)(A)(3). Thus, while operational changes, such as physical plant changes or changes in utilization, that may be necessary to respond to changing market conditions, may be the subject of permit revisions without prior governmental authorization or public notice and comment, significant changes related to a source's compliance regime must undergo full review before being implemented.

Several other protections ensure the adequacy and reasonableness of the minor modification procedures. A minor

permit modification will not be deemed to have issued for purposes of Federal law until EPA has had the opportunity to review the proposed modification for compliance with the Act. Likewise, affected States will have an opportunity to review and comment on proposed revisions and to make their views known to EPA prior to issuance. These governmental review requirements will help ensure that any modification of a permit accomplished through minor permit modification procedures will comply with the Act and the requirements of this part.

The rule provides the source with an additional incentive to comply. The rule provides that the permitting authority may enforce the original permit terms if the source should fail to comply with its proposed terms during the pendency of the minor permit modification.

Even after a minor permit modification has been properly "issued" following review by the permitting authority and EPA, the source remains responsible for compliance with the Act. Revisions effected through minor permit modification procedures do not receive the protection of the permit shield, so the permitting authority, EPA, and private citizens may enforce the applicable requirements and the requirements of part 70 regardless of how the permit has been revised.

Finally, the concern regarding the potential to increase emissions without legal limit under the minor permit modification procedures is misplaced, and is based on a misunderstanding of title V and the substantive requirements of the Act.

As discussed above, title V is primarily procedural, and is not generally intended to create any new substantive requirements. Nor are title V programs required to establish any sort of "cap" on emissions unless derived from a substantive requirement in another title of the Act. The title V permit is intended to record in a single document the substantive requirements derived from elsewhere in the Act. Therefore, in most cases the only emissions limits contained in the permit will be emissions limits that are imposed to comply with the substantive requirements of the Act (including SIP requirements). The permit itself will not impose any sort of independent "cap" on emissions except where requested by the source. This might occur, for example, in order to limit the source's potential to emit through a federally-enforceable mechanism for the purpose of lawfully avoiding substantive requirements of the other titles that would apply in the absence of a cap.

Like the minor permit amendment provisions of the proposed rule, the minor permit modification provisions in the final rule explicitly prohibit changes that would (1) constitute title I modifications, or (2) violate any applicable requirement of the Act. Applicable requirements include MACT standards, NESHAP, RACT limits contained in a SIP, NSPS, BACT, lowest achievable emission rate standards, and work practice standards established pursuant to a SIP, and other Federal requirements (including SIP limits). The minor permit modification procedure cannot be used to exceed any of these limits. It should be pointed out in this regard that the Act implicitly prohibits "stacking" of emissions increases under the minor permit modification procedures. The EPA has long held that stacking is unlawful where it is done for the purpose of improperly evading full permit modification procedures under title I. See, e.g., 54 FR 27274, 27281 (June 29, 1989) (prohibition against use of "sham" minor source permits for purpose of evading major NSR requirements under title I).

It is also worth noting that title I establishes additional substantive limits that would prevent unlimited vertical stacking in specific instances. For example, section 182(c)(6) establishes *de minimis* levels for ozone precursors in serious, severe, and extreme nonattainment areas that limit increases for purposes of title I modifications to 25 tons when aggregated with all other net increases in emissions at the source over the five years preceding the change. Thus, for these areas, there is a cumulative limit of 25 tons that, if exceeded, would trigger a title I modification and would prevent the source from using the minor permit modification procedures for changes above these limits. In other nonattainment areas and in attainment areas, certain increases above prescribed "significance levels" would also be aggregated with all other net increases in emissions at the source within a five-year contemporaneous period. See, *e.g.*, 40 CFR § 52.21(b)(2) and (3).

It bears emphasis that the minor permit modification procedures set forth in the final rule set the minimum standard for an approvable State permit program. States are free to establish permit revision procedures more stringent than those set forth in this rule. The EPA recognizes that most States have already adopted some form of operating permits program and, based on their own experience, have developed different approaches for processing permit revisions. The EPA also recognizes that different States have different environmental concerns. For example, States that have serious nonattainment problems may wish to adopt more stringent review procedures than those that do not. The final rule allows State the flexibility to design permit programs or to adapt their existing programs to meet their individual circumstances, provided the minimum requirements of part 70 are met.

(iii) *De minimis* justification for minor permit modification procedures. The EPA starts from the assumption that, in the context of regulatory statutes there is "virtually a presumption in * * * favor [of *de minimis* exemptions]." *Public Citizen* v. *Young*, 831 F.2d 1108, 1113 (D.C. Cir. 1987), and they will be inferred "save in the face of the most unambiguous demonstration of congressional intent to foreclose them." *Alabama Power*, 636 F.2d at 357. If such an exemption were statutorily permissible and otherwise valid, it would allow omission of public notice and comment in genuinely *de minimis* cases, even assuming that under step one of *Chevron* the Act unambiguously required public notice and comment for all permit actions.

In *Public Citizen*, the U.S. Court of Appeals for the D.C. Circuit reviewed the law in this area in the context of the "Delaney Clause" of the Color Additive Amendments of 1960, a provision of the Federal Food, Drug and Cosmetic Act (FFDCA) that bars the Food and Drug Administration (FDA) from listing any color additive "found * * * to induce cancer in man or animal," 21 U.S.C. section 376 (b)(5)(B); such FDA listing is a prerequisite for an additive's legal use. The court found that the language, structure, and legislative history of the Color Additive Amendments clearly foreclosed any *de minimis* exemption authority, because, although the cancer risks of the products did indeed appear "trivial," 831 F.2d at 1111, the statute was sufficiently rigid to preclude application of the *de minimis* doctrine. In reaching this conclusion, the court found that "the [statutory] language itself is rigid; the context—an alternative design admitting administrative discretion for all risks other than carcinogens—tends to confirm that rigidity. * * * [T]he legislative history * * * only strengthens the inference." 831 F.2d at 1113.

The language, structure, and legislative history of title V do not indicate that "Congress has been extraordinarily rigid," *Alabama Power*,

636 F.2d at 360–61, precluding the virtual[ ] * * * presumption," *Public Citizen*, 831 F.2d at 1113, that EPA may lawfully seek to frame *de minimis* exemptions from permit review requirements. Accordingly, such exemption authority is available to support a minor amendment procedure.

With regard to the language and structure of title V, a number of provisions are relevant. A modification procedure insulates a source that complies with its requirements from liability under section 502(a), which provides that "it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter," 42 U.S.C. section 7661a(a). This prohibition is similar to that set out in section 165(a) of the Act, the provision at issue in *Alabama Power* ("No major emitting facility * * * may be constructed unless a permit has been issued"). Under title V, Congress nowhere prescribed an inflexible adherence to permit allowables. To the contrary, where the statutory design both contains a prohibition on exceedance of permit limits and authorizes modifications of such limits through procedures that must be both "streamlined" and "expeditious," *id.* section 7661a(b)(6), title V allows an exemption for minor exceedances on the basis of a *de minimis* rationale. Likewise, the legislative history of the relevant statutory provisions and title V as a whole is consistent with this approach.

Given that the statute does not explicitly preclude the crafting of a *de minimis* exemption for minor exceedances of permit allowables, the question remains whether the *de minimis* exemption here satisfies the principle articulated in *Alabama Power* for justification of a *de minimis* exemption that the "burdens of regulation yield a gain of trivial or no value." 636 F.2d at 361. The minor permit modification provisions of this rule comport with this criterion for establishment of a *de minimis* exemption because public review of changes effected through the minor modification track would yield a trivial gain in furthering the ultimate goal of the title V permit, namely, to assure compliance with the requirements of the Act. For the reasons stated below, EPA believes this application of the *de minimis* concept follows directly from the EPA's prior actions to follow the directives of the *Alabama Power* decision.

Central to this conclusion is the rule's limitation that no revision may be processed as a minor modification if it would constitute a title I modification. By regulation, EPA has limited modifications under parts C (prevention of significant deteriorations) and D (nonattainment) of title I to changes that would not increase emissions beyond certain "significance levels." These significance levels, established in response to the *Alabama Power* decision following careful analysis by EPA of the legal and air quality considerations, have never been challenged and remain in effect. *See* 40 CFR § 51.165(a)(1)(x). See also 45 FR 52676 (August 7, 1980). In fact, Congress endorsed this *de minimis* approach in the 1990 Act Amendments. It did so in part by setting specific statutory *de minimis* levels for major modifications in certain areas, and by leaving in EPA's other *de minimis* exceptions undisturbed. See, *e.g.*, sections 182(d)(6) and 182(e)(2). The minor permit modification track is therefore limited to increases in emissions levels long recognized under the Act as insignificant.

Compared to this established exemption from NSR, the minor permit modification procedure in fact presents a stronger case for a *de minimis* exemption from Act requirements for the following reasons. First, as noted above, the *de minimis* exemption for minor permit modifications is taken from a statutory context far more flexible than was the case for the NSR *de minimis* exemption. The statutory provisions in question in *Alabama Power* required that a permit be obtained for any "modification" to a major stationary source. The directive of title V that permit procedures be "streamlined" and "expeditious" indicates the intent to allow far more flexibility in the establishment of revision procedures.

Secondly, the *de minimis* exemption established in response to *Alabama Power* allowed a source to avoid altogether the considerable review requirements associated with NSR under parts C and D of title I. In this case, the exemption is merely from the public notice and comment component of a regulatory review scheme that remains largely intact. Thus, while increases in emissions up to title I significance levels would normally escape governmental and public review entirely under the NSR procedures of parts C and D, the same changes to a title V permit will be reviewed by the State and EPA for compliance with all applicable requirements of the Act.

Moreover, the NSR exemption allows a source to avoid significant substantive requirements, such as the requirement to install technological controls or to obtain emissions offsets from other sources in the area prior to construction. By contrast, the minor permit modification procedure is an exemption from certain procedural requirements only. Any change effected through minor permit modifications must comply with all substantive Act requirements.

EPA received a comment addressing the analysis in the Department of Justice opinion. Although this comment was received very late in the process, it has been carefully considered. In general, the analysis in the Department's opinion speaks for itself. A few specific points merit response, however.

First, the commenter contends that providing an opportunity for judicial review of minor permit amendments without providing also for public notice and comment would require courts to conduct trials *de novo* because there would be no administrative record. However, as noted earlier in this preamble, there will be a record for review, consisting at least of the permit modification application, the proposed permit and statement of basis, and the State's final action.

The commenter also asserted that, while the *de minimis* concept may be appropriate to limit the scope of an agency's authority, it may not find application where an agency seeks to limit the extent of public review of matters already within its jurisdiction. The EPA believes that, to the contrary, the latter case finds more support in judicial precedent establishing authority for *de minimis* exemptions. The primary test of the legal sufficiency of an administratively-created *de minimis* exemption is that the burden of regulation must yield a gain of "trivial or no value." *Alabama Power*, 636 F.2d at 360–361. If a gain of trivial or no value would result from the inclusion of certain activities within the regulatory jurisdiction of an agency, there must similarly be at best a trivial gain when those same activities, once brought within the agency's authority, are merely exempted from requirement to undergo public review. This is precisely the case here, because the same *de minimis* emissions levels established for purposes of exemption from the NSR requirements will serve to limit the changes eligible for processing through minor permit modifications. The present rule therefore presents an even stronger case than the new source review thresholds for application of the *de minimis* principles established in the *Alabama Power* decision, as it has been implemented by EPA for over a decade.

This commenter also asserted that allowing permit terms to be modified

without notice to the general public would frustrate the requirement that permits be enforceable. But contrary to the commenter's claim, nothing in minor modification procedures insulates a source from EPA or citizen enforcement of the modified permit terms or the requirements of the Act. First, any permit that is modified using minor modification procedures will be a matter of public record on file with the permitting authority pursuant to section 503(e) of the Act. Citizens may obtain a copy of any permit, as amended, from the permitting authority or the relevant EPA Region for the purpose of enforcing its terms. Second, today's rule specifically denies the permit shield to changes incorporated into a permit using minor modification procedures. If a citizen believes that a minor permit modification violates the underlying requirements of the Act, the citizen may always seek to enforce the Act's requirements if the source is relying on its modified permit to demonstrate compliance with those requirements of the Act.

The commenter also alleges that EPA provided the public with inadequate notice of its intention to rely on a *de minimis* rationale as a ground for denying public participation on minor permit modifications. On the contrary, the Agency's notice of proposed rulemaking so clearly pointed toward a *de minimis* rationale that the adoption of such a rationale in these final rules can readily be seen as a logical outgrowth of the Agency's proposal. See, *Small Refiner Lead Phase Down Task Force* v. *EPA*, 705 F.2d 506, 547, 549 (D.C. Cir., 1983); *City of Stoughton* v. *EPA*, 858 F.2d 747, 753 (D.C., Cir., 1988). The provision in question called "minor permit amendments" (§ 70.7(f)) in the proposal concerned what emissions increases could be considered sufficiently small that they could be instituted without public participation, an inquiry which covers whether increases are so small as to be *de minimis*. Proposal § 70.7(f) applied if the proposed revision "does not constitute a modification under any provision of title I of the Act". In turn, under the landmark decision of *Alabama Power* v. *Costle*, 636 F.2d 323 (D.C. Cir., 1979), *de minimis* emissions increase may be exempted from consideration as "modifications". Hence, the use of the term modification put the public on notice that *de minimis* was an issue in the rule making. Indeed, the Agency received numerous comments (e.g., IV–D–208, IV–D–312, IV–D–323) that minor permit amendments were justified as *de minimis* under *Alabama Power*. During the comment period, several State groups (IV–D–121, IV–D–232, IV–D–270) and one environmental group (N–D–81) addressed the issue of appropriate *de minimis* thresholds. Finally, the commenter's own comment addressed the *de minimis* issue. In sum, the EPA proposal provided sufficient notice that *de minimis* was an approach that might be adopted as a final outcome in the rulemaking.

(c) Legal basis for section 502(a) exemption. EPA's model regulations outlining an option for minor permit modifications preserve the elements of permitting authority, affected States, and EPA review. They allow a source to make the proposed change after notice, but before the review procedures have been completed. Thus the procedures in effect temporarily exempt the source from the technical requirement of section 502(a) that a source operate in compliance with its permit. The basis for such limited exemption resides in the doctrine of *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 357–361 (D.C. Cir. 1979), where the D.C. Circuit set forth "the principles pertinent to an agency's authority to adopt general exemptions to statutory requirements."

In *Alabama Power*, the Court observed that "Unless Congress has been extraordinarily rigid, there is likely a basis or an implication of *de minimis* authority to provide exemption when the burdens of regulation yield a gain of trivial or no value." *Id.* at 360–361. Far from being "extraordinarily rigid" with respect to procedures governing permit actions, Congress' intent in title V, as evidenced in section 502(b)(6) and elsewhere, was to establish a flexible standard: procedures for "expeditious review of permit actions" that are "adequate, streamlined, and reasonable". In title V Congress repeatedly demonstrated interest in balancing the need for "expeditious action" by the permitting authority with the need for adequate governmental and public oversight of the permitting process (see, e.g. 502(b)(7), (8)).

The minor permit modification procedures outlined in EPA's regulations allow States to create a highly limited *de minimis* exemption that satisfies the requirements of *Alabama Power*. The Administrator has determined that States could find that requiring review by the permitting authority, EPA, and affected States to take place before a source can make a change qualifying for treatment as a minor permit modification may impose great burdens on industry and State regulatory systems, while any benefit that would accrue would be trivial. The regulations require ample safeguards to ensure that such a temporary exemption (to the formal requirement of compliance with all permit terms while a modification application is pending) is truly *de minimis* in scope and impact.

First, a State could not allow a change to qualify for minor permit modification procedures unless it were less than a title I modification and met certain additional eligibility criteria. These stringent criteria, described in paragraph (c) below, will assure that this procedure is not used for significant changes. Second, the State could not allow a change to be made until after the source filed a complete application for a permit modification.

Third, the State could allow the source to make the change it proposed, but the source must bear the full risk of the consequences if its proposed modification is subsequently disapproved. Moreover, no "permit shield" attaches to any minor permit modification. The only exemption that the source could receive, and it would be a temporary one lasting only until its permit application is processed, is from the technical requirement that the source comply with the existing permit terms that are the subject of the proposed modification. The source would continue to be subject to all applicable requirements, and to those permit terms not addressed by its proposed modification.

If a source chooses to make a change before final action on its proposed modification, and that change is subsequently disapproved, enforcement proceedings may be brought for any violation of applicable requirements resulting from the change. Furthermore, if the source chooses to implement a change prior to issuance of a revision and the permitting authority does not take final action on the application in a timely fashion, the public may have the opportunity under State law to seek a State court order requiring the permitting authority to act finally on the application, and can seek enforcement of the applicable requirements of the Act if it believes the revision violates the Act.

Given these consequences, no source would lightly undertake to make a change while awaiting a permit modification. Emissions resulting from changes that are subsequently disapproved would, moreover, be small and limited in time. Since the permit must issue or be denied in 90 days, the potential for significant illegal emissions increases to occur is negligible. Thus the environmental consequences of this *de minimis* exemption are trivial.

Furthermore, a State might determine that the exemption is desirable because it would free the regulatory system to devote resources to processing significant modifications, without holding up smaller changes with low environmental risk. It would also preserve for the permit modification process the protections of governmental oversight, thereby ensuring the integrity of the permit system without unnecessarily burdening regulatory authorities or regulated industry.

The Administrator concludes that such a *de minimis* exemption is well within his discretion, and comports with the regulatory objectives of title V. A permitting authority may reasonably determine that regulations based on this *de minimis* exemption provide "adequate, streamlined, and reasonable procedures" for permit modifications.

With these tracks, EPA believes it has provided States with an example of adequate, streamlined, and reasonable procedures for handling permit revisions. States may meet their obligation to adopt such procedures using EPA's model or provisions that are substantially equivalent. A State's substantially equivalent procedures need not be identical to EPA's model, nor are the procedures set forth in § 70.7(e) meant to preempt the States from requiring additional process before allowing a change to take effect or before granting a permit revision.

(d) Description of final rule. Following is a description of how the model set forth in § 70.7(e) would work. The model attempts to match the significance and complexity of the proposed revision with the nature and degree of the process required. Changes that qualify for minor permit modification procedures could be made immediately after notifying the permitting authority. Significant changes could not be made until the permitting authority issued the permit modification after review by affected States, the public, and the Administrator.

Criteria for minor permit modification procedures: State programs must include criteria for determining which types of modifications undergo which review process. Today's rule sets forth criteria describing the types of modifications that can be processed on an expedited basis, although States can adopt more restrictive criteria. Under these criteria, State programs cannot use minor permit modification procedures except for modifications that:

(1) Do not violate any applicable requirement;

(2) Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit (as discussed below);

(3) Do not require or change a case-by-case determination of an emission limitation or other standard (such as a case-by-case MACT determination under section 112(g) of the Act, or equivalency determinations for RACT limits under title I), or a source-specific determination of ambient impacts, or a visibility or increment analysis;

(4) Do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which it would otherwise be subject (as, for instance, a change to a previously established voluntary cap to escape new source review);

(5) Are not modifications under any provision of title I of the Act; and

(6) Are not required by the State program to be processed as a significant modification.

Only insignificant changes in existing monitoring, reporting, and recordkeeping requirements may go through the minor permit modification procedures of § 70.7(e) (2) and (3). An example of an insignificant change in monitoring would be a switch from one validated reference test method for that pollutant and source category to another, where the permit does not already provide for an alternative test method.

The final rule also allows States to process "economic incentives, emissions trading, marketable permits, or other similar approaches" under the minor permit modification process, if the underlying SIP or EPA rule provides explicitly for use of minor permit modification procedures when implementing these types of changes. EPA is providing this form of permit modification for the same reason that it is expanding the use of the operational flexibility provisions for emissions trading: to encourage the use of market-based strategies, and to allow flexibility for processing changes under these programs, consistent with the requirements of title V. The term "other similar approaches" includes other programs that may achieve a similar result as an economic incentive program, a marketable permits program, or an emission trading program, but that may use a different mechanism or approach. This term is meant to allow States to use the minor permit modification process for other programs that may be developed in the future, provided that the underlying requirement explicitly allows for this type of processing. As with similar provisions elsewhere in this rule, future SIP's and EPA rules would have to contain compliance requirements and procedures that would assure that any or all market-based programs are quantifiable, accountable, and enforceable, and based on replicable procedures for determining the emission reductions expected from the program.

Minor permit modification procedures for individual permit modifications. If the source requested the minor permit modification process, the source could make the proposed change while its application was pending. The types of changes that can be made using minor permit modification procedures vary. Thus, it does not make sense to insist that States follow identical procedures in all circumstances, provided that the States comply with the minimum time period specified in these rules. Review by the permitting authority, affected States, and the Administrator could occur concurrently. The permitting authority could then issue (or deny) the permit modification.

A source may request minor permit modification processing of a permit modification by filing a complete application demonstrating that it qualifies for such treatment. The application must also include the source's suggested draft permit. The source may make the proposed change after filing a complete application.

During the pendency of an application for a minor permit modification, a source would receive a qualified exemption from the requirement that it comply with its existing permit terms, but the exemption would be in effect only while the source operates in compliance with its proposed permit terms and conditions. If a source uses minor permit modification procedures to make the change, during the pendency of its application the source need not comply with the existing permit terms and conditions it seeks to modify, but must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. Thus, if a source uses minor permit modification procedures to make such a change, an enforcement action always may be brought to enforce the underlying applicable requirements with respect to the change. Furthermore, if a source violates the proposed permit terms and conditions, it will lose its exemption from complying with its existing permit terms and conditions, and an action enforcing the existing permit terms and conditions may be brought.

The permit shield otherwise allowed under § 70.6(f) cannot be granted to permit terms resulting from minor permit

modifications. Requiring the source to be bound by the underlying applicable requirements irrespective of a minor permit modification helps ensure that providing additional process for minor permit modifications would provide only trivial benefits and provides a limit on the emissions increases available which could occur "stacking."

Within 5 working days of receipt of a complete permit application, the permitting authority must fulfill its obligations under § 70.8(a)(1) and (b)(1) to notify affected States of the requested permit modification and transmit the proposed permit and other necessary documents to the Administrator. For purposes of EPA review and petitions to EPA, the draft permit would be the same as the proposed permit. The permitting authority would have to respond promptly to affected States' recommendations. If EPA objected to a permit modification, then the procedures in § 70.8 of this part would apply.

The final rule requires 45 days for EPA review of and opportunity to veto permit modifications, including those that change the emissions allowable under the permit. The rule also requires that sources comply with substantive conditions and limitations contained in permits that have been issued in accordance with the Act, including those issued as modified permits. Thus permit modifications are subject to the procedures required by § 70.8 for permit issuance. These include § 70.8's requirement that an affected State receive notice and an opportunity to comment on permit modifications.

The permitting authority may not issue a final permit modification until EPA's review period has elapsed without objection or EPA has sent written notice to the permitting authority that it will not object to the modification. However, the permitting authority may approve the modification prior to the time it finally issues the modification. The permitting authority must act within 90 days of receipt of an application for modification, or 15 days after the end of the Administrator's 45-day review period, whichever time is later. This action may include a determination that minor permit modification procedures are inappropriate and that significant modification procedures must be followed (which would terminate the source's ability to operate out of compliance with its approved permit terms and conditions).

In developing State programs, States may also want to provide the permitting authority with the option of issuing a revised proposed permit that would restart EPA's 45-day review period. This would allow the State to make minor changes to the proposed permit without requiring the State to deny an application due to minor errors in the proposed permit, thereby forcing the source to reapply for a permit modification. EPA believes that a source should be allowed to make a change before a modified permit is issued by the permitting authority only if the source bears the risk of making a change that the permitting authority later finds should not have been made.

Group processing procedures. Within the class of changes that can be processed as minor permit modifications, EPA believes that some of these changes are so insignificant that the administrative burdens of individually processing large numbers of such proposed modifications may not be justified. Therefore, the permitting authority may process groups of such modifications together. The group processing procedures basically track the minor permit modification procedures described above, except that the permitting authority could process all eligible modifications on a quarterly basis, or as soon as the aggregate of the source's applications reached the threshold level, discussed below, set in the State program.

Modifications eligible for treatment as minor permit modifications could be processed in a group if they fell below a threshold level approved as part of the State permit program. A State may establish its own threshold levels. However, EPA's regulations suggest the following threshold levels, based on comments from State and local air pollution control agencies with experience implementing permitting programs: 5 tons per year, 20 percent of the major source definition for the area, or 10 percent of the permitted allowable level, whichever is lowest. Many States do not require permits for sources at or below these levels. Moreover, changes below these suggested levels are not likely to trigger new Federal applicable requirements.

The State may establish alternative thresholds if it can justify them based on criteria drawn from the *Alabama Power* decision. The regulations provide the States with guidance for setting appropriate levels, without locking them into a rigid formula. A State's experience under an established program is a good basis for demonstrating that alternate *de minimis* levels will meet the program's goals and legal obligations.

States may also propose alternate *de minimis* levels in response to new regulations which might create unanticipated results under the formula for *de minimis* emission levels described above. For example, section 112(a)(1) allows EPA to establish "lesser quantity" thresholds for certain toxic air pollutants. A fixed percentage of the major source size which yields an appropriate *de minimis* level for a 100-ton per year major sources may not be reasonable when applied to major sources of well less than 10 tons per year. EPA will review such alternate limits according to the same criteria drawn from the *Alabama Power* decision.

The group processing procedures differ in only a few respects from the general procedures for minor permit modifications. Most importantly, the timing of review by the permitting authority, EPA, and affected States is different from that under general procedures for minor permit modifications. Instead of processing applications as soon as the applications are submitted by the source, the permitting authority can collect applications and process them as a group once a quarter. Modifications eligible for group processing would need to be processed more frequently only when the pending applications, in the aggregate, reach the threshold level set by the State. Second, the source would have to notify EPA that it is seeking a modification. Such notice is required because the EPA may not receive notice of the change from the permitting authority for three months.

The source would also be required to submit all forms necessary for the permitting authority to notify EPA and affected States. For purposes of EPA review and petitions to EPA, the draft permit would be the same as the proposed permit. The permitting authority would be required to fulfill its obligation under § 70.8(a)(1) and (b)(1) to notify affected States and transmit information to the Administrator promptly after receipt of the complete application for minor permit modification.

Criteria for significant modifications. Significant modifications are those modifications which do not qualify for treatment as minor permit modifications or administrative amendments. Significant changes to existing monitoring permit terms or conditions, or changes that would relax reporting or recordkeeping requirements would be significant modifications, since these types of changes are likely to affect how the permitting authority determines whether the source is in compliance with emission limitations and other permit terms and conditions. An example of such a change would be a

switch from direct measurement of emissions to fuel sampling and analysis, such as switching from emissions monitoring of SO_2 to sampling and analyzing coal sulfur content. The EPA believes it would be inappropriate for sources to be able to change the method of measuring compliance with its requirements using the minor permit modification procedures. Although EPA recognizes that there are legitimate economic reasons for making some changes quickly, there should be no such urgency for changing existing significant monitoring, reporting, or recordkeeping requirements. Nothing in § 70.7(e)(4)(i) regarding compliance provisions shall be interpreted to prevent sources from making off-permit changes pursuant to § 70.4(b)(14) and (15), or using the operational flexibility provision in § 70.4(b)(12)(ii). When a source takes advantage of these provisions, it may alter its activities to such a degree that its original compliance terms are no longer relevant with respect to the change. A source which makes off-permit changes must comply with any compliance provisions imposed by the applicable requirements that apply to the off-permit change. Similarly, a source that uses the operational flexibility provision of § 70.4(b)(12)(ii) must comply with all compliance provisions imposed by the SIP provision authorizing the operational flexibility. If the source later decides to operate as originally permitted, it must comply with the compliance provisions in its original permit.

Significant Procedures. The EPA has not set forth a specific model for processing significant permit modifications. It is anticipated that the procedures will be very similar to those for processing initial permits or permit renewals. However, most significant modifications should be less complex than initial permits or permit renewals, and the process need only focus on the changes to the permit rather than repeat any more comprehensive permit analysis of the source. Therefore, EPA has required that each State program provide that the majority of significant modification applications are finally issued or denied within 9 months after they are received.

3. Deadline for Action on Applications

Under the Act, the permitting authority is required to act on permit applications, including permit modifications and renewals, within 18 months from receipt of a complete permit application, except for permits for affected sources (acid rain). The proposal did not suggest that shorter deadlines might be appropriate for permit renewals or modifications.

Industry commenters were concerned that 18 months for renewals and modifications is too long and recommended reducing the review period to 4 to 6 months.

The EPA responds that, although section 503(c) of the Act clearly requires an 18-month deadline for action on applications (except during the phase-in transition period), EPA agrees that many permit renewals and modifications could be reviewed in far less time, provided that the conditions and terms of the permit do not lapse.

Thus, the Administrator, consistent with section 502(b)(6), has included several provisions in the final regulations to substantially expedite review of permit modifications [*see* § 70.7(e)]. Furthermore, the Administrator agrees that permit renewals are often so straightforward that they should be reviewed in much less time than 18 months. In discussions with State and local agencies, it is apparent that renewal times of less than 6 months are common except in a few cases. Thus, while EPA cannot require that all renewals occur in a shorter time frame, it strongly encourages States to review 90 percent of renewal applications in under 6 months.

4. Administrative Permit Amendments

An administrative permit amendment would include administrative changes such as correction of typographical errors, changes in address, change of ownership, etc. EPA also proposed to treat as administrative permit amendments any changes that have been processed under an approved State preconstruction review program. The proposal stated that since these changes have already received sufficient EPA review and appear to offer adequate opportunity for public comment and a hearing, EPA believed it would be unnecessary for them to undergo the full permit revision procedure described in section 502(b)(6) simply to incorporate the results of the NSR program.

A number of State agencies recommended that permit requirements issued under State NSR programs should be incorporated into title V permits via the administrative permit amendment process. One group of State agencies suggested that EPA should expand the list of items to be processed as administrative permit amendments to include anything that is obviously approvable.

The EPA has learned, however, that most State preconstruction review programs do not meet title V requirements for review by EPA and affected States. EPA believes that such procedures are required for permit revisions. Thus, EPA will allow States to use the administrative permit amendment procedures to incorporate the results of an EPA-approved State NSR program, if the NSR program is enhanced as necessary to meet requirements substantially equivalent to the applicable part 70 requirements. Changes that meet the requirements for minor permit modifications may be made under procedures substantially equivalent to those in § 70.7(e) (2) or (3). Changes that do not meet the requirements for minor permit modifications must be made under procedures substantially equivalent to those for permit issuance or significant permit modifications. Accordingly, the permit shield may only attach to the latter category of administrative amendments and can not attach until final action has been taken granting the request for the administrative amendment. If a State does not make the necessary improvements to its NSR program, the permit modification process must be used to revise the part 70 permit, as needed.

The primary intent of these "enhancements" of the NSR process is to allow the permitting authority to consolidate NSR and title V permit revision procedures. As stated in the May 10, 1991 proposal, it is not to second-guess the results of any State NSR determination. For example, if a State does provide for EPA's 45-day review in its NSR program, EPA would only be reviewing whether the State had conducted a BACT analysis, if applicable, and whether that analysis is faithfully incorporated in the title V permit. The EPA will not use its review period to object to or attempt to revise the State's BACT determination. Correspondingly, EPA's failure to object to the substance of the BACT determination will not limit any remedies EPA might otherwise have under the Act to address a faulty BACT determination.

The proposed rule allows changes that the permitting authority determines to be similar to those in items (i)–(iv) in § 70.7(d) to be permit revisions for purposes of administrative permit amendments. The EPA has decided to strengthen the proposal by requiring that this list of similar changes be proposed by the permitting authority in its permit program and approved by the EPA. The EPA believes this change is necessary to allow adequate EPA review of these changes to ensure that they are similar to the types of changes defined in items (i)–(iv).

Section 70.7(d)(3)(i) requires the permitting authority to take final action on a request for an administrative amendment to a permit within 60 days of receipt of such request. This 60-day period was intended as a convenience to the permitting authority, not as a waiting period imposed on a source seeking to implement changes qualifying for the administrative amendment track. To clarify this meaning, new § 70.7(d)(3)(iii) provides that a source may implement changes addressed in a request for an administrative amendment immediately upon submittal of the request. Except as discussed above, § 70.7(d)(4) has been revised to clarify that the permit shield may not attach for these changes.

