revised SIP will provide for maintenance for an additional ten years.

Proposed Action

EPA proposes approval of the State of Tennessee's request to redesignate to attainment the Middle Tennessee O3 nonattainment area, and the Middle Tennessee and maintenance plan contingent upon a full and final approval of the outstanding requirements discussed above (emissions inventory, RACT catch-ups, emissions statements, and NO_X requirements). EPA also proposes to approve the 1990 baseline inventory and the 1994 base year inventory for the Middle Tennessee nonattainment area.

The OMB has exempted these actions from review under Executive Order 12866.

Nothing in this action shall be construed as permitting or allowing or establishing a precedent for any future request for a revision to any state implementation plan. Each request for revision to the state implementation plan shall be considered separately in light of specific technical, economic, and environmental factors and in relation to relevant statutory and regulatory requirements.

Unfunded Mandates

Under sections 202, 203, and 205 of the Unfunded Mandates Reform Act of 1995 (''Unfunded Mandates Act''), signed into law on March 22, 1995, EPA must undertake various actions in association with proposed or final rules that include a Federal mandate that may result in estimated costs of $100 million or more to the private sector, or to State, local, or tribal governments in the aggregate.

Through submission of this state implementation plan or plan revision, the State and any affected local or tribal governments have elected to adopt the program provided for under section 107(d)(3)(E) of the CAA. These rules may bind State, local and tribal governments to perform certain actions and also require the private sector to perform certain duties. EPA has examined whether the rules being proposed for approval by this action would impose any new requirements. Since such sources are already subject to these regulations under State law, no new requirements are imposed by this proposed approval. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action, and therefore there will be no significant impact on a substantial number of small entities.

Under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, EPA must prepare a regulatory flexibility analysis assessing the impact of any proposed or final rule on small entities. 5 U.S.C. 603 and 604. Alternatively, EPA may certify that the rule will not have a significant impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and government entities with jurisdiction over populations of less than 50,000.

Redesignation of an area to attainment under section 107(d)(3)(E) of the CAA does not impose any new requirements on small entities. Redesignation is an action that affects the status of a geographical area and does not impose any regulatory requirements on sources. The Administrator certifies that the approval of the redesignation request will not affect a substantial number of small entities.

List of Subjects

40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Hydrocarbons, Intergovernmental relations, Nitrogen dioxide, Ozone, Reporting and recordkeeping requirements.

40 CFR Part 81

Air pollution control, National parks, Wilderness areas.

Dated: June 13, 1996.

A. Stanley Meiburg,

Acting Regional Administrator.

[FR Doc. 96–16022 Filed 6–21–96; 8:45 am]

BILLING CODE 6560–50–P

40 CFR Part 70

[MI001; FRL–5524–6]

Proposed Interim Approval of the Operating Permits Program; Michigan

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed interim approval.

SUMMARY: The EPA proposes interim approval of the Operating Permits Program submitted by the State of Michigan for the purpose of complying with Federal requirements for an approvable State program to issue operating permits to all major stationary sources, and to certain other sources, with the exception of sources on Indian lands.

DATES: Comments on this proposed action must be received in writing by July 24, 1996.

ADDRESSES: Written comments should be addressed to: Robert Miller, Chief, Permits and Grants Section (AR–18J), EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604.

Copies of the State's submittal and other supporting information used in developing the proposed interim approval are available for inspection during normal business hours at the following location: EPA Region 5, Air and Radiation Division (AR–18J), 77 West Jackson Boulevard, Chicago, Illinois 60604.

FOR FURTHER INFORMATION CONTACT: Beth Valenziano, Permits and Grants Section (AR–18J), EPA, 77 West Jackson Boulevard, Chicago, Illinois 60604, (312) 886–2703. E-mail address: valenziano.beth@epamail.epa.gov.

SUPPLEMENTARY INFORMATION:

I. Background and Purpose

A. Introduction

As required under title V of the Clean Air Act (Act) as amended (1990), EPA has promulgated rules which define the minimum elements of an approvable State operating permits program and the corresponding standards and procedures by which EPA will approve, oversee, and withdraw approval of State operating permits programs. See 57 FR 32250 (July 21, 1992). These rules are codified at 40 Code of Federal Regulations (CFR) part 70. Title V requires States to develop, and submit to EPA, programs for issuing these operating permits to all major stationary sources and to certain other sources.

The Act requires that States develop and submit these programs to EPA by November 15, 1993, and that EPA act to approve or disapprove each program within 1 year after receiving the submittal. If the State's submission is materially changed during the 1-year review period, 40 CFR 70.4(e)(2) allows EPA to extend the review period for no more than 1 year following receipt of the additional material. The EPA received material changes to Michigan's May 16, 1995 submittal on July 20, 1995, and therefore considers EPA's review period to begin from the latter date.

The EPA's program review occurs pursuant to section 502 of the Act and the part 70 regulations, which together outline criteria for approval or disapproval. Where a program substantially, but not fully, meets the requirements of part 70, EPA may grant the program interim approval for a period of up to 2 years. If EPA has not fully approved a program by 2 years after the November 15, 1993 date, or by the end of an interim program, it must establish and implement a Federal program.

