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, 1998, 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. 88].

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 certainty, 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