5. Public Participation

Under section 502(b)(6) of the Act, State programs are to have "adequate, streamlined and reasonable" procedures for providing public notice, "including offering an opportunity for public comment and a hearing," of "permit actions, including applications, renewals, or revisions." The EPA proposed that the opportunity for a public hearing can be implemented in an informal manner (e.g. not a full trial-type hearing), such as through open meetings for interested parties to express their concerns. The proposal stated that States were to develop procedures for notice and an opportunity for public comment and a hearing "after considering the requirements of part 124 of 40 CFR."

State agencies commented that the EPA should be careful not to make the public review process unduly burdensome. Environmentalists commented that the EPA should require more specific public comment and hearing procedures, since section 502(b)(6) requires EPA to promulgate minimum elements of a permit program, including "adequate, streamlined and reasonable procedures * * * for public notice, including offering an opportunity for public comment and a hearing."

Although EPA believes that part 124 may provide some useful guidance to States in establishing procedures for public participation, EPA decided that the reference to part 124 was too vague and could have been read to incorporate elements in part 124 that EPA believes are not necessary for title V permits. Therefore, EPA has deleted the reference in the rule to part 124 and has specifically listed the minimum elements of public participation that must be included in a State program.

Section 70.7(h) makes clear that all permit proceedings, except those for minor permit modifications, must provide adequate procedures for public participation. For this purpose, public participation includes: notice, an opportunity for public comment, and a hearing where appropriate. Section 70.7(h) goes on to specify the key elements required in such procedures.

Section 70.7(h)(1) addresses the manner of giving notice, and those to whom it must be given. It provides that notice must be given: By publication in a general circulation newspaper; to all those who request to be included on a mailing list developed by the permitting authority by other means if necessary to assure adequate notice to the affected public.

Section 70.7(h)(2) describes the information that the notice must include, and § 70.7(h)(3) requires notice to be provided to affected states pursuant to § 70.8.

Sections 70.7(h) (4) and (5) contain requirements for the timing of public comment and notice of any public hearing. For initial permit issuance, permit renewals, and significant modifications, the permitting authority must provide at least 30 days for public comment and at least 30 days advance notice of any public hearing.

Finally, § 70.7(h)(6) requires the permitting authority to keep a record of the commenters and also of the issues raised during the public participation process so that the Administrator may fulfill his obligation under section 505(b)(2) of the Act to determine whether a citizen petition may be granted, and to make them available to the public.

Public objections to a draft permit, permit revision, or permit renewal must be germane to the applicable requirements implicated by the permit action in question. For example, objections addressed to portions of an existing permit that would not in any way be affected by a proposed permit revision would not be germane. Public comments will only be germane if they address whether the draft permit is consistent with applicable requirements or requirements of part 70.

H. Section 70.8—Permit Review by EPA and Affected States

1. 90-day Response Period

Proposed § 70.8(c)(4) allowed 90 days for the permitting authority to make a submittal in response to an EPA objection to issuance of a proposed permit. If the permitting authority submitted a revised permit that only partially met EPA's objection, up to another 90-day period could be granted for the permitting authority to submit a second permit revision meeting EPA's objection. This provision for a second 90-day period is removed from the final rules because the Administrator has determined that section 505(c) of the Act only allows one 90-day period. Although section 505(e) of the Act allows an additional 90-day period, this section applies to reopening permits for cause, not for objections to proposed permits.

Section 70.8(d) provides that where EPA, in response to a public petition, has objected to a permit that has already been issued, EPA will modify, terminate, or revoke such permit. The final rule clarifies that EPA shall do so consistent with the procedures for reopening a permit for cause set forth in § 70.7(g)(4) or (5)(i) and (ii), "except in unusual circumstances." Unusual circumstances would include those where there is a substantial and imminent threat to the public health and safety resulting from the deficiencies in the permit.

2. Permit Continuance

The proposal required permitting authorities to suspend a permit if the Administrator objected to the permit as a result of a public petition under § 70.8(d). Upon further review, EPA now believes that this provision would not meet the requirements section 505(b)(3) of the Act. The final rule states that upon EPA objection as a result of a petition and after the permit is issued, EPA shall modify, terminate, or revoke the permit. The permitting authority can thereafter issue a revised permit meeting EPA's objections. These provisions are as section 505(b)(3) of the Act stipulates and EPA has no discretion to do otherwise.

3. Grounds for an EPA Objection

The proposal allowed EPA to object to a permit if the permitting authority failed to submit necessary information, forms or notices to EPA. The final regulation expands this provision by allowing EPA to object to a permit if the public notice and comment and affected State review requirements (under sections 502(b)(6) and 505(a)(2) of the Act), where applicable, were not met. This is necessary to ensure that permitting authorities meet their obligation under the Act to provide adequate opportunity for public participation and affected State review. The regulations also specify that the Administrator may only object if a proposed permit is not in compliance with the applicable requirements or the requirements of part 70.

I. Section 70.9—Fee Determination and Certification

The requirement that State operating permit programs establish an adequate permit fee schedule is a key prevision of title V. The statute provides that an approvable permit program require sources subject to part 70 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 statute also mandates that all fees required to be collected by a permitting authority under title V must be used solely to support the permit program [502(b)(3)(C)(iii)]. Following is a description of the basis and purpose of the changes in § 70.9.

1. Permit Program Costs

The proposal required States to collect permit fees sufficient to cover most, if not all, of a State's costs of its air pollution control program for stationary sources. After review of public comment and further evaluation of section 502(b)(3) and its legislative history, the Administrator concludes that all air pollution control program costs related to stationary sources need not be recouped through operating permit fees. The rejection of the interpretation in the proposal is based primarily on the fact that the Senate bill would have required recovery of all stationary source air pollution control program costs [S. Rep. No. 228, 101st Cong., 1st Sess. 351 (1989)], but the Senate bill was rejected by the Conference Agreement in favor of the House bill. Although the Act requires recovery of fewer costs than the Senate bill, it leaves the Agency some discretion in deciding which costs must be recouped.

The proposal was accurate in its conclusion that the fee provisions of title V mandate that the permit fees be collected in sufficient amount to support several air pollution control program activities that are relevant to title V sources and implemented through the operating permit program. This is clear from the list of such activities in section 502(b)(3)(A) of the Act, which includes some activities that are not strictly part of the permitting program, but for which costs related to stationary sources must be recovered. The final rule focuses more upon permit program activities, rather than air program activities more generally, in determining the minimum mandated amount for fee collections. Because the nature of permitting related activities can vary greatly from State to State, the EPA intends toe valuate each demonstration individually using the definition of "permit program costs" in the final regulation.

Finally, it should be noted that title V does not prevent a State from developing a fee schedule that will result in the collection of revenues in excess of those required to support the permit program. The Administrator will consider the use of such funds in reviewing the fee schedules proposed by States.

2. Role of the $25/tpy Presumptive Fee Amount

The proposal highlighted two "tests" ford determining fee schedule adequacy: The "program support test" (the fee schedule would result in the collection of adequate revenues to support all of the specified air program functions) and the "cost-per-ton test" (the $25/tpy presumptive fee minimum). An environmental group objected to this approach, claiming that it might give the incorrect impression that a State program meeting the "cost-per-ton test" would be approvable regardless of whether this amount adequately funded its program.

Although EPA has consistently viewed program support as the true measure of a fee schedule's approvability, the Agency acknowledges that the format of the proposal could have created some uncertainty. For this reason, § 70.9(b) is restructured to indicate that the program support test is the basic measure of fee schedule approvability. Section 502(b)(3)(A) clearly requires that all State programs collect enough in fees to cover their permit program costs.

Section 70.9(b) clarifies that there is a rebuttable presumption that a State fee schedule is adequate if it collects in the aggregate an amount equal to or greater than the presumptive minimum program cost, which is $25/tpy of actual emissions of regulated pollutants (for presumptive fee calculation). The EPA believes that the use of a presumptive minimum amount as a rebuttable presumption that the State is covering its permit program costs is the best way to give meaning to section 502(b)(3)(B) of the Act. A requirement that all State programs prove that their fee schedules recoup their permit program costs without regard for the presumptive minimum amounts an impermissible reading of the Act because it makes section 502(b)(3)(B) meaningless. The Administrator anticipates that this presumption will be most useful during the initial round of program approvals, until permitting programs develop and States and EPA gain greater expertise in estimating program financial needs and fee revenues.

3. "Regulated Pollutants"

The proposal set the presumptive minimum amount that a State must collect to cover its permit program costs as $25/tpy of regulated pollutants actually emitted by part 70 sources the preceding year. The proposal was somewhat confusing as to what pollutants would be considered "regulated pollutants" for this purpose, in part because the proposal used the statutory term "regulated pollutant" for purposes other than calculating the presumptive minimum. To clarify the matter, "regulated air pollutant" was added as a defined term for other than fee purposes, and "regulated pollutant 9for presumptive fee calculation)" was redefined consistent with the Act's definition.

The proposal requested comment on when a pollutant listed in section 112(b) becomes a regulated pollutant for fee purposes. The following three alternatives were set forth: (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 proposal adopted the second alternative.

The final rule adopts a slightly modified version of the second alternative, i.e., a pollutant becomes a regulated pollutant (for fee purposes) when EPA first promulgates a MACT standard for that pollutant. In addition, if a pollutant is regulated at a particular source, its emissions will be considered for fee purposes even if a general standard has not been issued. The EPA continues to rely on the rationale in the preamble supporting the second alternative. This alternative is the most reasonable interpretation of the Act and makes the most sense from a policy perspective.

The EPA has also decided to exercise its discretion by excluding from regulated pollutant (for presumptive fee calculation) those substances that would be regulated pollutants only because they are regulated under section 112(r) (the accidental release program). Requiring these substances to be included in calculating the presumptive minimum necessary to cover a State's permit program costs would be administratively difficult and would not significantly increase the presumptive minimum. Because releases of these substances are not permitted and occur accidentally, the amount of

actual emissions from an accidental release may not be knwon—certainly it is unlikely that it would be measured with monitoring equipment. The EPA believes that there will be relatively few substances that are regulated under section 112(r) and not regulated elsewhere under the Act. Additionally, the amount of emissions of such substances are likely to be small enough that they would be insignificant for purposes of calculating the presumptive minimum amount to cover permit program costs.

The proposal was also modified so as to allow States relying on the $25/tpy presumptive minimum to exclude from the calculation insignificant quantities of actual emissions not required to be in a permit application pursuant to § 70.5(c). The EPA could not justify requiring States to include such emissions in the presumptive minimum calculation given the administrative burden of collecting the necessary information for fees purposes, and the insignificant additional fees that a State would be required to collect if these insignificant levels of emissions were included. To the extent that actual emissions must be included in the calculation of the $25/tpy presumptive minimum, they need not be measured using the same methods as might be required to determine whether a source is complying with an underlying applicable requirement.

Section 502(b)(3) provides that States relying on the $25/tpy presumptive minimum must base this computation upon each "regulated pollutant (for presumptive fee calculation)" and defines this for fee purposes only in terms of criteria pollutants (except CO), pollutants regulated under section 111 or 112, and VOC. No exemption is created for such pollutants which a particular source emits but for which the source is not in fact subject to a specific regulatory requirement. On the other hand, no fees are required from other "regulated air pollutants" as defined more expansively in § 70.2 in making the $25/tpy test.

4. Fees From Phase I Acid Rain Sources

The proposal interpreted section 408(c)(40 of the Act as prohibiting EPA, but not the States, from collecting emissions-related fees during 1995 through 1999 from affected sources under section 404. Some industry commenters maintained that this prohibition extends to both States and EPA. After reanalysis of the statutory provision, EPA concludes that the stronger reading is that during 1995 through 1999 section 408(c)(4) precludes EPA and the States from using fees to support a title V program when these fees are related to emissions from affected units under section 404.

It is important to note, however, that States have discretion in how to address utilities. Section 408(c)(4) does not prevent a State from assessing such fees against utilities if the State chooses. The EPA will not, however, consider such emissions-based fees in determining whether the State fee schedule meets the State's obligation to recover permit program costs.

Because of the limitation on fee assessment on affected units under section 404, States relying on the $25/tpy presumptive minimum amount to recover permit program costs shall not be required to include emissions on which they cannot charge a title V emissions fee in their calculation of the presumptive minimum program cost.

5. State Fee Schedules

The final part 70 regulations clarify that States have a great deal of discretion in using the fee schedule to allocate permit program costs among part 70 sources. Even if the State relies on the $25/tpy presumptive minimum, the State fee schedule does not need to assess fees at $25/tpy. The State is not required to assess fees on any particular basis and can use application fees, service-based fees, emissions fees based on either actual or allowable emissions, other types of fees, or any combination thereof.

It should be clarified that State fee programs can provide for the assessment of fees on the basis of emissions of any regulated air pollutant. The exclusion of three categories of regulated air pollutants (carbon monoxide and certain pollutants regulated under sections 112(r) and 602 of the Act) applies solely to how the $25/tpy presumption with respect to aggregate program revenue adequacy is to be calculated. States electing to assess fees for emissions of any of the regulated air pollutants, including those in the three categories referenced above, are fully authorized to do so. All fee revenues from those programs will be recognized for the purposes of determining program adequacy.

J. Section 70.10—Federal Oversight and Sanctions

I. Geographic Application of Sanctions

The proposal indicated, in accordance with section 502 (d) and (i), that sanctions are applicable if a permitting authority fails to submit an approvable operating permit program or fails to implement an approved program. The proposal did not specify the geographical application of sanctions. State and local agency commenters felt that in the event a partial program for a local agency is granted full approval in a State, the local agency should not be penalized if the State fails to meet its permit program obligations for the remainder of the State. If sanctions are to be applied, they should not be applied in the local agency jurisdiction where a program is adequately being implemented. Conversely, the local agency may be found to not be administering or enforcing its program and be subject to sanctions. The State may have an approved program for the remainder of the area within the State and should not be penalized for failure of the local agency to meet its obligations.

The Administrator agrees with this concern and the stipulation is added to § 70.10 that sanctions are applicable only to the geographic area covered under the program which has not been submitted or is not being adequately administered or enforced. Any other area of the State covered by an approved program that is being adequately implemented will not be affected by sanctions.

2. Discretionary Application of Sanctions

Proposed § 70.10(a)(2) stated that EPA will apply sanctions within 18 months after the date required for program submittal. Section 502(d)(2)(A) states that, where a State has failed to submit a permit program by the required date, EPA has discretion within the first 18 months of that date to apply sanctions. Section 70.10(a)(2) has been corrected to more accurately reflect the intent of the Act. Similarly, § 70.10(b)(3) has been amended to more accurately reflect the intent of section 502(i)(1) that EPA has discretion whether to apply sanctions within the first 18 months after making a finding that a State is not adequately administering or enforcing a program.

3. Withdrawal of Approval of Part 70 Program

Section 70.10(c) sets out criteria for withdrawal of part 70 program approval, such as failure of the permitting authority to enforce the requirements of the part 70 program and the terms and conditions of part 70 permits. The final regulations now add in § 70.10(c)(1)(ii)(E) that failure to act in a timely way on applications for permits, permit renewals, and permit revisions is grounds for withdrawal of approval of the part 70 program. This addition is simply a recognition of the importance and benefits of the permitting program.

If large numbers of permits are allowed to lapse and sources continue to operate without a permit because they have submitted a timely and complete application, or permits are not updated in a timely way to reflect the current status of the source, all the benefits of the permitting program such as increased certainty for sources and enhanced enforcement are lost. Therefore, EPA has added this as a basis for withdrawal of part 70 program approval. The final rule also clarifies that EPA may withdraw a program in whole or in part.

4. EPA Issuance of Initial Permits

The proposal in § 70.10(b)(5) stated that the EPA may issue or deny the permit where the State has failed to act in a timely manner. Upon further review of the language and structure of the Act, EPA has decided to eliminate this provision in the final rule. Where initial permit issuance is concerned, section 502(e) is clear in stating that EPA shall suspend the issuance of permits upon approval of a State program. Where the permitting authority has failed to act in a timely manner on applications for permit renewal, EPA may revoke and reissue the permit as provided for in § 70.7.

K. Section 70.11–Requirements for Enforcement Authority

This section ensures that the basic framework for effective enforcement of title V permits will be in place in each State with an approved part 70 program. Section 70.11 contains specific requirements for enforcement authority consistent with those contained in 40 CFR 123.27 for the NPDES program with appropriate adjustments to conform to the Clean Air Act. No significant changes to the proposed § 70.11 for defining minimum requirements for State programs are contained in the final rules. However, EPA specifically encourages additional enforcement authority with respect to the two areas discussed below.

The EPA encourages State and local permitting authorities to have administrative enforcement authority similar to section 113(d) of the Act, although it is not required by § 70.11. Having administrative enforcement authority in addition to judicial enforcement authority has many advantages. First, administrative cases generally have lower forum costs and are effective for minor or straightforward violations. Reliance on the judiciary for all enforcement actions 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.

The EPA also recommends that State and local enforcement authorities consider as criminal penalties not only fines, but also incarceration. Such a penalty will be an inducement for State law enforcement officials to undertake environmental criminal cases that may be lacking if this type of crime can only result in a fine, which can also be obtained through civil suit. This will enable State enforcement authorities to pursue criminal cases which may otherwise have to be prosecuted by Federal enforcement authorities.

V. Administrative Requirements

A. 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). The docket is available for public inspection at EPA's Air Docket, which is listed under the **ADDRESSES** section of this document.

B. 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 effect on the economy of $100 million or more.

2. A major increase in costs or prices for consumers or individuals industries.

3. Significant adverse effects on competition, employment, investment, productivity, innovation, or international trade.

Although some States already have operating permit programs including fee provisions, the incremental cost of this regulation is not small. The national estimate of incremental annualized cost for the operating permit programs required by section 502(b)(3) of title V exceeds $100 million. Consequently, a Regulatory Impact Analysis has been prepared.

Given the mandate within title V to develop this regulation, the Agency has taken steps to provide for the timely accomplishment of title V requirements. In following the implementation principles mentioned in section II, EPA has allowed flexibility in permit design, in use of general permits to expedite the review process for certain smaller sources, and in the phase-in implementation of certain requirements. The Agency has thus attempted to reduce 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.

The draft RIA was made available for public comment as part of the May 10, 1991, proposal. In response to comments received, the RIA was revised to incorporate greater clarity and detail with respect to the numbers of sources affected and costs incurred. Certain costs related to paperwork burdens were increased as a result in both the RIA and the ICR (described below). The new estimate for the annualized direct cost to 34,000 major sources and permitting agencies is $526 million.

This estimate includes some costs that are due to existing State and local regulations, and are not attributable to this rule. It excludes, however, costs associated with permitting 350,000 nonmajor air toxic sources that were included in the Proposed Initial List of Categories of Sources under section 112(c)(1) of the Clean Air Act Amendments. Under today's final rules, States may temporarily defer permit requirements for these sources. The EPA encourages States to issue temporary exemptions. If no such exemptions were granted, and if all of these sources were required to obtain general permits, then the direct cost to sources and permitting agencies would increase by about $79 million annually. Use by the States of specific permits, rather than the general permits that the EPA believes are normally appropriate for these nonmajor air toxic sources, will also raise costs unnecessarily. The EPA estimates that use of specific rather than general permits would at least triple the permitting costs to each source. The EPA projects that if, for example, 25 percent of the nonmajor air toxic sources are not granted deferrals, then actions by the States to require specific rather than general permits would raise cost to sources and permitting agencies by about $68 million annually. Finally, to

the extent that the EPA has underestimated the cost of obtaining specific permits, and to the extent that States require permitting for nonmajor air toxic sources using specific permits (rather than general permits), the direct costs could be increased as much as a billion dollars annually. The EPA encourages States to consider cost differences between specific and general type permits. The EPA recommends that States allow sources to use the type of permit that achieves the requirements of title V at lowest cost. The EPA believes the general permit would normally be appropriate for the nonmajor air toxic sources that are not granted exemptions.

The EPA will soon promulgate a Final Initial List of Categories of Sources under section 112(c)(1) of the Act Amendments. This Final Initial List is expected to reduce the number of nonmajor air toxic sources that must comply with permitting requirements to below 350,000.

The benefits of this rule include more efficient enforcement and greater compliance with emission standards. Greater compliance may result in an improvement in air quality. This rule is not otherwise expected to yield gains in air quality since the rule does not affect ambient air standards or emission standards.

C. 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.

Applicable EPA guidelines for determining whether an RFA is required to accompany a rulemaking package 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 record keeping 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 will use and expects States to use, 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 large numbers of small entities will be adversely affected or will experience disproportionate significant impacts. I hereby certify that this rule as promulgated will not have a significant economic impact on a substantial number of small business entities and thereby does not require an RFA.

D. Paperwork Reduction Act

Under the Paperwork Reduction Act (44 U.S.C. 3501 et. seq.), Federal agencies must obtain OMB clearance for collection of information from ten (10) or more non-federal respondents. Each source subject to the requirements for obtaining a title V operating permit will have to submit a permit application and will make periodic compliance reports. These requirements parallel what many sources are already reporting to State and local permitting authorities and what States report to EPA. The effect of these regulations will be to subject more sources to such requirements, primarily those required to obtain a permit due to classification as a major source under the title III air toxics requirements or title I nonattainment requirements. The Act specifies that major sources cannot be exempted from the requirement to obtain a part 70 permit. Their inclusion in the Act is due to the necessity for more effective air quality management throughout the country.

Comments on the proposed Information Collection Request (ICR) were received from two Federal agencies, an industry group, and a research organization. All commenters felt that the cost and burden hour estimates in the proposed ICR were understated. Two commenters specifically identified major activities required of sources and permitting authorities in the permitting process which should be accounted for in the estimates. The need for guidance on general permits was also mentioned by two commenters. The final ICR has been updated to include estimates for two time periods: (1) The first three years (years 1–3) after EPA promulgates the part 70 regulations, as required by the Paperwork Reduction Act; and (2) the following five years (years 4–8), during which initial title V permits will be issued. Estimates for years 4–8 have been provided for informational purposes. EPA will be able to make better estimates of permit issuance costs for years 4–8 after State and local title V programs are reviewed and approved. It should be noted that the proposed ICR only addressed years 4–8, not the first three years after promulgation. Since the Act allows State and local agencies two years after promulgation of EPA regulations to submit programs to EPA, and it allows EPA a year to review and approve such programs, it was assumed in the final ICR that only permitting authorities will experience administration burden during years 1–3.

The analysis of years 4–8 in the final ICR has been updated to respond to comments received. The revised ICR incorporates several additional activities, including activities related to requirements for public notices, public hearings, permit revisions, and permit reopenings. The addition of these new activities, along with additional analysis of burden hour estimates by a group of permitting experts from the private and government sectors, have resulted in increased burden hour and cost estimates for permitting authorities and sources. For years 4–8, total annual cost estimates for permitting authorities have increased from $15 to $160 million, and for sources these estimates have increased from $115 million to $352 million annually. In regard to guidance for general permits, EPA has projects underway to develop model general permits for specific source categories.

The information collection requirements in this rule have been submitted for approval to the Office of Management and Budget (OMB) under the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.* These requirements are not effective until OMB approves them and a technical amendment to that effect is published in the **Federal Register**. The burden to all 112 State and local permitting authorities for this collection of information during the first three years after EPA promulgates the part 70 regulations, is estimated to total 1,944,880 hours equalling an annual average of 5,788 hours per permitting agency. This includes time for rule interpretation, analysis and/or revision to legislative authority, analysis and/or development of regulations, and development of a fee demonstration, standard application form, and a transition plan.

Send comments regarding the burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: Chief, Information Policy Branch (PM–223Y), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460; and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503, marked "Attention: Desk Officer for EPA."

The information collection requirements contained in 40 CFR part 70 have not been approved by the Office of Management and Budget (OMB) and are not effective until OMB has approved them.

Dated: June 25, 1992.

William K. Reilly,

Administrator.

List of Subjects in 40 CFR Part 70

Administrative practice and procedure, Air pollution control, Intergovernmental relations.

For 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, and revisions.
70.8 Permit review by the 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 State operating permit programs and the corresponding standards and procedures by which the Administrator will approve, oversee, and withdraw approval of State operating permit programs.

(b) All sources subject to these regulations shall have a permit to operate that assures compliance by the source with all applicable requirements. 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.

(c) Nothing in this part shall prevent a State, or interstate permitting authority, from establishing additional or more stringent requirements not inconsistent with this Act. The EPA will approve State program submittals to the extent that they are not inconsistent with the Act and these regulations. No permit, however, can be less stringent than necessary to meet all applicable requirements. In the case of Federal intervention in the permit process, the Administrator reserves the right to implement the State operating permit program, in whole or in part, or the Federal program contained in regulations promulgated under title V of the Act.

(d) 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 regulations promulgated under title IV of the Act (acid rain program).

(e) Issuance of State permits under this part may be coordinated with issuance of permits under the Resource Conservation and Recovery Act and under the Clean Water Act, whether issued by the State, the U.S. Environmental Protection Agency (EPA), or the U.S. Army 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.

Act means the Clean Air Act, as amended, 42 U.S.C. 7401, *et seq.*

Affected source shall have the meaning given to it in the regulations promulgated under title IV of the Act.

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.

Affected unit shall have the meaning given to it in the regulations promulgated under title IV of the Act.

Applicable requirement means all of the following as they apply to emissions units in a part 70 source (including requirements that have been promulgated or approved by EPA through rulemaking at the time of issuance but have future-effective compliance dates):

(1) Any standard or other requirement provided for in the applicable implementation plan approved or promulgated by EPA through rulemaking under title I of the Act that implements the relevant requirements of the Act, including any revisions to that plan promulgated in part 52 of this chapter;

(2) Any term or condition of any preconstruction permits issued pursuant to regulations approved or promulgated through rulemaking under title I, including parts C or D, of the Act;

(3) Any standard or other requirement under section 111 of the Act, including section 111(d);

(4) Any standard or other requirement under section 112 of the Act, including any requirement concerning accident prevention under section 112(r)(7) of the Act;

(5) Any standard or other requirement of the acid rain program under title IV of the Act or the regulations promulgated thereunder;

(6) Any requirements established pursuant to section 504(b) or section 114(a)(3) of the Act;

(7) Any standard or other requirement governing solid waste incineration, under section 129 of the Act;

(8) Any standard or other requirement for consumer and commercial products, under section 183(e) of the Act;

(9) Any standard or other requirement for tank vessels under section 183(f) of the Act;

(10) Any standard or other requirement of the program to control air pollution from outer continental shelf sources, under section 328 of the Act;

(11) Any standard or other requirement of the regulations promulgated to protect stratospheric ozone under title VI of the Act, unless the Administrator has determined that such requirements need not be contained in a title V permit; and

(12) Any national ambient air quality standard or increment or visibility requirement under part C of title I of the Act, but only as it would apply to temporary sources permitted pursuant to section 504(e) of the Act.

Designated representative shall have the meaning given to it in section 402(26) of the Act and the regulations promulgated thereunder.

Draft permit means the version of a permit for which the permitting authority offers public participation under § 70.7(h) or affected State review under § 70.8 of this part.

Emissions allowable under the permit means a federally enforceable permit

term or condition determined at issuance to be required by an applicable requirement that establishes an emissions limit (including a work practice standard) or a federally enforceable emissions cap that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject.

Emissions unit means any part or activity of a stationary source that emits or has the potential to emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act. This term is not meant to alter or affect the definition of the term "unit" for purposes of title IV of the Act.

The EPA or the Administrator means the Administrator of the EPA or his designee.

Final permit means the version of a part 70 permit issued by the permitting authority that has completed all review procedures required by §§ 70.7 and 70.8 of this part.

Fugitive emissions are those emissions which could not reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening.

General permit means a part 70 permit that meets the requirements of § 70.6(d).

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 are described in paragraph (1), (2), or (3) of this definition. For the purposes of defining "major source," a stationary source or group of stationary sources shall be considered part of a single industrial grouping if all of the pollutant emitting activities at such source or group of sources on contiguous or adjacent properties belong to the same Major Group (i.e., all have the same two-digit code) as described in the Standard Industrial Classification Manual, 1987.

(1) A major source under section 112 of the Act, which is defined as:

(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. Notwithstanding the preceding sentence, emissions from any oil or gas exploration or production well (with its associated equipment) and emissions from any pipeline compressor or pump station shall not be aggregated with emissions from other similar units, whether or not such units are in a contiguous area or under common control, to determine whether such units or stations are major sources; or

(ii) For radionuclides, "major source" 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 plants;

(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; or

(xxvii) All other stationary source categories regulated by a standard promulgated under section 111 or 112 of the Act, but only with respect to those air pollutants that have been regulated for that category;

(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 tpy or more of volatile organic compounds or oxides of nitrogen in areas classified as "marginal" or "moderate," 50 tpy or more in areas classified as "serious," 25 tpy or more in areas classified as "severe," and 10 tpy or more in areas classified as "extreme"; except that the references in this paragraph to 100, 50, 25 and 10 tpy 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 requirements under section 182(f) of the Act do not apply;

(ii) For ozone transport regions established pursuant to section 184 of the Act, sources with the potential to emit 50 tpy or more of volatile organic compounds;

(iii) For carbon monoxide nonattainment areas:

(A) That are classified as "serious," and

(B) 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 tpy or more of carbon monoxide; and

(iv) For particulate matter (PM–10) nonattainment areas classified as "serious," sources with the potential to emit 70 tpy or more of PM–10.

Part 70 permit or *permit* (unless the context suggests otherwise) means any permit or group of permits covering a part 70 source that is issued, renewed, amended, or revised pursuant to this part.

Part 70 program or *State program* means a program approved by the Administrator under this part.

Part 70 source means any source subject to the permitting requirements of this part, as provided in § § 70.3(a) and 70.3(b) of this part.

Permit modification means a revision to a part 70 permit that meets the requirements of § 70.7(e) of this part.

Permit program costs means all reasonable (direct and indirect) costs required to develop and administer a permit program, as set forth in § 70.9(b) of this part (whether such costs are incurred by the permitting authority or other State or local agencies that do not issue permits directly, but that support permit issuance or administration).

Permit revision means any permit modification or administrative permit amendment.

Permitting authority means either of the following:

(1) The Administrator, in the case of EPA-implemented programs; or

(2) The State air pollution control agency, local agency, other State agency, or other agency authorized by the Administrator to carry out a permit program under this part.

Potential to emit means the maximum capacity of a stationary source to emit any air pollutant under its physical and operational design. Any physical or operational limitation on the capacity of a source to emit an air 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 enforceable by the Administrator. 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 or the regulations promulgated thereunder.

Proposed permit means the version of a permit that the permitting authority proposes to issue and forwards to the Administrator for review in compliance with § 70.8.

Regulated air pollutant means the following:

(1) Nitrogen oxides or any volatile organic compounds;

(2) Any pollutant for which a national ambient air quality standard has been promulgated;

(3) Any pollutant that is subject to any standard promulgated under section 111 of the Act;

(4) Any Class I or II substance subject to a standard promulgated under or established by title VI of the Act; or

(5) Any pollutant subject to a standard promulgated under section 112 or other requirements established under section 112 of the Act, including sections 112(g), (j), and (r) of the Act, including the following:

(i) Any pollutant subject to requirements under section 112(j) of the Act. If the Administrator fails to promulgate a standard by the date established pursuant to section 112(e) of the Act, any pollutant for which a subject source would be major shall be considered to be regulated on the date 18 months after the applicable date established pursuant to section 112(e) of the Act; and

(ii) Any pollutant for which the requirements of section 112(g)(2) of the Act have been met, but only with respect to the individual source subject to section 112(g)(2) requirement.

Regulated pollutant (for presumptive fee calculation), which is used only for purposes of § 70.9(b)(2), means any "regulated air pollutant" except the following:

(1) Carbon monoxide;

(2) Any pollutant that is a regulated air pollutant solely because it is a Class I or II substance to a standard promulgated under or established by title VI of the Act; or

(3) Any pollutant that is a regulated air pollutant solely because it is subject to a standard or regulation under section 112(r) of the Act.

Renewal means the process by which a permit is reissued at the end of its term.

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 a duly authorized representative of such person if the representative is responsible for the overall operation of one or more manufacturing, production, or operating facilities applying for or subject to a permit and either:

(i) The facilities employ more than 250 persons or have gross annual sales or expenditures exceeding $25 million (in second quarter 1980 dollars); or

(ii) The delegation of authority to such representatives is approved in advance by the permitting authority;

(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); or

(4) For affected sources:

(i) The designated representative in so far as actions, standards, requirements, or prohibitions under title IV of the Act or the regulations promulgated thereunder are concerned; and

(ii) The designated representative for any other purposes under part 70.