II. Proposed Action and Implications

A. Analysis of State Submission

1. Support Materials

The EPA received Michigan's title V operating permits program from the governor's designee, the Director of the Michigan Department of Natural Resources (MDNR) on May 16, 1995. The EPA received supplemental program submittals from the Acting Chief of the Air Quality Division, MDNR, on July 20, 1995, and October 6, 1995. The EPA also received supplemental program submittals from the Chief of the Air Quality Division of the newly formed Michigan Department of Environmental Quality on November 7, 1995 and January 8, 1996. Based on the May 16, 1995 and the July 20, 1995 submittals, EPA deemed Michigan's program complete in a letter to the MDNR Director dated August 16, 1995. Together, Michigan's program submittals contain all required elements of 40 CFR 70.4, including a description of Michigan's operating permits program, permitting program documentation, and the Attorney General's legal opinion that the laws of the State of Michigan provide adequate authority to carry out all aspects of the program required by the Act.

Michigan's November 7, 1995 supplement to its title V program submittal included Governor John Engler's Executive Order No. 1995–18. This executive order, effective October 1, 1995, created the Michigan Department of Environmental Quality (MDEQ) and transferred the authority for implementation of title V from MDNR to MDEQ. Michigan's November 7, 1995 supplemental submittal stated that this administrative transfer does not affect Michigan's part 70 implementation program.

Section 1.1 of Michigan's program description states that MDNR (now MDEQ) is responsible for implementing and administering the title V program for all geographical areas of the State. The submittal includes no further discussion of any basis under which MDEQ might assert jurisdiction over sources on tribal lands.

Because MDEQ has not demonstrated, consistent with applicable principles of Indian law and Federal Indian policies, legal authority to regulate sources on tribal lands, the proposed interim approval of Michigan's operating permits program will not extend to lands within the exterior boundaries of any Indian reservation in the State of Michigan.[1] Title V sources located within the exterior boundaries of Indian reservations in Michigan will be subject to either the Federal operating permits program, to be promulgated at 40 CFR part 71, or to a tribal operating permits program approved pursuant to title V and the regulations that will be promulgated under section 301(d) of the Act. The section 301(d) regulations will authorize EPA to treat tribes in the same manner as States for appropriate Act provisions.[2]

2. Regulations and Program Implementation

Michigan's operating permits program, including the operating permits program regulations (found in Michigan's administrative rules for air pollution control, R 336.1101 et. seq.) substantially meet the requirements of 40 CFR part 70, including: sections 70.2 and 70.3 with respect to applicability; section 70.5 with respect to application forms, completeness requirements, and criteria for defining insignificant activities; sections 70.4, 70.5, and 70.6 with respect to permit content (including operational flexibility); sections 70.7 and 70.8 with respect to permit processing requirements (including minor permit modifications and public participation); and section 70.11 with respect to enforcement authority.

For a detailed analysis of Michigan's program submittal, please refer to the Technical Support Document (TSD) for this proposed action, which is available in the informal docket at the address noted above. The TSD shows that all operating permits program requirements of title V of the Act, 40 CFR part 70, and relevant guidance were met by Michigan's submittal, with the exception of those requirements described in subpart II.B. below.

a. Delegation of State Program to Local Governments. Section 324.5523 of Michigan's Natural Resources and Environmental Protection Act (NREPA) provides the authority to delegate the State's title V operating permits program to certain county governments. MDEQ acknowledges in the State's program submittal that the Wayne County Department of Environment, Air Quality Management Division, intends to seek delegation of the State's title V program, and that a program revision to EPA may be necessary to address any such delegation.

b. Definition of Potential to Emit. The Michigan definition of ''potential to emit'' in R 336.1116(m) provides that physical and operational limits on a source's capacity can be considered in determining ''potential to emit, '' provided that such limits are ''legally enforceable. '' The 40 CFR 70.2 definition of ''potential to emit'' requires such limits to be federally enforceable.

Although two recent court cases have challenged the ''federally enforceable'' requirement in other Act programs, the provision is still required by part 70.

The EPA issued a memorandum on January 22, 1996 entitled ''Release of Interim Policy on Federal Enforceability of Limitations on Potential to Emit'' that addresses the court cases and their effect on the Act's programs. In response to the court cases (and a pending challenge to the part 70 ''potential to emit'' requirements), the memorandum also states EPA's intention to propose rulemaking actions in the spring of 1996 that would address the Federal enforceability issue as it relates to title V and other Act programs. At this time, however, the title V Federal enforceability requirements remain unaffected, and therefore EPA is proposing that the State revise its definition to include the Federal enforceability requirement in its ''potential to emit'' definition as a condition of full approval.

This interim approval condition does not affect the State's ability to utilize the January 25, 1995 EPA memorandum entitled, ''Options for Limiting the Potential to Emit (PTE) of a Stationary Source under Section 112 and Title V of the Clean Air Act (Act), ''[3] which provides a transition policy through January 25, 1997 for establishing federally enforceable mechanisms for limiting PTE. In addition, this issue would no longer be a condition for full approval if the final EPA rulemaking referred to above were to no longer require Federal enforceability in limiting ''potential to emit'' as part of the title V program. After EPA finalizes its rulemaking on this issue, it will work with Michigan to assure that the State's regulations are consistent with national requirements.

c. Use of Old Permits to Limit Potential to Emit. R 336.1209 provides a mechanism for sources to limit their potential to emit through certain existing permits, and therefore avoid being subject to the title V operating permit program. The EPA notes that existing State permits can establish

[1] This is not a determination that MDEQ could not possibly demonstrate jurisdiction over sources within the exterior boundaries of Indian reservations in Michigan. However, no such showing has been made.

