

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

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

Numerous provisions in the Act itself and in other environmental statutes setting forth notice and comment requirements demonstrate that Congress can and does formulate and apply explicit provisions for public comment to particular types of activities. For example, section 169A of the Act requires "notice and opportunity for public hearing" before the EPA may exempt a major stationary source from a retrofit requirement if that source is contributing to visibility impairment. 42 U.S.C. 7491 (b), (c)(1). Similarly, section 165 of the Act requires that construction permits issued for new major emitting facilities be subject to "a public hearing . . . with opportunity for interested persons . . . to appear and submit written or oral presentations on the air

quality impact of such source." *Id.* section 7475(a)(2). The Clean Water Act requires the EPA to provide an "opportunity for public hearing" before issuing a pollutant discharge permit, 33 U.S.C. 1342(a)(1), and the Resource Conservation and Recovery Act requires public notice and, if requested, an "informal public hearing (including an opportunity for presentation of written and oral views)" prior to the issuance of any hazardous facility permit, 42 U.S.C. 6974(b)(2).

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

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

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

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

generally *Camp v. Pitts*, 411 U.S. 138, 141-42 (1973).

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

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

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

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

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

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

EPA's exercise of discretion. *Chevron*, 467 U.S. at 842.

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

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

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

EPA believes that the procedures for minor permit modifications in the final rule accommodate these industry concerns to the extent possible while maintaining a careful balancing of the above-mentioned statutory goals and preserving the integrity of the permit process. The minor permit modification procedures achieve the goals of being "streamlined" and "expeditious" because they allow States to adopt procedures under which sources may make permit revisions related to operational needs without delay and without the need to submit those revisions to public notice and comment. For changes resulting in increases in emissions below *de minimis* threshold levels set by the permitting authority and approved by EPA, the permitting authority may group these revisions on a

quarterly basis for purposes of EPA and affected State review. For changes resulting in emissions increases above these threshold levels (but below title I modification levels) the source may implement the change immediately after filing a complete application, unless the permitting authority establishes a waiting period. In either case, permitting authority, EPA and affected State review may occur after the change has been made.

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

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

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

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

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

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

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

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

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

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

It bears emphasis that the minor permit modification procedures set forth in the final rule set the minimum standard for an approvable State permit program. States are free to establish permit revision procedures more stringent than those set forth in this rule. The EPA recognizes that most States have already adopted some form of operating permits program and, based on their own experience, have developed different approaches for

processing permit revisions. The EPA also recognizes that different States have different environmental concerns. For example, States that have serious nonattainment problems may wish to adopt more stringent review procedures than those that do not. The final rule allows State the flexibility to design permit programs or to adapt their existing programs to meet their individual circumstances, provided the minimum requirements of part 70 are met.

(iii) *De minimis* justification for minor permit modification procedures. The EPA starts from the assumption that, in the context of regulatory statutes there is "virtually a presumption in . . . favor [of *de minimis* exemptions]." *Public Citizen v. Young*, 831 F.2d 1108, 1113 (D.C. Cir. 1987), and they will be inferred "save in the face of the most unambiguous demonstration of congressional intent to foreclose them." *Alabama Power*, 636 F.2d at 35'. If such an exemption were statutorily permissible and otherwise valid, it would allow omission of public notice and comment in genuinely *de minimis* cases, even assuming that under step one of *Chevron* the Act unambiguously required public notice and comment for all permit actions.

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

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

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

With regard to the language and structure of title V, a number of provisions are relevant. A modification procedure insulates a source that complies with its requirements from liability under section 502(a), which provides that "it shall be unlawful for any person to violate any requirement of a permit issued under this subchapter." 42 U.S.C. section 7661a(a). This prohibition is similar to that set out in section 185(a) of the Act, the provision at issue in *Alabama Power* ("No major emitting facility * * * may be constructed unless a permit has been issued"). Under title V, Congress nowhere prescribed an inflexible adherence to permit allowables. To the contrary, where the statutory design both contains a prohibition on exceedance of permit limits and authorizes modifications of such limits through procedures that must be both "streamlined" and "expeditious," *id.* section 7661a(b)(6), title V allows an exemption for minor exceedances on the basis of a *de minimis* rationale. Likewise, the legislative history of the relevant statutory provisions and title V as a whole is consistent with this approach.

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

Central to this conclusion is the rule's limitation that no revision may be processed as a minor modification if it

would constitute a title I modification. By regulation, EPA has limited modifications under parts C (prevention of significant deteriorations) and D (nonattainment) of title I to changes that would not increase emissions beyond certain "significance levels." These significance levels, established in response to the *Alabama Power* decision following careful analysis by EPA of the legal and air quality considerations, have never been challenged and remain in effect. See 40 CFR § 51.165(a)(1)(x). See also 45 FR 52678 (August 7, 1980). In fact, Congress endorsed this *de minimis* approach in the 1990 Act Amendments. It did so in part by setting specific statutory *de minimis* levels for major modifications in certain areas, and by leaving in EPA's other *de minimis* exceptions undisturbed. See, e.g., sections 182(d)(6) and 182(e)(2). The minor permit modification track is therefore limited to increases in emissions levels long recognized under the Act as insignificant.

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

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

Moreover, the NSR exemption allows a source to avoid significant substantive requirements, such as the requirement to install technological controls or to

obtain emissions offsets from other sources in the area prior to construction. By contrast, the minor permit modification procedure is an exemption from certain procedural requirements only. Any change effected through minor permit modifications must comply with all substantive Act requirements.