Section 502(b)(10) changes are changes that contravene an express permit term. Such changes do not include changes that would violate applicable requirements or contravene federally enforceable permit terms and conditions that are monitoring (including test methods), recordkeeping, reporting, or compliance certification requirements.

State means any non-Federal permitting authority, including any local agency, interstate association, or statewide program. The term "State" also includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. Where such meaning is clear from the context, "State" shall have its conventional meaning. For purposes of the acid rain program, the term "State" shall be limited to authorities within the 48 contiguous States and the District of Columbia as provided in section 402(14) of the Act.

Stationary source means any building, structure, facility, or installation that emits or may emit any regulated air pollutant or any pollutant listed under section 112(b) of the Act.

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, the term "State" does not include local permitting authorities, but refers only to the entire State, Commonwealth, or Territory.

§ 70.3 Applicability.

(a) *Part 70 sources.* A State program with whole or partial approval under this part must provide for permitting of at least the following sources:

(1) Any major source;

(2) Any source, including an area source, subject to a standard, limitation, or other requirement under section 111 of the Act;

(3) Any source, including an area source, subject to a standard or other requirement under section 112 of the Act, except that a source is not required to obtain a permit solely because it is subject to regulations or requirements under section 112(r) of this Act;

(4) Any affected source; and

(5) Any source in a source category designated by the Administrator pursuant to this section.

(b) *Source category exemptions.* (1) All sources listed in paragraph (a) of this section that are not major sources, affected sources, or solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act, may be exempted by the State from the obligation to obtain a part 70 permit until such time as the Administrator completes a rulemaking to determine how the program should be structured for nonmajor sources and the

appropriateness of any permanent exemptions in addition to those provided for in paragraph (b)(4) of this section.

(2) In the case of nonmajor sources subject to a standard or other requirement under either section 111 or section 112 of the Act after July 21, 1992 publication, the Administrator will determine whether to exempt any or all such applicable sources from the requirement to obtain a part 70 permit at the time that the new standard is promulgated.

(3) 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 a permit under a part 70 program.

(4) Unless otherwise required by the State to obtain a part 70 permit, the following source categories are exempted from the obligation to obtain a part 70 permit:

(i) All sources and source categories that would be required to obtain a permit solely because they are subject to part 60, subpart AAA—Standards of Performance for New Residential Wood Heaters; and

(ii) All sources and source categories that would be required to obtain a permit solely because they are subject to part 61, subpart M—National Emission Standard for Hazardous Air Pollutants for Asbestos, § 61.145, Standard for Demolition and Renovation.

(c) *Emissions units and part 70 sources.* (1) For major sources, the permitting authority shall include in the permit all applicable requirements for all relevant emissions units in the major source.

(2) For any nonmajor source subject to the part 70 program under paragraph (a) or (b) of this section, the permitting authority shall include in the permit all applicable requirements applicable to emissions units that cause the source to be subject to the part 70 program.

(d) *Fugitive emissions.* Fugitive emissions from a part 70 source shall be included in the permit application and the part 70 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.

§ 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 part 70 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 or within such other period as authorized by the Administrator.

(b) *Elements of the initial program submission.* Any State that seeks to administer a program under this part shall submit to the Administrator a 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 permitting program, reasonably available evidence of their procedurally correct adoption, (including any notice of public comment and any significant comments received on the proposed part 70 program as requested by the Administrator), and copies of all applicable State or local statutes and regulations including those governing State administrative procedures that either authorize the part 70 program or restrict its implementation. The State shall include with the regulations any criteria used to determine insignificant activities or emission levels for purposes of determining complete applications consistent with § 70.5(c) of this part.

(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 states, 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 states 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 shall 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 and assure compliance with each applicable requirement and requirement of this part by all part 70 sources.

(ii) Incorporate monitoring, recordkeeping, reporting, and compliance certification requirements into part 70 permits consistent with § 70.6.

(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 standards under section 129(e) of the Act.

(iv) Issue permits for solid waste incineration units combusting municipal waste subject to standards under section 129(e) of the Act for a period not to exceed 12 years and review such permits at least every 5 years. No permit for a solid waste incineration unit may be issued by an agency, instrumentality or person that is also responsible, in whole or in part, for the design and construction or operation of the unit.

(v) Incorporate into permits all applicable requirements and requirements of this part.

(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 § 70.11.

(viii) Make available to the public any permit application, compliance plan, permit, and monitoring and compliance, certification report pursuant to section 503(e) of the Act, except for information entitled to confidential treatment pursuant to section 114(c) of the Act. The contents of a part 70 permit shall not be entitled to protection under section 115(c) of the Act.

(ix) Not issue a permit if the Administrator timely objects to its issuance pursuant to § 70.8(c) of this part or, if the permit has not already been issued, to § 70.8(d) of this part.

(x) Provide an opportunity for judicial review in State court of the final permit action by the applicant, any person who participated in the public participation process provided pursuant to § 70.7(h) of this part, and any other person who could obtain judicial review of such actions under State laws.

(xi) Provide that, solely for the purposes of obtaining judicial review in State court for failure to take final action, final permit action shall include the failure of the permitting authority to take final action on an application for a permit, permit renewal, or permit

revision within the time specified in the State program. If the State program allows sources to make changes subject to post hoc review [as set forth in §§ 70.7(e)(2) and (3) of this part], the permitting authority's failure to take final action within 90 days of receipt of an application requesting minor permit modification procedures (or 180 days for modifications subject to group processing requirements) must be subject to judicial review in State court.

(xii) Provide that the opportunity for judicial review described in paragraph (b)(3)(x) of this section shall be the exclusive means for obtaining judicial review of the terms and conditions of permits, and require that such petitions for judicial review must be filed no later than 90 days after the final permit action, or such shorter time as the State shall designate. Notwithstanding the preceding requirement, petitions for judicial review of final permit actions can be filed after the deadline designated by the State, only if they are based solely on grounds arising after the deadline for judicial review. Such petitions shall be filed no later than 90 days after the new grounds for review arise or such shorter time as the State shall designate. If the final permit action being challenged is the permitting authority's failure to take final action, a petition for judicial review may be filed any time before the permitting authority denies the permit or issues the final permit.

(xiii) Ensure that the authority of the State/local permitting Agency is not used to modify the acid rain program requirements.

(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; and

(ii) Relevant guidance issued by the State to assist in the implementation of its permitting program, including criteria for monitoring source compliance (e.g., inspection strategies).

(5) A complete description of the State's compliance tracking and enforcement program or reference to any agreement the State has with EPA that provides this information.

(6) A showing of adequate authority and procedures to determine within 60 days of receipt whether applications (including renewal applications) are complete, to request such other information as needed to process the application, and to take final action on complete applications within 18 months of the date of their submittal, except for initial permit applications, for which the permitting authority may take up to 3 years from the effective date of the program to take final action on the application, as provided for in the transition plan.

(7) A demonstration, consistent with § 70.9, that the permit fees required by the State program are sufficient to cover permit program costs.

(8) A statement that adequate personnel and funding have been made available to develop, administer, and enforce 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 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, the responsibilities of each agency must be delineated, their procedures for coordination must be set forth, and an agency shall be designated as a "lead agency" to facilitate communications between EPA and the other agencies having program responsibility.

(iii) A description of the 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 permit program costs for the first 4 years after approval, and a description of how the State plans to cover 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 either commenced or 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, consistent with § 70.5(a)(2), but the State has failed to issue or deny the renewal permit before the end of the term of the previous permit, then:

(i) The permit shall not expire until the renewal permit has been issued or denied and any permit shield that may be granted pursuant to § 70.6(f) may extend beyond the original permit term until renewal; or

(ii) All the terms and conditions of the permit including any permit shield that may be granted pursuant to § 70.6(f) shall remain in effect until the renewal permit has been issued or denied.

(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 that:

(i) Submittal of permit applications by all part 70 sources (including any sources subject to a partial or interim program) shall occur within 1 year after the effective date of the permit program;

(ii) Final action shall be taken on at least one-third of such applications annually over a period not to exceed 3 years after such effective date;

(iii) Any complete permit application containing an early reduction demonstration under section 112(i)(5) of the Act shall be acted on within 9 months of receipt of the complete application; and

(iv) Submittal of permit applications and the permitting of affected sources shall occur in accordance with the deadlines in title IV of the Act and the regulations promulgated thereunder.

(12) Provisions consistent with paragraphs (b)(12)(i) through (iii) of this section to allow changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and the changes do not exceed the emissions allowable under the permit (whether expressed therein as a rate of emissions or in the terms of total emissions): *Provided*, That the facility provides the Administrator and the permitting authority with written notification as required below in advance of the proposed changes, which shall be a minimum of 7 days, unless the permitting authority provides in its regulations a different time frame for emergencies. The source, permitting authority, and EPA shall attach each such notice to their copy of the relevant permit. The following provisions implement this requirement of an approvable part 70 permit program:

(i) The program shall allow permitted sources to make section 502(b)(10) changes without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act and 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).

(A) For each such change, the written notification required above shall include a brief description of the change within

the permitted facility, the date on which the change will occur, any change in emissions, and any permit term or condition that is no longer applicable as a result of the change.

(B) The permit shield described in § 70.6(f) of this part shall not apply to any change made pursuant to this paragraph (b)(12)(i) of this section.

(ii) The program may provide for permitted sources to trade increases and decreases in emissions in the permitted facility, where the applicable implementation plan provides for such emissions trades without requiring a permit revision and based on the 7-day notice prescribed in this paragraph (b)(12)(ii) of this section. This provision is available in those cases where the permit does not already provide for such emissions trading.

(A) Under this paragraph (b)(12)(ii) of this section, the written notification required above shall include such information as may be required by the provision in the applicable implementation plan authorizing the emissions trade, including at a minimum, when the proposed change will occur, a description of each such change, any change in emissions, the permit requirements with which the source will comply using the emissions trading provisions of the applicable implementation plan, and the pollutants emitted subject to the emissions trade. The notice shall also refer to the provisions with which the source will comply in the applicable implementation plan and that provide for the emissions trade.

(B) The permit shield described in § 70.6(f) of this part shall not extend to any change made under this paragraph (b)(12)(ii) of this section. Compliance with the permit requirements that the source will meet using the emissions trade shall be determined according to requirements of the applicable implementation plan authorizing the emissions trade.

(iii) The program shall require the permitting authority, if a permit applicant requests it, to issue permits that contain terms and conditions, including all terms required under § 70.6 (a) and (c) of this part to determine compliance, allowing for the trading of emissions increases and decreases in the permitted facility solely for the purpose of complying with a federally-enforceable emissions cap that is established in the permit independent of otherwise applicable requirements. The permit applicant shall include in its application proposed replicable procedures and permit terms that ensure the emissions trades are quantifiable and enforceable. The permitting authority shall not be required to include in the emissions trading provisions any emissions units for which emissions are not quantifiable or for which there are no replicable procedures to enforce the emissions trades. The permit shall also require compliance with all applicable requirements.

(A) Under this paragraph (b)(12)(iii) of this section, the written notification required above shall state when the change will occur and shall describe the changes in emissions that will result and how these increases and decreases in emissions will comply with the terms and conditions of the permit.

(B) The permit shield described in § 70.6(f) of this part may extend to terms and conditions that allow such increases and decreases in emissions.

(13) Provisions for adequate, streamlined, and reasonable procedures for expeditious review of permit revisions or modifications. The program may meet this requirement by using procedures that meet the requirements of § 70.7(e) or that are substantially equivalent to those provided in § 70.7(e) of this part.

(14) If a State allows changes that are not addressed or prohibited by the permit, other than those described in paragraph (b)(15) of this section, to be made without a permit revision, provisions meeting the requirements of paragraphs (b)(14) (i) through (iii) of this section. Although a State may, as a matter of State law, prohibit sources from making such changes without a permit revision, any such prohibition shall not be enforceable by the Administrator or by citizens under the Act unless the prohibition is required by an applicable requirement. Any State procedures implementing such a State law prohibition must include the requirements of paragraphs (b)(14) (i) through (iii) of this section.

(i) Each such change shall meet all applicable requirements and shall not violate any existing permit term or condition.

(ii) Sources must provide contemporaneous written notice to the permitting authority and EPA of each such change, except for changes that qualify as insignificant under the provisions adopted pursuant to § 70.5(c) of this part. Such written notice shall describe each such change, including the date, any change in emissions, pollutants emitted, and any applicable requirement that would apply as a result of the change.

(iii) The change shall not qualify for the shield under § 70.6(f) of this part.

(iv) The permittee shall keep a record describing changes made at the source that result in emissions of a regulated air pollutant subject to an applicable requirement, but not otherwise regulated under the permit, and the emissions resulting from those changes.

(15) Provisions prohibiting sources from making, without a permit revision, changes that are not addressed or prohibited by the part 70 permit, if such changes are subject to any requirements under title IV of the Act or are modifications under any provision of title I of the Act.

(16) Provisions requiring the permitting authority to implement the requirements of §§ 70.6 and 70.7 of this part.

(c) *Partial programs.* (1) The EPA may approve a partial program that applies to all part 70 sources within a limited geographic area (e.g., a local agency program covering all sources within the agency's jurisdiction). To be approvable, any partial program must, at a minimum, ensure compliance with all of the following applicable requirements, as they apply to the sources covered by the partial program:

(i) All requirements of title V of the Act and of part 70;

(ii) All applicable requirements of title IV of the Act and regulations promulgated thereunder which apply to affected sources; and

(iii) All applicable requirements of title I of the Act, including those established under sections 111 and 112 of the Act.

(2) Any partial permitting program, such as that of a local air pollution control agency, 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 (16) of this section.

(3) 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.

(4) Any partial program may obtain interim approval under paragraph (d) of this section if it substantially meets the requirements of this paragraph (c) of this section.

(d) *Interim approval.* (1) 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 be rule grant the program interim approval.

(2) 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 shall

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 part 70 program.

(3) The EPA will grant interim approval to any program if it meets each of the following minimum requirements:

(i) *Adequate fees.* The program must provide for collecting permit fees adequate for it to meet the requirements of § 70.9 of this part.

(ii) *Applicable requirements.* The program must provide for adequate authority to issue permits that assure compliance with the requirements of paragraph (c)(1) of this section for those major sources covered by the program.

(iii) *Fixed term.* The program must provide for fixed permit terms, consistent with paragraphs (b)(3) (iii) and (iv) of this section.

(iv) *Public participation.* The program must provide for adequate public notice of and an opportunity for public comment and a hearing on draft permits and revisions, except for modifications qualifying for minor permit modification procedures under § 70.7(e) of this part.

(v) *EPA and affected State review.* The program must allow EPA an opportunity to review each proposed permit, including permit revisions, and to object to its issuance consistent with § 70.8(c) of this part. The program must provide for affected State review consistent with § 70.8(b) of this part.

(vii) *Permit issuance.* The program must provide that the proposed permit will not be issued if EPA objects to its issuance.

(vii) *Enforcement.* The program must contain authority to enforce permits, including the authority to assess penalties against sources that do not comply with their permits or with the requirement to obtain a permit.

(viii) *Operational flexibility.* The program must allow changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the act and the changes do not exceed the emissions allowable under the permit, consistent with paragraph (b)(12) of this section.

(ix) *Streamlined procedures.* The program must provide for streamlined procedures for issuing and revising permits and determining expeditiously after receipt of a permit application or application for a permit revision whether such application is complete.

(x) *Permit application.* The program submittal must include copies of the permit application and reporting form(s) that the State will use in implementing the interim program.

(xi) *Alternative scenarios.* The program submittal must include provisions to insure that alternate scenarios requested by the source are included in the part 70 permit pursuant to § 70.6(a)(9) of this part.

(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**. Prior to such notice, the Administrator shall provide an opportunity for public comment on such approval or disapproval. Any EPA action disapproving a program, in whole or in part, shall include a statement of the revisions or modifications necessary to obtain full approval. The Administrator shall approve State programs that conform to the requirements of this part.

(1) Within 60 days of receipt by EPA of a State program submission, EPA will notify the State whether its submission is complete enough to warrant review by EPA for either full, partial, or interim approval. 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 1-year review period, the Administrator may extend the review period for no more than 1 year following receipt of the revised submission.

(3) In any notice granting interim or partial approval, the Administrator shall specify the changes or additions that must be made before the program can receive full approval and the conditions for implementation of the program until that time.

(f) *State response to EPA review of program.*—(1) *Disapproval.* The State shall submit to EPA program 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.

(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 part 70 program, including any 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, except that the Administrator will continue to issue phase I acid rain permits. After program approval, EPA shall retain jurisdiction over any permit (including any general permit) that it has issued unless arrangements have been made with the State to assume responsibility for these permits. Where EPA retains jurisdiction, it will continue to process permit appeals and modification requests, to conduct inspections, and to receive and review 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 for the State to collect appropriate fees, consistent with § 70.9 of this part.

(i) *Program revisions.* Either EPA or a State with an approved program may initiate a program revision. Program revision may be necessary when the relevant Federal or State statutes or regulations are modified or supplemented. The State shall keep EPA apprised of any proposed modifications to its basic statutory or regulatory authority or procedures.

(1) If the Administrator determines pursuant to § 70.10 of this part 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 State shall revise the program or its means of implementation 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 make 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.

(ii) After EPA receives a proposed program revision, it will publish in the **Federal Register** a public notice summarizing the proposed change and

provide a public comment period of at least 30 days.

(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 nonsubstantial program revisions may be given by a letter from the Administrator to the Governor or a designee.

(v) The Governor of any State with an approved part 70 program shall notify EPA whenever the Governor 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 and in a form specified by the Administrator, including computer-readable files to the extent practicable. If the information has been submitted to the State under a claim of confidentiality, the State may require the source to submit this information to the Administrator directly. Where the State submits information to the Administrator under a claim of confidentiality, the State shall submit that claim to EPA when providing information to EPA under this section. Any information obtained from a State or part 70 source accompanied by a claim of confidentiality will be treated in accordance with the regulations in part 2 of this chapter.

(2) The EPA will furnish to States with approved programs the information in its files that the State needs to implement its approved program. Any such information submitted to EPA under a claim of confidentiality will be subject to the regulations 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 program shall be subject to certain Federal sanctions as set forth in § 70.10 of this part.

§ 70.5 Permit applications.

(a) *Duty to apply.* For each part 70 source, the owner or operator shall submit a timely and complete permit application in accordance with this section.

(1) *Timely application.* (i) A timely application for a source applying for a part 70 permit for the first time is one that is submitted within 12 months after the source becomes subject to the permit program or on or before such earlier date as the permitting authority may establish.

(ii) Part 70 sources required to meet the requirements under section 112(g) of the Act, or to have a permit under the preconstruction review program approved into the applicable implementation plan under part C or D of title I of the Act, shall file a complete application to obtain the part 70 permit or permit revision within 12 months after commencing operation or on or before such earlier date as the permitting authority may establish. Where an existing part 70 permit would prohibit such construction or change in operation, the source must obtain a permit revision before commencing operation.

(iii) For purposes of permit renewal, a timely application is one that is submitted at least 6 months prior to the date of permit expiration, or such other longer time as may be approved by the Administrator that ensures that the term of the permit will not expire before the permit is renewed. In no event shall this time be greater than 18 months.

(iv) Applications for initial phase II acid rain permits shall be submitted to the permitting authority by January 1, 1996 for sulfur dioxide, and by January 1, 1998 for nitrogen oxides.

(2) *Complete application.* 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 required pursuant to paragraph (c) of this section, except that applications for permit revision need supply such information only if it is related to the proposed change. Information required under paragraph (c) of this section must be sufficient to evaluate the subject source and its application and to determine all applicable requirements. The program shall require that a responsible official certify the submitted information consistent with paragraph (d) of this section. Unless the permitting authority determines that an application is not complete within 60 days of receipt of the application, such application shall be deemed to be complete, except as otherwise provided in § 70.7(a)(4) of this part. If, while processing an application that has been determined or deemed to be complete, the permitting authority determines that additional information is necessary to evaluate or take final action on that application, it may request such information in writing and set a reasonable deadline for a response. The source's ability to operate without a permit, as set forth in § 70.7(b) of this part, shall be in effect from the date the application is determined or deemed to be complete until the final permit is issued, provided that the applicant submits any requested additional information by the deadline specified by the permitting authority.

(3) *Confidential information.* In the case where a source has submitted information to the State under a claim of confidentiality, the permitting authority may also require the source to submit a copy of such information directly to the Administrator.

(b) *Duty to supplement or correct application.* Any applicant who fails to submit any relevant facts or who has submitted incorrect information in a permit application shall, upon becoming aware of such failure or incorrect submittal, promptly submit such supplementary facts or corrected information. In addition, an applicant shall provide additional information as necessary to address any requirements that become applicable to the source after the date it filed a complete application but prior to release of a draft permit.

(c) *Standard application form and required information.* The State program under this part shall provide for a standard application form or forms. Information as described below for each emissions unit at a part 70 source shall be included in the application. The Administrator may approve as part of a State program a list of insignificant activities and emissions levels which need not be included in permit applications. However, for insignificant activities which are exempted because of size or production rate, a list of such insignificant activities must be included in the application. An application may not omit information needed to determine the applicability of, or to impose, any applicable requirement, or to evaluate the fee amount required under the schedule approved pursuant to § 70.9 of this part. The permitting authority may use discretion in developing application forms that best

meet program needs and administrative efficiency. The forms and attachments chosen, however, shall include the elements specified below:

(1) Identifying information, including company name and address (or plant name and address if different from the company name), owner's name and agent, and telephone number and names of plant site manager/contact.

(2) A description of the source's processes and products (by Standard Industrial Classification Code) including any associated with alternate scenario identified by the source.

(3) The following emission-related information:

(i) All emissions of pollutants for which the source is major, and all emissions of regulated air pollutants. A permit application shall describe all emissions of regulated air pollutants emitted from any emissions unit, except where such units are exempted under this paragraph (c) of this section. The permitting authority shall require additional information related to the emissions of air pollutants sufficient to verify which requirements are applicable to the source, and other information necessary to collect any permit fees owed under the fee schedule approved pursuant to § 70.9(b) of this part.

(ii) Identification and description of all points of emissions described in paragraph (c)(3)(i) of this section in sufficient detail to establish the basis for fees and applicability of requirements of the Act.

(iii) Emissions rate in tpy and in such terms as are necessary to establish compliance consistent with the applicable standard reference test method.

(iv) The following information to the extent it is needed to determine or regulate emissions: Fuels, fuel use, raw materials, production rates, and operating schedules.

(v) Identification and description of air pollution control equipment and compliance monitoring devices or activities.

(vi) Limitations on source operation affecting emissions or any work practice standards, where applicable, for all regulated pollutants at the part 70 source.

(vii) Other information required by any applicable requirement (including information related to stack height limitations developed pursuant to section 123 of the Act).

(viii) Calculations on which the information in paragraphs (c)(3 (i) through (vii) of this section is based.

(4) The following air pollution control requirements:

(i) Citation and description of all applicable requirements, and

(ii) Description of or reference to any applicable test method for determining compliance with each applicable requirement.

(5) Other specific information that may be necessary to implement and enforce other applicable requirements of the Act or of this part or to determine the applicability of such requirements.

(6) An explanation of any proposed exemptions from otherwise applicable requirements.

(7) Additional information as determined to be necessary by the permitting authority to define alternative operating scenarios identified by the source pursuant to § 70.6(a)(9) of this part or to define permit terms and conditions implementing § 70.4 (b) (12) or § 70.6 (a) (10) of this part.

(8) A compliance plan for all part 70 sources that contains all the following:

(i) A description of the compliance status of the source with respect to all applicable requirements.

(ii) A description as follows:

(A) For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

(B) For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis.

(C) For requirements for which the source is not in compliance at the time or permit issuance, a narrative description of how the source will achieve compliance with such requirements.

(iii) A compliance schedule as follows:

(A) For applicable requirements with which the source is in compliance, a statement that the source will continue to comply with such requirements.

(B) For applicable requirements that will become effective during the permit term, a statement that the source will meet such requirements on a timely basis. A statement that the source will meet in a timely manner applicable requirements that become effective during the permit term shall satisfy this provision, unless a more detailed schedule is expressly required by the applicable requirement.

(C) A schedule of compliance for sources that are not in compliance with all applicable requirements at the time of permit issuance. Such a schedule shall include a schedule of remedial measures, including an enforceable sequence of actions with milestones, leading to compliance with any applicable requirements for which the source will be in noncompliance at the time of permit issuance. This 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. Any such schedule of compliance shall be supplemental to, and shall not sanction noncompliance with, the applicable requirements on which it is based.

(iv) A schedule for submission of certified progress reports no less frequently than every 6 months for sources required to have a schedule of compliance to remedy a violation.

(v) 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, except as specifically superseded by regulations promulgated under title IV of the Act with regard to the schedule and method(s) the source will use to achieve compliance with the acid rain emissions limitations.

(9) Requirements for compliance certification, including the following:

(i) A certification of compliance with all applicable requirements by a responsible official consistent with paragraph (d) of this section and section 114(a)(3) of the Act;

(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 more frequently if specified by the underlying applicable requirement or by the permitting authority; and

(iv) A statement indicating the source's compliance status with any applicable enhanced monitoring and compliance certification requirements of the Act.

(10) The use of nationally-standardized forms for acid rain portions of permit applications and compliance plans, as required by regulations promulgated under title IV of the Act.

(d) Any application form, report, or compliance certification submitted pursuant to these regulations shall contain certification by a responsible official of truth, accuracy, and completeness. This certification and any other certification required under this part shall state that, based on information and belief formed after reasonable inquiry, the statements and information in the document are true, accurate, and complete.

§ 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 assure compliance with all applicable requirements at the time of permit issuance.

(i) The permit shall specify and reference the origin of and authority for each term or condition, and identify any difference in form as compared to the applicable requirement upon which the term or condition is based.

(ii) The permit shall state that, where an applicable requirement of the Act is more stringent than an applicable requirement of regulations promulgated under title IV of the Act, both provisions shall be incorporated into the permit and shall be enforceable by the Administrator.

(iii) If an applicable implementation plan allows a determination of an alternative emission limit at a part 70 source, equivalent to that contained in the plan, to be made in the permit issuance, renewal, or significant modification process, and the State elects to use such process, any permit containing such equivalency determination shall contain provisions to ensure that any resulting emissions limit has been demonstrated to be quantifiable, accountable, enforceable, and based on replicable procedures.

(2) *Permit duration.* The permitting authority shall issue permits for a fixed term of 5 years in the case of affected sources, and for a term not to exceed 5 years 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 standards under section 129(e) of the Act for a period not to exceed 12 years and shall review such permits at least every 5 years.

(3) *Monitoring and related recordkeeping and reporting requirements. (i)* Each permit shall contain the following requirements with respect to monitoring:

(A) All emissions monitoring and analysis procedures or test methods required under the applicable requirements, including any procedures and methods promulgated pursuant to sections 114(a)(3) or 504(b) of the Act;

(B) Where the applicable requirement does not require periodic testing or instrumental or noninstrumental monitoring (which may consist of recordkeeping designed to serve as monitoring), periodic monitoring sufficient to yield reliable data from the relevant time period that are representative of the source's compliance with the permit, as reported pursuant to paragraph (a)(3)(iii) of this section. Such monitoring requirements shall assure use of terms, test methods, units, averaging periods, and other statistical conventions consistent with the applicable requirement. Recordkeeping provisions may be sufficient to meet the requirements of this paragraph (a)(3)(i)(B) of this section; and

(C) As necessary, requirements concerning the use, maintenance, and, where appropriate, installation of monitoring equipment or methods.

(ii) With respect to recordkeeping, the permit shall incorporate all applicable recordkeeping requirements and require, where applicable, the following:

(A) Records of required 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 that performed the analyses;

(*4*) The analytical techniques or methods used;

(*5*) The results of such analyses; and

(*6*) The operating conditions as existing at the time of sampling or measurement;

(B) Retention of records of all required 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.

(iii) With respect to reporting, the permit shall incorporate all applicable reporting requirements and require the following:

(A) Submittal of reports of any required monitoring at least 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 § 70.5(d) of this part.

(B) Prompt reporting of deviations from permit requirements, including those attributable to upset conditions as defined in the permit, the probable cause of such deviations, and any corrective actions or preventive measures taken. The permitting authority shall define "prompt" in relation to the degree and type of deviation likely to occur and the applicable requirements.

(4) A permit condition prohibiting emissions exceeding any allowances that the source lawfully holds under title IV of the Act or the regulations promulgated thereunder.

(i) No permit revision shall be required for increases in emissions that are authorized by allowances acquired pursuant to the acid rain program, provided that such increases do not require a permit revision under any other applicable requirement.

(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 applicable requirement.

(iii) Any such allowance shall be accounted for according to the procedures established in regulations promulgated under title IV of the Act.

(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) The permittee must comply with all conditions of the part 70 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) The permit may be modified, revoked, reopened, and reissued, or terminated for cause. The filing of a request by the permittee for a permit modification, revocation and reissuance, or termination, or of a notification of planned changes or anticipated noncompliance does not stay any permit condition.

(iv) The permit does not convey any property rights of any sort, or any exclusive privilege.

(v) 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 to be kept by the permit or, for information claimed to

be confidential, the permittee may furnish such records directly to the Administrator along with a claim of confidentiality.

(7) A provision to ensure that a part 70 source pays fees to the permitting authority consistent with the fee schedule approved pursuant to § 70.9 of this part.

(8) *Emissions trading.* A provision stating that no permit revision shall be required, under any approved economic incentives, marketable permits, emissions trading and other similar programs or processes for changes that are provided for in the permit.

(9) Terms and conditions for reasonably anticipated operating scenarios identified by the source in its application as approved by the permitting authority. Such terms and conditions:

(i) Shall require the source, contemporaneously with making a change from one operating scenario to another, to record in a log at the permitted facility a record of the scenario under which it is operating;

(ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions under each such operating scenario; and

(iii) Must ensure that the terms and conditions of each such alternative scenario meet all applicable requirements and the requirements of this part.

(10) Terms and conditions, if the permit applicant requests them, for the trading of emissions increases and decreases in the permitted facility, to the extent that the applicable requirements provide for trading such increases and decreases without a case-by-case approval of each emissions trade. Such terms and conditions:

(i) Shall include all terms required under paragraphs (a) and (c) of this section to determine compliance;

(ii) May extend the permit shield described in paragraph (f) of this section to all terms and conditions that allow such increases and decreases in emissions; and

(iii) Must meet all applicable requirements and requirements of this part.

(b) *Federally-enforceable requirements.* (1) All terms and conditions in a part 70 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act.

(2) Notwithstanding paragraph (b)(1) of this section, the permitting authority shall specifically designate as not being federally enforceable under the Act any terms and conditions included in the permit that are not required under the Act or under any of its applicable requirements. Terms and conditions so designated are not subject to the requirements of §§ 70.7, 70.8, or of this part, other than those contained in this paragraph (b) of this section.

(c) *Compliance requirements.* All part 70 permits shall contain the following elements with respect to compliance:

(1) Consistent with paragraph (a)(3) of this section, compliance certification, testing, monitoring, 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 that meets the requirements of § 70.5(d) for this part.

(2) Inspection and entry requirements that require 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 to perform the following:

(i) Enter upon the permittee's premises where a part 70 source is located or emissions-related activity is 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 air pollution control equipment), practices, or operations regulated or required under the permit; and

(iv) As authorized by the Act, sample or monitor at reasonable times substances or parameters for the purpose of assuring compliance with the permit or applicable requirements.

(3) A schedule of compliance consistent with § 70.5(c)(8) of this part.

(4) Progress reports consistent with an applicable schedule of compliance and § 70.5(c)(8) of this part to be submitted at least semiannually, or at a more frequent period if specified in the applicable requirement or by the permitting authority. Such progress reports shall contain the following:

(i) Dates for achieving the activities, milestones, or compliance required in the schedule of compliance, and dates when such activities, milestones or compliance were achieved; and

(ii) An explanation of why any dates in the schedule of compliance were not or will not be met, and any preventive or corrective measures adopted.