[2] Tribes may also have inherent sovereign authority to regulate air pollutants from sources on tribal lands.

[3] As amended by the January 22, 1996 interim policy memorandum.

federally enforceable limits on potential to emit to the extent that the permits have been issued pursuant to an approved State Implementation Plan (SIP), and are also practically enforceable. The EPA understands that Michigan will be submitting R 336.1209 as a SIP revision to ensure that such permits are federally enforceable. For additional information, see the January 25, 1995 and the January 22, 1996 EPA memoranda referenced in subpart II.A.2.b. above.

d. Definition of Title I Modification. 40 CFR part 70 uses the term ''modifications under any provision of title I of the Act'' in establishing requirements for operational flexibility, off permit provisions, and minor permit modifications. Because this term was not specifically defined in Federal regulations, there have been differing interpretations regarding whether the term includes or excludes modifications under States' minor New Source Review (NSR) Programs. The Michigan regulations use this term in addressing the State's operational flexibility [R 336.1215(2)], off permit [R 336.1215(3)], minor permit modification [R 336.1216(2)], and significant modification [R 336.1216(3)] provisions. In addition, the State's minor permit modification provisions specifically exclude minor State NSR modifications in R 336.1216(2)(a)(v), which is the State's interpretation of 40 CFR 70.7(e)(2)(i)(A)(5).

In an August 29, 1994 rulemaking proposal, EPA explained its view that ''modifications under any provision of title I of the Act'' include minor NSR. However, EPA solicited public comment on whether the phrase should be interpreted to mean literally any change at a source that would trigger permitting authority review under regulations approved or promulgated under title I of the Act. 59 FR 44572. This would include State NSR programs approved by EPA as part of the SIP under section 110(a)(2)(C) of the Act.

The EPA has not yet taken final action on the August 29, 1994 proposal. However, in response to public comment on that proposal, EPA has decided that the definition of ''modifications under any provision of title I of the Act'' is best interpreted as not including changes reviewed under minor NSR programs. This decision was included in the supplemental 40 CFR part 70 rulemaking proposal published on August 31, 1995. 60 FR 45545. Therefore, Michigan's interpretation of this term in its minor permit modification provisions is consistent with the requirements of part 70.

e. Research and Development Activities. R 336.1211(3) provides that process and process equipment which is used exclusively for research and development (R&D), and that is located on the same contiguous site as other process or process equipment used for manufacturing a product shall be treated as a separate source for purposes of determining operating permit program applicability. The Michigan regulations define R&D activities in R 336.1283, and specifically exclude activities that include the production of a product for sale, unless such sale is incidental to the process.

The EPA stated in the preamble to the final part 70 rule that ''in many cases States will have the flexibility to treat an R&D facility * * * as though it were a separate source, and [the R&D facility] would then be required to have a title V permit only if the R&D facility itself would be a major source.'' 57 FR 32264 and 32269. Read consistently with the major source definition in 40 CFR 70.2, this statement means that separate source treatment would occur only in situations where the co-located R&D portion of a source has its own two-digit Standard Industrial Classification code and is not a support facility. As explained in the supplemental proposal to revise part 70, EPA believes that R&D should be treated as having its own industrial grouping for purposes of determining major source status, and has proposed to revise 40 CFR part 70 accordingly. 60 FR 45556–45558.

It is important to note that separate treatment will not exempt R&D facilities in all cases. Some R&D activities may still be subject to permitting because they are either individually major or are a support facility that makes significant contributions to the product of a co-located major facility. The support facility test dictates that, even where there are two or more industrial groupings at a commonly owned facility, these groupings should be considered together if the output of one is more than 50 percent devoted to support of another. Although Michigan's program does not specifically reference the support facility test for R&D activities, EPA expects that such a test will be applied in making major source applicability determinations as established under the NSR program and continued under title V.

f. Insignificant Activities. Michigan's insignificant activities rule, R 336.1212(1), lists various activities that are excluded from calculations of potential to emit for purposes of determining whether a source is major. The part 70 rule does not provide for such an exception to major source determinations. Although the listed activities might qualify as ''insignificant'' under 40 CFR 70.5(c) or even ''trivial'' (as described in EPA's ''white paper'' on permit applications), these concepts relate to the need to describe activities in permit applications, and not to whether such activities need to be considered in a major source determination. Major source determinations are intended to be based on the potential impact of a source, as measured by its potential to emit, and not merely on those activities at the source which have historically been regulated. In addition, it should be noted that any emissions from these units can have the same effect on public health and the environment as similar amounts from the regulated emissions units at the plant. The EPA is therefore proposing to require the State to revise its regulations to delete these exemptions from major source determinations as a condition of full approval. This interim approval condition does not apply to the State's use of R 336.1212(1) as an insignificant activities list pursuant to 40 CFR 70.5(c).

