

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 applications 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. 1830, 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 what 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 to 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]ppropriate, 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 150 (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-enforceable 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(1) 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 158, 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 Ass'n 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)—