

**PREAMBLE TO REVISED PART 51 AND Part 70**

**DRAFT**

**February 18, 1998**

**TABLE OF CONTENTS**

**I. Background . . . . . 4**

**II. Summary of Changes For Which There Was Not Adverse Public  
Comment . . . . . 7**

**III. Changes to Section 70.2 . . . . . 10**

    A. Advance Approval . . . . . 10

    B. Alternative Operating Scenarios . . . . . 19

    C. Eligible Indian Tribe . . . . . 21

    D. Emissions Cap Permit . . . . . 21

    E. Indian Tribe . . . . . 22

    F. Major Source . . . . . 22

    G. Permit Revision/Permit Modification . . . . . 62

    H. Plantwide Applicability Limit . . . . . 64

    I. Potential to Emit . . . . . 66

    J. Regulated Air Pollutant . . . . . 69

    K. Research and Development Activities . . . . . 70

    L. Section 502(b)(10) Changes . . . . . 70

    M. State Review Program . . . . . 70

    N. Title I Modification . . . . . 71

**IV. Changes to Section 70.3 . . . . . 72**

    A. Part C and D Sources . . . . . 72

    B. Section 112(r) Applicability . . . . . 74

**V. Changes to Section 70.4 . . . . . 75**

    A. Authority to Issue Emissions Cap Permits and Advance NSR

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

	75
B. <u>Trading Under Permitted Emissions Caps</u> . . . . .	78
C. <u>Provisions for Section 502(b)(10) Changes</u> . . . . .	82
D. <u>Off-Permit Changes</u> . . . . .	85
E. <u>Changes Under Section 502(b)(10)</u> . . . . .	90
F. <u>Time Period for Judicial Review</u> . . . . .	93
G. <u>Interim Approval Criteria</u> . . . . .	94
<b>VI. Changes to Section 70.5</b> . . . . .	95
A. <u>Insignificant Activities</u> . . . . .	95
B. <u>Certification Language</u> . . . . .	97
<b>VII. Changes to Section 70.6</b> . . . . .	99
A. <u>Weekly Reporting of Alternative Scenarios</u> . . . . .	99
B. <u>Emergency Defense</u> . . . . .	100
<b>XI. Program Transition</b> . . . . .	114
A. <u>Submission of Initial Programs</u> . . . . .	114
B. <u>Submissions of Program Revisions to Conform to the</u> <u>Revised Part 70</u> . . . . .	116
<b>XII. Tribal Programs</b> . . . . .	120
<b>XIII. Administrative Requirements</b> . . . . .	125
A. <u>Docket</u> . . . . .	125
B. <u>Executive Order (E.O.) 12866</u> . . . . .	125
C. <u>Regulatory Flexibility Act Compliance</u> . . . . .	126
D. <u>Paperwork Reduction Act</u> . . . . .	127
E. <u>Unfunded Mandates Reform Act</u> . . . . .	129
F. <u>Submission to Congress and the General Accounting Office</u>	
	130

[NOTE: Sections VIII., IX., and X. are not included in this February 18, 1998 draft preamble.]

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 51 and 70

[FRL-         ]

Operating Permits Program

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

-----  
SUMMARY: The EPA is today promulgating new streamlined procedures for revising stationary source operating permits issued by State and local permitting authorities under title V of the Clean Air Act (Act). These revisions to part 70 were proposed in two notices published in the Federal Register on August 29, 1994 and on August 31, 1995.

In addition, today's notice promulgates numerous other changes to part 70 that were proposed in those two notices. Among these are changes to: the definition of major source with respect to research and development activities, support facilities, and fugitive emissions; provisions related to operational flexibility under emissions caps; the certification of compliance that a responsible official of a permitted source is required to submit; and the affirmative defense available for violations of permit terms during an emergency. Today's notice also promulgates revised procedural requirements for "minor" new source review (NSR) permitting under title I of the Act to provide additional flexibility to States in providing public review for minor NSR actions.

DATES: The regulatory amendments announced herein take effect on [60 days from the date of publication], 1997.

ADDRESSES:

*Docket:* Supporting information used in developing the regulatory revisions to part 70 are contained in Docket No.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

A-93-50. This docket is available for public inspection and copying between 8:30 a.m. and 3:30 p.m. Monday through Friday. A reasonable fee may be charged for copying. The address of the EPA Air Docket is: room M-1500, Waterside Mall, 401 M Street SW, Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Ray Vogel (919/541-3153, vogel.ray@epamail.epa.gov) or Roger Powell (919/541-5331, powell.roger@epamail.epa.gov), mail drop 12, United States Environmental Protection Agency, Office of Air Quality Planning and Standards, Information Transfer and Program Integration Division, Research Triangle Park, North Carolina 27711.

**SUPPLEMENTARY INFORMATION:**

Today's proposal reflects the principles articulated in the President's and the Vice President's March 16, 1995 report, "Reinventing Environmental Regulation." That report establishes goals for partnerships between EPA and State and local agencies in development of environmental regulations. These goals are: minimizing costs, providing flexibility in implementing programs, tailoring solutions to the problem, and shifting responsibilities to State and local agencies. The Agency believes that the proposal in today's notice meets the goals of the report.

**Table of Contents**

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

- I. Background
  - A. Operating Permits Regulations
  - B. Proposed Permit Revision System
  - C. Other Proposed Revisions in Today's Notice
  - D. Environmental Benefits
  - E. Structure of Preamble
- II. Summary of Changes For Which There Was Not Adverse Public Comment
- III. Changes to Section 70.2

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

- IV. Changes to Section 70.3
- V. Changes to Section 70.4
- VI. Changes to Section 70.5(a)
- VII. Changes to Section 70.6
- VIII. Changes to Section 70.7
  - A. Structure of The Revised Permit Revision System
  - B. Notice Of Application Completeness
  - C. Expedited Permit Revisions
  - D. Minor Permit Revisions
  - E. Significant Permit Revisions
  - F. Merging Programs
  - G. Permit Shield
  - H. Incorporation of MACT Standards
  - I. Public Review
- IX. Changes to Section 70.8
- X. Changes to Part 51
- XI. Program Transition
- XII. Tribal Programs
- XIII. Administrative Requirements
  - A. Docket
  - B. Executive Order (E.O.) 12866
  - C. Regulatory Flexibility Act Compliance
  - D. Paperwork Reduction Act
  - E. Unfunded Mandates Reform Act
  - F. Submission to Congress and the General Accounting Office
  - I. Background**
    - A. Operating Permits Regulations

Title V requires that EPA develop regulations which set minimum standards for State operating permits programs. Those regulations, codified in part 70 of chapter I of title 40 of the Code of Federal Regulations, were originally promulgated on July 21, 1992 (57 FR 32250). On August 29, 1994, EPA proposed a number of revisions to the part 70 regulations as a result of

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

negotiations with litigants who petitioned for review of part 70 after its promulgation (59 FR 44460). The August 1994 proposal primarily included new procedures for revising permits. In response to comments on the 1994 proposal, on August 31, 1995, EPA proposed further revisions to part 70 including a proposal for a simpler permit revision approach designed to build upon existing State permitting programs (60 FR 45530).

Title V also requires that States submit their operating permit programs for EPA approval and that EPA promulgate and administer a Federal operating permits program for States that have not obtained EPA approval of a program by November 15, 1995. On November 15, 1997, EPA began administering Federal operating permits programs in Indian country, except where a part 70 program was approved. The EPA's regulations for the Federal operating permits program are codified at part 71, which was promulgated on July 1, 1996 (61 FR 34202). In large part the part 71 regulations are modeled on the original part 70. The EPA will also promulgate in a future rulemaking action a phase II of the part 71 regulations, which will consist of regulatory changes that will make part 71 consistent with part 70 as revised by today's rulemaking.

**B. Permit Revision System**

The August 1994 notice proposed to revise § 70.7 to establish a four-track system for revising operating permits. Comments received at the October 19, 1994 public hearing and comments submitted to the docket indicate that the proposed four-track system was widely perceived as too complicated, prescriptive, and disruptive to existing State programs. In response to those concerns, EPA sought further input from representatives of State and local permitting agencies, industry, and environmental groups to learn more directly about their implementation concerns. The EPA received many thoughtful ideas from these groups about streamlining the process for permit

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

revisions. After considering comments received on the August 1995 proposal, EPA is today promulgating final revisions to part 70 based largely on the August 1995 proposal for permit revisions.

C. Other Revisions in Today's Notice

Today's notice also promulgates additional part 70 revisions proposed in the August 1994 and August 1995 notices. In part, these revisions involve provisions in the current part 70 regarding certification by a responsible official, the affirmative defense for violations of permit terms during an emergency, and the definition of title I modification. Today's notice also revises the public review requirements of title I applicable to minor NSR permits.

Finally, in today's notice EPA is clarifying that research and development (R&D) activities located with a major source under sections 112, 302(j), or part D of title I of the Act, need not be considered part of that major source or required to obtain a permit, unless the R&D activities together constitute a major source.

A number of revisions to the definitions in § 70.2 are included in today's notice to be consistent with the promulgated revisions.

D. Environmental Benefits

Implementation of today's action will help achieve the environmental benefits that Congress expected from an operating permits program. The revisions tailor public and EPA review to the environmental significance of the changes being made. This review should improve compliance with the Act and its implementing regulations by sources undertaking permit revisions with potentially substantial environmental consequences, such as those which avoid major source requirements by offsetting emissions increases at new or modified units with emissions decreases at existing units. At the same time, the streamlined

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

permit revision system assures that most permit actions, which are much less likely to have a major environmental impact, are revised expeditiously to avoid unnecessary procedural delays and associated costs. Yet, the system will still assure in all cases that the source, the public, and governmental agencies are aware of all of a source's obligations under the Act and regulations promulgated thereunder, which will improve compliance.

**E. Structure of Preamble**

This notice sets forth the changes that have been made to part 70 as a result of the August 1994 and August 1995 proposal notices. Sections III. through IX. discuss changes to §§ 70.2 through 70.8 where the change is not being made as proposed due to public comment, or where the change is being made as proposed and there was significant adverse public comment to the proposed change. Similarly, section X. discusses proposed revisions to 40 CFR part 51. For these changes, the preamble summarizes the proposal, summarizes the comments, discusses the proposal and comments, and explains the final change. Section II of this preamble lists, without discussion, the changes that are being made as proposed where there was no significant public comment. Responses to public comments are provided in greater detail in a response to comment document which is in the docket for today's action.

In this preamble, as in part 70, the word "State" includes any local, city, county, or tribal air pollution control agency, or any other entity, that is implementing an EPA approved part 70 operating permits program.

**II. Summary of Changes For Which There Was Not Adverse Public Comment**

A number of regulatory revisions to part 70 that were proposed in the August 1994 and August 1995 proposals were not the subject of substantive public comment and are being promulgated in today's action as proposed. These revisions are,



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

therefore, not being discussed in this preamble. For clarity, however, these revisions are listed herein.

Definitions are added for "Major NSR" and "Minor NSR." The definitions of "Permit modification" is being deleted. The definition of "Applicable requirement" is being revised to include requirements limiting emissions for purposes of offsets and to specify that section 608 and 609 requirements of title VI are applicable requirements. The definition of "Administrator" is being revised to add "her." The definition of R&D activities is revised to clarify restrictions on separate major source treatment and to expand eligibility to more sources. The definition of "Responsible official" is revised to be consistent with the definition of designated official under the Acid Rain program.

Under the definition of "Major source," a clarification is added that for areas defined in paragraph (3) of the definition with lower major source cutoffs (e.g., serious, severe, or extreme ozone nonattainment areas), fugitive emissions are to be counted in determining major source status for those sources listed in paragraph (2) of the definition. Also, a change is made to category (viii) to change the size of covered municipal incinerators from 250 tons of refuse per day to 50 tons.

Sections 70.3(a)(2) and (3) are being revised to clarify that an area source is the same as a non-major stationary source.

Sections 70.4(b)(11)(iii) and 70.7(a)(2) are revised to change the period for acting on early reductions under section 112(i)(5) of the Act from 9 months to 12 months. Section 70.4(h) is revised to add a provision that EPA can continue to issue phase II acid rain permits when a part 70 program is approved. Section 70.4(i)(1) is added to provide a timeframe for permitting authorities to submit program revisions to EPA in response to revisions to part 70 or a finding by the Administrator that a program revision is necessary. Section 70.4(j) is added to

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

specify what version of part 70 will be used in reviewing initial program submissions. This assumes some initial programs may be submitted after today's revisions to part 70, which may be true for Indian Tribes.

Section 70.5(a)(1)(ii) is revised to remove the 12-month time period for submitting permit revisions except for new stand-alone sources subject to part 70. Section 70.5(a)(1)(iv) is revised to provide flexibility for submittal of acid rain permit applications. Section 70.5(a)(2) is revised to add the provision that an application may be deemed complete if it contains information necessary to allow processing to begin. Section 70.5(c)(8) is revised to require the permit to identify units eligible for emissions trading.

Section 70.6(a)(1)(iv) is added to require permit conditions in accordance with regulations promulgated under section 112(r) of the Act. Section 70.6(a)(3)(iii)(B) is revised to add provisions for defining "prompt" with respect to reporting deviations from the permit and defining "upset conditions." Clarifying language is added to § 70.6(a)(4) with respect to acid rain SO<sub>2</sub> allowances. The wording of § 70.6(a)(8) is changed for purposes of clarity with respect to emissions trading. Section 70.6(c)(1) is revised to be more specific with respect to compliance assurance. Section 70.6(d)(3) is added to provide for notifying the public of sources covered under general permits. Section 70.6(f)(3)(i) is revised to restrict provisions of section 112(r)(9) of the Act from the permit shield.

Section 70.7(a)(7) is added to specify when new applicable requirements that are promulgated during permit issuance or renewal should be included in the permit.

Section 70.8(a)(1) is revised to conform to the new permit revision system the provisions for submittal of permit revision applications, proposed permit revisions, and revised permits to EPA. A provision is added to § 70.8(b)(2) to ensure that

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

affected States are notified of permit revisions at or before the time the public is notified. The provisions for EPA review in §§ 70.8(c), (c)(1), (d)(3), (d)(4), and (e) are modified to account for the new permit revision system. Section 70.8(d)(1) is revised to add a provision that the public be notified of the beginning and end of EPA's review period; this is for purposes of knowing when the public's 60-day petition period begins.

Section 70.9(c) is revised to clarify that EPA may require periodic updates to a permitting authority's permit fee demonstration.

Section 70.10(a) is modified to clarify the application of sanctions and operation of a Federal operating permits program.

A provision is added to § 70.11(a)(3)(i) to indicate that States may include mental state as an element of proof for civil violations for penalties over \$10,000.

**III. Changes to Section 70.2**

**A. Advance Approval**

**1. Summary of Advance NSR Proposal**

The EPA, in August 1994, proposed to allow use of the concept of alternative scenarios to provide advance approval to construct and operate new or modified units subject to NSR and section 112(g) (referred to as "advance NSR"). The concept of advance NSR is that the permitting agency decides the applicable NSR requirements before an anticipated project or class of projects is constructed or modified, and then includes that project's requirements in the part 70 permit for the facility. As a result, the project is "pre-approved" by the permitting authority. This pre-approval avoids the need for a separate NSR permit and a part 70 permit revision prior to the project being constructed or operated. The NSR permit is unnecessary because preconstruction review and approval has already occurred for the anticipated project or class of projects, and the NSR permit terms are already established (in the part 70 permit). A part 70

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

permit revision is unnecessary since the part 70 permit already contains the NSR construction and operation requirements for the project.

The 1994 proposal to treat advance NSR as an alternative scenario under part 70 did not propose to materially alter the underlying NSR State implementation plan (SIP) requirements. The extent to which advance NSR approval is available, or indeed, whether it is available at all, is governed by each State minor NSR program. Since the structures of State NSR programs vary widely, the degree to which advance NSR is available in a particular program (if at all) also varies widely. For example, a State that required a contemporaneous case-by-case review of each minor NSR action for its ambient impact or for a control technology determination would likely have limited opportunities for advance NSR. However, States whose NSR programs apply a given control technology to a category of changes or who can make control technology determinations which remain valid for some time after permit issuance are likely to have opportunities for advance NSR. For example, a flexible permit for a semiconductor facility in Oregon<sup>1</sup> grants a minor NSR preapproval for a class of new and modified VOC emitting activities within certain "stationary sources" (as defined by Oregon) at the facility. The permit assures that the preapproved changes comply with the State minor NSR regulations by including requirements that preapproved units in certain source categories must employ certain control equipment, and requirements that the facility stay below a national ambient air quality standard (NAAQS)-protective cap. The State of Oregon determined that the preapprovals as set forth in the part 70 permit satisfied the minor NSR requirements, thus allowing the changes to be made without the need for further

---

<sup>1</sup>See Intel's Oregon Part 70 Operating Permit, Permit No. 34-2681, which is included in docket A-93-50 as item II-I-3.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

minor NSR approval or part 70 permit revisions.

The 1994 proposal did not address the extent to which advance NSR would be available in State NSR programs. It simply provided that, where advance NSR is available, the alternative operating scenario provisions of § 70.6(a)(9) offer a mechanism for implementing it through part 70 permits. A permitting authority considering implementing advance NSR must still consider the extent to which its NSR rules allow the use of approaches which forecast specific NSR requirements in advance. Advance NSR demands an ability to predict the construction and operational details of the future project or class of projects with enough certainty to allow the permitting authority to fix relevant NSR requirements in the part 70 permit, including compliance monitoring terms. A permitting authority must also consider whether including advance NSR as an alternative operating scenario in a part 70 permit would satisfy its own procedures for drafting, providing for review of, and issuing NSR permits for the changes which are being preapproved.

In August 1995, EPA further clarified its advance NSR proposal by proposing to add a definition of advance NSR to § 70.2, and by explaining that, in EPA's view, a change subject to an advance approval scenario would not be a change under section 502(b)(10) of the Act. Rather, it would constitute a switch to an alternative operating scenario under § 70.6(a)(9). As the preamble noted, this interpretation would have two advantages. First, it would allow the use of advance NSR for title I modifications, and avoid the limitation that changes made under section 502(b)(10) cannot be title I modifications. Second, and more important, the 7-day advance notification under section 502(b)(10) which attaches to each change made under that section would not apply to changes under the advance NSR approval. Consequently, where the NSR program allows for advance approval, and the permitting authority approves an alternative

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

scenario containing advance approval, the part 70 permit could allow a source to make the approved change without a part 70 permit revision.

2. Summary of Advance NSR Comments

A large number of industry commenters supported the addition of the definition of advance NSR. However, several commenters raised concerns about the approach. An environmental commenter believed that advance NSR should be allowed only for specifically identified new units whose impacts have already been evaluated. The commenter was concerned that, without this restriction, adverse environmental consequences could result.

A State commenter was concerned that the advance NSR provisions would preclude the State's ability to decide that a separate construction permit is still necessary, i.e., to allow for preconstruction review of the proposed project. The commenter drew a distinction between: (1) preauthorizing in the part 70 permit certain minor NSR changes by including permit conditions that ensure that the preauthorized changes meet minor NSR, and (2) anticipating in a part 70 permit the terms that would result from a separate minor NSR process. In this latter case, the State still completes a separate minor NSR case-by-case approval, but the part 70 permit does not need a revision because it anticipated and already contains the operating terms and conditions that result from the minor NSR process. The commenter was concerned that if EPA intends to require States to provide advance approval in the first situation, the State could lose its ability to conduct preconstruction review. In addition, two industry commenters were concerned about possible confusion between advance NSR and plantwide applicability limits (PALs).

3. Discussion of Advance NSR

The EPA disagrees with the comment that advance NSR should be allowed only for specifically identified new units, or that adverse environmental consequences could result unless advance

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

approval is limited to such units. The EPA notes that any advance approval must still meet all applicable requirements, including the NAAQS-protective requirements of the SIP and any control technology requirements (e.g., "minor source (best available control technology (BACT))" including case-by-case requirements where applicable. However, EPA believes that advance approvals that meet applicable requirements can apply not only to specifically identified new units, but can also apply to new units identified as part of a class (e.g., storage tanks meeting certain criteria) to the extent that applicable air pollution rules are written so as to regulate such units as a class. For example, the Federal new source performance standards (NSPS), national emission standards for hazardous air pollutants (NESHAP), maximum achievable control technology (MACT) standards, and most SIP limits apply to certain source categories (though parts of some of these standards, such as monitoring, are source specific and determined on a case-by-case basis). By the same token, NSR requirements may allow NSR permit terms to apply categorically, such that each time a unit in the category is added, the relevant NSR requirements would apply to that unit in a predictable way that could be built in to the permit in advance.

The EPA notes that, if the change triggers a new applicable requirement other than NSR, (e.g., NSPS), that requirement would also need to be included in the permit, which would require a permit revision. However, as discussed below, an advance approval may also be written to cover applicable requirements other than NSR. Finally, the Agency emphasizes that the permitting authority may establish additional permit terms as needed to ensure that changes under an advance approval comply with the Act and the SIP (e.g., a NAAQS-protective cap, or a requirement to screen for ambient impact violations). Such an approach is demonstrated by the Intel permit in Oregon.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

The EPA also disagrees with the comment that advance NSR would preclude a State's ability to require a construction permit or to allow for preconstruction review. As an initial matter States are not required to provide for advance NSR in SIP's or part 70 programs. Moreover, as this is not a program requirement, any State establishing such a program would have flexibility in deciding what types of changes required preconstruction review and a preconstruction permit.

In the first situation mentioned by this commenter, where a source can avoid review at the time of the change because the part 70 permit allows changes which are preauthorized, EPA does not see this as a problem since this is one of the objectives of advance NSR. The State has not lost its ability to conduct preconstruction review. Rather, it has conducted preconstruction review in advance, and has included the resulting terms in the part 70 permit in advance of the change.