The EPA does agree with the concern underlying these provisions, that significant resources not be expended on calculation of emissions from activities such as these which normally do not implicate clean air regulations. The EPA expects that emissions from activities such as those exempted by R 336.1212(1) would only be examined where those emissions might actually impact whether the source is major. The EPA expects that, where EPA has not spoken to this issue precisely, sources will exercise their judgment (as guided by the permitting authority) in deciding the rigor of analysis appropriate to calculate PTE for different insignificant activities at the source. For example, a rough estimate based on engineering judgment may be all that is necessary. The EPA believes that following such a ''rule of reason'' approach should alleviate the concerns underlying the State's exemptions.

g. Source Category Limited Interim Approval. Michigan's permit fee program relies on a 4 year initial permit issuance schedule to demonstrate that the fees are sufficient to cover the State's operating permit program costs. Because of this, the State has requested that EPA approve a 4 year initial permit issuance schedule under source category limited interim approval. See the EPA guidance memorandum entitled ''Interim Title V Program Approvals,'' signed by John S. Seitz, Director of EPA's Office of Air Quality

Planning and Standards, August 2, 1993. In accordance with this guidance, Michigan's program submittal demonstrates compelling reasons why the State cannot permit initial sources in 3 years, including a short term funding deficit that is eliminated under a 4 year permit issuance schedule, a large and complex source population, and an exceptional ramp up workload caused primarily by the State never having implemented an operating permit program similar to the title V program. The State also demonstrates that its proposed 4 year issuance schedule substantially meets the requirements of 40 CFR part 70 by permitting 60 percent of the title V sources and 80 percent of the emissions during the first 3 years of the program.

However, EPA cannot grant Michigan source category limited interim approval until after Michigan finalizes revisions to its permit issuance schedule regulation [R 336.1210(13)]. This regulation currently requires a 3 year issuance schedule. In other words, because the State's regulations currently meet the 40 CFR 70.4(b)(11)(ii) requirement to issue initial permits in 3 years, source category limited interim approval is not warranted. However, because EPA recognizes MDEQ's proposed 4 year permit issuance schedule for the purposes of determining fee schedule sufficiency, EPA may grant source category limited interim approval to the State after it revises its regulations to incorporate a 4 year permit issuance schedule, provided that the State continues to meet the requirements for source category limited interim approval. Therefore, EPA is proposing full approval of the State's permit issuance schedule. In the alternative, EPA is proposing source category limited interim approval, provided: (1) The State finalizes regulatory revisions to its permit issuance schedule that are consistent with the current draft revisions, and (2) the State program continues to meet the requirements for source category limited interim approval outlined in the August 2, 1993 guidance.

h. Startup, Shutdown, and Malfunction Provisions. R 336.1912, R 336.1913, and R 336.1914 include provisions relating to startups, shutdowns, and malfunctions (SSM) of sources. The EPA reviewed these regulations as a part of Michigan's title V program to determine whether these rules affect the State's ability to meet the requirements of 40 CFR 70.4(b)(3)(i). This provision requires that a title V program must have the authority to issue permits and assure compliance with all applicable requirements, including the requirements of the title V program, by all part 70 sources.

The Michigan SSM regulations provide an affirmative defense from violations of permit conditions which occur during SSM, provided that sources meet the requirements in these State rules. These requirements include the implementation of written preventative maintenance and malfunction abatement plans and other operating, recordkeeping, and reporting requirements. Michigan's title V Attorney General's opinion acknowledges that the rules establish an affirmative defense for certain violations. Structured as they are, the SSM provisions cannot be characterized as being based on enforcement discretion.

The only affirmative defense allowed in the title V regulations (other than any defense or other enforcement relief provided for in the applicable requirements themselves) is the emergency defense provisions in 40 CFR 70.6(g). The emergency defense is available only for exceedances of technology based emission limitations attributable to an emergency, as defined in 40 CFR 70.6(g)(1). The Michigan SSM affirmative defense is broader than the emergency defense in these two respects. First, the Michigan defense extends to exceedances beyond emergency situations, and applies to exceedances caused by startups, shutdowns, and malfunctions. Second, the Michigan defense applies to exceedances of any emission standard and any violation of a continuous emission, parametric monitoring, or automated recordkeeping requirement. In contrast, the emergency defense may only apply to exceedances of technology based emission limitations. Because Michigan's SSM affirmative defense is broader than the defense provided by part 70, the State does not have the authority to issue permits and assure compliance with all applicable requirements, as required by 40 CFR 70.4(b)(3)(i). Therefore, EPA is proposing that Michigan revise its SSM regulations to be consistent with the affirmative defense in 40 CFR 70.6(g) as a condition of full approval.

The EPA notes that Michigan's SSM regulations contain certain provisions similar to certain SSM operating requirements found in 40 CFR part 63 (general provisions for National Emission Standards for Hazardous Air Pollutants, section 112), 40 CFR part 60 (general provisions for New Source Performance Standards, section 111), and EPA's SIP policy regarding treatment of SSM. See EPA's policy memorandum dated February 15, 1983 from Kathleen M. Bennett, Assistant Administrator for Air, Noise, and Radiation entitled ''Policy on Excess Emissions During Startup, Shutdown, Maintenance, and Malfunctions''. However, these provisions of the part 60 and 63 regulations do not apply uniformly to all Federal standards, and the 1983 policy does not establish an affirmative defense from violations caused by SSM conditions.