(5) Requirements for compliance certification with terms and conditions contained in the permit, including emission limitations, standards, or work practices. Permits shall include each of the following:

(i) The frequency (not less than annually or such more frequent periods as specified in the applicable requirement or by the permitting authority) of submissions of compliance certifications;

(ii) In accordance with § 70.6(a)(3) of this part, a means for monitoring the compliance of the source with its emissions limitations, standards, and work practices;

(iii) A requirement that the compliance certification include the following:

(A) The identification of each term or condition of the permit that is the basis of the certification;

(B) The compliance status;

(C) Whether compliance was continuous or intermittent;

(D) The method(s) used for determining the compliance status of the source, currently and over the reporting period consistent with paragraph (a)(3) of this section; and

(E) Such other facts as the permitting authority may require to determine the compliance status of the source;

(iv) A requirement that all compliance certifications be submitted to the Administrator as well as to the permitting authority; and

(v) Such additional requirements as may be specified pursuant to sections 114(a)(3) and 504(b) of the Act.

(6) Such other provisions as the permitting authority may require.

(d) *General permits.* (1) The permitting authority may, after notice and opportunity for public participation provided under § 70.7(h) of this part, issue a general permit covering numerous similar sources. Any general permit shall comply with all requirements applicable to other part 70 permits and shall identify criteria by which sources may qualify for the general permit. To sources that qualify, the permitting authority shall grant the conditions and terms of the general permit. Notwithstanding the shield provisions of paragraph (f) of this section, the source shall be subject to enforcement action for operation without a part 70 permit if the source is later determined not to qualify for the conditions and terms of the general permit. General permits shall not be authorized for affected sources under the acid rain program unless otherwise provided in regulations promulgated under title IV of the Act.

(2) Part 70 sources that would qualify for a general permit must apply to the permitting authority for coverage under

the terms of the general permit or must apply for a part 70 permit consistent with § 70.5 of this part. The permitting authority may, in the general permit, provide for applications which deviate from the requirements of § 70.5 of this part, provided that such applications meet the requirements of title V of the Act, and include all information necessary to determine qualification for, and to assure compliance with, the general permit. Without repeating the public participation procedures required under § 70.7(h) of this part, the permitting authority may grant a source's request for authorization to operate under a general permit, but such a grant shall not be a final permit action for purposes of judicial review.

(e) *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 affected source shall be permitted as a temporary source. Permits for temporary sources shall include the following:

(1) Conditions that will assure compliance with all applicable requirements at all authorized locations;

(2) Requirements that the owner or operator notify the permitting authority at least 10 days in advance of each change in location; and

(3) Conditions that assure compliance with all other provisions of this section.

(f) *Permit shield.* (1) Except as provided in this part, the permitting authority may expressly include in a part 70 permit a provision stating that compliance with the conditions of the permit shall be deemed compliance with any applicable requirements as of the date of permit issuance, provided that:

(i) Such applicable requirements are included and are specifically identified in the permit; or

(ii) The permitting authority, in acting on the permit application or revision, determines in writing that other requirements specifically identified 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 paragraph 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; or

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

(g) *Emergency provision*—(1) *Definition.* An "emergency" means any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God, which situation requires immediate corrective action to restore normal operation, and that causes the source to exceed a technology-based emission limitation under the permit, due to unavoidable increases in emissions attributable to the emergency. An emergency shall not include noncompliance to the extent caused by improperly designed equipment, lack of preventative maintenance, careless or improper operation, or operator error.

(2) *Effect of an emergency.* An emergency constitutes an affirmative defense to an action brought for noncompliance with such technology-based emission limitations if the conditions of paragraph (g)(3) of this section are met.

(3) The affirmative defense of emergency shall be demonstrated through properly signed, contemporaneous operating logs, or other relevant evidence that:

(i) An emergency occurred and that the permittee can identify the cause(s) of the emergency;

(ii) The permitted facility was at the time being properly operated;

(iii) During the period of the emergency the permittee took all reasonable steps to minimize levels of emissions that exceeded the emission standards, or other requirements in the permit; and

(iv) The permittee submitted notice of the emergency to the permitting authority within 2 working days of the time when emission limitations were exceeded due to the emergency. This notice fulfills the requirement of paragraph (a)(3)(iii)(B) of this section. This notice must contain a description of the emergency, any steps taken to mitigate emissions, and corrective actions taken.

(4) In any enforcement proceeding, the permittee seeking to establish the occurrence of an emergency has the burden of proof.

(5) This provision is in addition to any emergency or upset provision contained in any applicable requirement.

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

(a) *Action on application.* (1) A permit, permit modification, or renewal may be issued only if all of the following condition have been met:

(i) The permitting authority has received a complete application for a permit, permit modification, or permit renewal, except that a complete application need not be received before issuance of a general permit under § 70.6(d) of this part;

(ii) Except for modifications qualifying for minor permit modification procedures under paragraphs (e) (2) and (3) of this section, the permitting authority has complied with the requirements for public participation under paragraph (h) of this section;

(iii) The permitting authority has complied with the requirements for notifying and responding to affected States under § 70.8(b) of this part;

(iv) The conditions of the permit provide for compliance with all applicable requirements and the requirements of this part; and

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

(2) Except as provided under the initial transition plan provided for under § 70.4(b)(11) of this part or under regulations promulgated under title IV of title V of the Act 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 a request for permit modification or renewal) within 18 months, or such lesser time approved by the Administrator, after receiving a complete application.

(3) The program shall also contain reasonable procedures to ensure priority is given to taking 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 requests additional information or otherwise notifies the applicant of incompleteness within 60 days of receipt of an application, the application shall be deemed complete. For modifications processed through minor permit modification procedures, such as those in paragraphs (e) (2) and (3) of this section, the State program need not require a completeness determination.

(5) The permitting authority shall provide 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 to any other person who requests it.

(6) The submittal of a complete application shall not affect the requirement that any source have a preconstruction permit under title I of the Act.

(b) *Requirement for a permit.* Except as provided in the following sentence, § 70.4(b)(12)(i), and paragraphs (e) (2)(v) and (3)(v) of this section, 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 part 70 program. The program shall provide that, if a part 70 source submits a timely and complete application for permit issuance (including for 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 this section. This protection shall cease to apply if, subsequent to the completeness determination made pursuant to paragraph (a)(4) of this section, and as required by § 70.5(a)(2) of this part, the applicant fails to submit by the deadline specified in writing by the permitting authority any additional information identified as being needed to process the application.

(c) *Permit renewal and expiration.* (1) The program shall provide that:

(i) Permits being renewed are subject to the same procedural requirements, including those for public participation, affected State and EPA review, that apply to initial permit issuance; and

(ii) Permit expiration terminates the source's right to operate unless a timely and complete renewal application has been submitted consistent with paragraph (b) of this section and § 70.5(a)(1)(iii) of this part.

(2) 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 or revoke and reissue the permit.

(d) *Administrative permit amendments.* (1) An "administrative permit amendment" is a permit revision that:

(i) Corrects typographical errors;

(ii) 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;

(iii) Requires more frequent monitoring or reporting by the permittee;

(iv) 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 permittee has been submitted to the permitting authority;

(v) Incorporates into the part 70 permit the requirements from preconstruction review permits authorized under an EPA-approved program, provided that such a program meets procedural requirements substantially equivalent to the requirements of §§ 70.7 and 70.8 of this part that would be applicable to the change if it were subject to review as a permit modification, and compliance requirements substantially equivalent to those contained in § 70.6 of this part; or

(vi) Incorporates any other type of change which the Administrator has determined as part of the approved part 70 program to be similar to those in paragraphs (d)(1) (i) through (iv) of this section.

(2) Administrative permit amendments for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Act.

(3) *Administrative permit amendment procedures.* An administrative permit amendment may be made by the permitting authority consistent with the following:

(i) The permitting authority shall take no more than 60 days from receipt of a request for an administrative permit amendment to take final action on such request, and may incorporate such changes without providing notice to the public or affected States 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.

(iii) The source may implement the changes addressed in the request for an administrative amendment immediately upon submittal of the request.

(4) The permitting authority may, upon taking final action granting a request for an administrative permit amendment, allow coverage by the permit shield in § 70.6(f) for administrative permit amendments made pursuant to paragraph (d)(1)(v) of this section which meet the relevant requirements of §§ 70.6, 70.7, and 70.8 for significant permit modifications.

(e) *Permit modification.* A permit modification is any revision to a part 70 permit that cannot be accomplished under the program's provisions for administrative permit amendments under paragraph (d) of this section. A permit modification for purposes of the acid rain portion of the permit shall be governed by regulations promulgated under title IV of the Act.

(1) *Program description.* The State shall provide adequate, streamlined, and reasonable procedures for expeditiously processing permit modifications. The State may meet this obligation by adopting the procedures set forth below or ones substantially equivalent. The State may also develop different procedures for different types of modifications depending on the significance and complexity of the requested modification, but EPA will not approve a part 70 program that has modification procedures that provide for less permitting authority, EPA, or affected State review or public participation than is provided for in this part.

(2) *Minor permit modification procedures*—(i) *Criteria.*—(A) Minor permit modification procedures may be used only for those permit modifications that:

(1) Do not violate any applicable requirement;

(2) Do not involve significant changes to existing monitoring, reporting, or recordkeeping requirements in the permit;

(3) Do not require or change a case-by-case determination of an emission limitation or other standard, or a source-specific determination for temporary sources of ambient impacts, or a visibility or increment analysis;

(4) Do not seek to establish or change a permit term or condition for which there is no corresponding underlying applicable requirement and that the source has assumed to avoid an applicable requirement to which the source would otherwise be subject. Such terms and conditions include:

(A) A federally enforceable emissions cap assumed to avoid classification as a modification under any provision of title I; and

(B) An alternative emissions limit approved pursuant to regulations promulgated under section 112(i)(5) of the Act;

(5) Are not modifications under any provision of title I of the Act; and

(6) Are not required by the State program to be processed as a significant modification.

(B) Notwithstanding paragraphs (e)(2)(i)(A) and (e)(3)(i) of this section,

minor permit modification procedures may be used for permit modifications involving the use of economic incentives, marketable permits, emissions trading, and other similar approaches, to the extent that such minor permit modification procedures are explicitly provided for in an applicable implementation plan or in applicable requirements promulgated by EPA.

(ii) *Application.* An application requesting the use of minor permit modification procedures shall meet the requirements of § 70.5(c) of this part and shall include the following:

(A) A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs;

(B) The source's suggested draft permit;

(C) Certification by a responsible official, consistent with § 70.5(d), that the proposed modification meets the criteria for use of minor permit modification procedures and a request that such procedures be used; and

(D) Completed forms for the permitting authority to use to notify the Administrator and affected States as required under § 70.8.

(iii) *EPA and affected State notification.* Within 5 working days of receipt of a complete permit modification application, the permitting authority shall meet its obligation under § 70.8 (a)(1) and (b)(1) to notify the Administrator and affected States of the requested permit modification. The permitting authority promptly shall send any notice required under § 70.8(b)(2) to the Administrator.

(iv) *Timetable for issuance.* The permitting authority may not issue a final permit modification until after EPA's 45-day review period or until EPA has notified the permitting authority that EPA will not object to issuance of the permit modification, whichever is first, although the permitting authority can approve the permit modification prior to that time. Within 90 days of the permitting authority's receipt of an application under minor permit modification procedures or 15 days after the end of the Administrator's 45-day review period under § 70.8(c), whichever is later, the permitting authority shall:

(A) Issue the permit modification as proposed;

(B) Deny the permit modification application;

(C) Determine that the requested modification does not meet the minor permit modification criteria and should be reviewed under the significant modification procedures; or

(D) Revise the draft permit modification and transmit to the Administrator the new proposed permit modification as required by § 70.8(a) of this part.

(v) *Source's ability to make change.* The State program may allow the source to make the change proposed in its minor permit modification application immediately after it files such application. After the source makes the change allowed by the preceding sentence, and until the permitting authority takes any of the actions specified in paragraphs (e)(2)(v) (A) through (C) of this section, the source must comply with both the applicable requirements governing the change and the proposed permit terms and conditions. During this time period, the source need not comply with the existing permit terms and conditions it seeks to modify. However, if the source fails to comply with its proposed permit terms and conditions during this time period, the existing permit terms and conditions it seeks to modify may be enforced against it.

(vi) *Permit shield.* The permit shield under § 70.6(f) of this part may not extend to minor permit modifications.

(3) *Group processing of minor permit modifications.* Consistent with this paragraph, the permitting authority may modify the procedure outlined in paragraph (e)(2) of this section to process groups of a source's applications for certain modifications eligible for minor permit modification processing.

(i) *Criteria.* Group processing of modifications may be used only for those permit modifications:

(A) That meet the criteria for minor permit modification procedures under paragraph (e)(2)(i)(A) of this section; and

(B) That collectively are below the threshold level approved by the Administrator as part of the approved program. Unless the State sets an alternative threshold consistent with the criteria set forth in paragraphs (e)(3)(i)(B) *(1)* and *(2)* of this section, this threshold shall be 10 percent of the emissions allowed by the permit for the emissions unit for which the change is requested, 20 percent of the applicable definition of major source in § 70.2 of this part, or 5 tons per year, whichever is least. In establishing any alternative threshold, the State shall consider:

(1) Whether group processing of amounts below the threshold levels reasonably alleviates severe administrative burdens that would be imposed by immediate permit modification review, and

(2) Whether individual processing of changes below the threshold levels would result in trivial environmental benefits.

(ii) *Application.* An application requesting the use of group processing procedures shall meet the requirements of § 70.5(c) of this part and shall include the following:

(A) A description of the change, the emissions resulting from the change, and any new applicable requirements that will apply if the change occurs.

(B) The source's suggested draft permit.

(C) Certification by a responsible official, consistent with § 70.5(d) of this part, that the proposed modification meets the criteria for use of group processing procedures and a request that such procedures be used.

(D) A list of the source's other pending applications awaiting group processing, and a determination of whether the requested modification, aggregated with these other applications, equals or exceeds the threshold set under paragraph (e)(3)(i)(B) of this section.

(E) Certification, consistent with § 70.5(d) of this part, that the source has notified EPA of the proposed modification. Such notification need only contain a brief description of the requested modification.

(F) Completed forms for the permitting authority to use to notify the Administrator and affected States as required under § 70.8 of this part.

(iii) *EPA and affected State notification.* On a quarterly basis or within 5 business days of receipt of an application demonstrating that the aggregate of a source's pending applications equals or exceeds the threshold level set under paragraph (e)(3)(i)(B) of this section, whichever is earlier, the permitting authority promptly shall meet its obligations under §§ 70.8 (a)(1) and (b)(1) to notify the Administrator and affected States of the requested permit modifications. The permitting authority shall send any notice required under § 70.8(b)(2) of this part to the Administrator.

(iv) *Timetable for issuance.* The provisions of paragraph (e)(2)(iv) of this section shall apply to modifications eligible for group processing, except that the permitting authority shall take one of the actions specified in paragraphs (e)(2)(iv) (A) through (D) of this section within 180 days of receipt of the application or 15 days after the end of the Administrator's 45-day review period under § 70.8(c) of this part, whichever is later.

(v) *Source's ability to make change.* The provisions of paragraph (e)(2)(v) of

this section shall apply to modifications eligible for group processing.

(vi) *Permit shield.* The provisions of paragraph (e)(2)(vi) of this section shall also apply to modifications eligible for group processing.

(4) *Significant modification procedures*—(i) *Criteria.* Significant modification procedures shall be used for applications requesting permit modifications that do not qualify as minor permit modifications or as administrative amendments. The State program shall contain criteria for determining whether a change is significant. At a minimum, every significant change in existing monitoring permit terms or conditions and every relaxation of reporting or recordkeeping permit terms or conditions shall be considered significant. Nothing herein shall be construed to preclude the permittee from making changes consistent with this part that would render existing permit compliance terms and conditions irrelevant.

(ii) The State program shall provide that significant permit modifications shall meet all requirements of this part, including those for applications, public participation, review by affected States, and review by EPA, as they apply to permit issuance and permit renewal. The permitting authority shall design and implement this review process to complete review on the majority of significant permit modifications within 9 months after receipt of a complete application.

(f) *Reopening for cause.* (1) Each issued permit shall include provisions specifying the conditions under which the permit will be reopened prior to the expiration of the permit. A permit shall be reopened and revised under any of the following circumstances:

(i) Additional applicable requirements under the Act become applicable to a major part 70 source with a remaining permit term of 3 or more years. Such a reopening shall be completed not later than 18 months after promulgation of the applicable requirement. No such reopening is required if the effective date of the requirement is later than the date on which the permit is due to expire, unless the original permit or any of its terms and conditions has been extended pursuant to § 70.4(b)(10) (i) or (ii) of this part.

(ii) Additional requirements (including excess emissions requirements) become applicable to an affected source under the acid rain program. Upon approval by the Administrator, excess emissions offset plans shall be deemed to be incorporated into the permit.

(iii) The permitting authority or EPA determines that the permit contains a material mistake or that inaccurate statements were made in establishing the emissions standards or other terms or conditions of the permit.

(iv) The Administrator or the permitting authority determines that the permit must be revised or revoked to assure compliance with the applicable requirements.

(2) Proceedings to reopen and issue 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. Such reopening shall be made as expeditiously as practicable.

(3) Reopenings under paragraph (f)(1) of this section shall not be initiated before a notice of such intent is provided to the 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.

(g) *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 (f) of this section, the Administrator will notify the permitting authority and the permittee of such finding in writing.

(2) The permitting authority shall, within 90 days after receipt of such 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 will review the proposed determination from the permitting authority within 90 days of receipt.

(4) The permitting authority shall have 90 days from receipt of an EPA objection to resolve any objection that EPA makes and to terminate, modify, or revoke and reissue the permit in accordance with the Administrator's objection.

(5) If the permitting authority fails to submit a proposed determination pursuant to paragraph (g)(2) of this section or fails to resolve any objection pursuant to paragraph (g)(4) of this section, the Administrator will 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 paragraphs (g) (1) through (4) of this section.

(ii) Providing the permittee an opportunity for comment on the Administrator's proposed action and an opportunity for a hearing.

(h) *Public participation.* Except for modifications qualifying for minor permit modification procedures, all permit proceedings, including initial permit issuance, significant modifications, and renewals, shall provide adequate procedures for public notice including offering an opportunity for public comment and a hearing on the draft permit. These procedures shall include the following:

(1) Notice shall be given: by publication in a newspaper of general circulation in the area where the source is located or in a State publication designed to give general public notice; to persons on a mailing list developed by the permitting authority, including those who request in writing to be on the list; and by other means if necessary to assure adequate notice to the affected public;

(2) The notice shall identify the affected facility; the name and address of the permittee; the name and address of the permitting authority processing the permit; the activity or activities involved in the permit action; the emissions change involved in any permit modification; the name, address, and telephone number of a person from whom interested persons may obtain additional information, including copies of the permit draft, the application, all relevant supporting materials, including those set forth in § 70.4(b)(3)(viii) of this part, and all other materials available to the permitting authority that are relevant to the permit decision; a brief description of the comment procedures required by this part; and the time and place of any hearing that may be held, including a statement of procedures to request a hearing (unless a hearing has already been scheduled);

(3) The permitting authority shall provide such notice and opportunity for participation by affected States as is provided for by § 70.8 of this part;

(4) *Timing.* The permitting authority shall provide at least 30 days for public comment and shall give notice of any public hearing at least 30 days in advance of the hearing.

(5) The permitting authority shall keep a record of the commenters and also of the issues raised during the public participation process so that the Administrator may fulfill his obligation under section 505(b)(2) of the Act to determine whether a citizen petition

may be granted, and such records shall be available to the public.

§ 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 provide to the Administrator a copy of each permit application (including any application for permit modification), each proposed permit, and each final part 70 permit. The applicant may be required by the permitting authority to provide a copy of the permit application (including the compliance plan) directly to the Administrator. Upon agreement with the Administrator, the permitting authority may submit to the Administrator a permit application summary form and any relevant portion of the permit application and compliance plan, in place of the complete permit application and compliance plan. To the extent practicable, the preceding information shall be provided in computer-readable format compatible with EPA's national database management system.

(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) By regulation for a category of sources nationwide, or

(ii) At the time of approval of a State program for a category of sources covered by an individual permitting program.

(3) Each 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) *Review by affected States.* (1) The permit program shall provide that the permitting authority give notice of each draft permit to any affected State on or before the time that the permitting authority provides this notice to the public under § 70.7(h) of this part, except to the extent § 70.7(e) (2) or (3) of this part requires the timing of the notice to be different.

(2) The permit program shall provide that the permitting authority, as part of the submittal of the proposed permit to the Administrator [or as soon as possible after the submittal for minor permit modification procedures allowed under § 70.7(e) (2) or (3) of this part], 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 or affected State review period. The notice shall include the permitting authority's reasons for not accepting any such recommendation. The permitting authority is not required to accept recommendations that are not based on applicable requirements or the requirements of this part.

(c) *EPA objection.* (1) The Administrator will object to the issuance of any proposed permit determined by the Administrator not to be in compliance with applicable requirements or requirements under this part. No permit for which an application must be transmitted to the Administrator under paragraph (a) of this section shall be issued if the Administrator objects to its issuance in writing within 45 days of receipt of the proposed permit and all necessary supporting information.

(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 will 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) Comply with paragraphs (a) or (b) of this section;

(ii) Submit any information necessary to review adequately the proposed permit; or

(iii) Process the permit under the procedures approved to meet § 70.7(h) of this part except for minor permit modifications.

(4) If the permitting authority fails, within 90 days after the date of an objection under paragraph (c)(1) of this section, to revise and submit a proposed permit in response to the objection, the Administrator will issue or deny the permit in accordance with the requirements of the Federal program promulgated under title V of this Act.

(d) *Public petitions to the Administrator.* The program shall provide that, if the Administrator does not object in writing under 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 make such objection. 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 § 70.7(h) 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. If the Administrator objects to the permit as a result of a petition filed under this paragraph, the permitting authority shall not issue the permit until EPA's objection has been resolved, except that a petition for review does not stay the effectiveness of a permit or its requirements if the permit was issued after the end of the 45-day review period and prior to an EPA objection. If the permitting authority has issued a permit prior to receipt of an EPA objection under this paragraph, the Administrator will modify, terminate, or revoke such permit, and shall do so consistent with the procedures in § 70.7(g) (4) or (5) (i) and (ii) of this part except in unusual circumstances, and the permitting authority may thereafter issue only a revised permit that satisfies EPA's objection. In any case, the source will not be in violation of the requirement to have submitted a timely and complete application.

(e) *Prohibition on default issuance.* Consistent with § 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 part 70 permit or renewal 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 and affected States.

§ 70.9 Fee determination and certification.

(a) *Fee Requirement.* The State program shall require that the owners or operators of part 70 sources pay annual fees, or the equivalent over some other period, that are sufficient to cover the permit program costs and shall ensure that any fee required by this section will be used solely for permit program costs.

(b) *Fee schedule adequacy.* (1) The State program shall establish a fee schedule that results in the collection and retention of revenues sufficient to cover the permit program costs. These costs include, but are not limited to, the costs of the following activities as they relate to the operating permit program for stationary sources:

(i) Preparing generally applicable regulations or guidance regarding the permit program or its implementation or enforcement;

(ii) Reviewing and acting on any application for a permit, permit revision, or permit renewal, including the development of an applicable requirement as part of the processing of a permit, or permit revision or renewal;

(iii) General administrative costs of running the permit program, including the supporting and tracking of permit applications, compliance certification, and related data entry;

(iv) Implementing and enforcing the terms of any part 70 permit (not including any court costs or other costs associated with an enforcement action), including adequate resources to determine which sources are subject to the program;

(v) Emissions and ambient monitoring;

(vi) Modeling, analyses, or demonstrations;

(vii) Preparing inventories and tracking emissions; and

(viii) Providing direct and indirect support to sources under the Small Business Stationary Source Technical and Environmental Compliance Assistance Program contained in section 507 of the Act in determining and meeting their obligations under this part.

(2)(i) The Administrator will presume that the fee schedule meets the requirements of paragraph (b)(1) of this section if it would result in the collection and retention of an amount not less than $25 per year [as adjusted pursuant to the criteria set forth in paragraph (b)(2)(iv) of this section] times the total tons of the actual emissions of each regulated pollutant (for presumptive fee calculation) emitted from part 70 sources.

(ii) The State may exclude from such calculation:

(A) The actual emissions of sources for which no fee is required under paragraph (b)(4) of this section;

(B) The amount of a part 70 source's actual emissions of each regulated pollutant (for presumptive fee calculation) that the source emits in excess of four thousand (4,000) tpy;

(C) A part 70 source's actual emissions of any regulated pollutant (for presumptive fee calculation), the emissions of which are already included in the minimum fees calculation; or

(D) The insignificant quantities of actual emissions not required in a permit application pursuant to § 70.5(c).

(iii) "Actual emissions" means the actual rate of emissions in tons per year of any regulated pollutant (for presumptive fee calculation) emitted from a part 70 source over the preceding calendar year or any other period determined by the permitting authority to be representative of normal source operation and consistent with the fee schedule approved pursuant to this section. 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 or such other time period established by the permitting authority pursuant to the preceding sentence.

(iv) The program shall provide that the $25 per ton per year used to calculate the presumptive minimum amount to be collected by the fee schedule, as described in paragraph (b)(2)(i) of this section, shall be increased each year by the percentage, if any, by which the Consumer Price Index for the most recent calendar year ending before the beginning of such year exceeds the Consumer Price Index for the calendar year 1989.

(A) 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.

(B) The revision of the Consumer Price Index which is most consistent with the Consumer Price Index for the calendar year 1989 shall be used.

(3) The State program's fee schedule may include emissions fees, application fees, service-based fees or other types of fees, or any combination thereof, to meet the requirements of paragraph (b)(1) or (b)(2) of this section. Nothing in the provisions of this section shall require a permitting authority to calculate fees on any particular basis or in the same manner for all part 70 sources, all classes or categories of part 70 sources, or all regulated air pollutants, provided that the permitting authority collects a total amount of fees sufficient to meet the program support requirements of paragraph (b)(1) of this section.

(4) Notwithstanding any other provision of this section, during the years 1995 through 1999 inclusive, no fee for purposes of title V shall be required to be paid with respect to emissions from any affected unit under section 404 of the Act.

(5) The State shall provide a detailed accounting that its fee schedule meets the requirements of paragraph (b)(1) of this section if:

(i) The State sets a fee schedule that would result in the collection and retention of an amount less than that presumed to be adequate under paragraph (b)(2) of this section; or

(ii) The Administrator determines, based on comments rebutting the presumption in paragraph (b)(2) of this section or on his own initiative, that there are serious questions regarding whether the fee schedule is sufficient to cover the permit program costs.

(c) *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 meet the requirements of this section.

(d) *Use of Required Fee Revenue.* The Administrator will not approve a demonstration as meeting the requirements of this section, unless it contains an initial accounting (and periodic updates as required by the Administrator) of how required fee revenues are used solely 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.* (1) If a State fails to submit a fully-approvable whole part 70 program, or a required revision thereto, in conformance with the provisions of § 70.4, or if an interim approval expires and the Administrator has not approved a whole part 70 program:

(i) At any time the Administrator may apply any one of the sanctions specified in section 179(b) of the Act; and

(ii) Eighteen months after the date required for submittal or the date of disapproval by the Administrator, the Administrator will 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.

(2) If full approval of a whole part 70 program has not taken place within 2 years after the date required for such submission, the Administrator will promulgate, administer, and enforce a whole program or a partial program as appropriate for such State.

(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 of 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 will notify the permitting authority of the determination and the

reasons therefore. The Administrator will publish such notice in the **Federal Register.**

(2) If, 90 days after issuing the notice under paragraph (c)(1) of this section, the permitting authority fails to take significant action to assure adequate administration and enforcement of the program, the Administrator may take one or more of the following actions:

(i) Withdraw approval of the program or portion thereof using procedures consistent with § 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 Federal program under title V of the Act.

(3) Whenever the Administrator has made the finding and issued the notice under paragraph (c)(1) of this section, the Administrator will apply the sanctions under section 179(b) of the Act 18 months after that notice. These sanctions will 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 (c)(1) of this section, the Administrator will, unless the State has corrected such deficiency within 18 months after the date of such finding, promulgate, administer, and enforce, a whole or partial program 2 years after the date of such finding.

(5) Nothing in this section shall limit the Administrator's authority to take any enforcement action against a source for violations of the Act or of a permit issued under rules adopted pursuant to this section in a State that has been delegated responsibility by EPA to implement a Federal program promulgated under title V of the Act.

(6) Where a whole State program consists of an aggregate of partial programs, and one or more partial programs fails to be fully approved or implemented, the Administrator may apply sanctions only in those areas for which the State failed to submit or implement an approvable program.

(c) *Criteria for withdrawal of State programs.* (1) The Administrator may, in accordance with the procedures of paragraph (c) of this section, withdraw program approval in whole or in part whenever 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 any of the following:

(i) Where the permitting authority's legal authority no longer meets the requirements of this part, including the following:

(A) The permitting authority fails to promulgate or enact new authorities when necessary; or

(B) The State legislature or a court strikes down or limits State authorities to administer or enforce the State program.

(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 of § 70.7(h) of this part;

(D) Failure to collect, retain, or allocate fee revenue consistent with § 70.9 of this part; or

(E) Failure in a timely way to act on any applications for permits including renewals and revisions.

(iii) Where the State fails to enforce the part 70 program consistent 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 and fines and collect all assessed penalties and fines; or

(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 § 70.9 of this part, or if the Administrator makes a determination under paragraph (c)(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 to cover the Administrator's costs of administering the provisions of the permitting program promulgated by the Administrator, without regard to the requirements of § 70.9 of this part.

§ 70.11 Requirements for enforcement authority.

All programs to be approved under this part must contain the following provisions:

(a) *Enforcement authority.* Any agency administering a program shall have the following enforcement authority to address violations of program requirements by part 70 sources:

(1) To restrain or enjoin immediately and effectively any person by order or by suit in court from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment to the public health or welfare, or the environment.

(2) To seek injunctive relief in court 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 applicable requirement; 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 per day per 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 requirement; any permit condition; or any fee or filing requirement. These fines shall be recoverable in a maximum amount of not less than $10,000 per day per violation.

(iii) Criminal fines shall be recoverable against any person who knowingly makes any false material statement, representation or certification in any form, in any notice or report required by a permit, or who knowingly renders inaccurate any required monitoring device or method. These fines shall be recoverable in a maximum amount of not less than $10,000 per day per violation.

(b) *Burden of proof.* 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 intent required under the Act.

(c) *Appropriateness of penalties and fines.* A civil penalty or criminal fine assessed, sought, or agreed upon by the permitting authority under paragraph (a)(3) of this section shall be appropriate to the violation.

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Tuesday
July 21, 1992

Part III

Environmental Protection Agency

40 CFR Parts 51, 52, and 60

Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; and Standards for Performance for New Stationary Sources; Rule

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51, 52, and 60

[FRL 4137-7]

RIN 2060-AD62

Requirements for Preparation, Adoption and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans; Standards of Performance for New Stationary Sources

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The EPA today adopts a broad NSR exclusion for utility pollution control projects, adhering to its policy that new source regulations already generally exclude coverage of pollution control projects undertaken at electric utility units. Similarly, EPA is today adopting an "actual to future actual" methodology for determining whether all other nonroutine physical or operational changes at utilities (other than the replacement of a unit or addition of a new unit) are subject to NSR under either prevention of significant deterioration (PSD) or nonattainment provisions.

In addition, EPA is also modifying its regulations implementing the modification provisions of the title I new source performance standards (NSPS) program to provide that a utility may use for its pre-change baseline the highest hourly emissions rate achievable at any time during the 5 years prior to the physical or operational change. In addition, EPA is modifying its regulations to reflect changes made by Congress in the 1990 Amendments to the applicability of new source requirements to clean coal technology (CCT) and repowering projects, and to "very clean" units.

DATES: This rule takes effect on July 21, 1992. Under section 307(b)(1) of the CAA, petitions for judicial review must be filed on or before September 21, 1992, in the U.S. Court of Appeals for the DC Circuit.

ADDRESSES: Material relevant to this rulemaking may be found in Public Docket A-90-06. This docket is located in U.S. EPA's Central Docket Section (LE-131), Waterside Mall, M-1500, 401 M Street SW., Washington, DC 20460. The docket may be inspected between 8 a.m. and 3 p.m. on weekdays and a reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: Mr. David A. Solomon at (919) 541-5375 or Mr. Larry Elmore at (919) 541-5433, New Source Review Section (MD-15), Office of Air Quality Planning and Standards, U.S. EPA, Research Triangle Park, North Carolina 27711.