In the State commenter's second situation, where the part 70 permit anticipates the terms that would result from an NSR process and the part 70 permit need not be revised, EPA notes that the source must still await an affirmative approval under the State's NSR program before it can construct or modify the unit. Thus, this is not strictly advance approval. Although it avoids the need for a part 70 permit revision, the source must still await case-by-case NSR authorization, which will likely generate new permit terms. If the State rules require such case-by-case approval, then an advance approval would likely not be workable, and the State need not provide it. If the case-by-case review under NSR creates new terms or conditions, these would need to be incorporated into the part 70 permit through a part 70 permit revision and would thus not be an advance approval. The State has the ability to decide whether a construction permit is necessary. However, if the State determines that the advance approval can render a construction permit unnecessary for some



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

changes by fully anticipating the minor NSR terms in the part 70 permit, EPA sees little benefit to withholding advance approval of such changes.

To further address the State commenter's concern that the proposal could be read to override a State's ability to require preconstruction approval, EPA notes that a State's ability to grant advance NSR approval is limited by the requirements of the Act and the applicable SIP. Beyond that, it is properly an NSR issue to be decided by the State. Whether to allow for advance approval of minor NSR requirements in the first instance is a decision within the State's discretion under its minor NSR program, and what sort of conditions to place on specific permits containing advance approval provisions is also within the State's discretion. As discussed below, alternative operating scenarios (including advance approvals) under § 70.6(a)(9) are subject to approval by the permitting authority. Consequently, part 70 does not require any permitting authority to approve an alternative scenario proposed by a source, if in the judgment of the permitting authority, the scenario: (1) does not comply with applicable requirements, including those of the NSR program; (2) is not enforceable as a practical matter; or (3) is not reasonably anticipated.

Furthermore, nothing in today's rulemaking requires a State to revise its NSR program to provide for advance approval. Although EPA believes the advance approval concept has many benefits, as demonstrated in permits issued by States that have already provided for it, the Agency acknowledges that the availability of advance NSR under any particular NSR program is best determined by the permitting authority. The EPA defers to States to determine whether their NSR programs allow for advance approval of certain projects and what conditions and restrictions apply (e.g., pollutants covered, duration of advance approval, types of changes eligible, etc.). Where the State NSR program

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

provides for such an approach, today's part 70 revisions provide for that approach to be implemented through part 70's alternative operating scenario provisions.

As for comments about confusion between advance NSR and PALs, EPA today is providing further clarification of the meaning of the two terms. The EPA notes that these are two tools used in designing flexible permits, but differ in their basic purpose and structure. In an advance NSR approval, the State forecasts the NSR or other applicable requirements that would apply to a particular project (or class of projects), and then develops part 70 permit terms to comply with NSR and other applicable requirements. In contrast, a PAL is a limit taken to avoid triggering NSR, specifically major NSR, once the PAL is established. Compliance with the PAL avoids triggering major NSR; it does not conduct the NSR in advance. As a result, a PAL by itself would not avoid the need to obtain a minor NSR permit if a change is made that is subject to minor NSR, nor would it avoid the need to revise a part 70 permit to add additional applicable requirements (e.g., NSPS). To avoid minor NSR and part 70 permit revisions, a source would need to use a PAL in combination with advance NSR approval and other advance approvals as appropriate to meet the source's flexibility needs.

The EPA also wishes to further clarify the definition of advance NSR as it pertains to major NSR under parts C and D of the Act. The proposed definition of advance NSR appeared to treat major and minor NSR equally regarding the availability of advance approvals. The basic part 70 requirement states that if an advance approval can be structured to meet applicable requirements in advance, it should be eligible for incorporation into a part 70 permit as an alternative operating scenario. However, while the Agency has significant experience with structuring advance minor NSR approvals that meet all applicable minor NSR requirements, the Agency has no experience with such an

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

approach for major NSR. Furthermore, the Agency believes that many of the requirements of the major NSR program (e.g., contemporaneous BACT or lowest achievable emissions rate (LAER) determination, air quality analysis, etc.) are project-specific and time-sensitive, and are thus not consistent with the concept of advance approval. Therefore, EPA believes that advance approval for projects subject to major NSR is unworkable. **(Note: EPA is considering regulatory language to reflect this policy in the final part 70 revisions.)**

Finally, while the 1994 and 1995 proposals focus on advance NSR approvals, the Agency believes that States may provide advance approval for other applicable requirements. While NSR programs typically require minor NSR permits to include terms and conditions to assure compliance with all applicable Federal and State requirements, a part 70 permit that provides advance approval of just the NSR-driven requirements would fail to accommodate in advance other applicable requirements, such as NSPS or SIP requirements. Similarly a change could be made that is exempt from minor NSR, but still triggers some other applicable requirement. There are two options for addressing such situations under today's revisions: (1) the permit could be revised to incorporate the non-NSR applicable requirements (many of which could be eligible for streamlined incorporation through the notice-only revision process described in section VIII.C.3. of this preamble); or (2) an advance approval could be developed for the non-NSR applicable requirements. Determining permit terms for these applicable requirements is often straightforward and can, for many types of applicable requirements, be done in advance. As a result, EPA expects that advance approval should be available for some non-NSR applicable requirements. Therefore, EPA is changing the proposed term "Advance NSR" to "Advance Approval" and is revising this definition to accommodate other applicable requirements.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

B. Alternative Operating Scenarios

The EPA proposed in August 1995 to clarify the use of alternative operating scenarios by adding to § 70.2 a definition of the term "alternative operating scenarios." Although alternative operating scenarios were allowed under § 70.6, the original part 70 did not explicitly define this term. The proposed definition stated that alternative operating scenarios are part 70 permit terms that assure compliance with different modes of source operation for which different applicable requirements apply and for which the source is designed to accommodate. Commenters generally supported adding this definition. However, several industry commenters were concerned about two aspects of the proposed definition. First, four industry commenters objected to the inclusion of the phrase "designed to accommodate." They argued that this term is not defined in part 70 and could be interpreted in a way that overly restricts the availability of alternative operating scenarios. Two of these commenters also argued that if alternative operating scenarios were limited only to those changes which the source is currently designed to accommodate, advance approval of future new units and modifications would not be allowed as alternative scenarios since the units a facility is designed to accommodate include only those units currently installed, not new units or modifications not considered in the design.

The EPA agrees that the usage of the phrase "designed to accommodate," absent a definition of the term, is unclear. More importantly, EPA believes that the phrase restricts the availability of advance approvals as a subset of alternative operating scenarios, since it could be read to exclude advance approval of new units or modifications not considered in the facility's original design. The EPA originally felt that inclusion of the "designed to accommodate" phrase would properly restrict alternative operating scenarios to those changes which

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

did not require case-by-case review and approval by permitting authorities, since approval of the original project would have also approved any change which could be accommodated within that project's design, without the need for additional approval by the permitting authority. However, after further consideration of the proper scope of advance approvals discussed above, EPA believes that certain changes which the source is not designed to accommodate may still be approved in advance by the permitting authority and authorized as alternative operating scenarios. The Agency believes that new units or modifications should be eligible for advance approval as alternative operating scenarios where the State NSR program allows it and where the permitting authority approves the alternative scenario(s) as such. For these reasons, EPA is deleting the phrase "designed to accommodate" from the definition of alternative operating scenarios and adding language clarifying that alternative scenarios may include advance approvals.

Commenters were also concerned about the phrase "for which a different applicable requirement applies," on the grounds that, if alternative operating scenarios were limited only to those for which a "different" applicable requirement applies, some changes that should be allowed would be excluded. Examples include a change from a scenario with an applicable requirement to a scenario where that requirement is not applicable, or a change under an advance approval where all the current requirements still apply, but a new one applies as well. To address the concerns with this phrase, EPA is making a minor change to clarify that the purpose of an alternative operating scenario is to allow reasonably anticipated changes at a source which change the set of applicable requirements at a source. Such changes could include the following: (1) scenario B adds a requirement to the requirements under scenario A, while the requirements under A remain applicable; (2) scenario B removes a requirement

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

from the requirements under scenario A; or (3) scenario B replaces one or more of the requirements of scenario A. To reflect this purpose, EPA is changing the definition to read "terms or conditions in a part 70 permit which assure that different modes of operation comply with the applicable requirements relevant to each mode of operation."

C. Eligible Indian Tribe

This topic is discussed in section XI. of this preamble.

D. Emissions Cap Permit

In August 1995, to promote greater certainty in implementing caps under section 502(b)(10), EPA proposed to include a definition of the term "emissions cap permit." This term would be used in the proposed § 70.4(b)(3)(xiv), which, together with § 70.4(b)(12)(i), would define part 70 program requirements for the issuance of permits containing emissions caps. A number of commenters expressed confusion about the proposed definition of emissions cap permit. Specifically, commenters were confused about whether this term could be used interchangeably with the term "PAL" and, if not, what the distinction between these terms would be. Commenters were also confused about the link between this definition and the requirement in § 70.4(b)(12) for States to issue permits that allow trading under emissions caps. Two additional industry commenters felt that the proposed definition was unclear and could unnecessarily limit the types of caps that could be constructed by prohibiting multiple caps within a single facility.

After considering the comments, and after evaluating other actions that EPA is taking today regarding emissions cap provisions, EPA has decided not to promulgate a definition of emissions cap permit. For reasons discussed in section V.A. of this preamble, EPA has decided not to promulgate the proposed § 70.4(b)(3)(xiv), which would have required that States demonstrate the authority to issue emissions cap permits and

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

permits containing advance NSR. Because this proposed provision was the only provision that would have referenced the term emissions cap permit, the definition is no longer necessary. Therefore, primarily because the definition is not needed, and also in light of the confusion surrounding its use, EPA believes that it would be most appropriate to leave this term out of the part 70 regulations. In lieu of a regulatory definition, EPA intends to clarify the types and uses of emissions caps elsewhere in today's preamble, and in future policies and/or guidance documents promoting the design of flexible permits.

E. Indian Tribe

This topic is discussed in section XI. of this preamble.

F. Major Source

1. Support Facilities

a. Summary of Proposal on Support Facilities

The EPA proposed in August 1994 to clarify the definition of major source (for the portion of the part 70 definition addressing major source under parts C and D of title I of the Act, i.e., the major NSR provisions) with respect to when to include the emissions of support facilities when determining if a source is major. The part C and D major source definition provides that when facilities are contiguous or adjacent, are under common control, and are classified in the same 2-digit SIC group, they are aggregated as part of the same major source. Furthermore, consistent with the original part 70 proposal preamble, with longstanding NSR policy, and with the NSR regulations promulgated on August 7, 1980 (45 FR 52695), and further clarified on November 28, 1989 (54 FR 48870), facilities may be aggregated, even if they have different SIC codes, if they are "support facilities" that are integrally related with the primary activity at the site.

The EPA proposed to add regulatory language to the part 70 definition of major source codifying for title V purposes EPA's

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

longstanding interpretations regarding this subject. Specifically, the August 1994 proposal would amend the part 70 definition of major source to make clear that any stationary source that supports another source must be considered a support facility and part of the same source regardless of the 2-digit SIC code for that support facility. Furthermore, the proposal stated that a facility would be considered a support facility if greater than 50 percent of its output is dedicated to the activity it supports.

b. Summary of Comments on Support Facility

Several industry commenters expressed opposition to including the support facility concept in part 70 major source determinations, arguing that this action would be contrary to Congressional intent, inappropriately link dissimilar sources, and add sources to the part 70 program. These commenters suggested that the language and legislative history of the major source definition in section 501(2) of the Act prohibit EPA from aggregating a support facility with a primary source that has a different SIC code as part of the same major source. They argued that EPA should define major source solely according to what would be aggregated under a single two-digit SIC code.

Several industry commenters also argued that the proposed regulatory language would cause confusion and would be difficult to implement. In particular, several industry commenters expressed confusion about the requirement that a facility be considered a support facility if 50 percent of its output is dedicated to the facility which it supports. They argued that terms like "support," "output," and "dedicated" are not defined and are difficult to implement. One commenter also argued that the level of support at some sources typically varies from year to year, making the 50 percent test difficult to implement.

Three State and local agency commenters also commented on the proposed regulatory language for support facilities. They



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

generally supported the clarification of the definition of major source offered by the proposal, noting that the proposed definition is consistent with longstanding NSR policy, as stated in the August 7, 1980 rulemaking. However, one local agency commenter noted that the definition should not unnecessarily restrict the authority of permitting authorities to make major source determinations given that permitting authorities have the most direct knowledge of source operations.

c. Discussion of Support Facility

The EPA believes that portion of the part 70 major source definition dealing with the term as defined in title I and section 302 of the Act should not be based on a strict SIC test that disregards support relationships. The Agency disagrees with commenters who suggested that the language and legislative history of the major source definition in section 501(2) prohibit EPA from including a support facility with a different SIC code as part of a major source. Rather, EPA believes that the approach used in NSR in defining major source, an approach which utilizes the SIC code as the central organizing principle for determining the scope of a stationary source but also includes use of the support facility test, is appropriate for purposes of Title V.

It is important to recognize that the pertinent language of the statute is silent on the topic of how, if at all, SIC codes should be used for collocation purposes. Indeed, section 501(2) takes a broad approach to the types of collocated sources that may be aggregated for purposes of title V major source determinations. This language clearly can support a variety of approaches to aggregating sources according to industrial groupings. If any direction can be taken from the statute itself, it is simply that Congress intended to broadly include collocated sources in major source determinations, a purpose that is quite consistent with a support facility test.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

In explaining its proposed decision to adopt the support facility test in the preamble to the proposed original part 70 promulgation [56 FR 21724, May 10, 1991], EPA noted that the House Report's explanation of identical collocation language in section 182(c) of the Act (regarding serious ozone nonattainment areas) sheds light on how the title V definition of major source should be interpreted. The portion of the House Report cited by EPA provides:

The definition of "major source" here and elsewhere in the bill uses the term "group of sources located within a contiguous area and under common control." The Committee understands this to mean a group of sources with a common industrial grouping, i.e., the same two-digit SIC code. It is the approach followed today by EPA as a result of the Alabama Power litigation. It avoids the possibility that dissimilar sources, like a power plant and an adjacent coal mine, will be considered as the same "source" because of common ownership. (56 FR 21724 (May 10, 1991) (citing House Report at 236-37)).

The EPA concluded that "[t]he legislative history reference to Alabama Power and EPA's current approach[] suggest that aggregation by SIC code should be done in a manner consistent with established NSR procedures" (id.). As noted, these established NSR procedures generally rely on SIC codes but also provide for grouping of support facilities with the facility they support, even where the support facilities and the primary activity have different SIC codes.

Application of the support facility test is consistent with the broad approach to collocation issues described by section 501(2). Nothing in the statute precludes the Agency from adopting a common-sense industrial grouping approach for title V as it has for NSR. Similarly, nothing precludes the Agency from grouping facilities with different two-digit SIC codes (in circumstances such as those in which the support facility test is applied) where a failure to group such facilities would artificially divide into separate "sources" facilities that

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

comprise a single entity relative to economic, functional, and air-quality perspectives.

While certain commenters argued that the House Report language cited above rejects the support facility test, EPA believes that the language read in context indicates that this statement from the House Report was directed not against the support facility test, but in support of EPA's general application of the SIC code rule. In fact, the example in the legislative history of the power plant and coal mine appear anomalous in light of the passage's general support for EPA's approach to aggregation of sources. While EPA's collocation rules generally do not provide for the aggregation of emissions from sources with different SIC codes, EPA's historic approach to collocation under the NSR and Prevention of Significant Deterioration (PSD) programs has been that a strip mine and an adjacent power plant controlled by the same entity should be treated as a single stationary source. Indeed, EPA made this precise finding in a 1989 rulemaking<sup>2</sup>, a finding which industry failed to challenge.

The EPA has thus concluded that application of the established NSR approach, including its collocation provisions, is generally quite consistent with the legislative history cited by commenters. The EPA submits that an aggregation policy that addresses support facilities is consistent with the broad approach taken by Congress in the language of the statute and in the legislative history, both of which demonstrate a clear intention that EPA follow its existing policies. To the extent that the House Report reference to a collocated strip mine and power plant could be read as contrary to EPA position in today's part 70 revisions, EPA does not regard the isolated comment as

---

<sup>2</sup> *Requirements for Implementation Plans: Surface Coal Mines and Fugitive Emissions; Approval and Promulgation of Implementation Plans*, 54 Fed. Reg. 48870, 48882 (November 28, 1989).

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

sufficiently clear and convincing under general rules of construction to overcome the statutory language and structure and the Agency's consistent and longstanding position.

The EPA also does not agree that codifying the support facility language would add sources to the part 70 program that were not intended by Congress to be included. Because the support facility language is consistent with longstanding NSR policy and practice, it would bring sources into part 70 that would already be classified as major under NSR. (though some of these sources may not need a major NSR permit because they were built before States adopted their NSR rules, and were thus "grandfathered"). This is consistent with section 501 of the Act, which states that a major source for title V purposes includes any source that is a "major stationary source" as defined in section 302 or part D of title I. Furthermore, it ensures that implementation of title V and of the NSR program are consistent. The EPA finds no reason to group sources under part 70 differently from how they are grouped under NSR, nor have any commenters presented convincing reasons why EPA should, in part 70, depart from its longstanding position under NSR.

Although EPA is including the support facility test in the part 70 major source definition, EPA acknowledges comments that the proposed regulatory language may be confusing in certain respects. Therefore, as explained below, EPA is making three minor changes to the proposed regulatory language. These changes, together with this preamble discussion, are intended to clarify the application of the support facility approach. These clarifications pertain to the use of the support facility test in making major source determinations under NSR, and are also intended to ensure that the use of the support facility test in major source determinations for part 70 is consistent with use of the support facility test in the NSR program.

First, EPA has concluded that it is not appropriate to

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

codify the proposed language which states that a stationary source is considered a support facility if at least 50 percent of its output is dedicated to the primary activity at the site. While a 50 percent test for support is an appropriate presumption that is consistent with EPA practice for NSR major source determinations, EPA believes that support facility relationships should always be established in light of the particular circumstances of the sources being evaluated<sup>3</sup>. The EPA is concerned, as are some State commenters, that establishing a rigid 50 percent test in part 70 would preclude permitting authorities from using their own judgement as to the most appropriate major source determination, and could in some cases conflict with past NSR major source determinations by permitting authorities. In addition, EPA agrees with comments that a rigid 50 percent cutoff fixed in regulations may be difficult to implement in some cases (e.g., where the level of support exceeds 50 percent in some years but not others.) Therefore, to maintain consistency with past major source determinations, to alleviate potential implementation difficulties, and to preserve permitting authority discretion to make the most appropriate judgments, EPA is not codifying the presumptive 50 percent test for support in part 70. Instead, part 70, like NSR, gives the permitting authority discretion to determine when a support activity should be designated as a support facility (and thus aggregated with the primary activity) in making major source determinations under title I and section 302 of the Act, consistent with EPA policies addressing such determinations.

While the Agency, as noted above, is deleting the proposed

---

<sup>3</sup>For more information, see the NSR regulations promulgated on August 7, 1980 (45 FR 52695), and the memorandum from John S. Seitz dated August 2, 1996 entitled "Major Source Determinations for Military Installations under the Air Toxics, New Source Review, and Title V Operating Permit Programs of the Clean Air Act."

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

regulatory 50 percent cutoff for determining support, EPA expects permitting authorities to follow certain basic criteria in making support facility determinations for part 70, just as they have done for NSR. These basic criteria are: (1) the degree to which the support activity supplies material inputs to the primary activity (i.e., percent output), and (2) the degree to which the support activity provides services to the primary activity (i.e., percent output). Where either of these is 50 percent or greater, EPA generally expects permitting authorities to conclude that a support facility exists, and expects these activities to be aggregated with the primary activity (if the activities are otherwise adjacent/contiguous and under common control.) In addition, where a support activity provides materials or services to two or more primary activities, permitting authorities generally should aggregate the support activity with the primary activity receiving the most support. Similarly, if 50 percent or more of the output from the candidate support activity goes off-site, the support activity may be considered a separate stationary source, not a support facility.

While the application of these basic criteria is straightforward in most cases, permitting authorities also have discretion to consider additional factors as necessary to make support facility determinations. Support facility determinations can depend upon a number of financial, functional, and contractual or other legal factors, which include, but are not limited to: (1) the degree to which the support activity receives materials or services from the primary activity (which may indicate a mutually beneficial arrangement between the primary and secondary activities); (2) the degree to which the primary activity exerts control over the support activity's operations; (3) the nature of any contractual arrangements between the facilities; and (4) the reasons for the presence of the support activity on the same site as the primary activity

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

(e.g., whether the support facility would exist at that site in the absence of the primary activity). Where such criteria indicate a support relationship, permitting authorities may conclude that a support activity contributing more or less than 50 percent of its output may be classified as a support facility and aggregated with the facility it supports (provided the support activity is also adjacent/contiguous and under common control).

The second change to the proposed support facility language pertains to the relationship between the support facility concept and the two other factors which must be considered in making major source determinations: (1) whether sources are "located on one or more contiguous or adjacent properties," and (2) whether they are "under common control of the same person (or persons under common control)." Part 70 provides, in the second sentence of the major source definition, that facilities need not be aggregated unless they are adjacent or contiguous and are under common control. The proposal would have also required that a facility be adjacent or contiguous and under common control before being classified as a support facility. The EPA believes that this repetition of the adjacent/contiguous and common control criteria is redundant and potentially confusing. While it is true that support activities are not aggregated with their primary activities unless both sets of activities are also adjacent/contiguous and under common control, EPA believes that the first sentence of the major source definition clearly reflects this fact, and the additional language is unnecessary.<sup>4</sup>

Finally, the Agency notes that the revised part 70

---

<sup>4</sup>In practice, the three factors comprising the major source definition (adjacency/contiguity, common control, and SIC code/support) are sometimes interrelated and cannot always be evaluated in sequential fashion. See, for example, letter from Matt Haber, U.S. EPA Region IX to Simpson Paper Company (November 27, 1996) or

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

definition of major source now provides that a support facility is a facility which "conveys, stores, or otherwise assists in the production of the principal product." This language originally appeared in the preamble to the August 7, 1980 PSD regulations and EPA believes that this language is an appropriate clarification to add to the part 70 regulatory language for support facilities.