The EPA may consider alternative approaches for resolving this condition for full approval, such as an approach that relies on enforcement discretion (see the February 15, 1983 Bennett memorandum), and is willing to work with the State as necessary. There may be various ways in which to structure such an enforcement discretion approach, and EPA will not attempt to provide detailed guidance in this document. However, EPA notes that certain issues would have to be addressed by the State if it were to craft such an approach using the current State rule as a starting point. Among these, the definition of ''malfunction'' in R 336.1113(d) does not limit malfunctions to failures that are ''infrequent'' and ''not reasonably preventable'', and is therefore broader than the Federal definition in 40 CFR 60.2 and 63.2. The State's air pollution control bypass provisions in R 336.1913(3)(b) and R 336.1914(4)(b) are broader than that provided by the Act. See the February 15, 1983 Bennett memorandum. The alternate emission limitations for startups and shutdowns in R 336.1914(4)(d) would allow relaxations of Act requirements, including NSR limitations, New Source Performance Standards, toxics requirements (NESHAP, MACT), etc. Finally, the State SSM regulations provide no authority for MDEQ to review and require revisions to a source's written emission minimization plan for normal or usual startups and shutdowns. Such authority is appropriate to ensure that operating practices for startups and shutdowns meet good engineering practice for minimizing emissions, similar to the authority R 336.1911 currently provides for State review and revision of written preventative maintenance and malfunction abatement plans.

i. Environmental Audit Privilege and Immunity Law. Sections 502(b)(5) (A) and (E) of the Act require that approvable State title V programs must have adequate authority to assure that sources comply with all applicable Act requirements, as well as the authority to enforce permits and recover minimum civil penalties and appropriate criminal penalties. In addition, part 70 explicitly

requires States to have certain enforcement authorities, including the authority to seek injunctive relief to enjoin a violation, to bring suit to restrain persons where a facility is posing an imminent and substantial endangerment to public health or welfare, and to recover appropriate criminal and civil penalties. Section 113(e) of the Act sets forth penalty factors for EPA or a court to consider in assessing penalties for civil or criminal violations of the Act, factors which necessarily apply to penalties for violations of title V permits. The EPA is concerned about the potential impact of some State audit privilege and immunity laws on the ability of the States to enforce Federal requirements, including those under title V of the Act. Upon review and consideration of the statutory and regulatory provisions discussed above, EPA issued guidance on April 5, 1996, entitled ''Effect of Audit Immunity/Privilege Laws on States' Ability to Enforce Title V Requirements''. This guidance outlines certain elements of the State audit immunity and privilege laws which, in EPA's view, may so hamper the State's ability to enforce as to render the Agency unable to approve the title V operating permit program. The guidance is consistent with EPA's December 22, 1995 audit policy, ''Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations''. 60 FR 66706.

On March 18, 1996, Michigan Governor John Engler signed the State's Environmental Audit Privilege and Immunity Law, part 148 of Michigan's Natural Resources and Environmental Protection Act (NREPA). This law provides that sources can hold confidential broad categories of information contained in a voluntary environmental audit report. The law also provides sources and persons immunity from certain State civil and criminal penalties for violations discovered through an environmental self audit, provided the violations are promptly reported and corrected.

In the April 5, 1996 memorandum referenced above, EPA set out specific authorities, based upon the requirements of 40 CFR 70.11, that cannot be affected by State privilege and immunity laws if a State is to receive full approval of its title V program. The EPA has identified several sections of Michigan's privilege and immunity law, described below, which appear to conflict with the requirements of part 70.

Section 14802 of Michigan's Environmental Audit Privilege and Immunity Law provides for the protection of factual data disclosed during an environmental audit. In conjunction with the definition of ''environmental audit'' and ''environmental audit report'' contained in section 14801, Michigan's audit privilege is so broad that it may be interpreted as restricting access to data and preventing testimony which is necessary to determine whether a civil or criminal violation has occurred or is imminent. Similarly, the broad language of section 14809 may be interpreted as prohibiting the State from assessing civil penalties for violations of regulations, permits, consent orders or agreements; violations which reflect a parent company's pattern of violations at various facilities; and violations which result in serious harm or imminent and substantial endangerment. In addition, section 14809 appears to allow sources to retain economic benefit from a violation, even if substantial or deliberately obtained. Although section 14802 appears to contain several exemptions from the otherwise broad scope of the privilege, EPA is unable to determine the extent to which the exemption limits the application of the privilege provisions. Furthermore, EPA does not believe that the section 14802 exemption applies to any portion of the penalty immunity contained in section 14809.

For these reasons, EPA believes that Michigan's privilege and immunity law affects the State's authority to assure compliance with part 70 permits and the requirements of the operating permit program [40 CFR 70.4(b)(3)(i)], as well as the authority to enforce permits and the requirement to obtain a permit [40 CFR 70.4(b)(3)(vii)]. In addition, EPA believes that the law affects Michigan's authority to recover civil penalties in accordance with 40 CFR 70.11(a)(3)(i). Therefore, EPA is proposing that Michigan must revise its privilege and immunity law, part 148 of NREPA, to ensure that the State meets these title V enforcement requirements as a condition of full approval. The EPA is also proposing that Michigan must submit a revised title V Attorney General's opinion that addresses the concerns listed above, and certifies that the State title V program meets the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), and 40 CFR 70.11(a)(3)(i) as a condition of full approval.