SUPPLEMENTARY INFORMATION: The following outline reflects the organization of today's notice:

I. Introduction
II. Background
A. The New Source Performance Standards, Prevention of Significant Deterioration and Nonattainment Programs of Title I
B. The Two-Step Test for Modifications
C. Step One: Physical or Operational Change
D. Step Two: Emissions Increases for NSPS Applicability
E. Step Two: Emissions Increases Under NSR Requirements
1. Existing Regulations
2. The WEPCO and Puerto Rican Cement Decisions
F. The Clean Air Act Amendments of 1990
1. New Source Review and the Acid Rain Provisions
2. Repowering and Clean Coal Technology Projects
III. Discussion of Final Action on Proposal
A. Pollution Control Projects
1. Regulatory Changes for Pollution Control Projects
2. Additional Modeling Requirements
B. Representative Actual Annual Emissions
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E. Clean Coal Technology Demonstration Projects and Very Clean Units
F. Calculation of NSPS Baseline
G. Utility BACT Presumption for NOx
H. Applicability Determinations
I. Limitation of the Rule to Electric Utilities
IV. Administrative Requirements
A. Executive Order (E.O.) 12291
B. Paperwork Reduction Act
C. Economic Impact Assessment
D. Regulatory Flexibility Act Certification
E. Effective Date
F. Federalism Implications

I. Introduction.

The applicability of the new source requirements of title I of the Clean Air Act (CAA) to physical or operational changes at electric utility generating units is an issue of considerable interest at this time because of the recent passage of the 1990 CAA Amendments (1990 Amendments). Many utilities will be undertaking major pollution control projects at their units in the next few years. In enacting title IV, Congress did not suspend any title I requirements for this work. However, the massive industry-wide undertakings of pollution control projects warrants a clarification of the new source review (NSR) requirements of title I. In particular, NSR provisions should not inadvertently bias a utility towards or against any means of complying with the acid rain provisions. The EPA believes the amendments adopted today and the clarification of its current policy under its present NSR regulations provide adequate assurances that utilities can undertake title IV pollution control projects without uncertainty as to the applicability of the various title I new source requirements. At the same time, the applicability of existing new source regulations to modifications has been the source of two recent Federal appellate decisions, *Wisconsin Electric Power Co.* v. *Reilly*, (*WEPCO*), 893 F.2d 901 (7th Cir. 1990), and *Puerto Rican Cement Co.* v. *EPA*, 889 F.2d 292 (1st Cir. 1989). As a result, EPA is today adopting clarifying amendments to these regulations that confirmed policies regarding some of these provisions as they apply to utility projects.

The EPA today amends its regulations implementing the various title I new source requirements governing physical or operational changes at electric utility steam generating units. Specifically, these changes are being issued to clarify the coverage of the NSPS, PSD and nonattainment preconstruction review requirements of title I of the CAA to projects undertaken at electric utility steam generating units.[1]

The EPA today amends the definition of "major modification" in 40 CFR parts 51 and 52 to set forth the conditions under which the addition, replacement or use at existing electric utility generating units of any system or device whose primary function is the reduction of air pollutants (including the switching to a less polluting fuel where the primary purpose of the switch is the reduction of air pollutants) will or will not subject the source to preconstruction review. Specifically, EPA is adopting in PSD and nonattainment areas a regulatory exclusion explicating its authority under the statutory definition of "modification" and confirming EPA's current practice that pollution control projects which "do not render the unit less environmentally beneficial" are not "physical or operational changes," and hence, are not "modifications" for the purposes of parts C and D of title I and are not "major modifications" for the purposes of EPA's regulations implementing those provisions. The EPA is today also amending its PSD and nonattainment NSR regulations (40 CFR

[1] The regulations define electric utility steam generating units as any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts (MW) of electrical output to any utility power distribution system for sale [see e.g., proposed 40 CFR 51.165(xx)].

parts 51 and 52) [2] as they apply to utilities to (1) clarify the NSR baseline for determining whether a proposed physical or operational change will subject a utility to the preconstruction review requirements of these provisions; (2) set forth an actual-to-future-actual methodology for determining whether a physical or operational change is subject to NSR; (3) provide further clarification of the existing regulatory requirement that only those increases in emissions that actually result from the physical change or change in the method of operation can be considered in determining whether the proposed change subjects the utility to NSR requirements; and (4) implement sections 409 and 415 of title IV of the 1990 Amendments which create special NSPS treatment for certain repowering projects and limited NSR exemptions for temporary and permanent CCT projects, and for certain "very clean" units. Finally, EPA is also amending its NSPS regulations (40 CFR part 60) to allow a utility to use as its pre-change baseline its highest hourly emissions rate achievable during the 5 years prior to the proposed physical or operational change.

Today's rule addressing pollution control projects and other non-routine physical and operational changes at electric utility units is timely for several reasons. First, the 1990 Amendments establish, in title IV, a new control scheme for addressing the acid rain problem which focuses exclusively and immediately on utility power plants. Title IV will force most electric utility steam generating units to undertake pollution control projects and provides full flexibility to achieve compliance without a bias towards or against any particular pollution control method. Second, the Agency believes its extensive experience with other non-routine physical and operational changes at such units and the unique characteristics of the electric utility industry (e.g., the general similarity of equipment within the category and the extent of publicly available information) support a revision to the NSR applicability criteria for this source category. Further, while Congress did not make significant changes in the NSR and NSPS statutory language in 1990, the conference committee provided the following guidance to EPA in its Joint Explanatory Statement:

> [T]he deletion of most provisions relating to the WEPCO decision is not intended to affect or prejudice in any way the issues or resolution of the WEPCO matter. At the same time, the conferees urge a quick resolution of the WEPCO matter by EPA as appropriate.

Conference Comm., Joint Explanatory Statement of the Committee of the Conference to Accompany S. 1630, Rep. 101–952, 101st. Cong., 2nd Sess. (1990) pp. 344–45. In passing title IV, Congress did not suspend any requirements of title I. However title I and title IV are clearly intended to work in concert, not conflict, and today's ruling is intended to ensure that harmony.

In taking the actions announced today, EPA has relied on the written comments provided to the docket in this matter as well as testimony provided at a public hearing on the proposed rule conducted by EPA on July 14, 1991.

The public comment period, originally scheduled to close on August 19, 1991, was extended until September 18, 1991 (56 FR 40843, August 16, 1991) to receive additional comments. The comment period was later reopened on November 25, 1991 (see 56 FR 59238) for 2 weeks to receive comments on the information contained in the transcript of a congressional hearing conducted by the Subcommittee on Health and the Environment of the House Committee on Energy and Commerce on July 22, 1991, and other related information. In response to several requests to extend the comment period, the comment period was extended for an additional 7 days, making the final deadline for comments December 17, 1991 (see 56 FR 65203).

II. Background

A. The New Source Performance Standards, Prevention of Significant Deterioration and Nonattainment Programs of Title I

Title I of the CAA has three programs specifically designed to ensure that no new air pollution—whether from new sources or from modifications to existing sources—can be emitted unless the source complies with new source requirements.

The 1970 CAA required EPA to promulgate technology-based NSPS applicable to the construction or modification of stationary sources that cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare [see CAA section 111(b)(1)(A), 42 U.S.C. 7411(b)(1)(A)]. The NSPS provisions were "designed to prevent new air pollution problems" by regulating newly-constructed sources and changes occurring at existing sources that result in emissions increases (see *National Asphalt Pavement Assoc.* v. *Train*, 539 F.2d 775, 783 (D.C. Cir. 1976); see also H.R. Rep. No. 1146, 91st Cong., 2d Sess. 3, reprinted in 1970 U.S. Code Cong. & Admin. News 5356, 5358). Congress defined the term "modification" as "any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results in the emission of any air pollutant not previously emitted" [see CAA section 111(a)(4), 42 U.S.C. 7411(a)(4)].

In 1977, Congress adopted additional amendments to the CAA. These changes included preconstruction permitting requirements for major new and modified sources under two programs, prevention of significant deterioration (PSD) and nonattainment NSR (respectively, parts C and D of the CAA). Congress intended these programs to apply generally where industrial changes might increase pollution in an area. *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 400 (D.C. Cir. 1979). Congress incorporated in parts C and D the same definition of the term "modification" set forth in the NSPS provisions [see CAA section 111(a)(4), 169(2)(C), and 171(4)].

The NSR program for PSD (CAA sections 160–169) applies in attainment areas, i.e., those areas which have attained the national ambient air quality standards (NAAQS). To receive a PSD permit, a prospective major new source or major modification must (among other things) show that (1) it will not cause or contribute to a violation of the available air quality "increment" (designed to prevent ambient air quality from deteriorating by more than certain specified levels), (2) it will not cause or contribute to a violation of a NAAQS, and (3) it will use the "BACT," which must be at least as stringent as any applicable NSPS or hazardous pollutant standard under section 112 of the CAA.

Part D of the 1977 Amendments applies to nonattainment areas, i.e., those areas which have not met the NAAQS under section 109. To receive a permit in such areas, major new and modified sources must (among other things) (1) obtain emissions offsets, thereby assuring that reasonable progress toward attainment of the NAAQS will occur, and (2) comply with the "lowest achievable emission rate (LAER)" (see CAA sections 171–173).[3]

[2] For the purposes of this notice, references to "new source review" (or "NSR") refer to the preconstruction review requirements of both part C (PSD) and part D (nonattainment) of the CAA, unless otherwise indicated.

[3] The 1970 CAA also included a provision applicable to construction or modification of any

Continued

B. The Two-Step Test for Modifications

The modification provisions of the NSPS and NSR programs are based on the broad NSPS definition of "modification" in section 111(a)(4) of the CAA. That section contemplates a two-step test for determining whether activities at an existing facility constitute a modification subject to new source requirements. In the first step, which is largely the same for NSPS and NSR, the reviewing authority determines whether a physical or operational change will occur.[4] If so, the reviewing authority proceeds in the second step to determine whether the physical or operational change will result in an emissions increase over baseline levels. In this second step, the applicable rules branch apart, reflecting the fundamental distinctions between the technology-based provisions of NSPS and the air quality-based provisions of NSR.

Briefly, the NSPS program examines maximum hourly emission rates, expressed in kilograms per hour.[5]

Emissions increases for NSPS purposes are determined by changes in the hourly emissions rates at maximum physical capacity. On the other hand, the NSR regulations examine total emissions to the atmosphere. For applicability determination purposes, emissions increases under NSR are determined by changes in annual emissions as expressed in tons per year (tpy).[6]

C. Step One: Physical or Operational Change

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

As a result, EPA has defined "modification" in the NSPS and NSR regulations to include common-sense exclusions from the "physical or operational change" component of the definition. For example, both sets of regulations contain similar exclusions for routine maintenance, repair, and replacement; for increases in the hours of operation or in the production rate; and for certain types of fuel switches [see e.g., 40 CFR 52.21(b)(2)(iii) and 60.14(e)]. In addition, with respect to pollution control equipment, the NSPS regulations contain an exclusion for:

> The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emissions control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

40 CFR 60.14(e) (5). As will be discussed, in recent individual applicability determinations EPA has excluded pollution control projects from NSR following a similar "environmentally beneficial" test.

D. Step Two: Emissions Increases for NSPS Applicability

The EPA's NSPS regulations define the term "modification" as any "physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies" (see 40 CFR 60.2 and 60.14). Under current NSPS regulations, emissions increases, for applicability purposes, are calculated by comparing the hourly emission rate, at maximum physical capacity, before and after the physical or operational change. That is, to determine whether a change to an existing facility will increase the emissions rate, the existing NSPS regulations authorize the use of an "emissions factor analysis," or a materials balance, continuous monitoring, or manual emissions test to evaluate emissions before and after the change [see 40 CFR 60.14(b)(2)].

Absent the exclusions from modifications specified at 40 CFR 60.14(e), any increase in emissions to the atmosphere over the previous emissions rate will subject the unit to NSPS [see 40 CFR 60.14 (a) and (b)]. In addition, under the "reconstruction rules," physical or operational changes which would cost 50 percent or more of the total cost of a comparable new facility may be classified as reconstructions (see 40 CFR 60.15) and are subject to NSPS as a new source, even if there is no emissions increase.

E. Step Two: Emissions Increases Under NSR Requirements

1. Existing Regulations

The EPA's regulations implementing the PSD and nonattainment programs require preconstruction review for sources undertaking a "major modification," *i.e.*, a physical change or change in the method of operations "that would result in a significant net emissions increase of any pollutant subject to regulation under the CAA" [see 40 CFR 52.21(b)(2)(i), 52.24(f)(5)].[7] A "net emissions increase" is defined as the increase in "actual emissions" from the particular physical or operational change together with any other "contemporaneous" increases or decreases in actual emissions [see 40 CFR 52.21(b)(3)(i)].[8]

Applicability of the CAA's NSR provisions must be determined in advance of construction and is pollutant specific. In cases involving existing sources, this requires a pollutant-by-pollutant projection of the emissions increases, if any, that will result from the physical or operational change. Specifically, to determine whether a proposed physical or operational change will result in an emissions increase, the source must first determine a baseline level of actual emissions. The regulations define actual emissions on a particular date as "the average rate, in tpy, at which the unit actually emitted the pollutant during a 2-year period which precedes the particular date and

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stationary source. This provision is presently set forth in section 110(a)(2)(C). Today's notice does not propose to change the scope of the regulations implementing this provision (see 40 CFR 51.160–164).

[4] This is further described in section III.H below.

[5] An hourly emissions rate may be determined by a stack test or calculated from the product of the instantaneous emissions rate, i.e., the amount of pollution emitted by a source, after control, per unit of fuel combusted or material processed (such as pounds of sulfur dioxide emitted per ton of coal burned) times the production rate (such as tons of coal burned per hour) (see 40 CFR 60.14).

[6] Annual emissions may be calculated as the product of the hourly emissions rate times the utilization rate, expressed as hours of operation per year, or as the product of an emissions factor (*e.g.*, from *Compilation of Air Pollutant Emission Factors*, AP-42, 4th Ed. and subsequent supplements) in units of mass emitted per unit of process throughput times the annual throughput [see 40 CFR 52.21(b)(21)].

[7] The current PSD program is set forth in two sets of regulations. One of the regulations cited (40 CFR 52.21) is part of the Federal PSD permit program which applies as part of a Federal implementation plan for States that have not submitted a PSD program meeting the regulatory requirements of 40 CFR 51.166 [standards for PSD provisions in State implementation plans (SIP)]. In most States where the Federal requirements apply, EPA has delegated the authority to implement the PSD program back to the State. Roughly two-thirds of the States are implementing their own PSD program pursuant to an EPA-approved SIP. Sections 52.21 and 51.166 have identical modification provisions.

The EPA's regulations for nonattainment areas are set forth at 40 CFR § 51.165, 52.24 and in part 51, Appendix S. These sections contain applicability provisions regarding modification that are largely identical to those in the PSD provisions.

[8] Roughly speaking, "contemporaneous" emissions increases or decreases are those which have occurred between the date 5 years preceding the proposed physical or operational change and the date that the increase from the change occurs [see 40 CFR 52.21(b)(3)(ii)]. Once a modification is determined to be major, the PSD requirements apply only to those specific pollutants for which there would be a significant net emissions increase [see e.g., 40 CFR 52.21(j)(3) (best available control technology); 40 CFR 52.21(m)(1)(b) (air quality analysis)].

which is representative of normal source operation" [see 40 CFR 52.21(b)(21)(ii)]. The Administrator "shall" allow use of a different time period "upon a determination that it is more representative of normal source operation." *Id.* The EPA has typically used the 2 years immediately preceding the physical or operational change to establish the baseline [see 45 FR 52676, 52705, 52718 (1980)]. However, it can allow the use of an earlier 2-year period that is more representative of normal source operations. For example, in *WEPCO*, EPA found the fourth and fifth years prior to the modification more representative of WEPCO's normal operations.

Because the applicability determination must be made in advance of construction, EPA's NSR regulations provide that when an emissions unit "has not begun normal operations," actual emissions equal the "potential-to-emit of the unit" [see 40 CFR 52.21(b)(21)(iv)]. This approach is referred to as the actual-to-potential methodology. This regulatory provision may be overcome—and NSR will not apply—if the source owner agrees, in a federally-enforceable instrument—not to increase its actual emissions above baseline level [see e.g., 40 CFR 52.21(b)(4)].

2. The WEPCO and Puerto Rican Cement Decisions

As noted above, to calculate whether a physical or operational change "increases" emissions, EPA regulations require it to find an increase in actual emissions [see 40 CFR 52.21(b)(3)(i)(a)]. Where the emissions unit has not "begun normal operations," EPA regulations recognize that future actual emissions are difficult to predict and employ future "potential" emissions as a proxy [see 40 CFR 52.21(b)(21)(iv)]. The linchpin under the current regulations for predicting future emissions after a modification is thus whether the unit has "begun normal operations."

Two recent Federal appellate court decisions have addressed EPA's interpretation of the phrase "begun normal operations." These decisions, *Puerto Rican Cement Co., Inc.* v. *US EPA*, 889 F.2d 292 (1st Cir. 1989) and *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F.2d 901 (7th Cir. 1990) ("*WEPCO*"), occasion a reexamination of EPA's interpretation of the phrase, and of the usefulness of the regulatory language itself. The meaning of the phrase is highly fact-dependent, and these decisions have created uncertainty regarding its application; thus, as described later in this notice, EPA today changes its regulations for electric utility steam generating units to employ a more useful criterion.

Both cases involved physical changes to existing emissions units, but changes of differing extent, nature and result. In *Puerto Rican Cement*, the owner of a cement plant [9] with several kilns sought to convert one "wet" kiln into a "dry" kiln, and to combine that kiln with another kiln (see 889 F.2d at 293). The court observed that the total production capacity of the renovated single kiln would exceed the combined production capacity of the previous two separate kilns by "about 35%." *Id.* It noted that the renovated single kiln would employ a different "cement-making process" than the original kiln from which it was "converted," *id.* And it said that the new kiln would be "more efficient [and] may lead the firm to decide to *increase the level of production*," *id.* at 297 (emphasis in original). In reviewing EPA's interpretation of "begun normal operations," the court applied a highly deferential standard of review, since an agency's interpretation of its own regulatory language is typically given " 'controlling weight unless it is plainly erroneous or inconsistent with the regulation' " [see 889 F.2d at 297, quoting *Udall* v. *Tallman*, 380 U.S. 1, 16–17 (1965) (citation omitted)]. The court concluded that on the facts of the case, EPA's interpretation that "normal operations" had not begun was not "arbitrary or irrational," *id.* at 298, and hence EPA's application of the actual-to-potential test to predict future emissions was permissible.

In *WEPCO*, 893 F.2d 901, the Seventh Circuit was faced with a different kind of modification. There renovations were proposed for several older (35 to 50 year old) coal-fired electric utility boilers. The physical changes involved repair and replacement of turbine-generators, steam drums and other major components. The EPA contended, as it had in *Puerto Rican Cement*, that these changes went beyond "normal operations" and thus warranted use of future potential emissions as the test for an emissions increase over past actual emissions. Here the court disagreed with EPA's interpretation that "normal operations" had not begun. The court coined the phrase "like-kind replacement" to describe the type of renovation occurring at the WEPCO plant. *Id.* at 917. The court described a "like-kind replacement" as one that "does not 'change or alter' the design or nature of the facility. Rather, it merely allows the facility to operate again as it had before the specific equipment deteriorated." *Id.* at 908. In determining whether such a "like-kind replacement" had "begun normal operations," *Id.* at 917, the court considered whether a "realistic assessment of [the] impact [of the change] on ambient air quality levels is possible.' " *Id.* at 917 [quoting *Alabama Power Co.* v. *Costle*, 636 F.2d 323, 379 (D.C. Cir. 1979)]. The court said that where the renovations were "like-kind replacements," EPA could not reasonably interpret its regulations to say that such a unit was so different that it has not "begun normal operations." Thus, it concluded that the "actual-to-potential" test could not be applied, under EPA's regulations, to units simply undergoing "like-kind replacements." [10]

Neither of these decisions specified the threshold for when a unit has "begun normal operations." Based on these decisions, under its current regulations, EPA must consider the facts of each case and apply the actual-to-potential test only where the change is sufficiently significant to support a finding that "normal operations" have not "begun." At least for changes that are "like kind replacements," "normal operations" have begun, and the actual-to-potential test is impermissible.

Because the "begun normal operations" criterion is highly fact-dependent and its application is inherently case-by-case, it may be an uncertain indicator of what emissions test will be applied in a given instance. However, EPA's extensive experience with electric utilities, and the generally similar nature of operations within this source category, provide EPA an adequate basis on which to predict future actual emissions from such units in most cases. Consequently, as explained below, EPA is today revising its regulations to apply the actual-to-actual test on all physical or operational changes at electric utility steam generating units save those that are an addition of a new unit or constitute a replacement of an existing unit.

F. The Clean Air Act Amendments of 1990

1. New Source Review and the Acid Rain Provisions

The 1990 Amendments, Pub L. No. 101–549, 104 Stat. 2399 (Nov. 15, 1990), made numerous changes in the nonattainment provisions of the CAA

[9] *Puerto Rican Cement* involved a cement plant, not an electric utility, but the court's legal analysis of the phrase "begun normal operations" in the current regulations is relevant to all facilities.

[10] On remand, EPA employed an actual-to-future actual test, comparing WEPCO's representative actual emissions for the baseline period to estimated future actual emissions based on ala the available facts in the record.

and added a new title to address the problem of acid rain. The amendments attack nonattainment problems with a broad array of new requirements all designed to bring all areas of the country into attainment with the national ambient air quality standards for all pollutants. These requirements include traffic reduction strategies, use of alternative clean fuels, increased offset requirements for stationary sources, and changes in the threshold size of stationary sources subject to NSR. A principal theme of the legislation is the establishment of categories of nonattainment areas based on the severity of the pollution problem. The more severe the area, the more controls Congress required be imposed.

The Amendments also establish, in title IV, a new control scheme for addressing the acid rain problem. The exclusive focus of this program is on utility power plant emissions of sulfur dioxide and nitrogen oxides. The 1990 Amendments require sulfur dioxide emissions from utilities to be reduced by approximately 10 million tons annually in two phases—the first to take effect in 1995, the second in 2000. A total of 111 specific plants are targeted in Phase I, and will be required to reduce their SO_2 emissions to specified emissions limits. In Phase II, these plants, and almost all others, are subject to even lower SO_2 emissions limits. This reduction program is to be implemented through a new market-based system under which emissions allowances reflecting the required reduction in current emissions are allocated to existing utility plants. Plant owners, who are required to hold allowances equal to their actual emissions, are then free to trade these allowances. Thus, the emissions of individual units may vary from the initial allocation of allowances, but aggregate emissions are always held to the program's overall target level. This program will provide powerful incentives to sources to undertake pollution control projects.

Because of these requirements, many of the plants subject to Phase I controls must make compliance decisions within the next year in order to assure that the complicated control equipment that may be necessary to meet Phase I standards is in place by the 1995 deadline. In enacting title IV, Congress did not suspend any title I requirements for this work. However, the massive industry-wide undertakings of pollution control projects warrants a clarification of the NSR requirements of title I. In particular, NSR provisions should not inadvertently bias a utility towards or against any means of complying with the acid rain provisions. The EPA believes the amendments promulgated today and the clarification of its current policy under its present NSR regulations provide adequate assurances that utilities can undertake title IV pollution control projects without uncertainty as to the applicability of the various title I new source requirements.

2. Repowering and Clean Coal Technology Projects

In title IV of the 1990 Amendments, which creates the acid rain program, Congress made changes in the applicability of new source requirements to changes involving repowering and Clean Coal Technology (CCT) projects.

Section 409 grants an extension of the acid rain controls deadline to sources that seek to comply with the acid rain reductions by repowering a unit with qualifying clean coal technology. Section 402(12) defines repowering as:

> [The] replacement of an existing coal-fired boiler with one of the following clean coal technologies: atmospheric or pressurized fluidized bed combustion, integrated gasification combined cycle, magnetohydrodynamics, direct and indirect coal-fired turbines, integrated gasification fuel cells, or as determined by the Administrator, in consultation with the Secretary of Energy, a derivative of one or more of these technologies, and any other technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of the date of enactment of the Clean Air Act Amendments of 1990. Notwithstanding the provisions of section 409(a), for the purpose of this title, the term 'repowering' shall also include any oil and/or gas-fired unit which has been awarded clean coal technology demonstration funding as of January 1, 1991, by the Department of Energy.

[See CAA sections 402(12) and 409(a)].

Congress provided that repowering projects that qualify for a Phase II compliance extension would also be exempt from NSPS requirements, so long as the repowering "does not increase actual hourly emissions for any pollutant regulated under the Act" [see CAA section 409(d)]. An operator can qualify for the 3-year extension of the Phase II emissions limitation by demonstrating (by December 31, 1997) to the permitting authority that one or more units will be repowered with a qualifying clean coal technology to meet the title IV restrictions. The operator must provide, no later than January 1, 2000, additional documentation of the repowering project including a preliminary design and engineering effort for the project and a binding contract for the majority of the equipment needed, as well as any additional information the reviewing authority requires.

Today's amendments also implement an exemption from new source requirements for CCT demonstration projects created by Congress in section 415 of title IV of the 1990 Amendments. In these provisions, CCT is defined as any technology not in widespread use on the date of enactment that achieves significant reductions in SO_2 or nitrogen oxides (NO_x) emissions associated with burning coal in the generation of electricity, process steam, or industrial products [see CAA section 415(a)]. A CCT "demonstration project" is a project funded under DOE's CCT program or a similar project funded by EPA.[11]

Repowering projects that are awarded funding from the Department of Energy (DOE) as permanent CCT demonstration projects (or similar projects funded by EPA) are exempt from NSPS and PSD requirements so long as *potential* emissions (see 40 CFR 52.21(b)(4)) from the unit do not increase as a result of the project [see CAA section 415(b)(3)]. These funded projects may still be required to comply with the nonattainment NSR provisions of title I of the CAA, unless they are eluded as pollution control projects.

The installation, operation, cessation, or removal of a temporary CCT demonstration project that is operated for 5 years or less is exempt from NSPS and both PSD and nonattainment new source requirements [see CAA 415(b)(2)]. However, the facility still must comply with the applicable SIP and other requirements necessary to attain and maintain the NAAQS.

Finally, in section 415(c), Congress provided an exemption from NSPS and PSD for the reactivation of "very clean units" otherwise in compliance with the CAA that had been shut down for at least the 2 years prior to enactment of the 1990 Amendments and that, prior to the shutdown, had been equipped with pollution controls with a removal efficiency of at least 85 percent for sulfur dioxide and 98 percent for particulates, and had been equipped with low-NO_x burners.

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[11] Section 415(b)(1) defines a CCT project as a project "using funds appropriated under the heading 'Department of Energy-Clean Coal Technology', up to a total amount of $2,500,000,000 for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency."

III. Discussion of Final Action on Proposal

A. Pollution Control Projects

1. Regulatory Changes for Pollution Control Projects

a. *Background.* The EPA proposed to amend its PSD and nonattainment regulations as they pertain to utility pollution control projects by exercising its authority under the statutory definition of "modification" and confirming the Agency's current policy that such projects are not subject to NSR unless they render the unit less environmentally beneficial. Generally, pollution control projects at existing stationary sources are not major modifications subject to NSR requirements for the simple reason that they do not result in an increase in actual emissions. In addition, EPA has always recognized that Congress did not intend that every activity at an existing facility be considered a physical or operational change for purposes of the NSR.[12]

The EPA proposed to adopt revisions to its PSD and nonattainment regulations for the addition, replacement or use at an existing electric utility steam generating unit of any system or device whose primary function is the reduction of air pollutants (including the switching to a less-polluting fuel where the primary purpose of the switch is the reduction of air pollutants). Under the proposal, a utility pollution control project would not be treated as a physical or operational change unless the project renders the unit less environmentally beneficial.

The key to this addition to the list of exclusions from the term physical or operational change is EPA's judgment that Congress did not intend that pollution control projects be considered the type of activity that should trigger NSR. The EPA proposed regulatory language to explicate and formalize its statutory authority to exclude pollution control projects under the NSR provisions. In 1977, when Congress enacted the NSR provisions of the CAA, it provided that the term "modification" in NSR shall have the same meaning as the term "modification" under NSPS [see section 169(2)(c), 171(4)]. At the time, regulations promulgated under the NSPS provisions defining "modification," provided that the term "modification" does not include:

> The addition or use of any system or device whose primary function is the reduction of air pollutants, except when an emissions control system is removed or is replaced by a system which the Administrator determines to be less environmentally beneficial.

[See 40 CFR 60.14(e)(5)].

In 1978, EPA noted that "in adding section 169(2)(c) to the CAA, Congress indicated that it intended to conform the meaning of 'modification' to 'usage in other parts of the Act' [see 123 Congr. Rec. H11955, 11957 (Nov. 1, 1977)" also see 43 FR 26396 (June 19, 1978)]. Thus, just as EPA had the statutory authority to exclude pollution control projects by regulation from NSPS, the statutory authority exists for EPA to explicate by regulation an exclusion for pollution control projects from parts C and D of title I.

This exclusion under NSR reflects the existing regulatory exclusion for pollution control activities under NSPS regulations, and several recent case-specific nonapplicability determinations under the NSR programs. The NSPS regulatory exclusion contains the proviso that the replacement of a pollution control system or device cannot be less "environmentally beneficial" to qualify for the exclusion [see 40 CFR 60.15(e)(5)]. With respect to NSR, the proposal adopted a similar regulatory exclusion for pollution control projects in the PSD and nonattainment context. The major difference in the proposed NSR exclusion is that it would apply the "not less environmentally-beneficial" test to the addition and use, as well as the replacement, of a pollution control system or device. This change reflects the distinct air quality component of the PSD and nonattainment programs. By focusing on whether a pollution control project is a physical or operational change within the meaning of the NSR regulations, the proposal avoids the need to undertake a quantitative emissions increase calculation in every case, as would be necessary if such projects were deemed to be physical or operational changes. The EPA expects that most, if not all, pollution control projects will reduce net actual emissions. Nevertheless, the Administrator's authority to consider individual pollution control projects provides an adequate opportunity to determine that a pollution control project would somehow result in an adverse environmental impact and thus conclude that the project renders the unit less environmentally beneficial, and is therefore a physical or operational change that may be subject to NSR.

As proposed, a pollution control project refers to a project undertaken at a utility unit for purposes of reducing emissions from such unit. These changes are limited to the installation of conventional or innovative emissions control equipment, including, but not limited to, installation of conventional and advanced flue gas desulfurization, sorbent injection for sulfur dioxide (SO_2) and NO_x controls, electrostatic precipitators, and projects undertaken to accommodate switching to a less polluting fuel, including natural gas or coal re-burning, co-firing of natural gas and other fuels for the purpose of controlling SO_2 and NO_x emissions.

Likewise, any activity that is necessary to accommodate switching to a less polluting fuel is considered to be part of the pollution control project. In some instances, this may involve changes to the pollution generating equipment (e.g., boiler), but only if the changes are necessary to maintain the normal operating capability of the unit at the time of the project, where the capability would otherwise be impaired as a result of the fuel switch. For example, an electric utility steam generating unit that switches from a higher sulfur bituminous coal to a low-sulfur subbituminous coal may need to make certain changes to the boiler in order to avoid derating the unit.

Changes that are intended primarily to restore original capacity or to improve the operational efficiency of the facility are not considered to be part of a pollution control project for purposes of today's rule. Also, the source still must comply with all applicable SIP limits and requirements, permit conditions and applicable NAAQS or PSD increment limits.

As proposed, this pollution control project exclusion did not extend to source categories other than electric utility steam generating units. The EPA so limited this provision because, in contrast with a general lack of experience with other industries, EPA has extensive experience in addressing new source applicability issues regarding pollution control projects in the utility industry. That experience led EPA to conclude that pollution control projects in the utility industry are generally environmentally beneficial.

As noted above, generally pollution control projects at existing stationary sources are not major modifications subject to NSR because they do not usually result in an increase in actual emissions, and EPA believes that, in general, pollution control projects were

[12] For instance, EPA has specifically recognized that routine maintenance, repair and replacement, and changes in hours of operation or in the production rate are not considered a physical change or change in the method of operation [see 40 CFR 52.21(b)(2)(iii), 52.24(f)(5)(iii), 51.165(a)(1)(v)(C)(1), 51.166(b)(2)(iii), and 60.14(e)(1)].

not intended by Congress to be considered physical or operational changes for purposes of NSR.