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

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

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

This commenter also asserted that allowing permit terms to be modified

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

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

the comment period, several State groups (IV-D-121, IV-D-232, IV-D-270) and one environmental group (N-D-81) addressed the issue of appropriate *de minimis* thresholds. Finally, the commenter's own comment addressed the *de minimis* issue. In sum, the EPA proposal provided sufficient notice that *de minimis* was an approach that might be adopted as a final outcome in the rulemaking.

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

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

The minor permit modification procedures outlined in EPA's regulations allow States to create a highly limited *de minimis* exemption that satisfies the requirements of *Alabama Power*. The Administrator has determined that States could find that requiring review by the permitting authority, EPA, and affected States to take place before a source can make a change qualifying for treatment as a minor permit modification may impose great burdens on industry and State regulatory systems, while any benefit that would accrue would be trivial. The regulations

require ample safeguards to ensure that such a temporary exemption (to the formal requirement of compliance with all permit terms while a modification application is pending) is truly *de minimis* in scope and impact.

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

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

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

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

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

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

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

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

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

- (1) Do not violate any applicable requirement;
- (2) Do not involve significant changes to existing monitoring, reporting, or

recordkeeping requirements in the permit (as discussed below);

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

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

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

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

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

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

SIP's and EPA rules would have to contain compliance requirements and procedures that would assure that any or all market-based programs are quantifiable, accountable, and enforceable, and based on replicable procedures for determining the emission reductions expected from the program.

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

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

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

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

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

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

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

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

In developing State programs, States may also want to provide the permitting authority with the option of issuing a revised proposed permit that would restart EPA's 45-day review period. This

would allow the State to make minor changes to the proposed permit without requiring the State to deny an application due to minor errors in the proposed permit, thereby forcing the source to reapply for a permit modification. EPA believes that a source should be allowed to make a change before a modified permit is issued by the permitting authority only if the source bears the risk of making a change that the permitting authority later finds should not have been made.

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

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

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

States may also propose alternate *de minimis* levels in response to new regulations which might create unanticipated results under the formula

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

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

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

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

switch from direct measurement of emissions to fuel sampling and analysis, such as switching from emissions monitoring of SO₂ to sampling and analyzing coal sulfur content. The EPA believes it would be inappropriate for sources to be able to change the method of measuring compliance with its requirements using the minor permit modification procedures. Although EPA recognizes that there are legitimate economic reasons for making some changes quickly, there should be no such urgency for changing existing significant monitoring, reporting, or recordkeeping requirements. Nothing in § 70.7(e)(4)(i) regarding compliance provisions shall be interpreted to prevent sources from making off-permit changes pursuant to § 70.4(b)(14) and (15), or using the operational flexibility provision in § 70.4(b)(12)(ii). When a source takes advantage of these provisions, it may alter its activities to such a degree that its original compliance terms are no longer relevant with respect to the change. A source which makes off-permit changes must comply with any compliance provisions imposed by the applicable requirements that apply to the off-permit change. Similarly, a source that uses the operational flexibility provision of § 70.4(b)(12)(ii) must comply with all compliance provisions imposed by the SIP provision authorizing the operational flexibility. If the source later decides to operate as originally permitted, it must comply with the compliance provisions in its original permit.

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

3. Deadline for Action on Applications

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

deadlines might be appropriate for permit renewals or modifications.

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

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

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

4. Administrative Permit Amendments

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

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

The EPA has learned, however, that most State preconstruction review programs do not meet title V requirements for review by EPA and

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

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

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

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

5. Public Participation

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

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

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

Section 70.7(h) makes clear that all permit proceedings, except those for minor permit modifications, must

provide adequate procedures for public participation. For this purpose, public participation includes: notice, an opportunity for public comment, and a hearing where appropriate. Section 70.7(h) goes on to specify the key elements required in such procedures.

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

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

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

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

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

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

1. 90-day Response Period

Proposed § 70.8(c)(4) allowed 90 days for the permitting authority to make a submittal in response to an EPA objection to issuance of a proposed permit. If the permitting authority submitted a revised permit that only partially met EPA's objection, up to another 90-day period could be granted for the permitting authority to submit a second permit revision meeting EPA's

objection. This provision for a second 90-day period is removed from the final rules because the Administrator has determined that section 505(c) of the Act only allows one 90-day period. Although section 505(e) of the Act allows an additional 90-day period, this section applies to reopening permits for cause, not for objections to proposed permits.

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

2. Permit Continuance

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

3. Grounds for an EPA Objection

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

I. Section 70.9—Fee Determination and Certification

The requirement that State operating permit programs establish an adequate permit fee schedule is a key provision of title V. The statute provides that an approvable permit program require sources subject to part 70 to pay an annual fee (or the equivalent over some other period) sufficient to cover all "reasonable (direct and indirect) costs" required to develop and administer the permit program [502(b)(3)(A)]. The statute also mandates that all fees required to be collected by a permitting authority under title V must be used solely to support the permit program [502(b)(3)(C)(iii)]. Following is a description of the basis and purpose of the changes in § 70.9.

1. Permit Program Costs

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

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

demonstration individually using the definition of "permit program costs" in the final regulation.

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

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

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

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

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

estimating program financial needs and fee revenues.

3. "Regulated Pollutants"

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

The proposal requested comment on when a pollutant listed in section 112(b) becomes a regulated pollutant for fee purposes. The following three alternatives were set forth: (1) At the time of enactment of the 1990 Act Amendments, (2) when EPA first promulgates a MACT standard for that pollutant, or (3) when a MACT standard for that pollutant first becomes applicable to the permitted source. The proposal adopted the second alternative.

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

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