The EPA acknowledges that Michigan may have a different interpretation of the provisions in the State's privilege and immunity law. If Michigan believes that its current law does not affect the part 70 enforcement requirements addressed above, Michigan need only submit a revised title V Attorney General's opinion certifying that the State title V program meets the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), and 40 CFR 70.11(a)(3)(i) as a condition of full approval. The Attorney General's opinion must also specifically address why EPA's interim approval provision requiring revisions to the currently enacted law is not valid.

To further ensure that Michigan's privilege and immunity law does not affect other requirements of the title V program, EPA believes that it is also necessary for the State to submit a supplemental Attorney General's opinion as a condition of full approval. This supplemental Attorney General's opinion must certify that any other title V requirements that may be affected by the privilege and immunity law are met, including: Michigan's authority to bring suit to restrain any person from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment [40 CFR 70.11(a)(1)]; Michigan's authority to seek injunctive relief to enjoin any violation of any program requirement, including permit conditions [40 CFR 70.11(a)(2)]; Michigan's authority to recover criminal fines [40 CFR 70.11(a)(3) (ii) and (iii)]; and the requirement that the burden of proof for establishing civil and criminal violations is no greater than the burden of proof required under the Act [40 CFR 70.11(b)]. The EPA intends to work with Michigan to ensure that the supplemental Attorney General's opinion specifically addresses all potential areas of concern regarding the State's privilege and immunity law.

3. Permit Fee Demonstration

Michigan's operating permits program fee schedule is established in section 324.5522, NREPA. The State's program submittal includes a detailed demonstration that Michigan's fee schedule is sufficient to cover the State's operating permit program costs. Because the sufficiency of the fee schedule is based on a 4 year initial permit issuance schedule, Michigan has requested that EPA approve a 4 year initial permit issuance schedule under source category limited interim approval (see the discussion on source category limited interim approval in subpart II.A.2.g. above).

Michigan's fee schedule consists of an annual fee equal to a facility charge plus an emissions charge. The facility charge is $2,500.00 for major sources of criteria pollutants, and $1,000.00 for major sources of hazardous air pollutants. The emissions charge is $25.00 per ton of

actual emissions, with a facility cap of 4,000 tons. Sources with total actual emissions less than 4,000 tons have a 1,000 ton per pollutant cap.

4. Provisions Implementing the Requirements of Other Titles of the Act

a. Authority for Section 112 Implementation. Michigan has demonstrated in its title V program submittal adequate legal authority to implement and enforce all section 112 toxics requirements through the title V permit. This legal authority is contained in Michigan's enabling legislation and in regulatory provisions that define ''applicable requirements'' and provide that the permit must incorporate all applicable requirements. The EPA has determined that this legal authority is sufficient to allow Michigan to issue permits to part 70 sources that assure compliance with all section 112 requirements.

The EPA is interpreting the above legal authority to mean that Michigan is able to carry out all section 112 activities for part 70 sources. For further rationale on this interpretation, please refer to the TSD for this proposed action.

b. Implementation of Section 112(g). Section 112(g) of the Act requires States to issue case-by-case Maximum Achievable Control Technology (MACT) determinations to sources that modify, construct, or reconstruct, if EPA has not established MACT for that particular source category. According to the interpretive notice published in the Federal Register on February 14, 1995, the requirements of section 112(g) will not become effective until after EPA has promulgated a regulation addressing that provision. The notice sets forth in detail the rationale for this interpretation. See 60 FR 8333. At the time of Michigan's program submittal and EPA's subsequent review period, EPA has not promulgated a Federal regulation containing the specific requirements of section 112(g).

The section 112(g) interpretative notice explains that EPA is still considering whether the effective date of section 112(g) should be delayed beyond the date of promulgation of the Federal rule so as to allow States time to adopt rules implementing the Federal rule, and that EPA will provide for any such additional delay in the final section 112(g) rulemaking. Unless and until EPA provides for such an additional postponement of section 112(g), Michigan must be able to implement section 112(g) during the transition period between promulgation of the Federal section 112(g) rule and adoption of implementing State regulations.

The EPA is aware that Michigan lacks a program designed specifically to implement section 112(g). However, Michigan does have a preconstruction review program that can serve as an adequate implementation vehicle during the transition period. Therefore, EPA is proposing approval under title V and part 70, of the use of Michigan's preconstruction permit program as the procedural mechanism for establishing federally enforceable case-by-case MACT emission limits for hazardous air pollutants (HAP) during the transition period. However, since the approval is for the single purpose of providing a mechanism to implement section 112(g) during the transition period, the approval itself will be without effect if EPA decides in the final section 112(g) rule that sources are not subject to the requirements of the rule until State regulations are adopted. This proposed approval is limited solely to the issuance of federally enforceable HAP emission limits to comply with the requirements of section 112(g), and is not an approval under section 110 of the Act.