The EPA applies its PSD regulations in harmony with its NSPS regulations, which exclude most pollution control projects [see 40 CFR 60.14(e)(5)]. In 1977, Congress incorporated the NSPS definition of modification into the PSD and nonattainment statutes [see CAA sections 111(a)(4), 169(a)(c), 171(4)]. In addition, the legislative history reflects that, as a general matter, Congress intended to conform the meaning of "modification" for PSD purposes to the usage under the NSPS program [see 123 Cong. Rec. H11957 (November 1, 1977)]. The EPA reiterated this view in 1978 (see 43 FR 26396, June 19, 1978). Subsequently, EPA interpreted its NSR regulations to incorporate the NSPS pollution control project exclusion.[13] The EPA later voiced concern about incorporating the precise NSPS pollution control language in the NSR context absent explication through notice-and-comment rulemaking largely because of the ambient air quality component of NSR that is absent from the NSPS program.[14] In recent years however, EPA has consistently excluded pollution control projects from NSR provided that the proposed project would be environmentally beneficial, taking into account ambient air quality.[15] In light of the title IV requirements and other provisions of the 1990 Amendments, EPA confirms that it will continue to consider the overall environmental consequences of pollution control projects for NSR applicability. By its nature, a determination of whether or not a project renders a unit less environmentally beneficial involves case-by-case assessment of its net emissions and overall impact on the environment. In making such assessments, EPA must consider the overall emissions before and after the project, as well as any other relevant environmental factors. As a result, no single factor can be identified in advance for purposes of making this determination.

b. *Comments Generally Favoring the EPA Proposal.* In general, comments from industry supported the proposal to exclude pollution control projects. Commenters supporting the provision noted that the exclusion is consistent with the CAA and EPA's earlier determinations regarding such projects. Indeed, several commenters expressed the view that no change in EPA's rules was necessary. One commenter noted that Congress indicated its intent not to apply NSPS or NSR requirements to pollution control projects by adopting the NSR definition of "modification."

Another commenter pointed out that because of the number of projects that will shortly be spawned by the acid rain provisions of the CAA, if permitting were required for every utility operator that plans a fuel switch or the installation of pollution control equipment, EPA would be overwhelmed with applications. This could affect the reliability of the electric utility industry and delay compliance with title IV. One commenter noted that a utility should not be prevented from qualifying for the pollution control exclusion if that utility takes steps to restore diminished capacity of a power plant at the same time that the utility undertakes a pollution control project such as repowering.

Several commenters supported flexibility for utilities on strategies for SO_2 control. Two commenters noted that if the national SO_2 emissions cap is maintained, plant modifications that may increase SO_2 emissions at one unit should not trigger NSR or NSPS requirements. Another commenter suggested that in light of the SO_2 emissions caps, utilities should be permitted to undertake pollution control projects or make nonroutine changes, even though such changes increase SO_2 emissions, without being forced to install technology (such as scrubbers) to control SO_2.

c. *Comments Generally Opposing the EPA Proposal.* Commenters opposed to the exclusion of pollution control projects from NSR provisions disputed EPA's authority to create such "exemptions" and disagreed that Congress intended to exclude pollution control projects from NSR. One commenter stated that the pollution control project exclusion is illegal and conflicts with section 182(e)(2) of the CAA, noting that while section 182(e)(2) provides limited NSR relief for some pollution control projects, it is not a blanket "exemption" from NSR, because the requirement to achieve the lowest achievable emission rate (LAER) remains effective, which demonstrates congressional intent to prevent EPA from granting broader exclusions.

Opponents to the exclusion for pollution control projects also pointed out that efforts by utilities to reduce one pollutant can often increase emissions of another. Such efforts, as well as projects that reduce pollution in one area but increase it in another, should not be "exempted" from NSR or PSD provisions. Several commenters provided examples of how installation of pollution control equipment or fuel switching aimed at reduction of SO_2 also had the effect of increasing emissions of NO_x and particulate matter, and how installation of low-NO_x burners increased VOC emissions.

Some opponents to the exclusion for pollution control projects said that the definition of pollution control project is overly broad, and that EPA lacks authority to apply such a broad definition.

d. *Comments Suggesting Revisions to the Proposal.* Several commenters, both for and against the exclusion, suggested specific regulatory changes to the pollution control exclusion. For instance, numerous commenters requested a clarification of the environmentally beneficial test. In addition, the following suggestions were made with regard to the definition of "pollution control project":

(1) Include any upgrade of the pollution control efficiencies of existing devices;

(2) Include "pollution prevention" changes such as leak detection and repair programs and the attendant site changes;

(3) Clarify that the pollution control project need not be a permanent change;

(4) Include boiler alterations involving natural gas cofiring, reburn, or reburn with sorbent injection even though there are benefits other than pollution control; and

(5) Include impacts on other Class I area air quality related values as well as visibility in determining whether a project that would increase emissions is nevertheless environmentally beneficial.

e. *The EPA Analysis.* Based on a review of the comments, EPA has determined to adopt a formal pollution control project exclusion for electric utility steam generating units. Thus EPA is today adopting revisions to its PSD and nonattainment regulations for the addition, replacement or use at an existing electric utility steam generating unit of any system or device whose primary function is the reduction of air pollutants (including the switching to a

[13] Memorandum from Edward Reich, Director, Stationary Source Compliance Division and William F. Pedersen, Acting Associate General Counsel, Air, Noise, and Radiation Division to Allyn M. Davis, Region IV (April 21, 1983).

[14] See Memorandum from Gerald A. Emison, Director, OAQPS, to Regional Division Directors (July 7, 1986).

[15] See Letter, William G. Rosenberg Assistant Administrator, EPA, to Andrew Aitken, Vice President, New England Power Service Co., March 26, 1991; Letter, Rosenberg to Patrick M. McCarter, Senior Vice President, Public Service Co. of Colorado, July 23, 1990; Letters, David Kee, Director, Air and Radiation Division, EPA Region V, to Timothy J. Method, Assistant Commissioner, Indiana Dept. of Environmental Management, January 30, 1990 and March 8, 1990.

less-polluting fuel where the primary purpose of the switch is the reduction of air pollutants). Under the regulations as adopted today, a utility undertaking a project qualifying for the pollution control project exclusion will not be subject to NSR under either PSD or nonattainment.

In the proposed rule, EPA did not provide any specific definition of the environmentally beneficial standard. Numerous commenters noted the lack of a specific standard for the environmentally beneficial test and requested that EPA provide a definition for this new term and guidance as to how it will be applied. Of course, as noted above, pollution control projects at existing stationary sources are generally not subject to NSR requirements for the simple reason that they do not usually result in an increase in actual emissions. In addition, as also noted above, EPA has determined that Congress did not intend that pollution control projects be considered the type of activity that should trigger NSR.

On the other hand, several commenters pointed out that a project that reduces one pollutant should not be allowed to increase emissions of another pollutant if that increase will cause or exacerbate a different pollution problem. More specifically, an environmental commenter suggested that EPA had endorsed at the Congressional hearing a view that increases would not be allowed in nonattainment areas absent a "compelling showing."

First, as discussed, nothing in today's action authorizes any emissions increase that would cause or contribute to a violation of the NAAQS, PSD increment or visibility limitation.[16] Second, the proposed and final rule provide an appropriate way of enabling utilities to undertake pollution control projects in an expeditious manner while protecting air quality. Although a pollution control project could theoretically cause a small collateral increase in some emissions, it will substantially reduce emissions of other pollutants. In recognition of this, the rule provides for a case-by-case assessment of the pollution control project's net emissions and overall impact on the environment. Third, as discussed in the following section, the permitting authority can require additional modeling under certain circumstances to evaluate the air quality impact of a pollution control project, thereby helping to assure protection of air quality. The EPA considers these safeguards to be adequate to address air quality concerns in both attainment and nonattainment areas.

Several commenters challenged the need for a regulatory exclusion, noting that EPA had already excluded numerous individual pollution control projects pursuant to its existing regulatory authority. However, while EPA has in fact made case-by-case determinations excluding pollution control projects from NSR, it has never provided a comprehensive statement of its policy in this regard nor formally included this exclusion in its NSR regulations governing SIP's or its own NSR regulations. Because of the enormous surge in projects that utilities can be expected to undertake in response to the acid rain provisions, EPA believes that a formal rulemaking spelling out the exact parameters of the exclusion is necessary.

At least one commenter cautioned EPA against requiring sources to submit "applications" to secure the pollution control project exclusion, lest sources face excessive paperwork burdens and lengthy delays every time they change their pollution control equipment. Under today's rule, and consistent with the other NSR applicability decisions, sources remain responsible in the first instance for determining what permitting requirements apply to their activities. Beyond issuing any construction or operating permits that may be needed, the permitting authority is not necessarily involved unless a source seeks a determination of NSR applicability on its own or a modeling analysis is required.

Several commenters requested that this exclusion be extended to nonroutine repairs that are undertaken by the utility in conjunction with the pollution control project. However, title IV's overall national SO_2 ceiling and emission trading program do not allow EPA to simply ignore the local air quality impact of SO_2 increases at individual title IV-covered facilities. The national emissions caps established by title IV are not designed to protect plant-specific considerations of local air quality, the focus of title I's NSR requirements. This argument is also refuted by the plain language of title IV which by its terms does not supersede title I [see §§ 403 (f) and (g), 413].

Several opponents of the exclusion point out that certain pollution control technologies can actually increase emissions of other pollutants and that the installation of a pollution control project may result in increased utilization of the unit, and thereby result in an increase in actual emissions. As noted above, EPA expects that pollution control projects will decrease actual emissions. Moreover, even though emissions increases are possible in some cases, EPA is not precluded from creating this exclusion. The mere fact of an emissions increase, standing alone, does not render the exclusion inconsistent with the CAA. For instance, EPA regulations have long excluded emissions increases associated with routine maintenance repairs and replacement, as well as increases in the operations of a unit in response to fluctuations in the market [see, e.g., 40 CFR 52.21(b)(2)(iii)(a), (f)]. Given the modeling safeguard and the overall benefit to the environment of pollution control projects as well as the relevant statutory provisions, EPA is confident that the regulatory clarification of this exclusion is a lawful and appropriate exercise of its powers.

It was also suggested that the pollution control project exclusion is inconsistent with § 182(e)(2) of the CAA. Section 182(e)(2) provides that in extreme ozone nonattainment areas (the Los Angeles area is the only one), any physical or operational change "which results in any increase in emissions" will be considered a modification. The source can avoid the offset requirements (but not the rest of NSR) by internally offsetting (i.e., netting) any increase in emissions at a ratio of at least 1.3 to 1. The provision also provides that the extreme area offset provisions (but again not the rest of NSR) do not apply to the installation of equipment required to comply with "the applicable implementation plan, permit, or this Act."

The EPA does not agree that this nonattainment provision, which applies to only one area, somehow precludes EPA from adopting an exclusion to its general NSR rules regarding pollution control projects. While there may be some overlap (i.e., utility compliance projects undertaken in the Los Angeles area that qualify under this rule as pollution control projects), in general the two provisions are quite different. Today's rule is limited to utilities but applies to all areas of the country, while section 182(e)(2) applies to all source

[16] The NSR regulations define a "major modification" subject to review as any physical or operational change at a major stationary source that would result in a "significant net emissions increase" in any regulated pollutant [see e.g., 51.166(a)(1)(v)(A)]. In nonattainment areas "significant," in reference to a net emissions increase, is defined as a rate of emissions that would equal or exceed a specified amount. For example, under the current regulations a rate of 40 tpy or more is "significant" for SO_2. This does not address the question of whether a significant increase in emissions will cause or contribute to a violation of the NAAQS, PSD increment or visibility limitation.

categories but only to the Los Angeles area. Section 182(e)(2) also appears to apply to a broader category of changes. There is no evidence that Congress intended this limited provision to preempt EPA from adopting a broad pollution control project exclusion. On the other hand, the CAA conferees did specifically direct EPA to find an administrative resolution of the WEPCO issues (see Conference Comm., Joint Explanatory Statement of the Committee of the Conference to Accompany S. 1630. Rep. 101–951, 101st Cong. 2nd Sess. (1990) pp. 344–45). For these reasons, EPA does not believe that section 182(e) directly or indirectly limits EPA's authority here.

2. Additional Modeling Requirements

a. *Background.* A proposed pollution control project or physical or operational change cannot result in an emissions increase that will cause or contribute to a violation of a NAAQS, PSD increment, or visibility limitation [see CAA section 110(a)(2)(c), 165, 169A(b), 173]. The pollution control projects exclusion does not authorize any significant net increase in emissions that would have this proscribed impact. It is possible that a pollution control project, while not causing any increase in maximum hourly emissions, will cause a significant net increase in actual emissions, which in turn could cause or contribute to the violation of a NAAQS, increment or visibility limitation. For this reason, as proposed, the reviewing authority may require a source to perform an air quality impact analysis (modeling) whenever (1) it has reason to believe that a proposed change will result in a significant net increase in actual emissions of any criteria pollutant over levels used for that source in the most recent air quality impact analysis and (2) it has reason to believe that such an increase would cause or contribute to a violation of a NAAQS, increment or visibility limitation. If this modeling indicates that this increase in emissions will cause or contribute to a violation of any ambient standard, PSD increment or visibility limitation, the pollution control exclusion does not apply.

b. *Comments on the EPA Proposal.* Many commenters viewed the modeling requirement as ensuring that the pollution control project exclusion will not have an adverse impact on local air quality because sources must still comply with all applicable emission limits necessary to protect NAAQS, PSD increments, and visibility.

However, several commenters expressed concern over the adequacy of EPA's air quality impact analysis requirement as a safeguard due to the methodology proposed to calculate actual emissions. Specifically, an environmental group pointed out that using increases in "representative actual annual emissions" as the test for determining whether a pollution control project results in unacceptable impacts on air quality can exclude real emissions increases (e.g., due to demand growth), and thus fails to account for the full impact of the project. This commenter asserted that increases in "actual emissions" should be the key to use of the pollution control project exclusion.

Some commenters also objected due to the fact that the proposal relies on State and local agencies to be aware of the project and request the analysis. One commenter added that it is unclear how a violation of the NAAQS can be avoided before the fact and how the permitting agency could require an air quality analysis if the pollution control project is not subject to NSR.

Finally, a government agency questioned why the safeguard provision protected "visibility limitations" when the PSD program is designed to protect all "air quality related values" in Class I areas. An environmental group commented that the proposed rule does not provide for notification to Federal Land Managers so that they can fulfill their responsibilities to protect Class I areas.

c. *The EPA Analysis.* After careful review of the proposal and the comments, EPA has determined to promulgate the modeling provision as proposed. The EPA does not believe the objections to this provision to be well-founded. Although the proposal does not explicitly require sources to inform the permitting authority of pollution control projects, EPA anticipates that in most, if not all, circumstances involving pollution control projects, permitting authorities will be aware of the source's intentions. For instance, State permitting requirements may require the source to bring the project to the permitting authority or the source may wish to do so to secure emission reduction credits for pollutants that will be decreased. In addition, most projects at utilities are typically subject to public scrutiny in a variety of forums as a result of filings made with Public Utility Commissions and other local, State or Federal agencies. Consequently, it is unlikely that a utility could proceed with a pollution control project without some type of review regarding CAA or other requirements. This will be especially true of pollution control projects undertaken for the purpose of compliance with title IV.

The EPA disagrees with the environmental group comment that it is inappropriate to hinge use of the pollution control project exclusion on increases in "representative actual annual emissions" rather than increases in "actual emissions." Nothing in today's rules would authorize pollution control projects that result in a violation of a NAAQS, PSD increment or visibility limitation. The commenter is correct that the rule as proposed would in certain circumstances not subject to review significant increases in actual emissions from a source that follow completion of the pollution control project. However, the rule is clear that this could occur only where the increase in question in fact does not result from the pollution control project, but rather from an independent factor such as demand growth. As discussed above, it is not the purpose of the NSR program to subject all emissions increases to permitting requirements, only increases that result from a nonroutine change at an existing plant. The State may always revise its SIP to correct NAAQS violations that it concludes are caused by increased utilization but do not result from a pollution control project at that plant.

The government agency commenter is correct that PSD permitting requirements are intended to prevent a major new source or major modification from causing an adverse impact on air quality related values in Class I areas. However, the agency ignores the fact that, in general, existing facilities that have not been modified are not subject to ambient requirements related to air quality related values. The EPA believes that today's rule will allow reviewing authorities sufficient flexibility to protect, to the extent required under existing law, Class I areas from possible adverse impacts from pollution control projects. Moreover, as noted above, pollution control projects *reduce* emissions of targeted pollutants. While emissions of other pollutants could in theory increase in a few cases, EPA does not expect this to result in significant impacts on Class I areas. Where prospective projects may be cause for concern, permitting agencies have the authority to require modeling to prevent increment or visibility violations, and likewise may solicit the views of others in taking any other appropriate remedial steps deemed necessary to protect Class I areas. In deciding to adopt the rule as proposed, EPA emphasizes that all environmental impacts, including those on Class I areas, can be considered in evaluating

whether a utility unit is "less environmentally beneficial" after controls than it was before controls. Accordingly, the final rule allows consideration of all environmental impacts—beneficial and adverse—in making a determination.

B. Representative Actual Annual Emissions

1. Background

The EPA proposed to clarify its methodology for calculating emissions increases at electric utility steam generating sources that had begun normal operations. The EPA proposed to compare actual emissions before and after changes for all physical or operational changes at an existing electric utility steam generating unit other than the addition of a new unit or the replacement of an existing unit. The EPA proposed to consider a unit to be replaced if it would constitute a reconstructed unit within the meaning of 40 CFR 60.15. Since there is no relevant operating history for wholly new units and replaced units, it is not possible to reasonably project post-change utilization for these units, and hence, their future level of "representative annual actual emissions." For other changes, past operating history, and other relevant information, provides a basis for reasonable projections.

As proposed, the "representative actual annual emissions" methodology requires the utility to compare its baseline emissions with its future actual emissions to determine if the proposed change will increase actual emissions. The EPA's existing regulations define baseline emissions as "the average rate, in tpy, at which the unit actually emitted the pollutant during a 2-year period which precedes the particular date and which is representative of normal source operation" (see, e.g., 40 CFR 52.21). The Administrator "shall" allow use of a different time period "upon a determination that it is more representative of normal source operation." *Id.* Although not required by the regulations, EPA has historically used the 2 years immediately preceding the proposed change to establish the baseline [see 45 FR 52676, 52705, 52718 (1980)]. However, in some cases it has allowed the use of earlier periods. For example, in *WEPCO,* EPA found the fourth and fifth years prior to the modification more representative of WEPC0's normal operations since the source's capacity was reduced due to physical problems. The EPA proposed to retain this regulatory language, but to adopt a new presumption regarding its implementation.

Under the proposed action, the Administrator would presume that any 2 consecutive years within the 5 years prior to the proposed change is representative of normal source operations for a utility. This presumption is consistent with the 5-year period for "contemporaneous" emissions increases and decreases in 40 CFR 52.21(b)(3)(i)(b).[17] Source owners or operators desiring to use other than a 2-year period or a baseline period prior to the last 5 years may seek the Administrator's specific determination that such period is more representative of normal operations.[18]

The future actual projection is the product of: (1) The hourly emissions rate, which is based on the unit's physical and operational capabilities following the change and federally-enforceable operational restrictions that would affect the hourly emissions rate following this change; and (2) projected capacity utilization, which is based on (a) the unit's historical annual utilization, and (b) all available information regarding the unit's likely post-change capacity utilization.[19] The projection of post-change capacity utilization for applicability purposes should be based on a projection of utilization for a period after the physical or operational change. Specifically, EPA proposed to allow sources to base the projection of utilization on the 2 years after the change, or a different consecutive 2-year period within the 10 years after the change, where the Administrator determines that such period is more representative of normal source operations.

2. Comments Generally Favoring the EPA Proposal

a. Several commenters favored the expansion of the time period for establishing the pre-change emissions baseline. Suggestions included:

(1) Allow the use of any 2 consecutive years within the last 5 years of operation to allow for a more representative baseline for units that have been shut down;

(2) Allow utilities to request to use periods of representative high utilization outside the 5 year time period;

(3) Add the "any 2 out of the prior 5 year baseline period" discussed in the preamble to 40 CFR parts 51, 52, and 60;

(4) Allow utilities to use the maximum utilization in any 1 year within at least the last 10 years, since 10 years is a more relevant capacity investment planning horizon than 5 years;

(5) Clarify that the source will be able to select the relevant 2-year period with approval of the reviewing authority required only when the pre-change baseline is outside of the 5-year period proceeding the change;

(6) Expand the baseline calculation period from 5 years to 10 years to be consistent with the after-change calculation period and to address a more representative time period;

(7) Allow the use of any 2 years (rather than consecutive years) due to long reserve shutdowns and because maintenance planning requires that utility boilers be operated in "abnormal" conditions for long durations; and

(8) Require sources to back up the choice of which 2 years to use with a short-term standard using an hourly rate, use the same 2-year period for determining the short-term and annual rates, and codify the 2 years used for the limit.

Several comments that recommended expanding the proposal to include industrial sources in the NSR exemption also noted that a "5-year window" is not satisfactory for industrial sources which do not always have representative periods of emissions immediately before a physical change. One industrial commenter suggested the use of any 2-year period be allowed.

Commenters in favor of the future actual emissions calculation method noted that it will alleviate uncertainty, for nonroutine repair, replacement, and maintenance projects while still protecting local air quality; the future-actual method reduces speculation and allows more reliance on factual data; and the actual-to-future-actual emissions comparison is more appropriate to look at the operating history and projected capacity of an existing unit to determine whether a change will increase emissions. One commenter stated that the actual-to-potential method discouraged environmentally beneficial modifications, but suggested that the

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[17] This presumption does not apply to past modifications at an emissions unit for the purpose of determining contemporaneous emission changes at a source and cannot be used to extend the 5 year period specified in that provision [see 40 CFR 52.21(b)(3)(1)(b)].

[18] The level of baseline emissions selected must be consistent with current assumptions regarding the source's emissions that are used under the SIP for planning or permitting purposes. Thus, the source may not select a level of baseline emissions higher than that used by the permitting authority in issuing a PSD or other construction permit to a source in the area, if such higher level would result in a NAAQS or increment violation, or violate a visibility limitation.

[19] In projecting future utilization and emissions factors, the permitting authority may consider the company's historical operational data, its own representations, filings with Federal, State or local regulatory authorities, and compliance plans developed under title IV of the 1990 Amendments.

most appropriate policy would be to adopt a potential-to-potential test.

One commenter noted that the actual-to-future-actual test would end what was felt to be the "unlawful and unfair practice" of using the NSR program to "arbitrarily reduce allowable hours of operation or rates of production for existing sources." Countering the argument that the actual-to-future-actual test could create public health problems, two commenters noted that utilities must comply with all Federal, State and local air quality restrictions regardless of the tests used. Also supporting the actual-to-future-actual test, one commenter pointed out that source owners will be motivated by incentives in the CAA, proposed regulations, and market forces to finance and engineer economic and efficient physical and operational changes at plants so as to achieve excellent environmental control. One commenter favored calculating future emissions over a representative 2-year period within a 5-year period after the change.

3. Comments Generally Opposing the EPA Proposal

One opponent of the proposed methods stated that emission increases at power plants would now be fostered since the proposal will allow utilities to choose their own definitions for when emissions have increased.

In general, opponents of the proposal regarding the pre-change baseline noted that the change is arbitrary and capricious and that there is no analysis in the docket suggesting that any 2-year period is more representative of pre-change maximum emissions. Commenters noted that under the proposal, sources could select the years in which they had the highest emissions in an attempt to minimize the appearance of an increase and escape NSR. One commenter noted that the change in baseline calculation methodology would give utilities such flexibility in refurbishing, repowering, and life extension projects as to bias competitive power markets towards the continued use of existing old units rather than the construction of new ones.

Opponents to the use of future actual emissions stated that there is no reasoned basis for an unenforceable representative actual emissions approach, and application of this test to electric utilities is not consistent with EPA's established policy toward other sources. Other comments contended that the future actual test ignores all past precedents and that, in determining whether a change triggers NSR, EPA should compare actual emissions for the current unit to potential emissions from the altered source; the future actual test does not guard against artificially low estimates made by sources to escape NSR, nor does it protect against substantial increases made immediately after the 2-year period; and the future actual emissions calculation procedure amounts to self-regulation and is easily subject to abuse.

State and local air agencies generally opposed the future actual method of calculating post-change emissions. One noted that the appropriate emission increase test should be determined on a case-by-case basis. One agency noted that the actual-to-future actual approach results in a significant relaxation of title I NSR requirements and would allow utilities to upgrade equipment which may have lost significant generating capacity without the equipment being subject to NSR, hampering local air quality attainment and maintenance efforts. There were several comments that future emissions cannot be reasonably determined solely on past operating history. One State noted that direction is needed on how actual versus potential emissions are estimated.

A few commenters addressed the 2-year period after the proposed change which is the basis for calculating the future actual emissions. Opponents of the future actual concept stated that use of such a provision would result in unrealistically low future emissions projections and shield a company against efforts to enforce NSR requirements at a source that increased emissions 3 years after making physical changes.

An environmental group and several State agencies noted that the projected post-change emissions should become an enforceable permit condition in order to commit a source to limit its future emissions to a specific amount and to provide assurance that these projections are reasonable estimates of expected emissions. If a source will not accept such a permit condition, then the source should have to use potential post-change emissions.

4. Comments Suggesting Revisions to the Proposal

Three commenters suggested a more flexible test for ascertaining SO_2 increases for determining applicability of NSR and NSPS requirements, namely a measure of pollution per unit of electrical output.

a. Commenters made the following specific suggestions for changes surrounding the future actual calculation method:

(1) Develop guidelines to assist States in making like-kind determinations;

(2) Require like-kind replacements to use the representative actual annual emissions for calculation of actual emissions;

(3) Define "like-kind replacement" to include complete replacement of an existing emissions unit;

(4) Define "routine repair and replacement;"

(5) Apply the actual-to-actual test to like-kind replacement of an entire emitting unit;

(6) Allow new units or greenfield plants to rely on future actual emissions if they can reliably project future emissions; and

(7) Consider an alternative way to make the NSR accounting system consistent, such as basing it on past allowable to future allowable emissions.

(b) Other suggestions included the following:

(1) Provide guidance on routine repair and replacement and maintenance activities to include placing units on cold reserve and bringing them back on line, and

(2) Use a 2-year period other than immediately after the change only when the EPA cannot clearly demonstrate that the 2-year period immediately following the change is not representative.

5. The EPA Analysis

The EPA has decided to promulgate the proposed "representative actual annual emissions" methodology for calculating emissions changes at electric utility steam generating units where the changes do not involve the construction of a new, "greenfield" unit or the replacement of an existing one. After a thorough review of the comments, EPA concludes that the comparison of "actual emissions before" to a projection of "actual emissions after" a physical or operational change at an existing utility steam generating unit is workable and, with the added safeguard discussed below, is the most suitable method for evaluating emissions changes at such sources.

Many commenters questioned EPA's proposed presumption that sources may use, as the baseline, emissions from any 2 consecutive years within the 5 years prior to the proposed change without regard to normal source operations. As discussed in the proposal, this presumption is consistent with EPA's decision in WEPCO and the 5-year period for "contemporaneous" emissions

increases and decreases in 40 CFR 52.21(b)(3)(i)(b).[20]

Moreover, EPA is not reading "normal source operations" out of the regulation as charged. Rather, the presumption recognizes the nature of utility operations without compromising the existing regulatory language which requires that the pre-change 2-year period used in defining baseline emissions be representative of "normal" operations. For example, as a system a utility's "normal" operations means directly responding to a demand for electricity. A cold winter or hot summer will result in high levels of "normal" operations while a relatively mild year will produce lower "normal" operations. By presumably allowing a utility to use any 2 consecutive years within the past 5, the rule better takes into consideration that electricity demand and resultant utility operations fluctuate in response to various factors such as annual variability in climatic or economic conditions that affect demand, or changes at other plants in the utility system that affect the dispatch of a particular plant. By expanding a baseline for a utility to any consecutive 2 in the last 5 years, these types of fluctuations in operations can be more realistically considered, with the result being a presumptive baseline more closely representative of normal source operation.

The EPA disagrees with comments seeking to allow the use of any 2 consecutive years within the last 5 years of a unit's "operation" rather within than the 5 years directly preceding the proposed change. A shifting of the 5-year period would be difficult to harmonize with definitions of contemporaneous contained in the regulations [see, e.g., 40 CFR 52.21(b)(3)(iii)]. This type of open-ended provision would even credit a unit which has been inoperative for 20 or 30 years or longer with a high level of emissions. The EPA notes, however, that as has always been the case under the prior regulations, any source owner or operator may request a determination that another baseline period is more representative of the unit's "normal" operations.

Several commenters opposing today's regulatory changes charged that without appropriate assurances utilities could deliberately underestimate future operations (and thus emissions) for the purpose of avoiding review or that even where a forthright estimate is made, the forecast may prove inaccurate. The EPA is concerned that without appropriate safeguards increases in future actual emissions that in fact resulted from the physical or operational change could go unnoticed and unreviewed. For this reason, EPA has added the safeguard explained below.

The EPA does not, however, agree with comments that post-change emissions estimates must always be made into permanent federally-enforceable permit conditions. To do so would permanently restrict a utility's legally allowable emission limits to its pre-change actual emissions level unless it subsequently underwent NSR, and would fail to account for the very real possibility that emissions might increase over baseline levels in the future for reasons unrelated to the physical or operational change in question. As discussed more fully in the following section, NSR applies only where the emissions increase is caused by the change. Thus the issue should be viewed more as one of tracking and monitoring post-change utilization and/or emissions levels at the unit to confirm that baseline emission levels are not exceeded as a result of the change.

To guard against the possibility that significant increases in actual emissions attributable to the change may occur under this methodology, EPA is clarifying in the final regulations that any utility which utilizes the "representative actual annual emissions" methodology to determine that it is not subject to NSR must submit for 5 years after the change sufficient records to determine if the change results in an increase in representative actual annual emissions.[21] Utilities may use continuous emissions monitoring data, operational levels, fuel usage data, source test results or any other readily available data of sufficient accuracy for the purpose of documenting a unit's post-change actual annual emissions.

Where the change does not increase the unit's emissions factor, i.e., the amount of pollution emitted by a source after control per unit of fuel combusted (such as pounds of SO_2 emitted per ton of coal burned), the utility may submit annual utilization data, rather than emissions data, as a method of tracking post-change emissions. If annual utilization data show that the unit increased utilization above baseline levels, the permitting authority should determine whether the increase resulted from the change. Where a causal link exists between the change and the increase in utilization, the permitting authority should then determine whether emissions have also increased as a result of the change.

Changes that could increase a unit's emissions factor typically involve changes to the boiler itself. (Such changes do not include activities that qualify as pollution control projects under today's rule.) Where these types of changes exist, the utility should submit annual emissions data to the permitting authority. If these data suggests that the utility has increased annual emissions over baseline levels, the permitting authority should inquire whether the increase resulted from the physical or operational change. The utility may demonstrate that any increase was caused by an independent factor, such as demand growth.

Appropriate records are to be submitted to the permitting agency on an annual basis for a period of 5 years from the date the unit begins operations (i.e., post-change operations after an initial shakedown period). A longer period, not to exceed 10 years, may be required by the permitting agency where it has determined that no period within the first 5 years following the change is representative of source operations.

Since it is expected that utilities will submit the same data normally used to report emissions or operational levels under existing Federal, State or local air pollution control agency requirements, EPA does not expect that documentation of post-change actual annual emissions will impose any additional data collection burden on the part of a utility.

The purpose of this provision is to provide a reasonable means of determining whether a significant increase in representative actual annual emissions resulting from a proposed change at an existing utility occurs within the 5 years following the change. Thus the intent is to confirm the utility's initial projections rather than annually revisiting the issue of NSR applicability. If, however, the reviewing authority determines that the source's emissions have in fact increased significantly over baseline levels as a result of the change, the source would become subject to NSR requirements at that time. The EPA has adopted this approach and the time period because it believes that, in most cases, any emissions increase resulting from a physical or operational change at a utility unit would occur within the first 5 years of normal operation of the unit

[20] As discussed, this presumption does not apply to past modifications at an emissions unit for the purpose of determining contemporaneous emission changes at a source and cannot be used to extend the 5-year period specified in that provision [see 40 CFR 52.21(b)(3)(1)(b)].