2. HAP Source Applicability Issues

The EPA also proposed to clarify the major source definition with respect to two issues in determining part 70 applicability for sources of HAPs. The first of these issues is whether a group of sources which are contiguous and under common control must consider the two-digit SIC codes of each facility in determining whether the facilities must be aggregated for purposes of determining if they are a major source for HAP emissions. The second issue relates to whether fugitive emissions of HAPs must be counted in making major source determinations.

The EPA proposed, in August 1994, to revise part 70 to conform with section 112(a) of the Act and the implementing regulations in 40 CFR part 63 (see § 63.2, definition of major source.) The proposal would clarify that, in determining part 70 applicability for HAP sources, major source is defined as any stationary source or group of stationary sources that emits or has the potential to emit above a threshold level of HAP emissions regardless of SIC code. This proposed clarification was based on the need to make the part 70 major source definition consistent with the part 63 major source definition, and reflects the title V definition of major source in section 501 of the Act, which includes all major sources under section 112.

A large number of commenters objected to the proposed clarification on the grounds that the part 63 major source definition contradicts longstanding source aggregation policy and



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

legislative history of the Act because it does not rely on SIC code in making major source determinations. The EPA disagrees, noting that the part 63 major source definition was upheld in National Mining Association (NMA) vs. EPA, 59 F.3d 1351 (D.C. Cir. 1995). The court, in denying a petition for review of part 63 on this issue, held that EPA's section 112 definition of major source, which does not consider source categories or two-digit SIC codes, was a reasonable interpretation of the statute.

In addition, a smaller number of commenters opposed the proposed clarification on the grounds that there is no reason why the part 63 and part 70 major source definitions should be identical in their treatment of HAP sources. The EPA disagrees with this argument as well. Although EPA agrees that this aspect of the part 70 major source definition departs from longstanding practice under NSR, it does so to track the separate treatment of HAPs set forth by Congress in the 1990 Amendments.

Section 501(2) requires that the part 70 major source definition include section 112 major sources, while section 112 aggregates facilities for major source purposes based exclusively on contiguity and common control (without regard to source category or SIC code). Moreover, as noted in the August 1994 proposal preamble, EPA believes that the implementation of section 112 will be enhanced by providing this clarification because it ensures that all major sources as defined in part 63 must apply for a part 70 permit. Therefore, EPA is promulgating this change to § 70.2 as proposed. However, as noted elsewhere in this preamble, EPA is providing for separate treatment for R&D activities in determining whether a source is major for part 70 purposes.

Regarding the second issue, fugitive emissions of HAPs, EPA proposed in August 1994 to clarify that HAP fugitive emissions be included in the determination of major sources of section 112 pollutants. The EPA explained in the proposal preamble that the

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

original part 70 required that HAP fugitive emissions must be included, but the Agency also proposed clarifying regulatory language on this point.

Several industry commenters argued that requiring inclusion of fugitive emissions for a HAP source category would require an affirmative determination by the Administrator under section 302(j) of the Act that fugitives must be counted for that source category. As explained in the August 1994 proposal preamble, EPA believes that the section 302(j) rulemaking requirement does not apply in the context of sources that are major under section 112 because the section 112 major source definition is distinct from the section 302(j) major stationary source definition used for parts C and D of title I of the Act. As with the HAP source aggregation issue, this issue was the subject of litigation in the context of the part 63 regulations implementing section 112. In NMA vs. EPA, the court held that section 112(a)(1) can be read to expressly provide that all emissions are to be counted in determining whether a source is major. Noting that section 302(j) requires the Administrator's determination "except as otherwise expressly provided in the Act" the Court concluded that section 112(a)(1) satisfies this exception clause, and therefore, fugitive emissions may be counted for section 112 sources without a section 302(j) rulemaking.

As noted above, for legal and policy reasons, EPA believes that the part 70 definition of major source as it applies to HAP sources should be consistent with the part 63 definition of major source. Therefore, because the part 63 definition requires consideration of fugitives, the part 70 definition will continue to require this also. Furthermore, as proposed, clarifying language for this provision is added to the definition of major source in § 70.2.

3. Listed Source Categories for Fugitive Emissions.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

The EPA also proposed to change the major source definition with respect to the list of source categories whose sources must count fugitive emissions in making major source determinations under section 302 of the Act. In the August 1994 notice, EPA proposed to change paragraph (2)(xxvii) of the section 302-based definition of major source, which refers to source categories regulated under section 111 or 112 of the Act which are not specifically listed in paragraphs (2)(i)-(xxvi). The original part 70 regulations required any source regulated by a section 111 or 112 standard to count fugitive emissions in making major source determinations under section 302. Although no date was given, the implicit date was the promulgation date, July 21, 1992. However, a petitioner challenged these regulations on procedural grounds, asserting that EPA may not require sources in these categories to count fugitive emissions when determining major source applicability until the Administrator makes an affirmative determination by rule under section 302(j). Since no such determination has been made for source categories regulated as of August 7, 1980, the August 1994 notice contained proposed language requiring only sources in categories regulated before August 7, 1980 to count fugitive emissions.

The August 1995 notice further refined this proposed language to avoid the need to revise the date contained in paragraph (2)(xxvii) of the part 70 major source definition each time EPA makes an affirmative determination under section 302(j) in the future. Rather than including a specific date, the proposed language would require fugitives to be counted for sources in any source category for which the Administrator has made an affirmative determination under section 302(j) of the Act. This change would not by itself require fugitives to be counted for source categories regulated by section 111 or 112 standards after August 7, 1980. Rather, it would provide that if and when a 302(j) determination occurs for such a category,

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

fugitive emissions would need to be counted in determining part 70 major source status under paragraph (2) of the major source definition.

Three commenters representing State and local permitting authorities opposed the August 1994 proposal to insert the August 7, 1980 date into the major source definition. They argued that sources in the NSPS and NESHAP categories, including those regulated after August 7, 1980, are the more significant sources of air pollution and should be regulated under title V. One commenter also noted that the original part 70 required inclusion of source categories regulated since August 1980, and to exclude these now could lead to serious shortfalls in part 70 fee revenue since States used the original part 70 in setting fee levels. The commenters indicated that if EPA makes the proposed change, the Agency should undertake 302(j) rulemakings for the additional categories.

In the August 1995 notice, EPA did indicate that a proposed rulemaking to revise NSR regulations implementing parts C and D of title I of the Act would be published in the near future which would solicit comment on amending the listed source categories for which fugitive emissions must be counted when determining whether a source is major. However, EPA's recently proposed revisions to the NSR regulations (61 FR 38249), published on July 23, 1996, did not include a proposal to amend the list of source categories. The EPA does not believe that today's rulemaking is now the appropriate place to conduct the necessary 302(j) rulemakings and has not yet proposed any such action. However, the Agency is still considering how best to conduct 302(j) rulemakings. Where appropriate, EPA intends to propose such rulemaking(s) as soon as practicable following today's part 70 revisions. Until such time as these rulemakings are conducted, EPA considers source categories regulated by section 111 or 112 standards after August 7, 1980 to be "unlisted source

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

categories," and sources in these categories would not be required by EPA to count fugitive emissions in major source determinations under section 302 of the Act.<sup>5</sup>

The EPA is sensitive to the concern that this change to the part 70 regulations could eventually result in a fee shortfall for some State programs. The EPA recognizes that States may have relied on the original part 70 language in determining fees. The EPA responds by noting that States are free to adopt (or, in this case, retain) part 70 programs with more stringent applicability provisions than EPA, including provisions requiring the counting of fugitives for source categories not listed by EPA. By today's action, EPA does not intend to encourage States to de-list any fugitive emissions source categories contained in their current part 70 programs, especially in light of the Agency's intent to undertake appropriate regulatory revisions to update the list. In addition, EPA notes that in the absence of more stringent minimum applicability provisions, States have the ability to revise fee schedules as necessary to assure adequate revenue.

Commenters did not object to the approach proposed in August 1995 that would eliminate the language defining source categories in paragraph (2)(xxvii) by a specific date, and that would instead define them by whether they had been listed by the Administrator in a 302(j) rulemaking. However, two industry commenters suggested that a better approach would be to include the list of categories defined by paragraph (2)(xxvii) directly in part 70 and update it through each subsequent 302(j)

---

<sup>5</sup> As described in the August 1995 preamble (60 FR 45547), any sources subject to section 111 or 112 standards promulgated since August 7, 1980 are not considered listed source categories for title V purposes. These sources would not have to count fugitives unless and until EPA completes a section 302(j) rulemaking requiring that fugitives be counted. However, as noted above, EPA plans to undertake rulemaking to update this list of source categories.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

rulemaking. The EPA is considering the merits of this approach, and will decide whether to list 302(j) source categories in the preamble versus the regulations in the upcoming 302(j) rulemaking(s).<sup>6</sup>

The EPA also proposed in August 1995 regulatory language that deletes from paragraph (2)(xxvii) the phrase "but only with respect to pollutants regulated for that source category." This phrase, contained in part 70 as promulgated in July 1992, required the consideration of fugitive emissions for listed section 111 and 112 source categories only for the pollutants regulated by the relevant section 111 or 112 standard. Thus if, for example, an NSPS regulates particulate matter, but not VOC, emissions for a source category, a source in that category, pursuant to the "but only..." phrase, would not have to consider fugitive VOC emissions in making a section 302 major source determination for VOC. The EPA proposed to delete this phrase because it is inconsistent with longstanding NSR policy on this issue and because the Agency did not follow the correct procedural steps when incorporating this phrase into the original part 70.

Five industry commenters opposed the deletion of the phrase "but only with respect to pollutants regulated for that source category" from the major source definition. They argued that this deletion would be an inappropriate expansion of the sources that must consider fugitive emissions when determining major source status. Two commenters argued further that placing the

---

<sup>6</sup>The current list of section 111 and 112 source categories regulated as of August 7, 1980 includes sources subject to the following standards: 40 CFR part 60 (New Source Performance Standards) subparts D, Da, E, F, G, H, I, J, K, Ka, L, M, N, O, P, Q, R, S, T, U, V, W, X, Y, Z, AA, BB, CC, DD, GG, HH, JJ, KK, and MM, as well as 40 CFR part 61 (National Emissions Standards for Hazardous Air Pollutants) subparts C, D, E, F, and M.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

focus only on regulated air pollutants is appropriate. They felt that the fact that EPA has not issued a section 111 or 112 standard governing a particular pollutant implies that such a pollutant does not pose a significant threat to public health and that its fugitive emissions should therefore not be counted in major source determinations under section 302 of the Act. The EPA also disagrees with the comment that the requirements of sections 502(b)(5)(A) and 504(a) of the Act are met if the permit contains all then-applicable requirements at issuance or renewal, and the permitting authority has ample authority to ensure that it does. The requirements of 502(b)(5)(A) cited by the commenter require that the permitting authority have authority to issue permits and assure compliance with "each applicable standard, regulation or requirement," which broadly read, means that each time a change is made to which an applicable requirement applies, the permit must be revised to assure compliance with that applicable requirement, unless the permit already provides for compliance with that applicable requirement. In the Agency's view, the best way to assure compliance with each applicable standard, regulation, or requirement of the Act, as section 502(b)(5)(A) requires, is to require that the permit be revised each time a change triggers an applicable requirement, except where the permit already complies with the applicable requirement by providing for advance approval of the change without a permit revision.

The EPA does not now see a legal or policy basis to retain the current regulatory language, which represents a significant departure from longstanding policy and legal interpretation of a section 302(j) rulemaking under NSR. For the purposes of the NSR regulations (40 CFR parts 51 and 52) EPA has determined, pursuant to 302(j), that all fugitive emissions from sources within any listed source category should be counted in major source determinations, without limiting the emissions counted to only

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

those pollutants regulated by a section 111 or 112 standard for a particular source category. Furthermore, the Act itself contains no language restricting consideration of fugitives solely to pollutants regulated under section 111 or 112. Section 302(j) of the Act requires consideration of fugitive emissions of any air pollutant as determined by rule by the Administrator. Finally, section 501 of the Act defines major source for title V purposes to include "major stationary sources" as defined in section 302. This provision suggests that the part 70 major source definition should be consistent with, rather than depart from, EPA's previous determinations of when fugitives are to be counted in making section 302 major source determinations. Therefore, EPA is revising this provision in part 70 to be consistent with parallel language in parts 51 and 52.

Moreover, EPA sees no policy basis to treat fugitive emissions differently for NSR and title V purposes under its longstanding two-step interpretation of the section 302(j) rulemaking requirement. As discussed in the August 1995 proposal at 60 FR 45547, under that first step EPA would propose to list a source category if emissions from that category have a potential for significant air quality deterioration, and would make a final listing unless commenters demonstrated that the social and economic costs of regulation would be unreasonable in comparison to the benefits. On this basis, EPA found for NSR purposes on August 7, 1980 that all source categories regulated under section 111 or 112 as of that date met the test for final listing. The EPA sees no reason why it should reach any different conclusion for title V purposes as to sources listed under NSR. This is so regardless of whether a given major source is actually regulated under NSR as a result of construction or modification or is simply operating unchanged in an NSR-listed source category. For the latter group of sources, which are nonetheless subject to applicable requirements (e.g., RACT or other SIP emission



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

limits), EPA does not expect that commenters would be able to show that the costs of compliance with part 70 would outweigh the benefits.

Finally, EPA notes that the larger question of applicability of part 70 to sources which would be major under NSR but not major under part 70 (for example, because fugitive emissions were counted for NSR, but not for part 70) is answered independently of the part 70 major source definition. Even if the "but only..." language were retained, major NSR sources would still have to obtain part 70 permits. As described in section III.D.2. of this preamble, any source required to have a permit under parts C and D of title I must obtain a part 70 permit, pursuant to section 502(a) of the Act.

#### 4. Unlisted Sources of Fugitive Emissions

In interpreting the application of the original part 70 definition of major source to unlisted sources of fugitive emissions (i.e., sources not in the fugitive emissions categories listed by the Administrator pursuant to section 302(j) and discussed above), EPA adopted an interpretation consistent with its approach under NSR. Thus, the Agency initially interpreted its major source definition as requiring that adjacent, commonly controlled ("collocated") sources must be combined under certain circumstances for purposes of making major source determinations. (See Section III.F.1. Summary of Proposal on Support Facilities). Under this interpretation, the collocation provisions apply to sources regardless of whether the source has been listed by rule under section 302(j) of the Act. Further, EPA interpreted the collocation rule as requiring fugitive emissions from unlisted sources to be considered in major source applicability determinations to the extent an unlisted source is collocated with a listed source and the primary activity of the operation as a whole falls within a listed source category.

The NMA and American Forest and Paper Association petitioned

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

for review of part 70 in part because of the Agency's interpretation of these collocation provisions. The petitioners asserted that the Agency's interpretation of its collocation provisions would have the effect of subjecting unlisted sources of fugitive emissions to the requirements of title V without undertaking a section 302(j) rulemaking.

The proper interpretation of the rulemaking requirement in section 302(j) was addressed by EPA in 1989 in the context of determining whether surface coal mines should be added to the section 302(j) list of sources. (54 FR 48870, November 28, 1989). In the final rule, EPA determined that the section 302(j) rulemaking provision did not provide a basis for making an exception to its collocation rules under the NSR program. Citing Alabama Power, the Agency explained that while section 302(j) requires EPA to conduct a rulemaking to include fugitive emissions in applicable emissions threshold calculations, it is irrelevant in defining the scope of the term "source" and in applying substantive NSR requirements (id. at 48881). The EPA recognized that its established collocation procedures could have the effect of subjecting an unlisted source of fugitive emissions to substantive NSR requirements, but found no reason "to depart from its longstanding use of the SIC code and other aspects of the definition of 'source'" (id.). In the NSR context, EPA clearly considered and rejected the position that a section 302(j) rulemaking was a necessary predicate to application of collocation procedures.

As noted above, EPA has found no convincing reason to depart from its longstanding approach under NSR in defining major source for purposes of title V. The EPA accordingly affirms its original interpretation of the collocation procedures as applied to unlisted sources of fugitive emissions.

The EPA's consideration of the title V collocation provisions is explained in detail in a June 2, 1995 guidance

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

document entitled, "EPA Reconsideration of Application of Collocation Rules to Unlisted Sources of Fugitive Emissions for Purposes of Title V Permitting." The EPA would like to clarify that unlisted sources of fugitive emissions which become subject to part 70 as a result of this final rulemaking will have 12 months from the effective date of this rule to file a part 70 permit application. As always, however, once sources become subject to part 70 permitting requirements, permitting authorities can request that applications be submitted prior to the 12-month deadline.

5. Research and Development Facilities

In August 1995, EPA proposed to allow States to separate R&D activities from other sources at the same site (i.e., "collocated" sources) when determining whether the collocated source is a major source for part 70 permitting purposes. This separate treatment applied only to R&D activities located with other sources, such as manufacturing facilities, rather than at "stand-alone" R&D activities. (Stand-alone R&D activities are sources where the primary activity is R&D and other sources at the site exist solely to support the R&D activity.) The proposal required such separately treated R&D activities to obtain permits if they would be a major source or a nonmajor source that is otherwise required to obtain a part 70 permit. Since most separately treated R&D activities would be nonmajor sources not otherwise required to obtain part 70 permits, the practical outcome of the proposal would have been to exempt most R&D activities from part 70 permitting requirements. Today's revisions to part 70 retain this separate major source treatment for R&D activities.

The August 1995 proposal defined "R&D activities" to include R&D and laboratory facilities conducting research and development into new processes and products. Under the proposed definition, an R&D activity could not manufacture products for sale or

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

exchange except in a de minimis manner. The proposal solicited comment on whether the definition of R&D activity should include pilot plants and laboratories not engaged in R&D and on whether EPA should define de minimis within the R&D definition. In addition, the proposal solicited comment on whether EPA should allow States to treat stand-alone R&D activities separately from their support facilities, such as boilers, during major source determinations.

The revised part 70 retains separate treatment for R&D activities but several revisions have been made to the definitions of "major source" and "R&D activities." (These changes are discussed in detail below.) This preamble also explains that individual States have substantial flexibility to implement these provisions and that today's revisions to part 70 allow them: (1) To define what constitutes de minimis within the definition of research and development activities; (2) to determine if pilot plants and R&D activities at educational institutions can be treated separately; and (3) to develop and implement State-specific procedures for calculating potential to emit (PTE) for R&D activities. In addition, the revised part 70 does not allow non-R&D laboratories to be treated in the same way as R&D activities, R&D activities to be exempt from PTE calculation requirements, or support facilities of stand-alone R&D facilities to be treated separately from the R&D activities. (These issues are also discussed in detail below.)

Separate Treatment Under Section 302 and Part D of Title I.

The source aggregation procedures required in the proposed definitions of major source for the purposes of section 302 and Part D of title I of the Act (for criteria pollutants and other non-HAP pollutants) were consistent with source aggregation procedures used traditionally in the PSD and NSR programs (parts 51 and 52). The proposal discussed separate treatment for R&D activities in the context of these traditional source aggregation

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

procedures. Traditionally, a stationary source located on contiguous or adjacent property and under common control with another source would be aggregated with the other source if both sources are in the same 2-digit SIC code. If in different 2-digit SIC codes, the sources would still be aggregated if one source is a support facility for the other source.

The EPA explained in the preamble for its August 1995 proposal that R&D activities could be treated as a separate source for part 70 permitting purposes if the R&D activity is not functionally integrated with the other collocated sources. The preamble explained that separate treatment could occur for R&D activities under traditional procedures for source grouping, but that several changes to the regulations were necessary for separate treatment to occur more frequently.

To group R&D activities separately, consistent with longstanding NSR policy, EPA proposed changes to the part 70 definition of major source to allow States to treat R&D activities as if they belong to a separate 2-digit SIC code. This was necessary because the SIC code manual treats R&D activities located with other sources, in some cases, as belonging to the same 4-digit code and, in other cases, as belonging to a separate 2-digit code. The EPA believes, however, that typical R&D activities are not functionally integrated with collocated industrial facilities, even when they could be assigned the same 4-digit code.

In addition, consistent with longstanding NSR policy, EPA stated in the preamble that it presumed R&D activities are not normally support facilities for collocated industrial facilities. As the preamble stated, R&D activities provide conceptual, rather than material, support to collocated industrial activities. The preamble explained that conceptual support provides ideas or information that is potentially useful for a commercial production process, while material support provides real products

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

or raw materials to a commercial industrial process. To limit separate treatment for R&D activities that provide substantial material support to other collocated industrial processes, EPA stated that activities that resemble R&D but "contribute to the product produced or services rendered by the collocated sources in more than a de minimis manner" should be treated as support facilities and considered part of the collocated source.

Most commenters supported EPA's proposal to allow separate major source treatment for R&D activities located with other sources, such as industrial facilities. Commenters agreed with EPA that R&D activities do not normally support commercial production in a material manner. The majority of commenters stated that the policy reasons for allowing this type of treatment are compelling: emissions of R&D activities are unpredictable but low, emissions are difficult and costly to estimate, and few applicable requirements typically apply.

In view of the support by commenters and of the Agency's continuing conviction that R&D activities are unique in providing conceptual support to other activities, the revised part 70 allows R&D activities to be treated separately from other types of collocated sources. The EPA believes this position is warranted for the reasons explained in the August 1995 proposal.

Separate Treatment Under Section 112. In its August 1995 notice, EPA proposed to let States consider R&D activities separate from other collocated industrial sources during major source determinations under section 112, provided the R&D activities did "not contribute to the products produced or service rendered by the collocated sources in more than a de minimis manner." In the preamble, EPA justified separate treatment for R&D activities for section 112 major source purposes on the grounds that the statutory language of section 112(a)(1), which refers to "any stationary source or group or stationary sources," leaves EPA discretion to separate out

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

discrete groups of stationary sources that are located together only for administrative convenience, rather than because they contribute to other activities at the site. Thus, the proposal allowed separate treatment for R&D activities during section 112 major source determinations after an administrative convenience test, rather than a support facility test.

Commenters generally supported the proposal, as they did for purposes of section 302 and part D of title I. In addition, commenters asked that EPA delete the de minimis language in the section 112 major source definition, stating that it is redundant with similar language in the definition of R&D activity.