This approval is for an interim period only, until such time as the State adopts regulations consistent with any regulations promulgated by EPA to implement section 112(g). Accordingly, EPA is proposing to limit the duration of this approval to a reasonable time following promulgation of section 112(g) regulations so that Michigan, acting expeditiously, will be able to adopt regulations consistent with the section 112(g) regulations. The EPA is proposing here to limit the duration of this approval to 18 months following promulgation by EPA of section 112(g) regulations.

Michigan's construction permit regulations [R 336.1205(2)] assume that section 112(g) authority is delegated to the State by EPA. The implementation of section 112(g) by the State for sources subject to title V is a requirement for approval of the State's title V program, and is therefore not a delegated program. To address the requirements in R 336.1205(2), the State should refer instead to EPA's forthcoming final rulemaking on Michigan's title V program and to the section 112(g) implementation requirements to be promulgated in the final section 112(g) regulations.

c. Program for Straight Delegation of Section 112 Standards. Requirements for operating permits program approval, specified in 40 CFR 70.4(b), also address section 112(l)(5) requirements for approval of a program for delegation of section 112 standards as promulgated by EPA as they apply to part 70 sources. Section 112(l)(5) requires that the State's program contain adequate authorities, adequate resources for implementation, and an expeditious compliance schedule, which are also requirements under part 70.

Therefore, EPA is also proposing to grant approval under section 112(l)(5) and 40 CFR 63.91 of Michigan's program for receiving delegation of section 112 standards that are unchanged from the Federal standards as promulgated. Because Michigan has the authority under section 324.5506(6), NREPA, to include any conditions in an operating permit that are necessary to assure compliance with the Act (including section 112 requirements), EPA proposes to approve the delegation of section 112 standards through straight delegation. The details of this delegation mechanism will be set forth in a Memorandum of Agreement between Michigan and EPA. The State of Michigan requested delegation of section 112 standards in a letter from Russell J. Harding, Director, MDEQ, dated October 12, 1995. This proposed approval of Michigan's program for delegations applies to both existing and future standards, but is limited to sources covered by the part 70 program.

d. Implementation of Title IV. Michigan's operating permits program contains adequate authority to issue permits that include the requirements of the title IV acid rain program. The State has incorporated the requirements of 40 CFR part 72 by reference in R 336.1299(d).

B. Options for Approval/Disapproval and Implications

The EPA is proposing to grant interim approval to the State of Michigan's operating permits program received on May 16, 1995, July 20, 1995, October 6, 1995, November 7, 1995, and January 8, 1996. This interim approval of Michigan's operating permits program applies to all title V sources, with the exception of any sources of air pollution over which an Indian Tribe has jurisdiction. *See, e.g.,* 59 FR 55813, 55815–18 (Nov. 9, 1994). The term ''Indian Tribe'' is defined under the Act as ''any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village, which is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.'' *See* section 302(r) of the Act; *see also* 59 FR 43956, 43962 (Aug. 25, 1994); 58 FR 54364 (Oct. 21, 1993).

1. Proposal in the Alternative

The EPA proposes full approval of the State's 3 year initial permit issuance schedule. In the alternative, EPA proposes source category limited interim approval of the State's 4 year permit issuance schedule, provided: (1) the State finalizes regulatory revisions to its permit issuance schedule that are consistent with the State's November 7, 1995 supplemental title V program submittal, and (2) the State program continues to meet the requirements for source category limited interim approval.

2. Proposed Interim Approval Issues

If interim approval of Michigan's operating permits program is promulgated as proposed today, the State must make the following changes to receive full approval.

a. Revise the definition of ''potential to emit'' in R 336.1116(m) to require that physical and operational limits on a source's capacity must be federally enforceable. Federal enforceability is required by the definition of ''potential to emit'' in 40 CFR 70.2. However, this issue would cease to be a condition of full approval if EPA revises the 40 CFR 70.2 definition to no longer require Federal enforceability in limiting ''potential to emit.''

b. Revise the definition of ''schedule of compliance'' in R 336.1119(a) to provide that the schedule of compliance for sources that are not in compliance shall resemble and be at least as stringent as that contained in any judicial consent decree or administrative order to which the source is subject. This provision is required by 40 CFR 70.5(c)(8)(iii)(C).

c. Revise the definition of ''stationary source'' in R 336.1119(q) to provide that the definition includes all of the process and process equipment which are located at one or more *contiguous or* adjacent properties. The emphasized phrase is not currently included in the State regulation. This provision is required in the definition of ''major source'' in 40 CFR 70.2.

d. Revise R 336.1211(l) to provide that nonmajor solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act are subject to the title V permits program. The permitting deferral for nonmajor section 111 sources in 40 CFR 70.3(b) does not apply to solid waste incineration units required to obtain a permit pursuant to section 129(e) of the Act.

e. Revise R 336.1212(l) to delete the exemption of certain activities from determining major source status. Part 70 and other relevant Act programs do not provide for such exemptions from major source determinations. This interim approval issue does not apply to the State's use of R 336.1212(l) as an insignificant activities list pursuant to 40 CFR 70.5(c).

f. Revise the State statutes or regulations, as appropriate, to require that permit applications include a certification of compliance with all applicable requirements and a statement of the methods used for determining compliance, as specified in 40 CFR 70.5(c)(9). Although Michigan's permit application forms include compliance certification requirements, EPA believes that neither the State statutes nor the State regulations clearly require applications to include this information.