[21] This is the only substantive change from the regulations as proposed. However, EPA has also made minor changes to the wording of some of the regulations to address problems with clarity and syntax. Since these changes are not intended to alter the meaning of the regulations, they are not individually discussed in this preamble.

after the change. Thus, EPA will presume that any increase in emissions levels more than 5 years after the change has occurred is not related to the physical or operational change.

In response to comments regarding "like-kind" replacements, EPA notes that today's regulations recognize no distinction between "like-kind" replacements and other nonroutine physical or operational changes at a utility steam generating unit. The "actual-to-future-actual" methodology promulgated today for calculating emissions changes applies to all types of changes at utility units, including the replacement of "like-kind" components at an existing unit. However, the "like-kind" replacement of a whole unit is for all practical purposes a replacement unit and, therefore, is treated as a new unit.

Although several commenters suggested that EPA should expand the representative actual emissions test to new and reconstructed units, EPA has decided not to do so. Since there is no relevant operating history for new or reconstructed units, it would not be possible to accurately project operations or emissions for these units. Consequently, the EPA has left unchanged the regulations which require that for any unit which has not begun normal operations, actual emissions are considered equal to the unit's potential-to-emit.

A few commenters requested that EPA define or provide guidance on "routine repair, replacement and maintenance" activities. The June 14 proposal did not deal with this aspect of the regulations, nor do the regulatory changes promulgated today. However, the issue has an important bearing on today's rule because a project that is determined to be routine is excluded by EPA regulations from the definition of major modification. For this reason, EPA plans to issue guidance on this subject as part of a NSR regulatory update package which EPA presently intends to propose by early summer. In the meantime, EPA is today clarifying that the determination of whether the repair or replacement of a particular item of equipment is "routine" under the NSR regulations, while made on a case-by-case basis, must be based on the evaluation of whether that type of equipment has been repaired or replaced by sources within the relevant industrial category.

C. The Causation Requirement

1. Background

The NSR regulatory provisions require that the physical or operational change "result in" an increase in actual emissions in order to consider that change to be a modification [see e.g., 40 CFR 52.21(2)(i)]. In other words, NSR will not apply unless EPA finds that there is a causal link between the proposed change and any post-change increase in emissions. The EPA proposed to amend its rules to clarify this provision in the context of modifications at electric utility steam generating units.

Under the proposed regulations, any emissions increase attributable to a physical or operational change, such as a physical or operational change that significantly alters the efficiency of the plant, (see, *Puerto Rican Cement*, 889 F.2d at 297–8), must continue to be included in the post-change emissions calculation. The proposal clarified that where increased operations are in response to independent factors, such as system-wide demand growth, which would have occurred and affected the unit's operations even in the absence of the physical or operational change, such increases do not result from the change and shall be excluded from the projection of future actual emissions. Thus, in assessing whether the proposed change will result in an increase in actual emissions, utilities need not include in their projection of post-change utilization that portion of the increased rate of utilization, if any, due to factors unrelated to the physical or operational change, such as an increase in projected capacity utilization due to the rate of electricity demand growth for the utility system (of which that source is a member) as a whole.

Under today's rule, during a representative baseline period (see *supra*), the plant must have been able to accommodate the projected demand growth physically and legally even absent the particular change. Increased operations (and resultant increases in actual emissions) that could not physically and legally be accommodated during the representative baseline period but for the proposed physical or operational change should be considered to result from the change.

2. Comments Generally Favoring the EPA Proposal

Several utility representatives supported the proposed demand growth exclusion and the causation requirement. Many commenters requested clarification of certain points or expansion of certain provisions. One commenter noted that there should be a specific exclusion for emissions increases at a generating station resulting from generation shifts and decreased plant efficiencies caused by operation of pollution control systems. Another noted that the discussion of the criteria for recognizing "factors unrelated to the physical or operational change" should be improved upon because the proposed requirements that a facility must have been physically able to accommodate the projected growth during a "representative baseline period" could have a negative impact in utility capacity planning and investment decisions, depending upon how such a period is determined.

One commenter noted that EPA should specifically recognize an exception for units which have been inactive, because a unit should not have to include all of its emissions due to demand growth merely because it was in need of repair or maintenance while inactive. Commenters asked that EPA better define "independent factors" in the context of the demand growth exclusion. Lastly, one commenter stated that the final rule should reconcile the "demand growth exclusion" with the existing "hours of operation/rate of production" exclusion by confirming that increases attributable to system-wide demand growth are already excluded under the already-existing exclusion and, therefore the "demand growth exclusion" only applies where there is a federally-enforceable permit term limiting hours of operation or production rate.

3. Comments Generally Opposing the EPA Proposal

Opponents of the exclusion of emissions attributable to demand growth contended that there is no rational basis for ignoring such emissions. When increased capacity or utilization is the immediate goal of a project and an increase in emissions occurs, the project must be subject to NSR regardless of the underlying reasons for the increased capacity or utilization and corresponding emission increase. Contrary to the letter and purpose of the statute, the demand growth exclusion could result in major increases in actual emissions going unreviewed and unregulated, would create serious local pollution problems, and would discriminate against companies that were successful in implementing energy efficiency programs. One local agency pointed out that it is virtually impossible to determine with any degree of certainty what portion of a unit's emissions are attributable to an increase in projected capacity utilization.

In addition, commenters noted that the exclusion will have an adverse effect on local agencies' ability to control emissions and that the time of

construction of a project is the most efficient and effective time to address such emissions. One commenter stated that the exclusion for demand growth may further bias competitive power markets toward existing units, and that EPA failed to consider the impact of the causation requirement on utility operations, emissions or competition in power markets.

4. The EPA Analysis

After careful consideration of the comments received and further analysis of the issues involved, EPA has decided to promulgate the causation provision as proposed.

Commenters argued that any post-change emissions increase, regardless of its origin, should subject a source to NSR. However, these arguments ignore the relevant statutory and regulatory modification provisions. No commenters challenging the provision have suggested the statute and implementing regulations do not contain a causation provision. Rather, they argue that in the proposed rule EPA has misconstrued this requirement.

In conjunction with developing the representative actual annual emissions methodology, EPA recognized that the analysis of the causation requirement may disclose that an emissions increase that follows a nonroutine physical or operational change is merely coincidental, and in fact results from independent factors such as demand growth. It is important to emphasize, however, that this does not amount to a per se exclusion of demand growth from the emissions increase calculation. Rather, demand growth can only be excluded to the extent it—and not the physical or operational change—is the cause of the emissions increase. The EPA believes that this is a reasonable interpretation of the statutory provision in question, of EPA's own regulations, and of judicial precedents.

Consequently, where projected increased operations are in response to an independent factor, such as demand growth, which could have occurred and affected the unit's operations during the representative baseline period even in the absence of the physical or operational change, the increased operations cannot be said to result from the change and therefore may be excluded from the projection of the unit's future actual emissions. Conversely, where the increase could not have occurred during the representative baseline period but for the physical or operational change, that change will be deemed to have resulted in the increase.

The EPA did receive numerous comments regarding the difficulty of applying this new interpretation. However, EPA believes it is possible to distinguish between emissions increases that are related to a physical or operational change from those that are not. This issue is a fact-dependent determination that must be resolved on a case-by-case basis. As discussed, EPA considers emissions increases due to increased operations that could not be physically or legally accommodated during the representative baseline period but for the proposed physical or operational change, to result from the change. The preamble to the proposal also made clear that any emissions increase attributable to a physical or operational change that significantly alters the efficiency of the plant, (see *Puerto Rican Cement*, 889 F.2d at 297–8), must continue to be included in the post-change emissions calculations. However, EPA in no way intends to discourage physical or operational changes that increase efficiency or reliability or lower operating costs, or improve other operational characteristics of the unit and does so by focusing on the effect of any nonroutine changes on the operating characteristics of the unit during the representative baseline period. The EPA recognizes that improvements such as these are desirable for economic reasons and to assure a reliable supply of electricity. Thus, physical or operational changes that improve operational characteristics will be treated in the same manner as any other changes. This means that where an improvement involves a routine change, it is excluded from the NSR definition of "major modification." Alternatively, where an improvement is not routine and an emissions increase results from the improvement, that portion of the emissions increase resulting from the improvement will be considered in determining whether the proposed change subjects the unit to NSR requirements.

Several commenters requested a clarification concerning a unit's ability to accommodate demand growth in its pre-change configuration. In EPA's view, such a clarification is not warranted. As discussed above, operational levels that a unit could not have achieved during the representative baseline period but for the physical or operational change are considered to result from the change. Post-change emissions increases associated with such operational levels must, therefore, be considered to result from the change and be taken into account for NSR applicability purposes.

Numerous commenters pointed out that it may be very difficult to determine when an increase is caused by independent factors and when it is caused by the physical change. Also, an environmental commenter argued that this causation question must always be resolved in favor of including all post-change emission increases that follow a change which improves a unit's efficiency, since in its view an efficiency gain will always be the primary determinant of the utility's use of a generating unit, notwithstanding the presence of other necessary—but not of themselves sufficient—factors such as demand growth. However, as so formulated, the comment answers itself. If efficiency improvements are the predominant cause of the change in emissions and demand growth is not, the exclusion does not apply. But this is a question of fact which must be resolved on a case-by-case basis and is dependent on the individual facts and circumstances of the change at issue. EPA declines to create a presumption that every emissions increase that follows a change in efficiency is inextricably linked to the efficiency change.

In calculating demand growth, utilities may consider the company's historical operational data, its own representations, filings with Federal, State or local regulatory authorities, and compliance plans developed under title IV of the 1990 Amendments.

The EPA disagrees with comments that this provision could result in major increases in actual emissions going unreviewed with the potential to create serious local air pollution problems. First, the NSR major modification provisions do not apply to all increases in emissions, just emission increases which result from a nonroutine physical or operational change at an existing major source. Second, as has already been observed, this provision does not amount to a per se exclusion of demand growth. Finally, this new provision does not diminish the scope of the coverage of EPA's NSR regulations. Rather, it merely incorporates into the actual-to-future-actual methodology a requirement of the pre-existing statutory and regulatory scheme.

Moreover, in response to those concerns that a demand growth exclusion could lead to serious local air pollution problems, EPA notes the restrictions it placed on the overall future projection in the proposal: the level of emissions the source claims that it will operate at should be consistent with current assumptions regarding the

source's emissions that are used in the relevant SIP.

Finally the EPA does not agree with the commenter requesting that the final rule confirm that increases attributable to system-wide demand growth are already excluded under the existing exclusion for increases in hours of operation and, therefore, the "demand growth exclusion" only applies where there is a federally-enforceable permit term limiting hours of operation or production rate. The commenter's statement is not correct. Although a source may vary its hours of operation or production as part of its everyday operations, an increase in emissions attributable to an increase in hours of operation or production rate which is the result of a construction-related activity is not excluded from review (see *WEPCO*, 893 F.2d at 916 n.11; *Puerto Rican Cement*, 889 F.2d at 298).

D. Repowering

1. Background

As previously mentioned, title IV of the 1990 Amendments grants special treatment to utilities that seek to comply with the mandated acid rain reductions by repowering a unit with qualifying clean coal technology [see 1990 Amendments section 402(12), 409(a)]. Specifically, repowering projects that qualify for a Phase II compliance extension will also be exempt from NSPS requirements, so long as the repowering "does not increase actual hourly emissions for any pollutant regulated under the Act" [see section 409(d)]. The EPA interprets the requirement that the repowering not lead to an increase in "actual hourly emissions" as an expression of Congressional intent that with respect to repowering projects, EPA should use the same general approach to determining applicability as it has for other physical or operational changes, discussed above. Accordingly, EPA proposed rules provided that a repowering project which results in an increase over baseline in a unit's post-modification hourly emissions will not be eligible for this limited NSPS exemption.

The proposed NSPS exemption applied to repowering of existing units at existing sources, so long as the project qualifies for the Phase II extension and satisfies the "actual hourly emissions" increase test. Because of this provision, the reconstruction limitations specified in 40 CFR 60.15 are not applicable to qualifying repowering projects. However, no special treatment can be afforded to a new unit which is located at a different site than the existing unit it replaces [see CAA section 409(d)].

Pursuant to section 409(e), EPA will provide expedited NSR processing for repowering projects and will encourage State permitting authorities to do the same.

2. Public Comment

The EPA did not receive any comments opposing the repowering proposal while several industry and Congressional commenters supported it. The Congressional commenters requested clarification of EPA's interpretation of term "repowering." The Congressional commenters stated that the proposed definition of "repowering" can be interpreted as limiting qualifying repowering technologies to those that only involve the replacement of the boiler, disqualifying highly-promising, multi-pollutant technologies that do not involve boiler replacement.

3. The EPA Analysis

In light of the lack of negative comments, EPA is today promulgating the CCT provisions as proposed. This includes no change in the definition of "repowering." However, EPA will follow an expansive interpretation of the term repowering, which should address many of the concerns expressed by some of the commenters while remaining consistent with statutory terms and Congressional intent. The EPA notes that this interpretation is currently subject to comment as part of the rulemaking implementing the acid rain provisions of the 1990 Amendments and EPA may address this issue further in the context of that proceeding.

Section 402(12), in relevant part, defines "repowering" as follows:

> Replacement of an existing coal-fired boiler with one of the following clean coal technologies: atmospheric or pressurized fluidized bed combustion, integrated gasification combined cycle, magnetohydrodynamics, direct and indirect coal-fired turbines, integrated gasification fuel cells or as determined by the Administrator, in consultation with the Secretary of Energy, a derivative of one or more of these technologies, and any other technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of the date of enactment of the Clean Air Act Amendments of 1990 * * *[22]

[22] The last sentence in the definition of "repowering" in section 402(12) of the CAA refers to a specific CCT project in Tallahassee, Florida (Arvah B. Hopkins Station Unit 2 Circulating Fluidized-Bed Repowering Project) awarded November 30, 1990.

a. The definition thus provides for three major categories of repowering technologies:

(1) Technologies specifically listed in the statute;

(2) Derivatives of one or more of these listed technologies; and

(3) Technologies which:

(a) Are capable of controlling multiple combustion emissions simultaneously;

(b) With improved boiler or generation efficiency; and

(c) With significantly greater waste reduction than technologies in widespread commercial use as of the date of enactment of the CAA (November 15, 1990).

In accordance with the language of the statutory definition of repowering, the final rule provides that a qualifying repowering technology must involve "replacement" of an existing boiler. The language of section 402(12), though ambiguous in many significant respects, will not support an interpretation which fails to recognize that repowering requires use of an appropriate new technology instead of the existing boiler.

The EPA considered whether the reference to boiler replacement in section 402(12) could be read as referring to only the first category of technologies. However, such an approach would require reading the provision as if the recital of the three alternative technologies began immediately after the phrase "repowering means," rather than after the phrase "repowering means replacement of an existing coal-fired boiler with one of the following clean coal technologies:."

Such a reading is inconsistent with the structure of the provision, in which the colon, which is "used chiefly to direct attention to matter that follows (as a list, explanation, or quotation)" [see Webster's Ninth New Collegiate Dictionary 266 (1985)], follows rather than precedes the reference to boiler replacement. Moreover, all three categories of technologies would be properly described as "the following clean coal technologies:."

While it is true that the list following the colon, like the phrase "the following clean coal technologies:" could be read to refer exclusively to the seven named technologies (or to those technologies and their approved derivatives), such an interpretation would still fail to provide a satisfactory explanation of the grammatical structure of the provision. Either of these two readings would fail to explain how the technologies that, according to those readings do not consider boiler replacement, relate to the term "repowering." In other words, if

the concept of boiler replacement were removed from either the third category of technologies or from both the second and third categories, the provision would read, with respect to those categories:

> The term "repowering" means * * * a derivative of one or more of (the seven) technologies, and any other technology capable of (meeting the three performance criteria).

The difficulty with this reading is that "repowering," whatever the precise scope of its definition, clearly means doing something with a derivative technology or a multipollutant control technology, rather than simply those technologies themselves. Requiring boiler replacement for all three categories avoids this particular infirmity.

The EPA also considered another textual argument that could be advanced to support an interpretation of section 402(12) that boiler replacement is not required for the third category of technology, but it also is unpersuasive. It simply does not follow from the fact that the category of multipollutant control technologies alone has expressly enumerated performance criteria that those criteria are meant to be the exclusive test for qualifying technologies of these types. Because the third category of technology was intended to encompass types of technologies which were unknown on the date of enactment (and thus, unlike the prior categories, not susceptible to being enumerated in the statute) that category would necessarily have to include explicit defining criteria, whether or not the boiler replacement criterion applied to it. By the same token, the fact that the latter two categories are subject to EPA approval in consultation with DOE does not imply that this is the only criterion applicable to them. Each is subject to additional criteria (i.e., the requirement of derivation in the case of the second category, and the three performance criteria in the case of the third category).

The pivotal phrase "replacement of an existing coal-fired boiler" is undefined in the statute, and its scope is not clearly delineated by its context. Some of the seven listed technologies may not require total boiler replacement, although all require such extensive changes to the boiler that they are tantamount to boiler replacement. Under the principle of *ejusdem generis*, therefore, the Agency clearly has, at a minimum, ample discretion to treat as functional boiler replacement any changes broadly similar in scope to those involved in installing the seven named technologies. Such a definition would clearly represent the lower, not the upper, limit on the Agency's discretion to give meaning to the term "replacement". Accordingly, the statute confers on EPA the additional discretion to define boiler replacement in a functional manner that takes into account achievement of the specified performance criteria as well as the degree of changes to the boiler. By way of example, elsewhere in today's final rule the Agency considers a unit to be "replaced" if it would "constitute a reconstructed unit within the meaning of 40 CFR 60.15." In accordance with the above language EPA will use the 40 CFR 60.15 test for "reconstruction" as general guidance in determining whether each individual application under § 409 involves sufficient replacement to qualify for a repowering extension and hence, an NSPS exemption.

In short, because "Congress has not directly spoken to the precise question at issue," *Chevron, U.S.A.* v *NRDC*, 467 U.S. 837, 842–43 (1984), EPA enjoys a significant measure of discretion to determine to what extent replacement of less than 100 percent of the parts of an existing boiler could be deemed replacement for purposes of § 402(12) and this rule. For the reasons discussed above, EPA believes the proposed regulatory language regarding repowering is reasonable. That proposal is today promulgated without change.

E. Clean Coal Technology Demonstration Projects and Very Clean Units

1. Background

The EPA also proposed rules implementing the new CCT exemption created by the 1990 Amendments. In this proposal, temporary CCT demonstration projects are defined as those CCT demonstration projects lasting 5 years or less. Title IV gives these projects an exemption from NSPS, PSD and nonattainment requirements. *Id.*, section 415(b)(2). However, the facility would still be subject to any applicable SIP and must comply with any other requirements necessary to attain and maintain NAAQS. The EPA proposed to implement this provision and clarify that EPA considers the 5 year period as starting on the date of startup (as defined in 40 CFR 60.2). A temporary demonstration project may be converted to a permanent status at any time, provided it meets all the requirements that apply to a permanent CCT project criteria at the time of conversion.

Further, EPA proposed that at the end of a temporary project, the facility must be returned to pre-demonstration conditions and hourly emission rates (or lower). The return of the facility to its pre-demonstration physical and operational condition would not result in the loss of the actual emissions margin between pre-demonstration actual emissions rate and SIP-allowable emissions rates for that facility. Rather, the facility would be treated as if the temporary demonstration project had never occurred.[23]

This proposal did not extend to emissions increases that are unrelated to the conduct of temporary demonstration projects. The EPA considers emissions increases (above the pre-demonstration levels) that are attributable to physical or operational changes, other than those necessary to restore that unit to its pre-demonstration condition, to be beyond the scope of the Congressional exemption.

The EPA also proposed to implement an exemption from NSPS and PSD requirements for repowering projects which are awarded funding from the DOE as permanent CCT demonstration projects (or similar projects funded by EPA) so long as *potential* emissions [see 52.21(b)(4)] from the unit do not increase as a result of the project [see section 415(b)(3)]. However, repowering projects that qualify as pollution control projects will be treated as other pollution control projects for the purposes of the nonattainment provisions of title I of the CAA.

Finally, the proposal implemented the statutory exemptions in section 415(c). In that section, Congress provided an exemption from NSPS and PSD for the reactivation of "very clean units" otherwise in compliance with the CAA that had been shut down for at least the 2 years prior to enactment of the 1990 Amendments and that, prior to the shutdown, had been equipped with pollution controls with a removal efficiency of at least 85 percent for sulfur dioxide and 98 percent for particulates, and had been equipped with low-NO_x burners. This exemption appears to have been narrowly tailored and is not expected to have widespread applicability.

[23] This would be the case even if there were small differences in the post-demonstration physical and operational conditions due to a technical inability to restore the unit to its precise pre-demonstration condition, or due to normal variability in the coal used. Thus, EPA would not seek to apply NSPS or NSR because of a post-demonstration emissions increase attributable solely to an increase in the hours of operation or production rate of the unit (subject to the NSPS limitation that the production rate increase must be accomplished without a capital expenditure).

2. Comments Generally Favoring the EPA Proposal

Some commenters specifically mentioned that CCT demonstration projects should not be subject to NSR provisions.

3. Comments Generally Opposing the EPA Proposal

Some commenters did not support the proposed blanket inclusion of all CCT projects as pollution control projects. One commenter suggested that each CCT project be reviewed on a case-by-case basis and, if the project results in higher emission levels, it should not be considered a pollution control project. Another commenter gave an example of a CCT project that converts an oil-fired unit to a higher emitting coal-fired unit, noting that this project should not be considered a pollution control project.

One commenter opposed to the pollution control project exemption questioned the very narrow exemption from NSPS and PSD for the reactivation of well-controlled, very clean units that had been shut down for at least 2 years prior to the enactment of the 1990 Amendments. If such exemptions are granted, the commenter urged EPA to include a condition that any reactivated sources perform an air quality impact assessment and demonstrate that they would not cause or contribute to a violation of NAAQS, PSD increments, or visibility standards.

4. Comments Suggesting Revisions to the Proposal

a. The following suggestions were made with regard to the definition of "pollution control project":

(1) Include all elements of CCT demonstration projects as an excluded project;

(2) Add the words "clean coal technology" in the examples of pollution control projects in 40 CFR 51.165, 51.166, 52.21, and 53.24; and

(3) Use the statutory definition of CCT demonstration project in 60.14(j)(1). The statutory definition omits the requirement that at least 20 percent of the funding for a CCT demonstration project come from the Federal government.

5. The EPA Analysis

After review of the public comments and further analysis of the subject provision, EPA has decided to promulgate the proposed rules implementing the CCT and very clean unit exemption created by the 1990 Amendments. The EPA views this action as merely incorporating into its existing regulatory framework statutory exemptions that were immediately effective upon passage of the 1990 Amendments. Please note that language inadvertently included in the proposed rules which purported to extend the exemption in section 415(c) to nonattainment areas has been deleted.

F. Calculation of NSPS Baseline

1. Background

As discussed in the proposal, "any physical or operational change to an existing facility which results in an increase in the emission rate to the atmosphere of any pollutant to which a standard applies" is a modification for NSPS applicability purposes [see 40 CFR 60.14(a)]. The NSPS regulations implementing this general definition focus on increases in hourly emissions, expressed in kilograms of pollutant discharged per hour. To determine if an increase in hourly emissions has occurred at a unit, a pre-change baseline must be established. Under current regulations, the emissions rate before and after a physical or operational change is evaluated at each unit by comparing the current hourly potential emissions at maximum operating capacity to hourly emissions at maximum capacity after the change. In this calculation, the reviewing authority disregards the unit's maximum design capacity.[24] The original design capacity of a unit, to the extent it differs from actual maximum capacity at the time that the baseline is established due to physical deterioration of the facility, is immaterial to this calculation.

The EPA proposed that, for an existing electric utility steam generating unit, the pre-change baseline for NSPS applicability purposes shall be calculated using the highest hourly emissions rate achievable at any time during the 5 years prior to the change. The proposal retained the key concept in existing regulations that the baseline be determined during a period that is roughly contemporaneous with the proposed change at the affected facility. The EPA believes that the proposed revision, while modest, is still necessary to avoid the current regulation's undue emphasis on the physical condition of the affected facility immediately prior to the change. The proposal's more flexible provision enables units to establish a baseline that is representative of its physical and operational capacity in recent years, while still precluding the use of a baseline tied to original design capacity, which as noted above may bear no relationship to the facility's capacity in recent years.

Without this revision, the NSPS regulations may unduly burden utilities undertaking physical or operational changes in conjunction with the acid rain program. For instance, if a unit has broken down and is in need of repairs, the utility's baseline will be artificially low. The proposed change would allow utilities to demonstrate that an earlier, higher capacity was more representative of the unit's maximum hourly emissions rate.

2. Comments Generally Favoring the EPA Proposal

Several commenters noted that EPA's proposal will provide needed flexibility and alleviate uncertainty for nonroutine repair, replacement, and maintenance projects while still protecting local air quality. One commenter supported retention of the key concept of equating contemporaneous emissions with representative emissions.

3. Comments Generally Opposing the EPA Proposal

One commenter opposing the proposal noted that the provision for the maximum hourly emissions achievable during the last 5 years would result in a significant relaxation of NSPS requirements and would allow utilities to upgrade equipment which may have lost significant generating capacity without the equipment being subject to NSPS. Sources that have been operating below their maximum achievable emission rates for the 5 years prior to the change can cause increases in actual hourly emission rates, inconsistent with the intent of the NSPS program. In addition, the change in the baseline will allow utilities such an extensive ability to make unregulated changes such as refurbishment, repowering or life-extension as to interfere with competition between existing units and new units.

4. Comments Suggesting Revisions to the Proposal

The most frequent comment on this part of the proposal was that the rule should be clarified to say that the baseline should reflect the last 5 years of operation, to address units that have not been operating. In this regard, commenters were concerned about whether the approach will ensure the establishment of past emission levels that are truly representative of normal

[24] [See 39 FR 36.948 col. 1 (proposed rule)]. In *WEPCO*, the utility contended that baseline capacity for the purpose of determining whether an increase in emission rate occurs for purposes of an NSPS modification is the original design capacity of the facility. However, the court rejected WEPCO's argument that original design capacity or past "representative" capacity, no longer achievable at the plant, had to be used for the baseline emissions rate.

source operations for utility units in cold storage for more than 5 years.

One commenter asked that the NSPS baseline [40 CFR 60.14(h)] be made consistent with the NSR pre-change baseline [40 CFR 52.21(b)(21)(ii)] by adding the phrase, "or other period deemed by the Administrator to be more representative of normal operation." One commenter remarked that if the rule cannot be changed to allow consideration of the past 5 years of operation, then EPA should select an alternative that would reflect a more representative baseline. In addition, some commenters asked for clarification that a unit may "net out" of NSPS requirements by switching to low sulfur coal.

5. The EPA Analysis

After careful consideration of the comments received and further analysis of the subject provision, EPA has decided to promulgate the proposed revised methodology for calculating the pre-change baseline for NSPS applicability purposes for an existing electric utility steam generating unit. The amended methodology will use the highest hourly emissions rate achievable at any time during the 5 years prior to the change.

The revised methodology retains the key concept in existing regulations that the baseline be determined during a period that is roughly contemporaneous with the proposed change at the affected facility. The EPA believes that this decision to revise the current regulation will allow utilities flexibility regarding the scheduling of nonroutine repair, replacement, and maintenance projects. Also, the EPA believes that without this revision, the NSPS regulations may unduly burden utilities undertaking physical or operational changes in conjunction with the acid rain program. This change will allow utilities to demonstrate that an earlier, higher capacity was more representative of the unit's maximum hourly emissions rate.

The EPA did not agree with comments that the use of the maximum hourly emissions achievable during the last 5 years would result in a significant relaxation of NSPS requirements and allow utilities to upgrade equipment which may have lost significant generating capacity without the equipment being subject to NSPS. The promulgated change provides a more flexible provision enabling units to establish a baseline that is representative of their physical and operational capacity in recent years, while still precluding the use of a baseline tied to original design capacity, which may bear no relationship to the facility's capacity in recent years.

The EPA did not agree with the comment that degree of flexibility granted utilities to make unregulated changes such as refurbishment, repowering or life-extension projects as a result of rule changes would interfere with competition between existing units and new units. The prior regulations allowed refurbishment, repowering or life-extension projects, provided emissions do not increase above the unit's current maximum hourly emissions rate. Both the prior and newly promulgated regulations require a unit that undergoes a refurbishment, repowering or life-extension project which increases emissions above the unit's actual current maximum hourly rate to be subject to NSPS. The promulgated regulation simply allows more flexibility in defining a unit's current capacity.

The EPA cannot agree with comments that the methodology for computing the NSPS baseline reflect the last 5 years of operation rather than the 5 years prior to the change. As discussed in conjunction the NSR baseline, the use of such a baseline would credit a unit which has been inoperable for 20 or 30 years, or longer, and in need of extensive nonroutine changes, with an emissions baseline that does not reflect current achievable levels of operations. The EPA notes, however, that the NSPS regulations have always allowed a dormant unit to demonstrate its current capacity in order to determine its emissions baseline. Thus an operable unit, or one in need of only routine maintenance or repair, which has been dormant for an extended period of time can still demonstrate its achievable capacity and associated emissions level by operating for a relatively short period of time.

A commenter requested that the NSPS baseline be revised to be consistent with the NSR pre-change baseline by adding the phrase, "or other period deemed by the Administrator to be more representative of normal operation." The EPA did not grant this request because it would change the emphasis of the NSPS program. As a technology-based program, the NSPS program examines maximum hourly emissions rates, expressed in kilograms per hour. Thus, emission increases for NSPS purposes are determined by changes in the hourly emissions rates at maximum physical capacity, regardless of how the unit has actually operated. In contrast, in light of the air quality planning component of the NSR program, the NSR regulations examine total actual annual emissions to the atmosphere. Consequently, normal operations over a period of time is considered for purposes of determining a source's impact on ambient air. For NSR applicability determination purposes emissions increases are determined by changes in actual annual emissions as expressed in tpy.

Some commenters requested clarification on "netting out" of NSPS requirements by switching to low sulfur coal. The proposed regulatory changes were specifically limited to addressing the maximum achievable emissions at a specific point in time (i.e., immediately prior to the change versus achievable over the last 5 years) and not the parameters used in quantifying maximum hourly emissions. Today's rule does not alter current NSPS regulations on this point. Under those present NSPS regulations, only physical limitations on maximum capacity are considered in determining potential emissions at powerplants. Thus, any prospective changes in fuel or raw materials accompanying the physical or operational change are not considered in determining maximum capacity.

G. Utility BACT Presumption for NO_x

1. Background

The EPA proposed to adopt a presumption that, in the case of PSD permits issued by EPA under 40 CFR 52.21, BACT for emissions of NO_x from existing coal-fired electric utility steam generating units undergoing a modification is the technology required under Section 407 of the CAA.

2. Comments Generally Favoring the EPA Proposal

Supporters of the low-NO_x burner BACT presumption pointed to strong Congressional policy judgement favoring the use of "low-NO_x burner technology." The BACT presumption should provide greater certainty and consistency to utilities, yet one supporter thought it would not limit the permitting authority's ability or obligation to consider other factors. One commenter noted that the BACT presumption establishes that low-NO_x burners constitute reasonable available control technology (RACT) as well as BACT.

3. Comments Generally Opposing the EPA Proposal

Concluding that the presumption is unwarranted, misguided, and possibly illegal, several opponents of the BACT presumption noted that it forecloses consideration of other NO_x control technologies and ignores the demonstrated track record and cost-

effectiveness of other technologies such as selective catalytic reduction (SCR) or selective noncatalytic reduction. Commenters noted that SCR technology is in use in more than 200 power plants in six nations and can achieve twice the NO_x reduction achievable by low-NO_x burners. The SCR or other technologies more effective than low-NO_x burners may be needed as retrofit requirements to attain the ozone standard.

Another comment voiced by opponents of the low-NO_x burner BACT presumption, was that it cannot be reconciled with the statutory command for case-by-case decisions. The EPA does not have the right to make such a presumption and several instances were cited where EPA has upheld the case-by-case BACT determination process. The BACT presumption fails to recognize that there are site-specific considerations that will affect the selection of BACT.