In response to comments, EPA has retained its proposal to allow separate major source treatment for nonmajor R&D activities during major source determinations under section 112. The Agency also agrees with commenters that the R&D activities definition should contain all necessary restrictions on separate treatment. Accordingly, EPA is deleting the language it used to impose the administrative convenience test, for the purposes of section 112, in proposed paragraph (1)(i)(B) of the major source definition and, instead, has added equivalent language to the definition of R&D activities.

Except for R&D activities, the final part 70 definition is consistent with part 63 in that all HAP sources are grouped together at a site. In its August 1995 proposal, EPA stated that parallel revisions would also be made to part 63 to allow R&D activities to be treated separately for MACT applicability purposes. The Agency has reconsidered that statement. In light of the decision in NMA vs. EPA, 59 F.3d 1351 (D.C. Cir. 1995), the Agency now believes that revisions to part 63 would not further the goals and objectives of the part 63 program. In NMA, the court agreed that the Agency was not bound to a common definition of major source in the title V and section 112 programs. At the time of that decision, part 70 required States

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

to group together sources in the same 2-digit SIC code if the sources were adjacent or contiguous and under common control. This requirement applied to all major source determinations under part 70, including those for section 112 purposes. The part 63 general provisions, however, required the grouping of all sources at a site, regardless of SIC code.

The petitioners in NMA argued that the major source definitions for part 70 and part 63 should be identical with respect to section 112. They also contended that the part 70 definition was the proper interpretation of the Act, and that part 63 should be revised to track part 70. The Court rejected those arguments and upheld EPA's position that for MACT standards Congress intended the term "major source" to include entire plant sites, without subdivision into SIC codes. The court also said that the part 70 and part 63 major source definitions could be different if EPA believed different definitions would further the goals and objectives of each program.

The EPA believes that its policy allowing different treatment for R&D activities in the part 70 and part 63 programs is appropriate because it furthers the goals and objectives of each program. The goal of section 112 is to impose strict regulatory air pollution control requirements on major sources of HAP to achieve the maximum degree of reduction in emissions that EPA deems achievable. These control requirements, MACT standards, as well as the major source definition used for these purposes, are established by rulemaking under part 63. The degree to which HAP emissions will be reduced depends, in part, on the number of sources that will be major sources under part 63. Therefore, disaggregating R&D activities from other sources at a site for purposes of part 63 could conceivably result in fewer major sources of HAP being subject to MACT standards. Consequently, the Agency is reluctant to allow separation of R&D activities from other sources when determining



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

whether a group of sources is a major source of HAP under part 63. On the other hand, the objective of title V is to issue permits that ensure compliance with existing air pollution control requirements, such as MACT. The EPA believes subjecting R&D activities to title V permitting would do little to ensure compliance with control requirements because EPA is not aware of any existing substantive control requirements, such as MACT standards, that apply to R&D activities. Although all rulemakings necessary to establish MACT standards have not been completed at this time, several final rulemakings establishing MACT standards for source categories that might have R&D activities collocated with them have specifically exempted R&D activities from the standard. In addition, making the source aggregation procedures for R&D activities in the part 70 program the same of all major source determinations, whether for the purposes of section 112, section 302, or part D of title I, ensures that R&D activities are grouped consistently under part 70 regardless of the type of air pollutants being considered.

Since EPA requires R&D activities that are major sources under part 70 to obtain part 70 permits, EPA believes the revised part 70 is consistent with the requirement of section 502(2)(a) of the Act for all major sources to obtain operating permits. However, because major source is now defined differently under part 63 and part 70 for R&D activities, EPA acknowledges the potential for States to be confused. The confusion arises from the concern that a site with both R&D and manufacturing activities could be major for HAP under part 63 solely when emissions from the R&D activities are included, while the same group of sources would not be major for HAP under part 70 when the R&D emissions are not included. The effect of such a situation would be that a source that is subject to a MACT standard for major sources under part 63 would not be a major

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

source under part 70, and thus, not required to obtain a part 70 permit. For two reasons, EPA believes that the number of sites where such a situation could occur will be limited. First, the definitions of major source in part 63 and in part 70 with respect to section 112 are different solely in how they group R&D activities with other collocated sources. They group all other sources, as well as stand-alone R&D activities, identically. Second, the Agency is not aware of any sources that actually would be major when counting HAP emissions from R&D activities but nonmajor when HAP emissions from R&D activities are not counted. The Agency believes that if such sites exist, any detrimental effects on compliance assurance will be limited. Part 70 permits are not the only tools available to assure compliance with MACT standards. For example, under the Act, MACT standards may impose compliance assurance requirements, such as monitoring, recordkeeping, and reporting requirements, and these requirements are enforceable by EPA and the States independent of part 70 permits.

Definition of R&D Activity. The August 1995 proposed definition covered two types of R&D activities: (1) testing activities, and (2) research or laboratory facility activities. "Testing activities" meant the testing of more efficient production processes or methods for preventing or reducing adverse environmental impacts, provided no products were produced for sale or exchange. "Research or laboratory facility activities" meant activities whose primary purpose was research and development into new processes and products. The proposed definition required those activities to be supervised by technically trained personnel and not engaged in "the manufacture of products for sale or exchange for commercial profit, except in a de minimis manner." (Emphasis added). The "research or laboratory facilities" part of the proposed definition paralleled similar language in the definition of "research or laboratory

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

facility" of section 112(c)(7) of the Act.

Extensive comment was received on the proposed definition of R&D activities. Commenters pointed out various contradictions or inconsistencies. They also suggested adding activities to the definition, and asked that the definition be simplified or clarified in several areas. Two State agencies were concerned that the definition could allow manufacturing facilities minimally engaged in R&D to exempt some of their production from major source determinations. Other commenters were concerned that the proposed definition seemed not to apply to: (1) Testing of new production processes and products or testing resulting in de minimis production of products; and (2) R&D for improving existing processes and products or for theoretical (basic) research.

The EPA agrees with commenters who pointed out inconsistencies between the testing and research or laboratory facilities parts of the proposed definition. In response, EPA has deleted the part of the definition referring to testing activities. That part of the proposed definition would have allowed testing activities not related to the primary purpose of research and development, such as quality assurance or quality control testing conducted during the normal course of manufacturing, to be eligible for separate major source treatment. Under the revised part 70, R&D activities must have as their primary purpose either theoretical research or research and development into new or improved processes and products. This revision does not eliminate all testing activities from eligibility for separate treatment, as testing conducted in the course of research and development could potentially meet the definition of R&D activities.

The Agency also agrees that the definition of R&D activities should include theoretical research and research and development on existing, as well as new, processes and products.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

Consequently, EPA is adding theoretical research and research and development to improve existing processes and products to the definition.

In response to comments, the final definition of R&D activities contains all language necessary to limit the circumstances under which R&D activities may qualify for separate major source treatment. The proposal imposed several limitations on separate treatment for R&D activities within the definition of major source: a support activity test, for section 302 and part D major source purposes; and an administrative convenience test, for section 112 major source purposes. In the proposal, these limitations were found in different sections of the definition of major source and were written with different wording. Today's part 70 revisions impose these limitations by using the same language in the definition of R&D activities. This language requires that R&D activities not contribute to the commercial production activities of collocated sources to more than a de minimis extent. The EPA believes that placing all eligibility limitations within the R&D activities definition will clarify part 70 and ease its implementation. Also, using the same language to impose the administrative convenience and support facility tests results in consistent source aggregation, whether HAP or criteria pollutants are being considered.

The final definition also retains the proposed requirement that R&D activities, by themselves, not engage in commercial production to more than a de minimis extent. Several commenters pointed out that, regardless of whether an activity supports a collocated source or not, commercial products may be manufactured "incidentally" during research and development and that the final definition should allow such production without limit. The EPA believes, however, that incidental commercial production should be limited and that an activity is no longer "primarily engaged in R&D" if it produces more than de minimis levels of commercial

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

production.

The Definition of De Minimis. The proposal did not define what level of commercial production was de minimis; however, EPA solicited comment on whether it should define the term and, if so, what criteria would be appropriate.

The majority of commenters asked that the final regulations allow the States to define de minimis and that EPA remain silent. Several commenters pointed out that States have experience in making these determinations and that they are able to set common-sense criteria tailored to their own programs, taking into account the mix of sources that exists in the State. In addition, they pointed out that national criteria are likely to disrupt State programs that already have established criteria. Other commenters asked EPA to define de minimis to minimize debate over its meaning.

The EPA agrees with comments suggesting that part 70 not define de minimis. Rather, part 70 allows States to interpret its meaning. The Agency believes this policy provides each State the flexibility to interpret this term based on the circumstances within that State.

However, each State should establish objective criteria to determine de minimis commercial production thresholds for R&D activities. The EPA believes criteria are needed to measure both the amount of support an R&D activity provides to other collocated sources and to measure the amount of commercial production generated solely by the R&D activity. States may use various criteria to achieve this purpose. For example, to measure the amount of commercial production from the R&D activity itself, the criteria may limit the percentage of time during which an R&D activity performs manufacturing activities or set dollar, volume, weight, or other values. To measure the level of support provided to other collocated sources, the criteria may include limits on the total percentage of products from a site

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

that are produced by the R&D activity. For example, such percentages may be calculated based on dollar, volume, weight, or other values.

R&D Activities at Educational Facilities. Several commenters expressed concern that the proposal would not allow disaggregation of R&D activities from collocated educational institutions, such as universities. They believe that R&D activities at universities are similar to R&D activities at manufacturing plants in terms of predictability of operations, and should be treated similarly.

In the August 1995 proposal, EPA did not discuss whether R&D activities at educational institutions would meet the R&D definition. In fact, the proposal presented several obstacles to such an interpretation. For one, the proposed definition of R&D activity covered research and development into new, but not existing, processes and products. For another, the definition did not cover theoretical research. Both of these activities typically occur at university R&D facilities. In addition, the proposed major source definition under paragraph (1)(i)(B), which imposed an administrative convenience test for section 112 purposes, was interpreted by commenters as being an obstacle to separate treatment for R&D at universities. The administrative convenience test stated that R&D activities need not be aggregated with other sources unless the R&D activities "contribute to the product produced or services rendered by the collocated sources in a more than de minimis manner." (Emphasis added.) This language appeared to be an obstacle because universities provide a service (education) to which R&D at universities may be considered to contribute in more than a de minimis manner. Thus, a literal reading of the proposed definition would have excluded R&D at educational institutions.

In view of these comments, EPA has developed final revisions to part 70 that it believes are amenable to an interpretation

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

that allows States to treat R&D activities separately from the educational institutions at which they are located. The revised definition includes activities that typically occur at university R&D facilities, such as basic research, and research and development of new or existing products and processes. Also, the "services rendered" language of proposed paragraph (1)(i)(B) has been revised and moved to the definition of R&D activity (for reasons explained in previous sections). States may interpret this revision to allow nonmajor R&D activities to be treated separately from collocated educational institutions. At the same time, EPA believes that the definition of R&D activities is broad enough to allow States to group university R&D facilities together with collocated educational institutions for major source purposes under part 70.

Treatment of Pilot Plants. The August 1995 proposal stated that "[p]ilot plants often present instances of activities that are conducted on a trial basis, but which are nevertheless dedicated to producing a product for commerce to more than a de minimis extent, and so would not be considered R&D."

Pharmaceutical and chemical companies commenting on the proposal asked that EPA reconsider this statement, pointing out that some pilot plants would qualify under the proposed definition of R&D activity. They also urged EPA to allow States to determine whether pilot plants meet the definition.

The EPA has reconsidered the statement it made in the proposal concerning pilot plants. The Agency agrees that States should be allowed to decide if a particular pilot plant is an R&D activity. Thus, under the revised part 70, a pilot plant may be considered R&D if a State determines it meets the definition of R&D activity. Each State may make this determination case-by-case. This clarification is appropriate because the term "pilot plant" means different things to different industries and different States. For example, some pilot plants, as integral

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

parts of large R&D facilities, test new products or production processes during the development phase of research and development. On the other hand, as commenters pointed out, in some industries a pilot plant is a small-scale manufacturing plant constructed for the purpose of producing the first goods for a new or test market. As a general rule, the former example could qualify because it is primarily engaged in R&D, while the latter could not, because it is primarily engaged in manufacturing. In the former example, the decision as to whether the pilot plant is primarily engaged in R&D may depend on whether it produces commercial products in more than a de minimis manner. The facts of a particular case will typically govern the decision.

Treatment of Non-R&D Laboratories. The proposal only allowed laboratories that were part of an R&D activity, and therefore "primarily engaged in research and development," to be treated separately from other collocated sources during major source determinations. The EPA solicited comment on whether the definition of R&D activities should include laboratories not engaged in R&D. In addition, the Agency asked for comment on specific categories of laboratories that are not predictable in operation and not functionally integrated with on-site industrial activities.

Many industry commenters supported extending separate major source treatment for all laboratories, although they acknowledged that the operation of certain types of laboratories can be predictable. These commenters also asked that States, rather than EPA, be allowed to make case-by-case decisions as to which non-R&D laboratories would receive separate treatment. State commenters were split on this issue, with some supporting and some opposing separate treatment for non-R&D laboratories. State commenters opposing separate treatment argued that the activities of industrial or commercial laboratories are often predictable.



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

Another State commenter suggested that a decision on this point could not be made without more data on predictability, functional integration, or environmental impacts for various types of laboratories. The State commenter requested that EPA perform further study before deciding whether to include sources other than R&D activities. Other commenters requested separate treatment for teaching laboratories and medical/health laboratories not engaged in R&D. These commenters argued that teaching and medical/health laboratories are not functionally integrated with on-site industrial activities and are unpredictable in operation and emissions.

Commenters did not provide enough evidence for EPA to conclude that all or even certain types of non-R&D laboratories are appropriate for separate treatment. For activities where R&D is the primary activity, EPA can clearly say that laboratories that support the R&D activity would be included under the R&D definition. However, laboratories that support many non-R&D activities, in EPA's view, tend to be functionally integrated with those activities and more predictable than not in their operations and emissions. Consequently, those non-R&D laboratories should not be disaggregated from the activities that they support. For example, several commenters asked that quality assurance/quality control laboratories be treated the same way as R&D activities. The EPA believes that such treatment would be inappropriate, because these laboratories are often dedicated components of a manufacturing source. As such, they should be treated as part of that source.

The revised part 70 will also not allow separate treatment for teaching laboratories at educational institutions. In the Agency's view, these laboratories are engaged in the primary activity of education, rather than research and development. As a result, EPA believes they are functionally integrated with the university and that their operations and emissions are

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

predictable. Thus, EPA believes they are dissimilar to R&D activities, and should not be treated similarly.

The EPA also disagrees with comments that all analytical or medical research laboratories should be included in the definition of R&D activity. For the reasons stated previously, where laboratories are functionally integrated with other sources, EPA believes they should be part of those sources. Conversely, where laboratories are primarily engaged in theoretical research or R&D into new or existing processes or products, and meet the other requirements of the final definition, the laboratories could be considered R&D activities.

In response to commenters' concerns that laboratories should be treated in a less rigorous way in part 70 permitting, EPA notes that its guidance, the "White Paper for Streamlined Development of Part 70 Permit Applications" (July 10, 1995), summarizes how laboratories may be treated in a streamlined manner in permit applications and permits. Although not exempting laboratories from permitting altogether, this guidance allows most laboratory activities to be treated as trivial or insignificant activities. This means, for most laboratories, that permit applications are not required to contain extensive emissions inventories and permits may contain streamlined compliance certification and monitoring requirements.

In summary, part 70 has not been revised to explicitly allow disaggregation of non-R&D laboratories; however, States may determine if any particular laboratories qualify for disaggregation under the definition of R&D activities.

Calculation of Potential to Emit. The proposal asked for comment on whether EPA should provide a de minimis exemption from the requirement to calculate PTE for R&D activities, including stand-alone R&D activities and R&D activities collocated with other sources. Comment was also requested on cost-effective means of calculating PTE for R&D activities. Comments by

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

industry representatives suggested that EPA exempt R&D activities from PTE calculation altogether. They pointed out that, since R&D operations and emissions are highly variable and noncontinuous, calculation of PTE would be expensive and the results highly speculative. Representatives of various types of laboratories asked for a similar exemption. One commenter representing an organization of State permitting agencies thought such an exemption was inappropriate because it would make the determination of whether an R&D activity is a major source an impossible task, since there would be no basis for making the determination. Several commenters asked that States, rather than EPA, take the lead in developing simple procedures for calculating PTE at R&D activities. Only one commenter offered an example of how PTE could be calculated cost-effectively (although no data on cost effectiveness was presented), suggesting that it be based on an annual projected emission inventory.

The Agency is not persuaded by commenters that an exemption to PTE calculations is appropriate. While calculation of PTE for R&D activities may be difficult, it is still possible, and has been successfully done in a number of cases. If EPA were to create a national exemption from PTE calculation for R&D activities, States would be unable to require PTE calculations even where the calculations are possible and the States believe the calculations are necessary. Therefore, EPA believes the best policy is not to allow a de minimis exemption from calculating PTE for R&D activities, while allowing State permitting authorities the discretion to develop and implement State-specific, streamlined methods for determining PTE for R&D activities.

Treatment of Stand-alone R&D Activities. The August 1995 proposal solicited comment on allowing stand-alone R&D activities to be treated separately from their support facilities, when those support facilities would independently be major sources.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

Many commenters supported such a position. They argued this was appropriate because: (1) support facilities are collocated with R&D activities mainly for administrative convenience; and (2) this additional flexibility would be a further refinement of the overall goal of separating out R&D activities during major source determinations. However, one State agency argued that this policy would potentially erode the concept of a source as the sum of its functionally-integrated parts.

The Agency agrees with the State commenter that the integrity of a source must be preserved. To separate a source from its support activities would undermine the traditional concept of a source as the sum of its functionally-integrated parts. The EPA believes that such support facilities are not generally collocated with R&D activities merely for administrative convenience, but rather for material necessity, and that they are functionally integrated with the R&D activities. The EPA does not agree that separation of support facilities would be a further refinement of its policy for R&D activities, since the policy for R&D activities is based on the theory that R&D activities are not functionally integrated with other collocated non-R&D sources and are located with these other sources merely for administrative convenience. Consequently, the revised part 70 does not allow the support facilities of stand-alone R&D activities to be treated separately from R&D activities during major source determinations.

G. Permit Revision/Permit Modification

The EPA proposed in the August 1994 notice to change the definition of "permit revision" and to remove the definition of "permit modification" from part 70 to make the terminology consistent with the revised permit revision procedures proposed in the August 1994 notice. In the August 1995 notice, EPA again proposed to revise the permit revision system, but did not propose specific corresponding changes to the definitions of

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

permit revision or permit modification. Commenters suggested that these terms be clarified.

The EPA has evaluated the two definitions in light of the permit revision procedures being promulgated today. The EPA believes that permit modification no longer has meaning distinct from permit revision and is therefore deleting it from part 70. The term "permit revision" is being further clarified to encompass the changes to a permit that could be made under any of the permit revision tracks set forth in § 70.7. This includes situations where a permit revision is required pursuant to § 70.7(d)(1)<sup>7</sup> as well as those which can be initiated by the source or permitting authority pursuant to the administrative permit amendment provisions of § 70.7(e)(1).

The EPA expects that the majority of permit revisions will be those which are required as a result of changes at a source. The basic statement as to when permit revisions are required is found in § 70.7(d). It states that a change requires a permit revision if it: (1) could not be operated without violating an existing permit term; or (2) renders the source subject to an applicable requirement to which the source has not been previously subject. This requirement follows naturally from the discussion of off-permit changes, contained in section V.D. of this preamble, which states that, in the Agency's view the best way to assure compliance with each applicable standard, regulation, or requirement of the Act, as section 502(b)(5)(A) requires, is to require that the permit be revised each time a change triggers an applicable requirement.

Nonetheless, as originally noted in the 1994 proposal (59 FR 44464), and clarified in 1995 (60 FR 45533), the

---

<sup>7</sup>These include: (1) notice-only permit revisions under § 70.7(e)(2); (2) de minimis permit revisions under § 70.7(e)(3); minor permit revisions under § 70.7(f), and significant permit revisions under § 70.7(g).

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

definition of permit revision should not be read so broadly as to encompass all changes at a facility that have applicable requirements governing them. In many cases, changes can be made which, despite the fact that they involve emissions units subject to applicable Act requirements, can be operated without a permit revision. For example, generally applicable requirements (e.g., opacity limits) can be treated generally in part 70 permits such that emissions units may be added or modified without triggering either of the requirements in § 70.7(d)(1). Similarly, as discussed in section III.A. of this preamble, advance approvals may be designed such that the change already complies with the applicable requirement(s), and so does not trigger § 70.7(d)(1).

H. Plantwide Applicability Limit

The EPA proposed in August 1995 to add to § 70.2 a definition of the term "plantwide applicability limit (PAL)." This term was referenced within the definition of the term "emissions cap permit," which noted that such a permit includes a PAL and/or an advance NSR condition. The PAL definition indicated that a PAL was a federally-enforceable limit established to limit a source's PTE to a level at or below which a particular requirement would not apply.

While commenters were generally supportive of the concept of applicability limits, they raised a number of concerns about the proposed definition of PAL. For example, two industry commenters suggested that applicability limits in part 70 permits need not always be plantwide; limits that only cover a portion of a plant should be available as well. Two additional industry commenters were unclear about the relationship between a PAL as defined in part 70 and the PAL concept recently developed for use in the major NSR program, and raised concerns that, if future NSR regulations address PALs, there could be inconsistencies between the NSR and part 70 approaches to PALs, including whether PALs are mandatory program elements. In addition, a State commenter

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

was concerned about the use of the term "potential emissions" in the PAL definition. The commenter noted that limitations on PTE are intended to limit actual emissions, not merely to limit PTE irrespective of what is actually emitted.

After considering these comments, and in light of two additional factors, EPA has decided not to promulgate a definition of the term PAL in today's regulatory changes. The first additional factor EPA considered is the Agency's proposal to significantly revise the PSD and NSR regulations in parts 51 and 52 (July 23, 1996, 61 FR 38249). Among other things, this proposal would add a definition of the term PAL, and would include provisions for the use of PALs to determine whether a major modification has occurred at an existing NSR major source. Although NSR permits containing major NSR PALs have been issued under current EPA regulations, EPA proposed to clarify a number of relevant issues regarding the establishment and adjustment of PALs. To harmonize the implementation of NSR and operating permit programs, and to minimize confusion, EPA believes that the definition of the term PAL should be consistent in both programs. Therefore, EPA believes it should defer to the definition of PAL that will be promulgated in the final NSR reform regulations. The analysis of comments on the proposed NSR regulations will provide an appropriate forum for considering the full range of issues related to PAL implementation, including issues raised by some part 70 commenters such as: the voluntary versus mandatory nature of PALs on the part of sources and States; the use of "potential emissions" terminology; and the options for applicability limits that do not cover the whole plant. Should a definition of PAL be needed in part 70, EPA will codify a definition consistent with that finalized in the NSR regulations in that rulemaking.

A second factor that EPA considered in deciding not to promulgate a definition of PAL is the Agency's decision not to

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

mandate emissions cap permits that include PALs and advance NSR as a minimum element of State part 70 programs. As discussed in section V.A. of this preamble, EPA is not finalizing proposed § 70.4(b)(3)(xiv) requiring State authority to issue emissions cap permits. In addition, requiring PALs for part 70 would be inconsistent with the proposed NSR changes, which would maintain the current NSR policy that PALs are optional on the part of sources and States. The deletion of the cap requirement as embodied in the proposed § 70.4(b)(3)(xiv) renders a regulatory definition of emissions cap permit unnecessary. Since the term PAL was defined in the part 70 proposal for use in the definition of emissions cap permit, it is likewise no longer necessary for this purpose.

The EPA notes that its decision not to adopt a definition of PAL today does not in any way limit the availability of PALs at part 70 sources. Under current NSR rules and policy, PALs are presently an option available to sources and States on a voluntary basis, and several PALs have been developed under existing NSR SIP's. Any PAL developed at a part 70 source could be established in the source's part 70 permit, or could be established as an NSR permit term, in which case it would be a part 70 applicable requirement like any other NSR permit term. The EPA also notes that its decision to use the term PAL that mirrors the major source NSR program does not in any way restrict the opportunities to use other types of caps to provide flexible approaches to determining applicability or compliance for other applicable requirements.

I. Potential to Emit

The EPA proposed in August 1994 to revise the definition of "potential to emit" in response to petitioners' comments that federally-enforceable potential to emit limits are enforceable not only by the Administrator, as stated in the original part 70, but also by citizens. However, in an unrelated development, in



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

Clean Air Implementation Project (CAIP) vs. EPA, (D.C. Cir. June 28, 1996), the court vacated and remanded to the Agency the part 70 definition of potential to emit in response to industry challenges to the Federal enforceability requirement. The EPA, in its memorandum, "Extension of January 25, 1995 Potential to Emit Transition Policy (August 27, 1996)," stated that the term "federally enforceable" in § 70.2 should now be read to mean "federally enforceable or legally and practicably enforceable by a State or local air pollution control agency" pending completion of new rulemaking on the federal enforceability issue.

A number of industry commenters addressed the issue of whether EPA should require limits on potential to emit to be federally enforceable, noting the inconsistency between the court's ruling in CAIP vs. EPA and the proposed and current part 70 definitions of potential to emit. As noted, the court has now vacated this definition, relying on its earlier decision in NMA vs. EPA regarding the definition of potential to emit under section 112. In the NMA decision, the court framed the issue as whether limits on potential to emit were "effective," and found that EPA had failed to justify the relationship between the Federal enforceability requirement and effective limits on potential to emit. The court did not have occasion to address the "maximum capacity to emit" concept, EPA's longstanding policies that limits on potential to emit must be both legally and practically enforceable, or any other aspect of the definition of potential to emit. Therefore, EPA is today revising the definition in response to the court's vacatur, for the purpose of reserving judgment on the Federal enforceability requirement challenged by petitioners, pending a separate rulemaking in which EPA would reconsider the definition of potential to emit in part 70 and related rules, to address the issue of Federal enforceability and the related issue of criteria for effectiveness of limitations on potential to emit. To

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

accommodate EPA's reservation of judgment on the Federal enforceability issue, the definition will be restructured somewhat, but will not otherwise change substantively. Thus, pending completion of a separate rulemaking, the definition of potential to emit finalized in today's rulemaking still should be read consistently with the August 27, 1996 memorandum noted above to mean limitations "federally enforceable or legally and practicably enforceable by a State or local air pollution control agency."

Nonetheless, EPA wishes to clarify today that the decision whether to require Federal enforceability is independent of the issue of whether limits enforceable by the Administrator are also enforceable by citizens under the Act. As noted, it is clarification of this latter point that comprised the substance of the August 1994 proposal. Commenters generally objected to adding language that could restrict the types of limits that could serve to limit potential to emit, and objected to revising the definition of potential to emit while it was the subject of litigation. However, they did not speak directly to the issue of whether federally-enforceable limits are also enforceable by citizens. Therefore, EPA today is proceeding to clarify, by way of today's rulemaking and preamble, its position stated in the August 1994 proposal that limits which are enforceable by the Administrator are enforceable by citizens under section 304 of the Act. This clarification is made without prejudice to any upcoming rulemaking on Federal enforceability.

J. Regulated Air Pollutant

The August 1995 notice proposed a change to the definition of "regulated air pollutant" to respond to concerns raised during the development of EPA rules implementing accidental release prevention requirements under section 112(r) of the Act (40 CFR part 68). The proposed change would revise the definition to delete a pollutant's listing pursuant to

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

section 112(r) as a criterion for that pollutant being considered a regulated air pollutant. Although some 112(r) pollutants would still be regulated pollutants for other reasons, a pollutant would no longer be defined as a regulated air pollutant solely because it is listed under 112(r). As noted in the August 1995 preamble, this action would benefit part 70 implementation by removing from part 70 program requirements (e.g., the requirement to describe emissions in permit applications) a number of section 112(r) pollutants which are generally not subject to air quality management programs.

Many commenters were generally supportive of EPA's proposal, noting that requiring estimates of 112(r) emissions in determining part 70 applicability would be unreasonably burdensome. However, commenters did raise concerns about whether the proposed language clearly reflects EPA's intent. They noted that the proposed language still generally includes any section 112 pollutant, and would be read to include 112(r) pollutants unless some additional language is added to provide a specific exemption for 112(r)-only pollutants. The EPA agrees and has added language to more clearly reflect its intent. In addition, one commenter noted that paragraph (3) of the definition of "regulated pollutant (for presumptive fee calculation)," which specifically exempts 112(r)-only pollutants from regulated pollutants that must be considered in fee calculations, is unnecessary if 112(r) pollutants are no longer regulated air pollutants to begin with. The EPA agrees, and has deleted paragraph (3) from that definition.

K. Research and Development Activities

See section III.F.5. of this preamble for a discussion of the definition of research and development activities.

L. Section 502(b)(10) Changes

The EPA proposed, in August 1994, to delete provisions in § 70.4(b)(12)(i) which allow the source to unilaterally make a

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

specific type of change, known as a "section 502(b)(10) change." Under the original part 70, this type of change could contravene an express permit term as long as the change would not violate applicable requirements, and would not contravene federally-enforceable monitoring, recordkeeping, reporting, or compliance requirements. Such changes could be made without a permit revision if the change was not a title I modification and did not exceed the emissions allowable under the permit. For reasons explained in section V.C. of this preamble, EPA is deleting the provisions in § 70.4 allowing such changes. As a result, the definition in section § 70.2 is no longer necessary and is deleted.

M. State Review Program

The August 1995 notice proposed a definition of "State review program" for purposes of implementing the proposed system for part 70 permit revisions. The proposed system divided changes into two classes; those that were subject to State review programs and those that were not. Commenters requested clarification of this term in light of the August 1995 proposal. However, the permit revision system being promulgated today (discussed in section VIII.A. of this preamble) has been restructured for clarity. The restructured part 70 no longer relies on the term "State review program." Therefore, this term is being deleted from part 70.

N. Title I Modification

The EPA proposed in August 1994 to include a definition of the term "title I modification" in response to the confusion and controversy surrounding its implementation. This term is used in the original part 70 primarily in establishing what changes were eligible for each of the three permit revision procedures. As indicated in the original part 70, title I modifications were not eligible for the minor permit modification or administrative amendment procedures, and would thus be significant permit

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

revisions. This term is also used in the Act in section 502(b)(10) and was in the original part 70 to exclude title I modifications from off-permit treatment, which allows certain changes without a permit revision.

The 1994 proposal stated that EPA believed that title I modifications included changes subject to State minor NSR programs approved under section 110(a)(2) of the Act. The EPA received a large number of comments from industry and States strongly opposing this interpretation. The EPA considered these comments in detail, and concluded that title I modification as it appears in section 502(b)(10) and in the original part 70 should be read to exclude changes subject to minor NSR. The rationale for this proposal is described in detail in the August 1995 proposal notice.

Comments on the 1995 proposed interpretation of title I modification were generally favorable. One environmental group incorporated by reference its earlier comments on the August 1994 proposal which supported EPA's original interpretation that title I modifications include minor NSR. However, this commenter did not raise any new issues regarding the position EPA took in its August 1995 proposal. Therefore, EPA stands by the proposal and rationale as set forth in the August 1995 notice.

Furthermore, EPA notes that the revised permit revision system being promulgated today greatly diminishes the importance of the term title I modification. Whereas the term is used in the original part 70 to govern which changes are eligible for streamlined permit revision procedures, EPA notes that the availability of today's new streamlined revision procedures do not depend on whether the change is a title I modification. Similarly, EPA is deleting the off-permit procedures, which had relied upon the meaning of title I modification. The remaining reference to the term in part 70 states that changes made pursuant to section 502(b)(10) cannot be title I modifications.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

Although the meaning of title I modification is now of greatly reduced significance in part 70, EPA sees no reason not to promulgate the definition as proposed in August 1995.

Noting that current part 70 does not contain a definition of title I modification, EPA wishes to today reiterate its position on the interpretation of this term for current part 70 programs until such time as they are revised pursuant to today's revisions. As Stated on November 7, 1995<sup>8</sup>, EPA believes that the interpretation of the current part 70 rule is consistent with that in the August 1995 proposal, i.e., that title I modifications do not include minor NSR changes.

**IV. Changes to Section 70.3**

**A. Part C and D Sources**

In the August 1994 notice, EPA proposed to add a new paragraph to § 70.3(a) to conform to section 502(a) of the Act, which lists the types of sources required to obtain a part 70 permit. This list includes "any other source required to have a permit under parts C and D of title I." Parts C and D of title I constitute the major NSR permitting programs. Three State and two industry commenters felt that the proposed change was unnecessary because major sources are already subject to part 70 because of existing § 70.3(a)(1). They felt that the additional language could add confusion. In particular, they were concerned that there is the possibility of confusing minor source NSR (though not in parts C or D) with part C or D NSR such that large numbers of those sources might unintentionally be brought into the part 70 permitting program.

The EPA wishes to clarify that the proposed change was not meant to refer to minor NSR sources, but only to sources that parts C and D of title I would require to have a permit.

---

<sup>8</sup>See the November 7, 1995 letter from Lydia Wegman, Deputy Director, OAQPS to William Becker, Executive Director, STAPPA/ALAPCO.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

However, EPA notes that certain sources that might in some respects be viewed as non-major are still sources "required to have a permit under parts C or D of title I." The EPA is aware of at least two ways that an NSR source which is not brought into part 70 by the major source size cutoffs in § 70.3(a)(1) could still be subject to proposed § 70.3(a)(4) 70 because it receives a part C or D permit: (1) a source was subject to major source NSR permitting when constructed or modified, but has since reduced its emissions to non-major levels though it remains subject to its NSR permit; or (2) a source is major for NSR but otherwise viewed as nonmajor for part 70 under a part 70 policy decision (e.g., the changed part 70 applicability criterion with respect to considering only "PM-10," rather than "particulate matter" in determining "major source" status<sup>9</sup>). The proposed change would apply to the minor sources described above, and may apply to other circumstances of which the Agency is not yet aware.

Considering the comments, EPA maintains that the proposed change, with the above clarification, best implements section 502(a) of the Act. The EPA believes that section 502(a) offers no basis to exclude such sources from part 70. Moreover, EPA believes that the proposed change will improve NSR and part 70 implementation, and will make the interface between NSR and part 70 more straightforward. Therefore § 70.3(a)(4) is being finalized as proposed.

**B. Section 112(r) Applicability**

The EPA proposed in August 1994 to provide that, where a source would be classified as major solely because of its emissions of 112(r)-only pollutants, that source would not be subject to the stipulation that all major sources must obtain

---

<sup>9</sup>This policy is described in the October 16, 1995 memorandum from Lydia Wegman entitled "Definition of Regulated Pollutant for Particulate Matter for Purposes of Title V."

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

part 70 permits. This provision is needed to conform to section 112(r)(7)(F) of the Act. All the commenters on this issue supported EPA's proposal to add this provision. However, EPA notes that the proposed language for § 70.3(a)(1) could be read to exempt sources that are major for any 112(r) pollutant, even those regulated elsewhere in the Act (e.g., HAPs listed in section 112(b)). The EPA intended for this exception to apply only to those pollutants listed solely pursuant to 112(r). Therefore, EPA is finalizing proposed language with the clarification that this applicability exception applies to 112(r)-only permits. The EPA believes that this change, together with the other 112(r) changes and clarifications in today's part 70 revisions, clarify the 112(r)/part 70 interface with respect to applicability, permit application, and permit content requirements.

**V. Changes to Section 70.4**

**A. Authority to Issue Emissions Cap Permits and Advance NSR**

The EPA proposed in August 1995 to specifically require, as a minimum program element, that a State demonstrate (through a legal opinion) authority to issue permits containing emissions caps and advance NSR conditions consistent with all applicable requirements. Two provisions, § 70.4(b)(3)(xiv) and § 70.4(b)(12)(i), together describe the part 70 program requirements that permitting authorities must meet with respect to caps and advance NSR. Proposed § 70.4(b)(12)(i), discussed in detail in the next section of this preamble required that permitting authorities provide caps, and also addressed the permit content and procedural requirements for trading under these caps. Proposed § 70.4(b)(3)(xiv), on the other hand, required the additional authority to issue emissions cap permits which include advance NSR and/or PALs. Thus, § 70.4(b)(12)(i) required caps but also required the permit to assure compliance with all applicable requirements, while the proposed



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

§ 70.4(b)(3)(xiv) could be read to require permitting authorities to employ caps either to assure compliance with or to avoid triggering of applicable requirements.

Several industry commenters expressed general support for mandatory caps and advance NSR. However, few commenters provided specific comments on the language of the proposed § 70.4(b)(3)(xiv), which embodied the specific mandate that States demonstrate authority to issue emissions cap permits that include PALs and/or advance NSR. Two industry commenters did support making PALs mandatory because it would promote the use of PALs.

One State agency representative was concerned that mandatory caps would seriously impact State minor NSR programs, many of which do not presently provide for PALs or advance NSR. This commenter also was concerned that a cap might result in less emissions reductions than would occur under current minor NSR programs. The commenter urged that emissions caps be left as an option to States. Another State commenter argued that trading under emissions caps should only be mandated where the State has a rule authorizing such an approach. An environmental group representative also opposed mandatory caps, contending that the cap concepts are relatively untried. The commenter suggested that States be allowed to test caps to determine which situations merit them, rather than have caps required by EPA. The commenter also argued that developing cap permits is more resource-intensive, and a cap mandate from EPA could stretch State resources. Several additional commenters were confused by the cap provisions and were unclear, among other things, about what sort of caps States were required to provide.

As noted below, EPA stands by its position in the original part 70 regulations and restated in the preamble to the August 1994 proposal, that trading under emissions caps is an appropriate, and even preferable, means of implementing section

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

502(b)(10) of the Act. After considering the comments, however, EPA has decided that the proposed § 70.4(b)(3)(xiv) is inappropriate for two reasons. First, EPA is concerned that, as proposed, this provision could have been read to require caps and advance NSR even where the caps and advance NSR are inconsistent with applicable requirements, including the procedural requirements of the applicable SIP. Although there was some confusion about exactly what this provision would have required, EPA never intended it to require permitting authorities to issue emissions cap permits that were inconsistent with applicable requirements. However, some commenters apparently read the proposal to supersede applicable requirements, or to require the States to change them. The Agency believes that reading section 502(b)(10) in this manner would be inappropriate. In any event, this was not EPA's intent, and the Agency wishes to clarify that the permitting authority has considerable discretion to determine whether its regulations allow provisions such as advance NSR or PALs in any particular case. Second, consistent with this position, EPA believes that the proposed language is now redundant with other provisions in § 70.4(b)(3), e.g., § 70.4(b)(3)(i) and § 70.4(b)(3)(v). For these reasons, the Agency is deleting the proposed provision.

The remaining components of EPA's approach to emissions cap permits and section 502(b)(10) are discussed in the next section of this preamble. Although EPA is not codifying the proposed § 70.4(b)(3)(xiv), the Agency wishes to clarify here that it still strongly supports the advance approval and PAL/cap concepts embodied in the proposal for emissions cap permits, if they are consistent with applicable requirements and State program needs. The EPA agrees with the large number of commenters who stated that cap and advance NSR approaches could improve operational flexibility by reducing the number of NSR permits and part 70 permit revisions, which should save significant time and

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

resources for sources and permitting authorities. For this reason, EPA encourages States to evaluate the present availability of advance NSR, PALs, and other types of caps, to consider ways to integrate these concepts into part 70 programs and/or SIP's. The Agency is adhering to the principle, however, that the States are best suited to determine whether caps or advance NSR are appropriate in their situations and EPA accepts that some States may choose not to provide these approaches or may choose to provide flexibility through other means.

**B. Trading Under Permitted Emissions Caps**

In the preamble to the August 1994 proposal, EPA stated that sources should be able to establish an emissions cap and to comply with that cap through trading, as an appropriate means of implementing section 502(b)(10) of the Act. Both the August 1994 and August 1995 notices proposed to modify the current part 70 requirements for trading under emissions caps to clarify the cap provision in § 70.4(b)(12) and address State and industry concerns.

A number of commenters generally supported EPA's efforts to promote the use of emissions caps and to provide for their incorporation into part 70 permits. Several industry commenters expressed general support for mandatory caps and one felt that mandatory caps are clearly required by Statute. In contrast, a number of State commenters urged EPA to clarify that applicable requirements continue to apply under any cap established under section 502(b)(10).

The EPA agrees with comments by State agencies that emissions caps must still meet all applicable requirements, and the Agency hereby clarifies that section 502(b)(10) does not mandate broad emissions caps that would conflict with or supersede applicable requirements. As stated in § 70.4(b)(12), the permitting authority must include terms and conditions in each part 70 permit that assure compliance with all applicable

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

requirements. Thus, where the permitting authority determines that a source's emissions cap proposal does not assure compliance with all applicable requirements, the permitting authority must include additional provisions as necessary to do so. For example, were a source to propose a cap for the purpose of allowing preapproval of minor NSR without case-by-case review, but the permitting authority has determined that it cannot or should not waive case-by-case review under its SIP, the permitting authority would be obligated to disapprove the proposed preapproval conditions. The § 70.4(b)(12) requirement should not be read to require the permitting authority to issue such a cap proposal. While the permittee may always propose a cap in the part 70 permit that it believes will meet applicable requirements, the permitting authority has the final authority to determine whether the cap meets that purpose and whether the permit includes the necessary applicable requirements.

To avoid the situation where the cap proposed by the source with the intent of satisfying an applicable requirement fails to meet the expectations of the permitting authority, EPA encourages sources to communicate early with permitting authorities when developing emissions caps so that the source can clearly understand State policies on the use of caps to meet applicable requirements, and can develop applications for caps that meet the source's needs while still assuring compliance with all applicable requirements. In addition, even if caps and minor NSR preapprovals are consistent with State program requirements, the permitting authority must still assure that a proposed emissions cap is enforceable as a practical matter, and must reject any cap proposal that it determines is not practically enforceable. Therefore, it is essential that sources and permitting authorities communicate clearly regarding the enforceability of caps as they are developed.

The EPA wishes to further clarify, in response to comments,

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

that caps by themselves do not necessarily avoid all permit revisions, since changes under a cap may still trigger other applicable requirements (e.g., a cap designed to avoid major NSR will not necessarily protect a source from the need to comply with minor NSR or section 112 requirements), which in turn will trigger the need for a permit revision. Sources and permitting authorities seeking to design flexible permits must consider the source's particular set of applicable requirements, including requirements that will apply to changes anticipated under the cap, and assess which of several flexibility approaches (e.g., emissions caps, emissions averaging, applicability limits, advance approvals, etc.) provide the most appropriate degree of flexibility. Sources with complicated sets of applicable requirements may find that several caps and/or advance approvals addressing different emission unit-applicable requirement combinations afford the source the greatest flexibility. For example, the previously discussed permit for an Intel semiconductor facility in Oregon includes, among other things, a major NSR applicability limit (similar to a PAL), a combination cap/preapproval for minor NSR, and a bubble-type limit for RACT at certain emissions units.

In August 1995, EPA also proposed to allow a one-time advance notification of a facility's anticipated changes under a cap during the term of the permit to comply with the 7-day notification requirement of section 502(b)(10). A number of industry commenters supported this proposal. They contended that a 7-day advance notification prior to each change under the cap did little to increase the assurance that the source was complying with the cap, but added significant reporting burdens, which according to some commenters, would render the cap unworkable, especially for companies that make many frequent changes. While EPA is sympathetic to any burden imposed by the notice, the Agency has determined that section 502(b)(10) cannot

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

be read to allow a waiver of the 7-day advance notification for individual changes under a cap, and that providing for one-time only notification would constitute such a waiver. Where trading occurs under an emissions cap established pursuant to section 502(b)(10), the Act requires a 7-day advance notification for each change under that cap. Consequently, the proposed language allowing one-time notification is not included in today's part 70 revisions.