Opponents of the BACT presumption also noted that such a presumption improperly shifts the burden of technology analysis to States at a time when they are overburdened. In addition, it will have an adverse effect on the ability of State and local agencies to control emissions to the degree necessary because it limits an agency's attainment strategies. Some of the northeastern States expressed concerns that such a presumption might interfere with efforts to attain the ozone standard.

4. The EPA Analysis

Based upon a consideration of the comments received, and a reexamination of the relevant facts and statutory provisions, EPA has determined not to promulgate the presumption regarding BACT for NO_x. The EPA is concerned that this presumption would suggest preemption of the exercise of State discretion and case-by-case decisionmaking which Congress envisioned as fundamental to the BACT process.

In light of its decision not to adopt a BACT low-NO_x presumption, EPA will not respond to other objections and suggestions raised by commenters.[25]

H. Applicability Determinations

As noted in the proposal, source owners or operators in most instances are able to readily ascertain whether NSR requirements apply to them. Consequently, in administering these requirements, EPA does not require sources to obtain a formal applicability determination before proceeding with construction. In keeping with that practice, EPA will not require utilities to seek applicability determinations under either the revised regulations promulgated today or the interpretations of existing regulations contained in this preamble. Utilities in most cases can readily ascertain how this notice will affect them. The EPA anticipates, however, that questions will arise regarding certain aspects of this proposal. Because some instances involve discrete judgments, utilities may wish to obtain determinations of applicability. The EPA will provide such determinations upon request. Such requests should be submitted together with appropriate documentation to the appropriate permitting authority.

Comments regarding applicability determinations have previously been addressed in other sections of this rulemaking.

I. Limitation of the Rule to Electric Utilities

1. Background

Consistent with the proposed rule, the regulatory provisions promulgated today are limited to electric utility steam generating units. Such units are defined as any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 megawatts of electrical output to any utility power distribution system for sale. In the proposal, EPA indicated that it was limiting this rulemaking to electric utility steam generating units for two reasons. First, title IV of the CAA addresses acid precipitation and focuses exclusively on utility power plants. Today's ruling ensures that the title I and title IV programs will not impose conflicting requirements for those plants. The second reason that the provisions were limited to utilities is that EPA's extensive experience with electric utilities, the general similarity of equipment within the category, and the particular extent of publicly available information, indicate that a revision to the NSR applicability criteria for this source category is warranted.

2. Public Comments

Several commenters noted that limitation of the proposal to electric utilities lacks rational justification as well as legal and technical support. Several noted that the limitation is unfair, arbitrary, and capricious. Typical of several letters, one commenter noted that EPA offered no qualitative evidence of underlying assumptions, and another noted that EPA violates the Administrative Procedures Act by limiting the proposal to electric utilities. To this commenter, the limitation discriminates against industrial sources and is not in line with the intentions of the legislation. One commenter noted that the *WEPCO* court did not base its analysis on any particular characteristics of the utility industry.

Numerous commenters countered EPA's claim and justification for the limitation that the Agency has more experience with electric utilities than other industries. Illustrating that EPA has extensive experience with other industries, commenters mentioned chemical manufacturing, cement plants, refineries, paper mills, auto assembly plants, the 65 NSPS sources, and sources covered in numerous guideline documents and RACT guidance. In addition, several noted that the lack of understanding is a poor excuse for not applying the proposal to all industries.

Commenters also noted that other industries face the same problems that utilities do when attempting to install pollution control equipment. Like electric utilities, pollution control projects in other industries are generally environmentally beneficial, but the limitation of the exclusion to electric utilities as proposed would discourage the other source categories, from installing pollution control projects.

Several commenters noted that other industries will be equally impacted by extensive regulations under titles I, III, and V, just as electric utilities will be affected by title IV. For example, pharmaceutical plants will undergo physical and operational changes to meet reasonably available control technology (RACT) and/or maximum achievable control technology, and these projects should not be subject to NSR or NSPS. They note that the burden and supportive reasons for making the proposed changes are just as great for other categories of sources as they are for electric utilities.

Some commenters pointed out that EPA presently applies the pollution control project exemption from NSPS to all industries and that existing NSR rules are not industry-specific.

3. The EPA Analysis

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

[25] This includes comments on the environmental impacts of the low-NO_x burner presumption, elaboration on what constitutes low-NO_x burner technology, and the merits and current use of other NO_x control technologies as BACT.

NSR pollution control project exclusion and the changes to the methodology for determining whether a source change constitutes a modification that have been adopted today for utilities. This rulemaking will also discharge EPA's obligation to propose and take final action on a potential-to-potential methodology as required by Exhibit B of the settlement agreement in *Chemical Manufacturers Association* v. *EPA* (D.C. Cir., No. 79–1112). The EPA presently intends to propose these NSR revisions by early summer.

Prior to proposal of this rule, EPA considered going forward with a rule that applied to all source categories. However, the complexity of that task meant that a rule could not be developed in a short time frame, a fact that posed unique and serious difficulties for one source category, utilities. While the commenters favoring expansion of this rule to all source categories are accurate in their claims that sources outside utilities face CAA-mandated pollution control projects, utilities alone are singled out to participate in the 1990 Amendments' new acid rain program. This program requires that units subject to phase I of the program meet SO_2 reduction limits by 1995. Given the size, complexity, and expense of scrubbers and other SO_2 pollution control technologies, the affected utilities need guidance today as to the title I implications of their control strategies. While other sources may soon have new control requirements imposed on them, utility sources face the most immediate need for clarification of their NSR responsibilities.

In addition, EPA also had high confidence that a workable "future-actual" methodology could be developed for the utility industry for all changes that did not involve construction of a new unit or replacement of an existing unit. The source population is relatively small and the technology in use is relatively uniform. Moreover, utility sources are largely regulated by PUC's which evaluate anticipated utility growth as part of the regulatory oversight process. The fact of Public Utility Commission (PUC) review helps ensure the reliability of utility projections of future operating conditions. The EPA anticipates that NSR permitting authorities will be able to draw upon PUC proceedings in evaluating utility claims of future utilization.

In addition, the emissions monitoring provisions of title IV requires that continuous emissions monitoring data or other highly accurate methods for reporting actual emissions will be used for all affected sources. This will assure that actual emissions data will be readily available for utility sources subject to today's rule. In the rulemaking which EPA intends to undertake by early summer, EPA will address the precise applicability of the pollution control project exclusion and of the actual to future actual methodology to non-utility source categories.

IV. Administrative Requirements

A. Executive Order (E.O.) 12291

Under E.O. 12291, EPA must judge whether a regulation is a "major rule" and therefore subject to the requirement for preparation of a Regulatory Impact Analysis. This ruling is not a major rule because it will reduce the economic costs of meeting the requirements of the CAA. However, this ruling was submitted to the Office of Management and Budget (OMB) for review. Written comments from OMB to EPA and any EPA response are included in Docket A–90–06.

B. Paperwork Reduction Act

The proposal package stated that no additional public reporting burden will result from this ruling. That is still the case despite final rule requirements for reporting certain data to agencies for 5 years following a change and for documenting excluded demand growth, because this information is already required by other provisions of the law and the final rule in doing so is providing exclusions for the affected sources and the net result is a decrease in these source's public reporting burden. All information collection requirements of the Federal NSR and NSPS regulations have been approved by OMB under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501, et seq., and have been assigned OMB control numbers 2060–0003 for NSR, and 2060–0023, 2060–0026 and 2060–0072 for NSPS. The effect of this rule would be a reduction in paperwork related to complying with NSR and NSPS requirements, since this ruling provides additional clarification as to physical and operational changes that may be excluded from these requirements.

C. Economic Impact Assessment

The requirement for performing an Economic Impact Assessment under section 317 of the CAA (42 U.S.C. 7617), does not apply to the amendments EPA is promulgating today. Section 317 applies only to "revisions which the Administrator determines to be substantial revisions." The promulgated amendments are not substantial revisions because they relieve current regulatory burdens.

D. Regulatory Flexibility Act Certification

As noted in the proposal notice, this action is not subject to the certification provisions of section 605(b) of the Regulatory Flexibility Act because this rule will result in a reduction of administrative costs and no increase in control costs, therefore having no significant impact on industry.

E. Effective Date

As stated earlier in this notice, this rule is effective immediately upon publication in the **Federal Register**. The EPA has concluded that, under section 307(d)(1) of the CAA, the requirement of sec. 4(d) of the Administrative Procedures Act, 5 U.S.C. 553(d), for a 30-day waiting period before making a rule effective is not applicable.

F. Federalism Implications

Under E.O. 12612, EPA must determine if a rule has federalism implications (i.e., substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government). For those rules which have federalism implications, a Federalism Assessment is to be made. The EPA's determination is that there are no federalism implications; these are relatively minor changes to existing Federal law and regulations.

The executive order also requires that agencies, to the extent possible, refrain from limiting the State policy options, consult with States prior to taking any actions that would restrict State policy options, and take such actions only when there is clear constitutional authority and the presence of a problem of national scope. The executive order provides for preemption of State law, however, if there is a clear congressional intent for the agency to do so. Any such preemption, however, is to be limited to the extent possible. Since the rule is a direct effort to ensure implementation of the 1990 Amendments, EPA considers all of the above requirements to be met.

Lists of Subjects

40 CFR Part 51

Administrative practice and procedure, Air pollution control, Carbon monoxide, Clean Coal Technology projects, Hydrocarbons, Intergovernmental relations, Lead,

Nitrogen dioxide, NSR, Ozone, Particulate matter.

40 CFR Part 52

Air pollution control, Carbon Monoxide, Clean Coal Technology projects, Hydrocarbons, Lead, Nitrogen dioxide, NSR, Particulate matter, Repowering, Sulfur oxides.

40 CFR Part 60

Air pollution control, Carbon monoxide, Clean Coal Technology projects, Hydrocarbons1 Lead, Nitrogen dioxide, NSPS, Particulate matter, Repowering, Sulfur oxides.

Dated: May 20, 1992.

William K. Reilly,

Administrator.

For the reasons set forth in the preamble, parts 51, 52, and 60 of chapter I of title 40 of the Code of Federal Regulations is amended as follows:

PART 51—REQUIREMENTS FOR PREPARATION, ADOPTION, AND SUBMITTAL OF IMPLEMENTATION PLANS

1. The authority citation for part 51 is revised to read as follows:

Authority: 42 U.S.C. 7401(b)(1), 7410, 7411, 7470–7479, 7491, 7501–7508, 7601 and 7602, as amended by the 1990 Amendments, Pub. L. No. 101–549, 104 Stat. 2399 (Nov. 15, 1990); 402, 409, 415 of the CAA as amended, 104 Stat. 2399, unless otherwise noted.

2. Section 51.165 is amended by revising paragraph (a)(1)(xii)(D) and by adding paragraphs (a)(1)(v)(C)(*8*), (a)(1)(v)(C)(*9*), (a)(1)(xii)(E), (a)(1)(xx), (a)(1)(xxi), (a)(1)(xxii), (a)(1)(xxiii), (a)(1)(xxiv), (a)(1)(xxv) to read as follows:

§ 51.165 Permit requirements.

(a) * * *

(1) * * *

(v) * * *

(C) * * *

(*8*) The addition, replacement or use of a pollution control project at an existing electric utility steam generating unit, unless the reviewing authority determines that such addition, replacement, or use renders the unit less environmentally beneficial, or except:

(*i*) When the reviewing authority has reason to believe that the pollution control project would result in a significant net increase in representative actual annual emissions of any criteria pollutant over levels used for that source in the most recent air quality impact analysis in the area conducted for the purpose of title I, if any, and

(*ii*) The reviewing authority determines that the increase will cause or contribute to a violation of any national ambient air quality standard or PSD increment, or visibility limitation.

(*9*) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

(*i*) The State Implementation Plan for the State in which the project is located, and

(*ii*) Other requirements necessary to attain and maintain the national ambient air quality standard during the project and after it is terminated.

* * * * *

(xii) * * *

(D) For any emissions unit (other than an electric utility steam generating unit specified in paragraph (a)(1)(xii)(E) of this section) which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(E) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit, provided the source owner or operator maintains and submits to the reviewing authority, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the reviewing authority if it determines such a period to be more representative of normal source post-change operations.

* * * * *

(xx) *Electric utility steam generating unit* means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility.

(xxi) *Representative actual annual emissions* means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit, (or a different consecutive two-year period within 10 years after that change, where the reviewing authority determines that such period is more representative of source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the reviewing authority shall:

(A) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory authorities, and compliance plans under title IV of the Clean Air Act; and

(B) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

(xxii) *Temporary clean coal technology demonstration project* means a clean coal technology demonstration project that is operated for a period of 5 years or less, and which complies with the State Implementation Plan for the State in which the project is located and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(xxiii) *Clean coal technology* means any technology, including technologies applied at the precombustion, combustion, or post combustion stage, at a new or existing facility which will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam which was not in widespread use as of November 15, 1990.

(xxiv) *Clean coal technology demonstration project* means a project using funds appropriated under the heading "Department of Energy-Clean Coal Technology," up to a total amount of $2,500,000,000 for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency. The Federal contribution for a qualifying project shall be at least 20 percent of the total cost of the demonstration project.

(xxv) *Pollution control project* means any activity or project at an existing electric utility steam generating unit for

purposes of reducing emissions from such unit. Such activities or projects are limited to:

(A) The installation of conventional or innovative pollution control technology, including but not limited to advanced flue gas desulfurization, sorbent injection for sulfur dioxide and nitrogen oxides controls and electrostatic precipitators;

(B) An activity or project to accommodate switching to a fuel which is less polluting than the fuel used prior to the activity or project, including, but not limited to natural gas or coal reburning, or the cofiring of natural gas and other fuels for the purpose of controlling emissions;

(C) A permanent clean coal technology demonstration project conducted under title II, sec. 101(d) of the Further Continuing Appropriations Act of 1985 (sec. 5903(d) of title 42 of the United States Code), or subsequent appropriations, up to a total amount of $2,500,000,000 for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency; or

(D) A permanent clean coal technology demonstration project that constitutes a repowering project.

3. Section 51.166 is amended by revising paragraph (b)(21)(iv) and by adding paragraphs (b)(2)(iii) (*h*) through (*k*), (b)(21)(v), and (b) (30) through (37) to read as follows:

§ 51.166 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(2) * * *

(iii) * * *

(*h*) The addition, replacement or use of a pollution control project at an existing electric utility steam generating unit, unless the Administrator determines that such addition, replacement, or use renders the unit less environmentally beneficial, or except:

(*1*) When the reviewing authority has reason to believe that the pollution control project would result in a significant net increase in representative actual annual emissions of any criteria pollutant over levels used for that source in the most recent air quality impact analysis in the area conducted for the purpose of title I, if any, and

(*2*) The reviewing authority determines that the increase will cause or contribute to a violation of any national ambient air quality standard or PSD increment, or visibility limitation.

(*i*) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

(*1*) The State implementation plan for the State in which the project is located: and

(*2*) Other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(*j*) The installation or operation of a permanent clean coal technology demonstration project that constitutes repowering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis.

(*k*) The reactivation of a very clean coal-fired electric utility steam generating unit.

* * * * *

(21) * * *

(iv) For any emissions unit (other than an electric utility steam generating unit specified in paragraph (b)(21)(v) of this section) which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(v) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit following the physical or operational change, provided the source owner or operator maintains and submits to the reviewing authority, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the reviewing authority if it determines such a period to be more representative of normal source post-change operations.

* * * * *

(30) *Electric utility steam generating unit* means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility.

(31) *Pollution control project* means any activity or project undertaken at an existing electric utility steam generating unit for purposes of reducing emissions from such unit. Such activities or projects are limited to:

(i) The installation of conventional or innovative pollution control technology, including but not limited to advanced flue gas desulfurization, sorbent injection for sulfur dioxide and nitrogen oxides controls and electrostatic precipitators;

(ii) An activity or project to accommodate switching to a fuel which is less polluting than the fuel used prior to the activity or project, including but not limited to natural gas or coal re-burning, or the co-firing of natural gas and other fuels for the purpose of controlling emissions;

(iii) A permanent clean coal technology demonstration project conducted under title II, section 101(d) of the Further Continuing Appropriations Act of 1985 (section 5903(d) of title 42 of the United States Code), or subsequent appropriations, up to a total amount of $2,500,000,000 for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency, or

(iv) A permanent clean coal technology demonstration project that constitutes a repowering project.

(32) *Representative actual annual emissions* means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit, (or a different consecutive two-year period within 10 years after that change, where the reviewing authority determines that such period is more representative of normal source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the reviewing authority shall:

(i) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory authorities, and compliance plans under title IV of the Clean Air Act; and

(ii) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the

representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

(33) *Clean coal technology* means any technology, including technologies applied at the precombustion, combustion, or post combustion stage, at a new or existing facility which will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam which was not in widespread use as of November 15, 1990.

(34) *Clean coal technology demonstration project* means a project using funds appropriated under the heading "Department of Energy—Clean Coal Technology", up to a total amount of $2,500,000,000 for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency. The Federal contribution for a qualifying project shall be at least 20 percent of the total cost of the demonstration project.

(35) *Temporary clean coal technology demonstration project* means a clean coal technology demonstration project that is operated for a period of 5 years or less, and which complies with the State implementation plan for the State in which the project is located and other requirements necessary to attain and maintain the national ambient air quality standards during and after the project is terminated.

(36) (i) *Repowering* means replacement of an existing coal-fired boiler with one of the following clean coal technologies: atmospheric or pressurized fluidized bed combustion, integrated gasification combined cycle, magnetohydrodynamics, direct and indirect coal-fired turbines, integrated gasification fuel cells, or as determined by the Administrator, in consultation with the Secretary of Energy, a derivative of one or more of these technologies, and any other technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of November 15, 1990.

(ii) Repowering shall also include any oil and/or gas-fired unit which has been awarded clean coal technology demonstration funding as of January 1, 1991, by the Department of Energy.

(iii) The reviewing authority shall give expedited consideration to permit applications for any source that satisfies the requirements of this subsection and is granted an extension under section 409 of the Clean Air Act.

(37) *Reactivation of a very clean coal-fired electric utility steam generating unit* means any physical change or change in the method of operation associated with the commencement of commercial operations by a coal-fired utility unit after a period of discontinued operation where the unit:

(i) Has not been in operation for the two-year period prior to the enactment of the Clean Air Act Amendments of 1990, and the emissions from such unit continue to be carried in the permitting authority's emissions inventory at the time of enactment;

(ii) Was equipped prior to shutdown with a continuous system of emissions control that achieves a removal efficiency for sulfur dioxide of no less than 85 percent and a removal efficiency for particulates of no less than 98 percent;

(iii) Is equipped with low-NO_x burners prior to the time of commencement of operations following reactivation; and

(iv) Is otherwise in compliance with the requirements of the Clean Air Act.

PART 52—APPROVAL AND PROMULGATION OF IMPLEMENTATION PLANS

1. The authority citation for part 52 is revised to read as follows:

Authority: 42 U.S.C. 7401–7642 as amended by the Clean Air Act Amendments of 1990, Pub. L. No. 101–549, 104 Stat. 2399 (Nov. 15, 1990), unless otherwise noted.

2. Section 52.21 is amended by revising paragraph (b)(21)(iv) and by adding paragraphs (b)(2)(iii)(*h*) through (*k*), (b)(21)(v), and paragraphs (b)(31) through (b)(38) to read as follows:

§ 52.21 Prevention of significant deterioration of air quality.

* * * * *

(b) * * *

(2) * * *

(iii) * * *

(*h*) The addition, replacement or use of a pollution control project at an existing electric utility steam generating unit, unless the Administrator determines that such addition, replacement, or use renders the unit less environmentally beneficial, or except:

(*1*) When the Administrator has reason to believe that the pollution control project would result in a significant net increase in representative actual annual emissions of any criteria pollutant over levels used for that source in the most recent air quality impact analysis in the area conducted for the purpose of title I, if any, and

(*2*) The Administrator determines that the increase will cause or contribute to a violation of any national ambient air quality standard or PSD increment, or visibility limitation.

(*i*) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

(*1*) The State implementation plan for the State in which the project is located, and

(*2*) Other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(*j*) The installation or operation of a permanent clean coal technology demonstration project that constitutes repowering, provided that the project does not result in an increase in the potential to emit of any regulated pollutant emitted by the unit. This exemption shall apply on a pollutant-by-pollutant basis.

(*k*) The reactivation of a very clean coal-fired electric utility steam generating unit.

* * * * *

(21) * * *

(iv) For any emissions unit (other than an electric utility steam generating unit specified in paragraph (b)(21)(v) of this section) which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(v) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit, provided the source owner or operator maintains and submits to the Administrator on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the Administrator if he determines such a period to be more representative of normal source post-change operations.

* * * * *

(31) *Electric utility steam generating unit* means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW

electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility.

(32) *Pollution control project* means any activity or project undertaken at an existing electric utility steam generating unit for purposes of reducing emissions from such unit. Such activities or projects are limited to:

(i) The installation of conventional or innovative pollution control technology, including but not limited to advanced flue gas desulfurization, sorbent injection for sulfur dioxide and nitrogen oxides controls and electrostatic precipitators;

(ii) An activity or project to accommodate switching to a fuel which is less polluting than the fuel in use prior to the activity or project, including, but not limited to natural gas or coal reburning, or the co-firing of natural gas and other fuels for the purpose of controlling emissions;

(iii) A permanent clean coal technology demonstration project conducted under title II, section 101(d) of the Further Continuing Appropriations Act of 1985 (sec. 5903(d) of title 42 of the United States Code), or subsequent appropriations, up to a total amount of $2,500,000,000 for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency; or

(iv) A permanent clean coal technology demonstration project that constitutes a repowering project.

(33) *Representative actual annual emissions* means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit, (or a different consecutive two-year period within 10 years after that change, where the Administrator determines that such period is more representative of normal source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the Administrator shall:

(i) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory authorities, and compliance plans under title IV of the Clean Air Act; and

(ii) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

(34) *Clean coal technology* means any technology, including technologies applied at the precombustion, combustion, or post combustion stage, at a new or existing facility which will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam which was not in widespread use as of November 15, 1990.

(35) *Clean coal technology demonstration project* means a project using funds appropriated under the heading "Department of Energy-Clean Coal Technology", up to a total amount of $2,500,000,000 for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency. The Federal contribution for a qualifying project shall be at least 20 percent of the total cost of the demonstration project.

(36) *Temporary clean coal technology demonstration project* means a clean coal technology demonstration project that is operated for a period of 5 years or less, and which complies with the State implementation plans for the State in which the project is located and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(37) (i) *Repowering* means replacement of an existing coal-fired boiler with one of the following clean coal technologies: atmospheric or pressurized fluidized bed combustion, integrated gasification combined cycle, magnetohydrodynamics, direct and indirect coal-fired turbines, integrated gasification fuel cells, or as determined by the Administrator, in consultation with the Secretary of Energy, a derivative of one or more of these technologies, and any other technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of November 15, 1990.

(ii) Repowering shall also include any oil and/or gas-fired unit which has been awarded clean coal technology demonstration funding as of January 1, 1991, by the Department of Energy.

(iii) The Administrator shall give expedited consideration to permit applications for any source that satisfies the requirements of this subsection and is granted an extension under section 409 of the Clean Air Act.

(38) *Reactivation of a very clean coal-fired electric utility steam generating unit* means any physical change or change in the method of operation associated with the commencement of commercial operations by a coal-fired utility unit after a period of discontinued operation where the unit:

(i) Has not been in operation for the two-year period prior to the enactment of the Clean Air Act Amendments of 1990, and the emissions from such unit continue to be carried in the permitting authority's emissions inventory at the time of enactment;

(ii) Was equipped prior to shut-down with a continuous system of emissions control that achieves a removal efficiency for sulfur dioxide of no less than 85 percent and a removal efficiency for particulates of no less than 98 percent;

(iii) Is equipped with low-NO_x burners prior to the time of commencement of operations following reactivation; and

(iv) Is otherwise in compliance with the requirements of the Clean Air Act.

* * * * *

3. Section 52.24 is amended by revising paragraph (f)(13)(iv) and by adding paragraphs (f)(5)(iii)(*h*) and (*i*), (f)(13)(v) and paragraphs (f)(19) through (24) to read as follows:

§ 52.24 Statutory restriction on new sources.

* * * * *

(f) * * *

(5) * * *

(iii) * * *

(*h*) The addition, replacement or use of a pollution control project at an existing electric utility steam generating unit, unless the Administrator determines that such addition, replacement, or use renders the unit less environmentally beneficial, or except:

(*1*) When the Administrator has reason to believe that the pollution control project would result in a significant net increase in representative actual annual emissions of any criteria pollutant over levels used for that source in the most recent air quality

impact analysis in the area conducted for the purpose of title I, if any, and

(2) The Administrator determines that the increase will cause or contribute to a violation of any national ambient air quality standard or PSD increment, or visibility limitation.

(*i*) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project, provided that the project complies with:

(1) The State implementation plan for the State in which the project is located, and

(2) Other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

* * * * *

(13) * * *

(iv) For any emissions unit (other than an electric utility steam generating unit specified in paragraph (f)(13)(v) of this section) which has not begun normal operations on the particular date, actual emissions shall equal the potential to emit of the unit on that date.

(v) For an electric utility steam generating unit (other than a new unit or the replacement of an existing unit) actual emissions of the unit following the physical or operational change shall equal the representative actual annual emissions of the unit, provided the source owner or operator maintains and submits to the Administrator, on an annual basis for a period of 5 years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. A longer period, not to exceed 10 years, may be required by the Administrator if he determines such a period to be more representative of normal source post-change operations.

* * * * *

(19) *Electric utility steam generating unit* means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility.

(20) *Representative actual annual emissions* means the average rate, in tons per year, at which the source is projected to emit a pollutant for the two-year period after a physical change or change in the method of operation of a unit, (or a different consecutive two-year period within 10 years after that change, where the Administrator determines that such period is more representative of normal source operations), considering the effect any such change will have on increasing or decreasing the hourly emissions rate and on projected capacity utilization. In projecting future emissions the Administrator shall:

(i) Consider all relevant information, including but not limited to, historical operational data, the company's own representations, filings with the State or Federal regulatory authorities, and compliance plans under title IV of the Clean Air Act; and

(ii) Exclude, in calculating any increase in emissions that results from the particular physical change or change in the method of operation at an electric utility steam generating unit, that portion of the unit's emissions following the change that could have been accommodated during the representative baseline period and is attributable to an increase in projected capacity utilization at the unit that is unrelated to the particular change, including any increased utilization due to the rate of electricity demand growth for the utility system as a whole.

(21) *Temporary clean coal technology demonstration project* means a clean coal technology demonstration project that is operated for a period of 5 years or less, and which complies with the State implementation plans for the State in which the project is located and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(22) *Clean coal technology* means any technology, including technologies applied at the precombustion, combustion, or post combustion stage, at a new or existing facility which will achieve significant reductions in air emissions of sulfur dioxide or oxides of nitrogen associated with the utilization of coal in the generation of electricity, or process steam which was not in widespread use as of November 15, 1990.

(23) *Clean coal technology demonstration project* means a project using funds appropriated under the heading 'Department of Energy-Clean Coal Technology', up to a total amount of $2,500,000,000 for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency. The Federal contribution for a qualifying project shall be at least 20 percent of the total cost of the demonstration project.

(24) *Pollution control project* means any activity or project undertaken at an existing electric utility steam generating unit for purposes of reducing emissions from such unit. Such activities or projects are limited to:

(i) The installation of conventional or innovative pollution control technology, including but not limited to advanced flue gas desulfurization, sorbent injection for sulfur dioxide and nitrogen oxides controls and electrostatic precipitators;

(ii) An activity or project to accommodate switching to a fuel which is less polluting than the fuel in use prior to the activity or project including, but not limited to natural gas or coal re-burning, co-firing of natural gas and other fuels for the purpose of controlling emissions;

(iii) A permanent clean coal technology demonstration project conducted under title II, section 101(d) of the Further Continuing Appropriations Act of 1985 (section 5903(d) of title 42 of the United States Code), or subsequent appropriations, up to a total amount of $2,500,000,000 for commercial demonstration of clean coal technology, or similar projects funded through appropriations for the Environmental Protection Agency; or

(iv) A permanent clean coal technology demonstration project that constitutes a repowering project.

* * * * *

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

1. The authority citation for part 60 is revised to read as follows:

Authority: 42 U.S.C. 7401, 7411, 7414, 7416, and 7601 as amended by the Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399 (Nov. 15, 1990; 402, 409, 415 of the Clean Air Act as amended, 104 Stat. 2399, unless otherwise noted.

2. Section 60.2 is amended by adding the following definitions in alphabetical order:

§ 60.2 Definitions.

* * * * *

Clean coal technology demonstration project means a project using funds appropriated under the heading 'Department of Energy-Clean Coal Technology', up to a total amount of $2,500,000,000 for commercial demonstrations of clean coal technology, or similar projects funded

through appropriations for the Environmental Protection Agency.

* * * * *

Electric utility steam generating unit means any steam electric generating unit that is constructed for the purpose of supplying more than one-third of its potential electric output capacity and more than 25 MW electrical output to any utility power distribution system for sale. Any steam supplied to a steam distribution system for the purpose of providing steam to a steam-electric generator that would produce electrical energy for sale is also considered in determining the electrical energy output capacity of the affected facility.

* * * * *

Reactivation of a very clean coal-fired electric utility steam generating unit means any physical change or change in the method of operation associated with the commencement of commercial operations by a coal-fired utility unit after a period of discontinued operation where the unit:

(1) Has not been in operation for the two-year period prior to the enactment of the Clean Air Act Amendments of 1990, and the emissions from such unit continue to be carried in the permitting authority's emissions inventory at the time of enactment;

(2) Was equipped prior to shut-down with a continuous system of emissions control that achieves a removal efficiency for sulfur dioxide of no less than 85 percent and a removal efficiency for particulates of no less than 98 percent;

(3) Is equipped with low-NO_x burners prior to the time of commencement of operations following reactivation; and

(4) Is otherwise in compliance with the requirements of the Clean Air Act.

* * * * *

Repowering means replacement of an existing coal-fired boiler with one of the following clean coal technologies: atmospheric or pressurized fluidized bed combustion, integrated gasification combined cycle, magnetohydrodynamics, direct and indirect coal-fired turbines, integrated gasification fuel cells, or as determined by the Administrator, in consultation with the Secretary of Energy, a derivative of one or more of these technologies, and any other technology capable of controlling multiple combustion emissions simultaneously with improved boiler or generation efficiency and with significantly greater waste reduction relative to the performance of technology in widespread commercial use as of November 15, 1990. Repowering shall also include any oil and/or gas-fired unit which has been awarded clean coal technology demonstration funding as of January 1, 1991, by the Department of Energy.

* * * * *

3. Section 60.14 is amended by adding paragraphs (h) through (l) to read as follows:

§ 60.14 Modification.

* * * * *

(h) No physical change, or change in the method of operation, at an existing electric utility steam generating unit shall be treated as a modification for the purposes of this section provided that such change does not increase the maximum hourly emissions of any pollutant regulated under this section above the maximum hourly emissions achievable at that unit during the 5 years prior to the change.

(i) Repowering projects that are awarded funding from the Department of Energy as permanent clean coal technology demonstration projects (or similar projects funded by EPA) are exempt from the requirements of this section provided that such change does not increase the maximum hourly emissions of any pollutant regulated under this section above the maximum hourly emissions achievable at that unit during the five years prior to the change.

(j) (1) Repowering projects that qualify for an extension under section 409(b) of the Clean Air Act are exempt from the requirements of this section, provided that such change does not increase the actual hourly emissions of any pollutant regulated under this section above the actual hourly emissions achievable at that unit during the 5 years prior to the change.

(2) This exemption shall not apply to any new unit that:

(i) Is designated as a replacement for an existing unit;

(ii) Qualifies under section 409(b) of the Clean Air Act for an extension of an emission limitation compliance date under section 405 of the Clean Air Act; and

(iii) Is located at a different site than the existing unit.

(k) The installation, operation, cessation, or removal of a temporary clean coal technology demonstration project is exempt from the requirements of this section. A *temporary clean coal control technology demonstration project*, for the purposes of this section is a clean coal technology demonstration project that is operated for a period of 5 years or less, and which complies with the State implementation plan for the State in which the project is located and other requirements necessary to attain and maintain the national ambient air quality standards during the project and after it is terminated.

(l) The reactivation of a very clean coal-fired electric utility steam generating unit is exempt from the requirements of this section.

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