However, as stated in the August 1995 preamble, EPA believes section 502(b)(10) was not intended to restrict any flexibility already available under the regulations governing applicable requirements. Thus, permits need not rely on section 502(b)(10), and the 7-day notification period does not apply where the underlying applicable requirements lawfully provide a different notification time frame (including no notification).

For example, if a State has granted a cap for the purposes of allowing certain minor NSR preapprovals, the State may have determined that, under its minor NSR regulations (as they may be revised to meet today's changes to part 51), no advance notification is necessary for such preapproved changes under the cap. However, section 502(b)(10) could be read to require 7-day advance notification for all changes under this cap. As noted, EPA believes that where the permitting authority issues a permit authorizing trading under a permitted emissions cap that is governed by an applicable requirement which does not require 7-day advance notification, then the section 502(b)(10) requirement for 7-day advance notification does not apply. In this case, the time period is governed by the minor NSR regulations, not by section 502(b)(10).

Flexibility in operating permits can be provided through emissions caps, advance approvals, and other flexible approaches that allow changes without a permit revision, while assuring compliance with applicable requirements. The appropriate

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

flexibility tools for a given source/applicable requirement situation are dictated by the source's flexibility needs and by the details of each applicable requirement facing the source. Determining appropriate flexibility approaches requires both a general awareness of the available flexibility options and a specific knowledge of which options are available under the relevant applicable requirements. The EPA is aware that many State programs are working to develop flexible permits, and the Agency supports and encourages these efforts. Several Agency efforts are underway to clarify and promote flexible permit development, and EPA intends to issue policy and guidance providing more detailed information about designing flexible permits. However, in many instances caps and advance approvals are not appropriate or necessary, such as where facilities do not make frequent or significant changes. Instead of a permit with caps and advance approvals, these facilities may be better off relying on the flexibility inherent in applicable requirements, alternative operating scenarios, or the streamlining offered by today's changes to the permit revision system.

C. Provisions for Section 502(b)(10) Changes

In August 1994, EPA proposed to delete the provision allowing section 502(b)(10) changes (§§ 70.2 and 70.4(b)(12)(i)), which, under the original part 70, allowed contravention of permit terms not necessary for compliance with applicable requirements, if the change contravening the permit term were not a title I modification and did not exceed emissions allowed under the permit, provided that a 7-day notice was given. State litigants raised implementation concerns with this provision, citing the difficulty of knowing which compliance term was or was not a section 502(b)(10) change, and the fact that the source could often make the decision without review by the permitting authority. In response to these concerns, EPA proposed to delete the provision, and require that changes which would have been

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

section 502(b)(10) changes will now need permit revisions, including permit revisions more streamlined than section 502(b)(10)'s 7-day advance notification procedures, if the change would conflict with the existing permit or trigger a newly applicable requirement not provided for in the permit.

Several State commenters supported the proposed deletion, although one recommended that EPA allow changes without a part 70 permit revision if the changes are exempt from review under a State's NSR program. Many industry commenters opposed the deletion of the definition of section 502(b)(10) changes and the deletion of § 70.4(b)(12)(i) on the grounds that the Act clearly provides for such changes under section 502(b)(10). Several commenters objected on the grounds that the section 502(b)(10) change provision allows a source the opportunity to "clean up" a permit which was initially laden with terms that the permittee found to be unworkable or unnecessary. Some commenters suggested that without this provision, a company would need a permit revision to "switch brands of paint." Some commenters believe that when a company changes its operations without triggering some new requirement, its permit may contain terms that restrict flexibility by requiring operation of a monitor or other apparatus that the company is no longer required to operate. They believe that sources should be able to change permit terms in such situations under section 502(b)(10), since it would require a 7-day notice alerting the State that the term was no longer being followed, and allow removal of the term from the permit without a permit revision.

For the following reasons, EPA is today deleting the provision allowing section 502(b)(10) changes that contravene express permit terms without requiring a permit revision. First, while section 502(b)(10) does allow some changes without a permit revision, other provisions of the Act clearly require that a company operate only in compliance with its permit. For example,



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

section 502(a) reads, "After the effective date of any permit program approved or promulgated under this title, it shall be unlawful for any person to violate any requirement of a permit issued under this title" (emphasis added). Permits must, in turn, assure compliance with all applicable requirements under the Act and the SIP (Sections 502(b)(5)(A), 504(a), and 505(b)(1)). In EPA's view, these statutory requirements are best met if an issued permit is complied with in whole and without exception, including all permit terms and conditions and applicable requirements. The EPA does not believe that an interpretation of section 502(b)(10) allowing violation of express permit terms is consistent with other requirements of the Act. The Agency believes that the proper way to remove permit terms which the company believes it is no longer required to meet is through a permit revision.

In response to concerns about the burden and delay of a permit revision, today's part 70 revisions provide several streamlined ways to revise a permit. If the changes are in fact "details" unrelated to federally-enforceable compliance terms, (i.e., they would have qualified as section 502(b)(10) changes under the original part 70), they should be eligible for the de minimis permit revision process. Similarly, if the change affects the compliance monitoring contained in the permit, the change is most appropriately handled through the applicable permit revision track, not through section 502(b)(10).

Second, important objectives of title V are to improve and assure compliance with relevant applicable requirements. Any provisions ensuring operational flexibility must be consistent with these objectives. Consequently, the Agency believes that section 502(b)(10) must be read consistently with other provisions of the Act so that it does not conflict with requirements to assure compliance with the permit and its applicable requirements. Thus, the Agency disagrees with

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

commenters who say that section 502(b)(10) must allow a company unilaterally to decide that it will not comply with its permit. In addition, EPA believes that to allow contravention of permit terms after a permit has undergone review by the permitting authority, the public, affected States, and EPA would render these review processes irrelevant. Instead, EPA believes part 70 should, as today's action does, protect the ability of the public, affected States, and EPA to review permit revisions, where such review is appropriate, and to allow permit revisions without review where the review would add little value.

Although EPA is deleting the definition of section 502(b)(10) changes and the provisions allowing for such changes as originally defined in part 70, the Agency maintains that section 502(b)(10) authorizes certain types of changes without permit revisions. These changes are discussed in section V.E. of this preamble. To avoid confusion, EPA is no longer using the term "section 502(b)(10) changes" because it may continue to be associated with the narrow definition used in the original part 70.

**D. Off-Permit Changes**

In the August 1995 notice, EPA proposed to delete §§ 70.4(b)(14) and (15). Section 70.4(b)(14) provided that a State could allow a source to make a change without a permit revision, if the change was not addressed or prohibited by the existing permit, and if the change was not one of those listed in § 70.4(b)(15), i.e., a requirement under title IV or modification under title I of the Act. Changes made pursuant to § 70.4(b)(14) were called "off-permit" changes, because the permit was not revised until it was renewed, instead of at the time the change was made. Thus, the requirements to which the change was subject remained off of the permit, or off-permit, until renewal. Section 70.4(b)(15) provided that any source making an off-permit change must submit a notice at the time of the change that

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

described the change, the change in emissions or pollutants, and the applicable requirements that would apply. Off-permit changes were not eligible for the permit shield.

The preamble to the August 1995 notice stated that the need for off-permit provisions would be greatly reduced by provisions of the proposed revisions which allow for rapid incorporation of changes that have undergone State review programs, and also by the provisions of the "notice-and-go" process. The preamble stated EPA's belief that the proposed elimination of off-permit provision would ensure that the permit is a contemporaneous and comprehensive summary of all applicable requirements, which is consistent with the statutory purpose of title V and favored by most permitting agencies.

Comments by permitting agencies were generally in favor of the proposal to eliminate the off-permit provisions, because most State and local regulatory agencies have traditionally viewed permits as allowing only those activities that are expressly stated in the permit, and as disallowing activities that are not expressly stated in the permit without a permit revision. Industry commenters favored retaining the off-permit provisions, although many of them agreed that the need for an off-permit provision should be greatly reduced if the proposed streamlined permit revision processes are adopted. Several commenters favored retaining off-permit provisions for changes that are expressly exempt from a State's minor NSR program, since changes exempt from NSR are not relied on by the SIP for attainment or maintenance of ambient standards. In these commenters' view, the main purpose of title V is to assure compliance with the SIP. Therefore, allowing changes that are exempt from the SIP's NSR program to remain off-permit is appropriate for the purposes of title V.

One industry commenter articulated several arguments that the commenter believes compel EPA to retain the off-permit

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

provisions. The commenter contends that title V requires only that a permit agency "have adequate authority" in its legislation to "issue permits and assure compliance by all sources required to have a permit under this title with each applicable standard, regulation or requirement under this Act" (section 502(b)(5)(A)). The commenter also noted that section 504(a) of the Act requires that each permit "issued" under title V must have enforceable emission limitations and standards, etc. to assure compliance with applicable requirements. The commenter believes that both of these sections are met if a part 70 permit at the time of initial issuance or renewal contains all then-applicable requirements, and the permitting agency has ample authority to ensure that it does. The commenter believes neither section requires that part 70 permits be continuously revised. In addition, the commenter contends that sections 502(b)(9) and 502(b)(10) of the Act both reflect a "strong Congressional intent for certainty and repose" during the part 70 permit term, unless there are strong reasons for a permit revision. The commenter also believes that concerns by regulatory agencies about the effect of off-permit changes are misplaced, and asserts that operating permits issued under State law, and State-only terms in part 70 permits are not constrained by part 70.

In response to comments that off-permit provisions should be retained for changes exempt from State minor NSR programs, the Agency disagrees, on the grounds that title V requires permits that "assure compliance with applicable requirements of this Act, including the requirements of the applicable implementation plan" (section 504(a)). Consequently, the Agency believes that a part 70 permit must assure compliance with not just the SIP, but with all applicable requirements. If changes that are exempt from a State's minor NSR program are subject to applicable requirements such as NSPS or MACT standards, or to the provisions of State programs under sections 112(g) or 112(l), as some of

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

them are, the Agency believes the permit must assure compliance with these requirements as well as it would assure compliance with requirements that are subject to NSR. Thus, the Agency disagrees that exemption from State minor NSR programs is an adequate rationale for retaining off-permit provisions.

The EPA also disagrees with the comment that the requirements of sections 502(b)(5)(A) and 504(a) of the Act are met if the permit contains all then-applicable requirements at issuance or renewal, and the permitting authority has ample authority to ensure that it does. The requirements of 502(b)(5)(A) cited by the commenter require that the permitting authority have authority to issue permits and assure compliance with "each applicable standard, regulation or requirement," which means, as the Agency reads it, that each time a change is made to which an applicable requirement applies, the permit must be revised to "assure compliance with that applicable requirement on an ongoing basis, unless the permit already provides for compliance with that applicable requirement.

In the Agency's view, the best way to assure compliance with each applicable standard, regulation, or requirement of the Act, as section 502(b)(5)(A) requires, is to require that the permit be revised each time a change triggers an applicable requirement, except where the permit already complies with the applicable requirement by containing the terms implementing the requirement or terms providing for advance approval of the change without a permit revision. If the Agency were to follow the commenter's suggestions, then it would not require States to revise permits at all during the term of the permit, except for reopening the permit to satisfy the requirements of section 502(b)(9), i.e., that the permit be reopened to add newly-promulgated requirements. The EPA does not read the ongoing obligation to assure compliance with each standard, regulation, or requirement when applicable to permit such a result. On the contrary, the

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

Agency believes that a principal objective of title V is to assure compliance with all applicable requirements of the Act, not only those recognized at the time of issuance or renewal, but also those that apply to changes made during the term of the permit. Although this approach results in the loss of some flexibility to permittees, eliminating the off-permit provisions gains substantial environment benefits since companies must certify compliance annually with applicable requirements that previously were off-permit. Consequently, a company must certify compliance with requirements to which it becomes subject up to 4 years earlier than it would have under the off-permit provisions.

Regarding the comment that sections 502(b)(9) and 502(b)(10) of the Act reflect a Congressional intent to avoid permit revisions, the Agency agrees that Congress intended that part 70 programs should, and in the case of section 502(b)(10) in limited circumstances must, provide ways to avoid permit revisions altogether. However, these provisions must be read consistently with the requirements that title V must assure compliance with all applicable requirements of the Act. The EPA believes that eliminating the off-permit provisions is the best way to reconcile these requirements.

Finally, the Agency emphasizes that elimination of the off-permit provisions affects only those changes made by the permittee that trigger newly applicable requirements. These changes, which were previously off-permit, must now undergo the relevant permit revision procedures of §§ 70.7(d), (e), (f), or (g). In contrast, deletion of the off-permit provisions does not affect applicable requirements that are adopted during the term of the permit, since these are subject to the reopening provisions under § 70.7(j) under today's part 70 revisions. Consistent with section 502(b)(9), applicable requirements promulgated after issuance of the permit must undergo the permit reopening procedures of § 70.7(j)(2) if 3 or more years remain on

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

the term of the permit. If less than 3 years remain on the permit, States may reopen the permit to incorporate newly-promulgated requirements, but are not required by part 70 to do so.

E. Changes Under Section 502(b)(10)

The previously discussed changes to § 70.4 have altered provisions that bear on the Agency's interpretation of section 502(b)(10). As noted in section V.A. of this preamble, section 502(b)(10) of the Act should not be read to require States to change applicable requirements to allow advance NSR or emissions caps that replace current requirements. In addition, as noted in section V.B. of this preamble, EPA believes that emissions cap requirements provide an appropriate means of implementing section 502(b)(10), but should not be required where such caps would conflict with applicable requirements. In preamble section V.C., EPA states that the provision for sources to make unilateral changes that contravene part 70 permit terms is an inappropriate means for implementing section 502(b)(10) consistently with other provisions of the Act. Finally, as explained in section V.D. above, EPA does not believe that the current off-permit provisions are consistent with all title V requirements, and the Agency is therefore deleting them as proposed.

Section 502(b)(10) must be read consistently with title V's requirement to assure compliance with all applicable requirements, as contained in such provisions as 502(b)(5)(A) and 504(a). The Agency believes that a consistent reading of the Act and proper implementation of all its requirements would not be achieved by any of the readings discussed above, or by any other overly broad reading of section 502(b)(10). The EPA believes that section 502(b)(10) is properly implemented through the following provisions of § 70.4(b)(12).

First, § 70.4(b)(12)(i) provides for permitting authority to include in a permit terms for trading under an emissions cap,

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

upon request by a permittee, provided the conditions of the paragraph are met. Permit terms and conditions allowing changes that lead to emissions increases and decreases pursuant to trading under the emissions cap implement section 502(b)(10) in EPA's view, so long as the conditions of § 70.4(b)(12)(i) are met to assure compliance with other requirements of the Act. Second, § 70.4(b)(12)(ii) provides for changes that trade emissions increases and decreases under the implementation plan, where such emissions trades are provided for under the implementation plan, so long as the conditions of the paragraph are met.

Finally, § 70.4(b)(12) allows changes within a permitted facility without requiring a permit revision, if the changes are not modifications under any provision of title I of the Act, the changes do not exceed the emissions allowable under the permit, and the remaining requirements of § 70.4(b)(12) are met. For the reasons discussed above, one such requirement is that any changes allowed pursuant to § 70.4(b)(12) shall not contravene or otherwise violate terms or conditions of the permit or any applicable requirement. This requirement has been added to the regulatory language to reflect this intent.

The EPA believes that the flexibility afforded by title V is met not only through the above interpretation of 502(b)(10), but also through the streamlined permit revision system being established in today's rulemaking. The permit revision system provides that, in many cases, changes that meet the criteria in section 502(b)(10) (i.e., changes that are not title I modifications and do not increase emissions allowable under the permit), but that nonetheless trigger new applicable requirements and require permit revisions, may be processed through procedures more streamlined than those included in section 502(b)(10). In short, the streamlined permit revisions process may require no revision or delay in many instances where changes under section 502(b)(10) otherwise would have required 7-day advance



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

notification prior to the proposed changes.

Finally, EPA believes that the flexibility afforded by title V extends to alternative operating scenarios, including advance approvals. This approach offers an excellent means to assure that the Act's objectives to assure compliance with applicable requirements and to minimize delay associated with permit revisions are achieved consistently. Therefore, EPA believes that the interpretation of section 502(b)(10) taken today, together with the streamlined permit revision system, and expanded opportunities for alternative operating scenarios, adequately provides for operational flexibility, yet remains consistent with the other requirements of title V.

**F. Time Period for Judicial Review**

In the August 1994 notice, EPA proposed to require States to extend the maximum length of the time period for filing petitions for judicial review after a permit action. The original part 70 in § 70.4(b)(3)(xii) specifies a time period of 90 days, or such shorter time as the State shall designate. Several petitioners noted that some existing State or local statutes provide for longer periods and argued that it was inappropriate for the Federal government to require States to shorten these statutes. The EPA agreed and proposed to extend the maximum time period to 125 days, which the Agency believed would not require any State or local agency to revise its statutes of limitation.

Ten industry commenters opposed this proposal. One argued that 90 days is ample time for filing since potential petitioners will generally know immediately upon permit issuance whether they plan to petition or not. This commenter and others noted that this time period should be balanced against the need for finality. They feel that 125 days is too long in light of the position that the sources' potential liability during this time will effectively prevent them from securing financing, making contractual commitments, and actually operating any change (even

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

one that was made via an otherwise streamlined process). Finally, one commenter argued that the period should be shortened to 60 days to be consistent with section 307 of the Act, which governs EPA promulgation of rules and standards.

The EPA acknowledged in its proposal the need to ensure finality of permit actions, noting that this was the basis of the 90-day limit in the original part 70. However, EPA does not believe that extending the maximum time period to 125 days significantly undermines this finality. Part 70 does not preclude States from adopting shorter periods for review. Furthermore, the Agency is not aware of any State or local permitting authority who has lengthened or plans to lengthen its statute of limitations as a result of this change to the part 70 regulations. The EPA stands by its position of minimizing disruption to existing State statutes and is finalizing the change as proposed.

The EPA noted in the 1994 proposal, and notes today, that the maximum period of 125 days for judicial review under part 70 would not preclude States from adopting shorter periods. However, EPA wishes to clarify that it also believes that the judicial review time period has an implicit minimum length as well. In developing the part 70 regulations, EPA elected not to include an explicit requirement for the minimum length for judicial review period. However, EPA notes that some opportunity for judicial review must be provided according to section 502(b)(6) of the Act. If an extremely short time period is adopted, it would not constitute a valid opportunity for judicial review, and EPA could not approve the State program. Therefore, EPA wishes to discourage States from adopting judicial review time periods which are unreasonably short.

G. Interim Approval Criteria

Section 70.4(d)(3) contains the criteria EPA uses to determine if a program is eligible for interim approval. Two

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

revisions were proposed in August 1994 for that section. The revision to paragraph (d)(3)(ii), promulgated on June 20, 1996 (61 FR 31443), allowed EPA to grant interim approval to programs that did not include minor NSR changes as applicable requirements.

The other proposed change, to paragraph (d)(3)(iv), would have allowed EPA to grant interim approval to programs that allowed minor NSR changes to be classified as minor permit revisions and thereby be exempted from public review. Minor NSR changes could not be classified as minor permit revisions because they were interpreted to be title I modifications. The criteria for what may be classified as a minor permit revision excludes title I modifications. Since that proposal, EPA has adopted the position that title I modifications do not include minor NSR changes thus allowing them to be classified as minor permit revisions and making the proposed change to paragraph (d)(3)(iv) unnecessary. That change, therefore, will not be adopted.

**VI. Changes to Section 70.5**

**A. Insignificant Activities**

In August 1994, EPA proposed to add a sentence to § 70.5(c) to clarify its existing policy for counting the emissions of insignificant activities and emissions levels in major source determinations. This sentence specified that "no emissions from an activity or emissions unit at a source may be discounted when determining major source status."

Five commenters submitted comments on this provision (2 regulatory agencies and 3 industry representatives). The regulatory agencies stated that they believed that the sentence would require all fugitive emissions and all emissions of section 112(r) substances to count toward major source status in conflict with the definition of major source and the applicability provisions of the current part 70. Industry commenters also stated that the proposal would interfere with the current

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

definition of major source because the definition does not require insignificant activities to be included in major source determinations.

In response to commenters, EPA would like to clarify that proposed § 70.5(c) would not have affected how fugitive emissions, section 112(r) pollutants, or other types of emissions would be treated in major source determinations under part 70. This proposed provision was intended to clarify that emissions or emissions units designation as "insignificant" should not be categorically excluded from major source applicability determinations. The determination of major source status is separate from, and occurs prior to, the determination of how activities or emissions are addressed in the permit application in § 70.5. The EPA believes that, while proposed § 70.5(c) may have been worded too broadly or imprecisely, it is clear from the context of the provision that emissions designated as "insignificant" are only "exempt" from certain application content requirements. The lack of specific reference in the definition of major source to "insignificant" emissions does not mean that all such emissions should be either excluded or included in major source determinations. Moreover, the final definition of major source specifically addresses how fugitive emissions and section 112(r) emissions are counted in major source determinations. The EPA proposed this language because it came to EPA's attention that many industrial representatives and a few States were misreading the provisions of § 70.5(c) concerning insignificant activities to affect major source determinations, and there was potential for resulting program deficiencies which could affect EPA's approval of State permit program submittals.

The EPA continues to believe that emissions should not be excluded from major source applicability determinations solely on the basis that they are deemed "insignificant" under the

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

provisions of § 70.5(c) and that part 70 should include language to clarify this point. Accordingly, today's revisions retain this provision with minor wording changes to clarify its original intent.

**B. Certification Language**

In its August 1995 notice, EPA proposed to revise the language of § 70.5(d) that requires the responsible official to certify the truth, accuracy, and completeness of each part 70 application form, report, or compliance certification. This proposal was intended to address issues raised by several State and local governments in their petitions for review of part 70 as to what certification language would be appropriate for the responsible official to use to make this certification. The governmental petitioners were concerned that EPA was requiring certification language different from that required by the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act, since they read the original part 70 certification language as potentially establishing a less rigorous standard for the inquiries on which certifications were to be based. Beyond that, they noted that the meaning of the NPDES language of 40 CFR 122.22(d) had been well established over the years of its use, and that the meaning of the different part 70 language would not be clear until it had been decided by the courts. After careful review, EPA proposed certification language similar to that found in the acid rain regulations promulgated under title IV of the Act at 40 CFR 72.21(b)(2), which EPA explained was modeled on the NPDES language.

State and industry commenters objected in general to the proposed revisions to the certification language, they opined that the original part 70 language was adequate to assure responsible officials conduct thorough inquiries before signing the certification, and they believed revisions to the original part 70 language would be disruptive to States and create

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

confusion that would interfere with the implementation of title V. Several other commenters believed that the proposed language was significantly more stringent than the NPDES language, that part 70 should track NPDES more closely, and they suggested revisions to part 70 to make it more consistent with NPDES. Whether commenters thought the original part 70 language should be retained, unchanged, or revised to be more consistent with NPDES, they were opposed to the proposal language requiring the responsible official to "personally examine" and be "familiar with," the statements and information submitted in the document and its attachments.

Part 70 has been revised to make the certification language of § 70.5(d) more closely track the NPDES certification language of 40 CFR 122.22(d). Although the certification language used by the acid rain program is appropriate for those purposes, EPA believes the more appropriate language for part 70 purposes is the language used in the NPDES program. The EPA believes the NPDES and title V programs are similar in terms of complexity of information that must be included in forms and reports, and thus the NPDES program provides a better model for sources to certify the truth, accuracy, and completeness of forms and reports. Since title V is such a broad program that applies to each emissions unit at major sources, EPA agrees with commenters that the phrases "personally examine" and "be familiar with" in the proposed part 70 certification language would have required responsible officials, who are relatively high-level managers under the definition of "responsible official" in part 70, to certify a potentially large amount of detailed information. The EPA agrees with commenters that this would have been beyond the normal scope of their knowledge and responsibilities. The revised part 70 allows responsible officials to base their certifications on the opinions of technical staff who may be subject matter experts in the areas for which information is

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

being collected and reported. In addition, EPA believes the revised part 70 requires the responsible official signing the certification to take reasonable steps to ensure that what he or she signs is true, accurate, and complete, not whether it provides a sufficient basis for a court to decide a question of law in the official's favor. The EPA believes differences in language between the proposed part 70 and NPDES certification language would have implied differences in meaning, and thus, today's revisions will result in the part 70 language being interpreted more consistently with the similar NPDES language.

**VII. Changes to Section 70.6**

**A. Weekly Reporting of Alternative Scenarios**

The original part 70 required sources, contemporaneous with making a change from one alternative operating scenario to another, to record the operating scenario to which it is switching in a log at the permitted facility. As a point of clarification, alternative operating scenarios are the various methods of operation, configurations, etc., that are contained in, and allowed by, the permit. The permit must include monitoring provisions adequate to demonstrate compliance with each scenario.

The EPA proposed to revise § 70.6(a)(9)(i) in August 1994 to require sources to send the permitting authority a weekly notice of any changes in operating scenarios. In addition, the proposal provided that no weekly notice was required if monitoring records could be used to determine the operating scenario (because the different operating scenarios would utilize distinctly different monitoring which would be indicative of the specific operating scenario). Industry commenters voiced opposition to the proposed requirements for notification of changes in operating scenarios as burdensome and unnecessary.

The EPA agrees with commenters that the weekly notice would be too burdensome. Thus, the revisions to part 70 do not require

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

State permitting programs to require sources to provide weekly notification to permitting authorities of changes in operating scenarios. Part 70 does retain the requirement that sources maintain an onsite log of changes in operating scenarios. However, the provisions of § 70.6(a)(6)(v) do provide that permitting authorities may request any information (which could include information concerning changes in operating scenarios) in writing from any source when the permitting authority believes such information will help them to determine compliance with the permit.

B. Emergency Defense

1. Background

The August 1995 notice solicited comment on the emergency defense provided in § 70.6(g) that set forth the terms of an affirmative defense that States could include in part 70 permits at their discretion. The defense applied to violations of technology-based emissions limits that are unavoidably caused by "any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God...." Section 70.6(g) did not cover start-ups, shut-downs, and preventative maintenance conditions. The petitioners in CAIP v. EPA sharply disagreed about the breadth of the defense and whether such a defense was appropriate. In the August 1995 notice, EPA solicited comment on numerous aspects of the defense, including (1) whether the defense should be available solely for emission limits established in the part 70 permit; (2) whether EPA should allow a start-up, shutdown, malfunction (SSM) defense for emission limits established in the part 70 permit; (3) whether part 70 should allow States to grant sources temporary authorization to make a change without a permit revision, as needed to protect public health or welfare in emergencies; and (4) the advantages and disadvantages of a uniform definition of upset or emergency across the water and air permitting programs.



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

Each of these topics is discussed below.

2. Emergency Defense for Part 70-Only Permit Terms

a. Summary of the Proposal on Emergency Defense

In the August 1995 notice, at § 70.6(g)(2), EPA proposed to narrow the applicability of the emergency defense to emissions limitations established in the first instance by the part 70 permit. The preamble noted that the NSPS and MACT general provisions and most SIP's do not provide an emergency defense, per se. The Agency was concerned about whether an emergency defense applicable to such limits would slow the development of technology or make enforcement slower and less sure. The EPA was also concerned about the effect of a generic emergency defense on State-established emission limits and State enforcement goals. Finally, EPA was concerned about overlaying an emergency defense for standards where a conscious decision not to provide one had been made in the standard setting process (e.g., where a longer averaging time for determining compliance was established in a standard as a means of providing for startups, shutdowns, and/or malfunctions).

The Agency solicited comment on whether to limit the availability of the emergency defense to part 70-only provisions, while noting it was still an open question as to whether part 70 can and should provide an emergency defense at all. The notice identified several types of emission limits that would be developed for the first time in part 70 permits and noted that some of those limits met the proposed definition of technology-based limits, i.e., the stringency of the limits are based on determinations of what is technologically feasible, considering relevant factors.

b. Summary of Comments on Emergency Defense

One environmental group commented that the overlay of an emergency defense in a part 70 permit provision would be an unlawful modification of the applicable requirement, that the

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

defense was not necessary, and at most it should be limited to terms that are found only in (i.e., established by) part 70 permits.

On the other hand, numerous industry commenters strongly asserted that the defense should broadly apply to health-based standards as well as technology-based standards and to standards created in a Federal or State rule, as well as to requirements established solely in the part 70 permit. They contended that a defense should be available when sources rely on technology to comply with standards under the Act because it is unfair to penalize a source when technology fails due to circumstances beyond the control of the source. A commenter asserted that because the emergency defense was discretionary, there is no need for concern that the defense would decrease the stringency of previously established standards or would have an adverse affect on technology forcing or enforcement strategies. Commenters offered several reasons why reliance on prosecutorial discretion is insufficient protection for industry in emergency situations. First, there is no guarantee that EPA or the State would choose to exercise this discretion in an emergency. Second, there remains the possibility of citizen suit. Third, many existing standards were developed prior to the 1990 Amendments, which increased EPA's penalty authority for violations and increased the visibility of violations by requiring increased monitoring, recordkeeping, and reporting. One commenter asserted that an upset defense is legally required for all technology-based limits. Finally, a commenter suggested that the emergency defense should be mandatory, not discretionary.

c. Discussion of Emergency Defense

Defense not retained for Federal standards. Although EPA has carefully weighed concerns from industry commenters regarding the emergency defense, EPA believes that the emergency defense should not be extended to federally-promulgated requirements. In

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

general, EPA believes that its authority under title V to provide for affirmative defenses for violations of permit terms is limited. The statutory language of title V does not authorize establishing exemptions from requirements established pursuant to other Act provisions. (As noted in prior Federal Register notice discussions on this topic, EPA believes general authority exists to establish provisions (such as an affirmative defense) addressing the limits of technological controls in the title V permitting program if EPA failed to consider these concerns when developing the underlying requirement.) However, where the rulemaking establishing a limit does consider the limits of technological controls, there is at best a questionable basis in law, and no compelling basis in policy, for providing additional or different provisions under title V, even if the defense is available at the discretion of the State. Accordingly, the August 1995 notice indicated that there was little or no basis for providing a SSM defense in part 70, since EPA believes it has considered the failure of technology in setting the major technology-based standards under the Act (NSPS and MACT), or at a minimum, has given commenters on those standards an opportunity to show that provisions to account for technology failures should be incorporated into those standards. For this reason and because the emergency defense in § 70.6(g) overlaps with the protection of the SSM defenses and exemptions in existing federally-promulgated standards, EPA believes that no further defense should be extended through the permit for Federal technology-based standards. The EPA believes that with respect to Federal technology-based standards, sources should have a level playing field in which sources that are subject to NSPS and MACT standards may avail themselves of the same defense regardless of the source's location, an objective that is undercut by providing States discretion to adopt an additional defense. As to Federal health-based standards, EPA does not

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

believe it has the authority to provide a defense for such standards, as is explained below.

Defense retained for certain SIP limits. The EPA believes that the emergency defense should be retained for certain State limits. Some SIP's do not contain provisions that provide sources relief from violations during SSM conditions.<sup>10</sup> In addition, some SIP provisions are narrowly drawn to provide significantly less relief when technology fails than would be allowed under the SSM provisions of the NSPS and MACT standards. Thus, while the emergency defense in the original § 70.6(g) was largely redundant with the SSM exemption for NSPS and MACT standards, there was less overlap with State SIP rules. The EPA is aware that few SIP's address emergencies per se (as opposed to SSM conditions), other than those that have been revised to incorporate defenses designed to bring the permit program into compliance with § 70.6(g). For these reasons, EPA believes it is appropriate to retain the emergency defense for technology-based SIP provisions, again at the discretion of the State. The fact that technology-based standards contribute to the attainment of the health-based NAAQS or help protect public health from toxic air pollutants does not change their character as technology-based standards. (On the other hand, if Federal standards such as NSPS or MACT standards are incorporated into the SIP by a State as a State standard, the incorporation does not alter the fact that the emergency defense would be inapplicable to permit terms and limits based on those standards.) The EPA will leave it to those States to decide in the first instance whether extending the defense to technology-based limits in the SIP would have any effect on State goals regarding enforcement and the development of technology. States must also account for the

---

<sup>10</sup> For example, the Louisiana SIP does not contain a start-up, shut-down, malfunction provision per se but requires notification of certain emergency occurrences or upsets. LA LAC 33:III.927.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

effects of extending the defense in their attainment demonstrations.

Health-based standards. The EPA does not agree that it has the authority to or that it would be appropriate to create in part 70 an emergency defense to health-based standards. The emergency defense is inapplicable to standards set without regard to technological feasibility, such as NESHAP, and to State rules or permit terms (such as limits that result from modeling exercises) for which the permitting authority directly links compliance to attainment of the NAAQS or the achievement of a health-based standard. Even for health-based standards, however, EPA agrees that as a matter of exercising its enforcement discretion, it may be inappropriate for EPA to impose a penalty for sudden and unavoidable malfunctions caused by circumstances entirely beyond the control of the source. Indeed, EPA has often used its enforcement discretion by declining to seek penalties in such cases. However, case law and Agency policy have consistently recognized that exemptions and affirmative defenses should not be available for violations of health based standards. See memorandum from Kathleen M. Bennett, Assistant Administrator for Air, Noise and Radiation, dated 2-15-83, entitled "Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions" (hereafter "Bennett memorandum"). To allow exemptions and affirmative defenses to health-based standards for periods of excess emissions can pose a threat to national ambient air quality standards and other requirements, such as pre-1990 NESHAP, where health considerations were considered paramount to failures of technology.

The EPA's policy is to use an enforcement discretion approach for exceedances of health-based standards due to sudden and unavoidable malfunctions. The EPA generally considers several criteria for the exercise of that discretion, including but not limited to a requirement that the control equipment was

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

maintained and operated in a manner consistent with good practices for minimizing emissions, that repairs were expeditiously completed, and that excess emissions were minimized. The EPA disagrees that this approach is unfair to industry and notes that industry has not documented in the record instances of unfair enforcement actions to support their concerns. Although industry commenters have raised the prospect of numerous citizen suits as grounds for an emergency defense, commenters provided nothing beyond speculation that sources might be subject to unreasonable penalties for violations of standards during emergencies. Even so, EPA believes that much of industry's concern about citizen suits should be allayed by the retention of the emergency defense for State technology-based limits.

Increased monitoring, recordkeeping, and reporting requirements. The EPA does agree that violations will become more apparent to permitting agencies and to the public as a result of the monitoring, recordkeeping, and reporting requirements of part 70, but disagrees that this is a valid reason for enlarging the defense to include health-based standards. To the contrary, better enforcement is one of the key objectives of title V and the 1990 Amendments. A primary benefit of the title V program is that it clarifies which requirements apply to a source, including reporting requirements. As a result, the source, States, EPA, and the public can better understand the requirements to which the source is subject, whether the source is meeting those requirements, and the reasons for any periods of noncompliance. The title V program was designed to increase source accountability and enhance compliance and enforcement. Also, with respect to the concern about higher penalties subsequent to passage of the 1990 Amendments, EPA does not agree that higher penalties in and of themselves would justify a defense against enforcement actions for sources that

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

exceed emission limits. Such a defense would be contrary to the intent of the Act to increase compliance through the Agency's and citizens' expanded enforcement authority.

Emergency defense not required for all technology-based standards. The EPA disagrees that it is required to extend an "upset" defense to all technology-based standards. The commenter relies on case law involving the Clean Water Act in which the courts have required EPA to provide an "upset" defense which is similar to both the emergency defense provided by § 70.6(g) and to the SSM exemptions and defenses that are contained in numerous existing requirements. As stated in the August 1995 notice, the relevant case law is split. While several courts have required EPA to provide an upset defense to address the fallibility of technology, other courts have not, out of concern that such a defense was inconsistent with Congress's intent that technology-based effluent limits force technological development and that enforcement of such limits be swift and direct. See 60 FR 45559 for a further discussion of relevant cases. Furthermore, commenters did not demonstrate or even allege that specific existing Federal standards have failed to account for the fallibility of technology.<sup>11</sup> The EPA is not aware of Federal standards that are lacking in this respect. If they were, the more rational solution would be to address the problem through revisions to each standard, rather than an across-the-board fix that treats all standards alike regardless of whether the underlying standards have already accounted for technological

---

<sup>11</sup>A commenter was concerned that some control technology guidance documents (CTG) lack SSM provisions. However, CTG's are guidance documents, not standards. Therefore, CTG's set forth presumptive control requirements but do not necessarily address all aspects of a regulation. States are free to rely on the CTG in developing limits in their SIP's. Furthermore, to the extent the State and EPA determine is appropriate, the State may include limited exemptions and defenses based on the fallibility of technology.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

fallibility.

Limits created in the part 70 permit. The August 1995 notice indicated that where the part 70 permit itself creates the requirement, an emergency defense may be appropriate. Requirements created in part 70 permits include technology-based limits pursuant to sections 112(g) and 112(j) of the Act and alternative limits pursuant to § 70.6(a)(1)(iii) and section 112(l) of the Act, which may or may not be technology-based, as explained below.

Other limits that are set in the permit include limits under section 112(i)(5) of the Act and limitations on PTE. These do not meet the definition of technology-based standards because they are not based on a determination of what is technologically feasible. Accordingly, the emergency defense does not apply to such terms. However, § 70.6(g) does not limit State authority to fashion appropriate limits on mass emissions. States may have authority under State law to account for SSM or emergency conditions when creating these limits. If so, the fact that the State part 70 program does not authorize the emergency defense is irrelevant. However, EPA notes that since PTE and section 112(i)(5) limits are designed to limit annual mass emissions below the major source thresholds, the effect of emissions during emergency or SSM events on the threshold must be considered (i.e., will the limit, taking into account its emergency or SSM provisions, effectively keep the source below the relevant annual emissions thresholds).

For alternative standards under § 70.6(a)(1)(iii) and section 112(l), in general, the Agency believes that the establishment of an exemption or affirmative defense is appropriate only where the standard for which the alternative is developed contains such an exemption or defense. Absent such a defense in the original requirement, a source would need to show that an alternative requirement containing a defense was, despite



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

its defense, equivalent to the original requirement. Whether equivalency could be demonstrated depends on whether emissions during malfunctions or emergencies can be estimated and factored into the equivalency determination. If an alternative with an exemption or defense can be shown to be equivalent, then part 70 may authorize it. Conversely, an alternative with a defense that cannot be shown to be equivalent could not be approved by EPA.

After considering whether to extend the emergency defense to limits established pursuant to 112(g) and 112(j), EPA was unable to justify providing the defense to limits under 112(g) and 112(j) when it would not be available to those set under 112(d). As stated above, EPA does not believe it is appropriate to retain the emergency defense for MACT standards because EPA considered the failure of technology when setting the standards and because the defense is largely redundant with the SSM exemption that applies to MACT standards. The EPA believes it would be unfair if a source that is subject to 112(g) is granted an emergency defense but the same type of source with the same modification would be denied the defense if its modification occurred after the 112(d) standard is effective.

An emergency defense for limits established pursuant to 112(g) and 112(j) would be largely redundant since part 63 provides a malfunction exemption for "any sudden, infrequent, and not reasonably preventable failure of air pollution control equipment, process equipment, or a process to operate in a normal or usual manner." The exemptions provided for in the general provisions may be applied to 112(g) and (j) requirements. The EPA believes that most conditions that qualify as emergencies would also qualify as malfunctions as defined in part 63. For the remainder, natural disasters, EPA believes that enforcement discretion would prevent the source from unfairly being held to a standard with which it was impossible to comply. The EPA and States can consider any demonstration by the source that the

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

excess emissions were due to an unavoidable occurrence in determining whether any enforcement action is required. With respect to industry's concern about citizen suits, EPA is not persuaded by comments from industry that there is cause for significant concern during natural disasters that would not otherwise be covered by the SSM exemption applicable to MACT standards. When a natural disaster such as flood or earthquake or other legitimate emergency causes a source to exceed its emission limits, EPA believes citizens are unlikely to initiate enforcement actions. Should this prove not to be the case, and should courts in such actions decline to exercise their discretion to not impose penalties under such extenuating circumstances, EPA would reconsider its position.

3. Start-Up, Shut-Down, Malfunction Defense for Part 70-Only Permit Terms

a. Summary of the Proposal on SSM Defense

In the August 1995 notice, EPA proposed to allow States to extend a SSM defense to technology-based limits established in the part 70 permit. It solicited comment on whether such a defense should be conditioned on the submittal of and adherence to a plan like that required in § 63.6(e)(3).

b. Summary of Comments on SSM Defense

Commenters generally supported extending a SSM defense to technology-based requirements established in the part 70 permit. They asserted that such a provision would remove any doubt that States can authorize an affirmative defense to violations of part 70 permit conditions during SSM periods and that the defense is consistent with the goal of providing States flexibility in managing their part 70 programs. Commenters generally agreed that an affirmative defense for SSM conditions should be conditioned on the submittal of, and adherence to, a SSM plan.

c. Discussion of SSM Defense

Given that the universe of technology-based changes for

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

which such a defense would be appropriate is limited to 112(g) and 112(j), there is no need for part 70 to address this issue. A State establishing a 112(g) or 112(j) limit is authorized to incorporate the SSM provisions of the part 63 general provisions.

4. Advance Authorization for Emergencies

a. Summary of the Proposal on Emergency Authorization

In the August 1995 notice, EPA solicited comment on whether part 70 should grant a source temporary authorization to make a change without revising its permit, as needed to protect public health or welfare in emergencies, such as natural disasters. Both the South Coast Air Quality Management District and the State of New York have available as a matter of State law a mechanism for granting sources temporary authorizations to make changes without revising the sources permits under specified circumstances (such as earthquakes, fires, and severe winter storms) in accordance with proscribed procedures.

b. Summary of Comments on Emergency Authorization

Commenters were generally supportive of this proposal and cited examples of situations where responses to emergencies and natural disasters forced a source to exceed permit limits. It was suggested that the defense should be available to both privately- and publicly-owned facilities that provide essential services. Many commenters suggested that given the wide range of activities that may qualify for temporary authorization, EPA should let States define the scope of activities that qualify. Several commenters proposed procedural safeguards for the authorization. One commenter proposed the adoption of a defense that would be applicable to National security emergencies. Several commenters argued that reliance on prosecutorial discretion is insufficient protection from liability in these situations because the Act allows private citizens to bring an unjustified enforcement action in a case where compliance was impossible.

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

c. Discussion of Emergency Authorization

After further consideration, EPA does not believe such an authorization is warranted. In the Agency's view, the exercise of enforcement discretion and judicial notions of equity should prevent the imposition of penalties for violations incurred as a result of actions taken to safeguard the public from serious harm in times of emergency. For example, if a power plant needed to produce more power in an emergency and consequently violated a permit term, it is highly unlikely that the State or EPA would consider bringing an enforcement action. It is also doubtful that citizens would waste time and resources by seeking to prosecute a violation caused by a source's actions to respond to a public health crisis. The EPA is unaware of any instances where an enforcement action was brought against a source that violated an emissions limit due to natural disaster, nor did the commenters provide any examples where States, EPA, or citizens sought enforcement under these circumstances.

5. Uniform Definition of Emergency for Air and Water Permits Programs.

a. Summary of Proposal on Emergency Definition

The EPA solicited comment in the August 1995 notice on the advantages and disadvantages of a uniform definition of upset or emergency across the water and air permitting programs. The emergency defense in § 70.6(g) was modeled on, but not identical to, the definition of "upset" under the NPDES regulations (40 CFR 122.41(n)).

b. Summary of Comments on Emergency Definition

Commenters were split on this issue, with a majority favoring a uniform definition. Those favoring different definitions pointed to the vastly different control strategies involved under the air and water programs.

c. Discussion of Emergency Definition

The EPA does not believe that on balance, there are

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

significant advantages to revising the definition of "emergency" to be identical with the definition of "upset." The EPA does not agree with commenters who suggested that the definition of "upset" is more precise and objective than the definition of "emergency." The EPA believes that courts, States, EPA, and the public can readily ascertain the meaning of the term "emergency." Also, the emergency defense is designed to supplement the traditional SSM provisions that are found in air standards while the upset provision of the NPDES program was envisioned as a supplement to the "bypass" provisions in the NPDES regulations. Since the definitions of "emergency" and "upset" were designed to complement different defenses, it would be difficult to make them identical without affecting the Agency's goal in adopting them initially. Furthermore, EPA agrees with the commenter who stated that an identical defense for different media is not warranted because of the vastly different control strategies required for protecting the air and water.

**XI. Program Transition**

**A. Submission of Initial Programs**

From time to time, EPA allows out-of-date requirements to remain applicable until regulated entities have had a reasonable opportunity to conform to the new requirements. Some refer to this concept as "grandfathering."

In the August 1994 notice, § 70.4(j) - Savings Provision was proposed to be added in anticipation that around the time part 70 was projected to be changed to include the new permit revision system, some initial State part 70 programs would not have been submitted. It was expected that the question would arise as to which version of part 70, the original or the changed, were these programs to conform. The proposed § 70.4(j) would allow a 6-month period after the publication date of the part 70 changes (this would be a one-time, date-specific provision geared only to

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

this one part 70 revision action) during which a new program submission could be based on the original part 70. After that 6 months, any program submittals would have to be based on the revised part 70. This grandfathering was necessary since, due to the time it takes to adopt regulations, it might be impossible for a State to develop a program in 6 months or less which would meet all the revisions to part 70. Alternatively, States could choose to meet some or all of the revised part 70 provisions in their original program submittal, and there would be no reason for EPA to object to this approach.

Nine commenters addressed the proposed § 70.7(j). All supported the grandfathering concept. All commenters either wanted a longer period, 12 or 18 months, or made suggestions such as phasing in the part 70 changes or not making them applicable until permit renewal. In summary, all commenters felt the provision essential but felt the 6 months was too short. No commenter mentioned interim approvals.

At this point, all State and local programs have been submitted and approved by EPA. The provision in § 70.4(j) is being adopted, however, because all Tribal programs have not been submitted at this time. The 6 months is being retained because EPA wishes to minimize the time after part 70 is revised that new programs will adhere to the original part 70. Tribal programs are not bound by submittal time limits and the imposition of a Federal program as were State programs. A Federal program is already in place for any tribal lands not covered by a Tribal program. If a Tribal program submittal 6 months after today's date cannot meet the revised part 70, submittal may be delayed until the necessary program changes can be made to meet the revised part 70. The only penalty will be a longer period before the Tribal program can replace the Federal program on those Tribal lands.

Section 70.4(j) was proposed to apply to new program

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

submissions only. For added clarity, the word "initial" has been added to the first sentence of that section to avoid confusion that the 6 month provision may apply to program revisions submitted to meet today's revisions to part 70.

B. Submissions of Program Revisions to Conform to the Revised Part 70

In creating the original part 70, it was realized that no program is static and from time to time changes would be made to part 70 and States would need time to adapt to those changes. Accordingly, the original part 70 provides a time period for States to revise their part 70 programs in response to changes to part 70 and submit them to EPA for approval. This provision was in the original § 70.4(a). It allowed 12 months, or other time authorized by EPA, after the changes to part 70 for States to submit to EPA program revisions to conform to part 70 changes. These provisions were applicable to any change to part 70.

In the August 1994 notice, EPA proposed that the grandfathering provisions (§ 70.4(a) in the original part 70) relating to submission of program revisions to meet any changes to part 70 be moved to § 70.4(i)(1), which pertains to program revisions. The timeframes in these provisions were expanded from the original part 70. The proposal would require program revisions necessary to meet a changed part 70 to be submitted according to the following:

- (i) Within 180 days if no new statutory authority or regulatory revisions are necessary;
  - (ii) Within 12 months if no new statutory authority is needed but regulatory revisions are necessary;
  - (iii) Within 2 years if new statutory authority is needed;
- or
- (iv) . . . any other time period that the Administrator determines is appropriate to allow for program revision.
- Nine commenters expressed support for a reasonable time

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

period to revise programs. Concerns focussed on the proposed timeframes being too short to accomplish program revisions.

The preamble to the August 1995 notice (page 45551, third column, second paragraph) proposed to invoke the Administrator's authority under the proposed § 70.4(i)(1)(iv) to provide States 2 years to submit program revisions to meet the changed part 70, regardless of what changes were needed to the programs. The justification was that this specific set of part 70 revisions was very complicated and would require considerable effort on the part of the States.

The discussion went on to recognize some States' concerns over making two program revisions, one to address interim approval issues followed by another to meet the changed part 70. The notice proposed (page 45552) to allow States with an interim approval to combine the two program revisions into one and delay submittal up to the proposed deadline to submit the part 70 changes, i.e., 2 years after changes to part 70 are promulgated.

On October 31, 1996, in response to the August 1995 proposal to allow combining of program revisions and allow up to 2 years after part 70 is changed for their submittal, EPA took a rulemaking action (61 FR 56368). Rather than allow the August 1995 proposal concerning combining State program revisions to persist and give the impression that all interim approvals were going to be extended, a final action was taken to bring the uncertainties to closure. A June 13, 1996 policy memorandum ("Extension of Interim Approvals of Operating Permits Programs") set out the policy for combining program revisions, but it had to be followed by a rulemaking action to actually extend interim approvals.

The October 1996 notice provided a 10-month extensions to programs already granted interim approval by the June 13, 1996 date of the memorandum, because EPA's August 1995 proposal could have caused some States to quit work on their interim approval



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

deficiencies thinking they had up until 2 years after part 70 changes to submit them. (The 10 months was the time that had lapsed between the August 1995 notice and the June 1996 memorandum.) In the June 1996 memorandum and the October 1996 notice, the 2 years was shortened to 1 year or 18 months (in terms of program revision submittal, not interim approval expiration, interim approvals would expire 6 months after the submittal date) depending on whether regulatory changes or legislative authority, respectively, were needed to meet the revised part 70.

The combining of program revisions (one to correct interim approval deficiencies and the other to meet the revised part 70) now becomes an option that the permitting authority may or may not choose, and there is a shortening of time to meet the changed part 70 if the option is chosen by the State.

At any time States may choose to meet some or all of the changed part 70 provisions. This may be at the option of the State, and may be in conjunction with correcting interim approval deficiencies or at any other time. The only requirement applicable in terms of meeting the changed part 70 is that all necessary program revisions must be submitted by 2 years after today's date.

To clarify that States may choose to meet some of the provisions of the revised part 70 when then correct their interim approval program deficiencies, language to that effect has been added to § 70.4(e)(3). The language first notes that in judging the adequacy of program submittals to correct interim approval deficiencies, the version of part 70 that was in effect at the time of the interim approval will be the criteria. The language then goes on to provide the option, as noted above, to meet some of the provisions of the revised part 70 in lieu of the original part 70. As a further clarification, language is also added to § 70.4(i) to stipulate that until a State revises its program,

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

and EPA approves the program revision, to meet any revisions to part 70, the version of Federal and State regulations in effect prior to being revised will be in effect. This is only a statement of the implicit understanding that was already in part 70.

If a State does not choose the program revision combination described above, or the program already has full approval, the Administrator is exercising her option under § 70.4(i)(1)(iv) to allow up to 2 years for submittal of part 70 program revisions necessary to meet today's revisions to part 70. Section 70.4(i)(2) indicates that EPA will take rulemaking action to approve or disapprove any program revisions submitted to meet any revisions to part 70. No timeframe for this action is provided since these provisions are generally applicable to any program revision submittal and the time needed for EPA to act will vary according to the complexity of any submission.

The Agency will evaluate program revisions submitted to meet today's part 70 revisions and complete approval action as soon as possible. If any deficiencies are identified in a program revision submission, EPA will work with the State to correct them. If a State does not correct deficiencies such that EPA can approve the program as fully meeting part 70, EPA may disapprove the program revisions (§ 70.4(i)(2)(iii)). Upon disapproval, EPA may implement a Federal operating permits program in accordance with part 71.

The Agency, of course, prefers to take a necessary and reasonable period of time to work with States to correct program deficiencies rather than to act quickly to impose a Federal program. The Agency intends to maintain a cooperative working relationship with States and aid States in correcting deficiencies and is not bound by § 70.4(i) to impose a Federal program within any certain timeframe. However, the Agency, in general, will not exceed the timeframes provided in § 70.10(b)

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

for correcting program deficiencies and implementing a Federal program. Those timeframes include a limit of 18 months for program correction after EPA notifies the State of a deficiency and implementation of a Federal program 2 years after the notice if corrections to the program have not been submitted and approved by that time. The timeframes also include the provision that EPA may implement a Federal program immediately if the State has not taken significant action to correct the program within 90 days of a notice of program deficiency.

**XII. Tribal Programs**

Today's action finalizes several regulatory provisions that affect Indian Tribes, including minor clarifications to definitions as well as provisions affecting disapprovals of Tribal programs, operational flexibility requirements, and the definition of "affected State." These provisions are discussed in detail in this section.

On August 25, 1994 (59 FR 43956, "Indian Tribes: Air Quality Planning and Management," hereafter "proposed Tribal authority rule") EPA proposed regulations specifying those provisions of the Act for which it is appropriate to treat Indian Tribes as States. Therein (59 FR 43971-72) EPA described expectations for Tribal programs in implementing various aspects of the part 70 program and how they might differ from those expected for State part 70 programs. The August 31, 1995 part 70 revisions proposal announced EPA's intentions to amend part 70 to conform part 70 to the proposed Tribal authority rule. The EPA solicited comment on whether the August 1995 proposal accurately proposed to implement the changes to part 70 previously described in the proposed Tribal authority rule.

Several commenters noted an inconsistency between the proposed Tribal authority rule and the August 1995 part 70 proposal, in that the August 1995 proposal provided that Tribal part 70 programs would not be disapproved while the proposed

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

Tribal authority rule indicated that inadequate Tribal submittals would be disapproved. The EPA agrees with the commenters that EPA should disapprove Tribal programs that are inadequate. Consequently, the proposed addition to § 70.4(e) that no Tribal program will be disapproved is not being adopted. However, in general, EPA expects there to be few, if any, disapprovals because EPA expects to work closely with Tribes in developing part 70 program submittals. Given that Tribes face no deadlines for submittal, there is no reason to expect submittals that warrant disapproval. Also, EPA wishes to clarify that Tribes do not have a duty to resubmit part 70 programs following disapproval and will not face sanctions for failing to do so. Although sanctions will not apply to Tribes by November 15, 1997, to protect Tribal air quality EPA will promulgate, administer, and enforce a Federal operating permits program for Tribes that lack approved programs, as provided in § 71.4(b).

The proposed Tribal rule suggested that the three operational flexibility provisions in § 70.4(b)(12) and the emissions trading and alternative operating scenario provisions of §§ 70.6(a)(8-10) would be optional for Tribes. Initially, EPA believed that the technical expertise required to implement operational flexibility provisions would make it too difficult for Tribal programs to obtain EPA approval. Accordingly, the Agency proposed in the Tribal authority rule that for purposes of these provisions, Tribes would not be treated in the same manner as States. Subsequently, the August 1995 part 70 notice incorporated the approach of the proposed Tribal authority rule by proposing that § 70.4(b)(12) and §§ 70.6(a)(8-10) not apply to Tribal programs.

In response to the proposed Tribal authority rule, commenters objected to position in the proposed part 70 that Tribal part 70 programs would not be required to include the same operational flexibility provisions required of State part 70

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

programs. The Agency then reconsidered the issue. The EPA now believes that a better approach would be to treat Tribes in the same manner as States for purposes of these provisions, while providing sufficient technical assistance, if needed, to enable Tribal permittees to issue permits that meet these operational flexibility requirements. Such an approach will assure that sources will be provided maximum flexibility regardless of whether the permitting agency is a Tribal or State agency. In addition, it will afford sources that are subject to Tribal part 70 programs the benefit of streamlined provisions that have been proposed for part 70. Consistent with the Tribal authority rule promulgated on xxx 1997 (62 FR xxx), today's action subjects Tribal permitting programs to all of the operational flexibility provisions to which State programs are subject. The phrase "Except for Tribal programs," is, therefore, not being added to the beginning of the first sentences in § 70.4(b)(12) and §§ 70.6(a)(8-10) as proposed.

The EPA also proposed that § 70.8(b) be revised to require that permitting authorities give notice of each draft permit or draft permit revision to any eligible Indian Tribe that administers a Tribal program and that otherwise meets the definition of "affected State" set forth in § 70.2. Under the provision adopted today, an Indian Tribe would need to (1) meet the eligibility requirements of section 301(d)(2) of the Act, implemented by 40 CFR part 49; (2) administer a review program, and (3) satisfy the locational requirements of the "affected State" definition, to receive notice under § 70.8(b).

The EPA expects that most recognized Tribes will readily be able to meet the eligibility requirements established in 40 CFR part 49 for being treated in the same manner as a State for the limited purpose of receiving notice pursuant to § 70.8(b). To be treated in the same manner as a State for purposes of receiving notice, a Tribe must meet the requirements of § 49.6. Sections

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

49.6(a-c) require that the Tribe be federally recognized, that the Tribe has a governing body carrying out substantial governmental duties and functions, and that the functions to be exercised by the Tribe pertain to the management and protection of air resources within the exterior boundaries of the reservation or other areas within the Tribe's jurisdiction. Section 49.6(d) requires that the Tribe is reasonably expected to be capable, in the EPA Regional Administrator's judgment, of carrying out the functions to be exercised in a manner consistent with the terms and purpose of the Act and all applicable regulations.

Tribes that want to receive notice under § 70.8(b) are not required to submit a part 70 program to meet the capacity requirement of § 49.6(d). The EPA recognizes that some Tribes may develop a very limited permit program, at least initially, that focuses on review of permitting actions of neighboring jurisdictions. To demonstrate the capacity to receive notice under § 70.8, a Tribe need only designate a person to receive the notice and inform the Regional Administrator of the designation. A letter from the governing body of the Indian Tribe requesting notice under § 70.8(b) and designating the person to receive the notice would satisfy the requirements of capacity and the administration of a review program for purposes of § 70.8(b)(1).

Accordingly, EPA has adopted a provision that clarifies the meaning of "administers a Tribal program" and clarifies that the Tribe would need to meet the requirements of paragraphs (1) and (2) of the definition of "affected State," which refer to the proximity of the source subject to the permitting action.

The EPA has also made minor revisions to several definitions that affect Indian Tribes. The definition of "Eligible Indian Tribe" was changed to clarify that to be treated in the same manner as a State, Tribes must not only comply with the requirements of section 301(d)(2) of the Act but also with the

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

regulations that implement that section. Also, as a convenience to the reader, EPA has included the statutory definition of "Indian Tribe" in lieu of referring to the statutory citation (section 302(r) of the Act). In addition, EPA revised the definition of "State" to refer to Indian Tribes. The EPA adopted this approach in lieu of adding numerous references to "Indian Tribes" and "Indian governing bodies" throughout the final rule. In those few instances when meaning of the term "State" does not include those terms, part 70 so specifies. For example, the language of § 70.4(a) which states the required submittal dates for State part 70 programs also excludes Indian Tribes from the definition of "State" for purposes of the submittal deadline. Similarly, Indian Tribes are not within the meaning of "State" for purposes of § 70.4(l), which discusses sanctions for failing to adopt or adequately administer or enforce an approvable part 70 program.

**XIII. Administrative Requirements**

A. Docket

The docket for this regulatory action is A-93-50. The docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this rulemaking. The principal purposes of the docket are: (1) to allow interested parties a means to identify and locate documents so that they can effectively participate in the rulemaking process, and (2) to serve as the record in case of judicial review (except for interagency review materials). The docket is available for public inspection at EPA's Air Docket, which is listed under the ADDRESSES section of this notice.

B. Executive Order (E.O.) 12866

Under E.O. 12866 (58 FR 51735, October 4, 1993), the Agency must determine whether each regulatory action is "significant," and therefore subject to the Office of Management and Budget (OMB) review and the requirements of the Order. The Order

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

defines "significant" regulatory action as one that is likely to lead to a rule that may:

1. Have an annual effect on the economy of \$100 million or more, adversely and materially affecting a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.

2. Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency.

3. Materially alter the budgetary impact of entitlements, grants, user fees, or loan program or the rights and obligation of recipients thereof.

4. Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in E.O. 12866.

Pursuant to the terms of Executive Order 12866, OMB and EPA consider this action related to part 70 permit revisions a "significant regulatory action" within the meaning of the Executive Order. The EPA has submitted this rulemaking package to OMB for review. Changes made in response to OMB suggestions or recommendations are documented in Docket A-93-50. Any written comments from OMB to EPA, and any EPA responses to those comments, are also included in Docket A-93-50.

**C. Regulatory Flexibility Act Compliance**

Pursuant to section 605(b) of the Regulatory Flexibility Act, 5 U.S.C. 605(b), the Administrator certifies that the part 70 revisions being promulgated today will not have a significant economic impact on a substantial number of small entities. In developing the original part 70 rule, the Agency determined that it would not have a significant economic impact on a substantial number of small entities. Similarly, the same conclusion was reached in an initial regulatory flexibility analysis performed in support of the August 1994 proposed part 70 revisions and in the analyses made in connection with updating



**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

the ICR for the part 70 regulations.

The primary impact of these regulatory revisions is on the process for revising permits. The total impact of today's action is an estimated savings of around \$22 million per year. This breaks out to be an estimated \$44 million reduction in burden on permitting authorities, due to more flexible and less resource intensive actions to revise permits, and an estimated \$22 million increased burden on sources. There will be more permit revisions during the term of a permit due to the elimination of off-permit; however, the burden to process those revisions are substantially reduced resulting in the estimated \$44 million savings per year. The burden on sources will increase by the estimated \$22 million per year due to the necessity to apply for these (mostly minor NSR) changes that would have been off-permit under the original part 70.

Since there are around 22,000 sources in the program at this time, the burden will be an average of \$1,000 per source per year. Most of these minor NSR changes, however, will occur at large facilities owned by large corporations. The annual burden on small businesses will be only a few hundred dollars per source, and then only if they make minor NSR changes that would have been off-permit under the original part 70. This action, therefore, does not substantially alter the part 70 regulations as they pertain to small entities and, accordingly, will not have a significant economic impact on a substantial number of small entities.

D. Paperwork Reduction Act

The OMB has approved the information collection requirements contained in part 70 under the provisions of the Paperwork Reduction Act, 44 U.S.C. 3501 et. seq. and has assigned OMB control number 2060-0243. The original ICR for part 70 was approved in July 1992. A revised ICR was prepared in 1996 and was made available in draft form for public comment on June 13,

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

1996 (61 FR 30061). After closure of the public comment period, the ICR was submitted to OMB; an announcement of this submittal was made on August 27, 1996 (61 FR 44049). The OMB approved the revised ICR on February 20, 1997.

The only significant impact of today's action on paperwork burden is due to the modification of the permit revision system in part 70. The new ICR indicates the average annual burden attributable to permit revisions will increase by approximately 1.2 million hours over the burden estimates in the previous ICR. This is misleading, however, because the number of permit revisions included in the previous ICR was an average of around 2,000 per year and the new ICR estimates an annual average of approximately 47,000 permit revisions. This difference is because the new ICR covers the period from October 1996 to October 1999 when programs will have moved into the permit revision phase. The previous ICR covered a 3-year period of time where programs were just beginning to issue permits and very few (i.e., the 2,000 per year) permit revisions were anticipated during that time.

To determine the true costs of today's action, it is more appropriate to look at the burden attributable to permit revisions assuming all initial permits have been issued. The revised permit revision system reduces the cost to permitting authorities by 91 per cent per permit revision and to sources by 70 per cent per permit revision. However, the total number of permit revisions increases from approximately 20,000 to 88,000 due to elimination of the "off-permit" option previously available. Taking into account the change in number and costs of permit revisions, the actual burden difference between the original part 70 and the revised part 70 is a decrease of 1.0 million burden hours for permitting authorities and an increase of .5 million hours for sources. Therefore, it is estimated that overall there will be a savings of approximately .5 million

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

burden hours. (Translated into dollars, these figures equate to the amounts discussed in section XIII.C.)

The ICR prepared for the part 70 rule, and approved in February 1997, is not affected by today's action because the part 70 revisions were already included in the estimated burden of the revised ICR. This was possible since the substance of the revisions affecting burden (i.e., merging of programs) could already be adopted by permitting authorities.

Send comments on the Agency's need for this information, the accuracy of the provided burden estimates, and any suggested methods for minimizing respondent burden, including through the use of automated collection techniques, to:

Director, Regulatory Information Division  
Office of Policy, Planning, and Evaluation (2136)  
U.S. Environmental Protection Agency  
401 M Street, SW  
Washington, DC 20460

and:

Office of Information and Regulatory Affairs  
Office of Management and Budget  
Attention: Desk Officer for EPA  
725 17th Street, NW  
Washington, DC 20503

Include the ICR number in any correspondence.

E. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), P.L. 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under section 202 of the UMRA, EPA generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with Federal mandates that may result in expenditures to State,

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any 1 year.

The EPA has determined that today's revisions to part 70 do not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector, in any 1 year. Today's action does not amend the part 70 regulations in a way that significantly alters the expenditures resulting from the Act requirements. Therefore, the Agency concludes that it is not required by section 202 of the UMRA of 1995 to provide a written statement to accompany this regulatory action.

F. Submission to Congress and the General Accounting Office

Under section 801(a)(1)(A) of the Administrative Procedures Act (APA) as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, EPA submitted a report containing these part 70 revisions and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office prior to publication of today's Federal Register. Today's part 70 revisions are not a "major rule" as defined by section 804(2) of the APA as amended.

List of Subjects in 40 CFR Part 70

Environmental protection, air pollution control, prevention of significant deterioration, new source review, fugitive emissions, particulate matter, volatile organic compounds, nitrogen dioxide, carbon monoxide, hydrocarbons, lead, operating

**DRAFT - DOES NOT REPRESENT FINAL AGENCY POSITIONS**

permits.

Dated: \_\_\_\_\_ Signed: \_\_\_\_\_  
Carol M. Browner,  
Administrator

Billing Code: 6560-50-P