g. Revise the definition of ''emergency'' in section 324.5527(1), NREPA, to ensure that the State's definition is not broader than that provided by 40 CFR 70.6(g)(1). The definition of ''emergency'' in 40 CFR 70.6(g)(1) includes, in part, ''any situation arising from sudden and reasonably unforeseeable events beyond the control of the source, including acts of God.''

h. Remove the provisions of section 324.5534, NREPA, which provide for exemptions from penalties or fines for violations caused by an act of God, war, strike, riot, catastrophe, or other condition as to which negligence or willful misconduct was not the proximate cause. Title V does not provide for such broad penalty and fine exemptions.

i. Revise R 336.1913 and R 336.1914 to be consistent with either the affirmative defense provisions in 40 CFR 70.6(g), or EPA's enforcement discretion policy. These State regulations provide an affirmative defense that is broader than that provided by 40 CFR 70.6(g), and therefore affect State's ability to assure compliance with all applicable requirements and the requirements of part 70 [40 CFR 70.4(b)(3)(i)].

j. Address all of the following issues relating to the State's audit privilege and immunity law, part 148 of NREPA. These conditions are proposed interim approval issues to the extent that they affect the State's title V operating permits program and the requirements of part 70.

i. Narrow the applicability of the privilege provided in section 14802, part 148 of NREPA, and narrow the applicability of the immunity provided by section 14809, part 148 of NREPA, to ensure that the State title V program has the authority to: assure compliance with part 70 permits and the requirements of the operating permits program [40 CFR 70.4(b)(3)(i)]; enforce permits and the requirement to obtain a permit [40 CFR 70.4(b)(3)(vii)]; and recover civil penalties in accordance with 40 CFR 70.11(a)(3)(i).

ii. Submit a revised title V Attorney General's opinion that addresses EPA's concerns in subpart II.A.2.i. above, and certifies that the revised part 148 does not affect Michigan's ability to meet the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), and 40 CFR 70.11(a)(3)(i).

iii. In lieu of subparts i. and ii. above, submit a revised title V Attorney General's opinion certifying that the current part 148 does not affect the enforcement requirements of 40 CFR 70.4(b)(3)(i), 40 CFR 70.4(b)(3)(vii), and 40 CFR 70.11(a)(3)(i). The Attorney General's opinion must also specifically address why EPA's interim approval provision requiring revisions to the currently enacted law is not valid.

iv. Submit a supplemental Attorney General's opinion certifying that all other title V authorities that may be affected by part 148 are met, including: Michigan's authority to bring suit to restrain any person from engaging in any activity in violation of a permit that is presenting an imminent and substantial endangerment [40 CFR 70.11(a)(1)]; Michigan's authority to seek injunctive relief to enjoin any violation of any program requirement, including permit conditions [40 CFR 70.11(a)(2)]; Michigan's authority to recover criminal fines [40 CFR 70.11(a)(3) (ii) and (iii)]; and the requirement that the burden of proof for establishing civil and criminal violations is no greater than the burden of proof required under the Act [40 CFR 70.11(b)]. The supplemental Attorney General's opinion must specifically address these requirements in light of the provisions contained in the State's privilege and immunity law.

This interim approval, which may not be renewed, extends for a period of up to 2 years. During the interim approval period, the State is protected from sanctions for failure to have a program, and EPA is not obligated to promulgate a Federal permits program in the State. Permits issued under a program with interim approval have full standing with respect to part 70, and the 1-year time period for submittal of permit applications by subject sources begins upon interim approval, as does the 3-year time period for processing the initial permit applications.

3. Other Proposed Actions

As outlined in subpart II.A.4.c., EPA is proposing to grant approval under section 112(1)(5) and 40 CFR 63.91 of

the State's program for receiving delegation of section 112 standards that are unchanged from Federal standards as promulgated. This program for delegations only applies to sources covered by the part 70 program.

As outlined in subpart II.A.4.b., EPA is also proposing to grant approval of Michigan's preconstruction permit program, found in R 336.1201, under the authority of title V and part 70 solely for the purpose of implementing section 112(g) to the extent necessary during the transition period between promulgation of the Federal section 112(g) rule and adoption of any necessary State rules to implement EPA's section 112(g) regulations. The EPA proposes to limit the duration of this approval to 18 months following promulgation by EPA of section 112(g) regulations, to provide Michigan adequate time to adopt any necessary regulations consistent with the Federal requirements.

C. Federal Oversight and Sanctions

If EPA were to finalize this proposed interim approval, it would extend for 2 years following the effective date of final interim approval, and could not be renewed. During the interim approval period, Michigan would be protected from sanctions, and EPA would not be obligated to promulgate, administer and enforce a Federal permits program for the State. Permits issued under a program with interim approval have full standing with respect to part 70, and the 1-year time period for submittal of permit applications by subject sources begins upon the effective date of interim approval, as does the 3-year time period for processing the initial permit applications.

Following final interim approval, if the State failed to submit a complete corrective program for full approval by the date 6 months before expiration of the interim approval, EPA would start an 18-month clock for mandatory sanctions. If the State then failed to submit a corrective program that EPA found complete before the expiration of that 18-month period, EPA would be required to apply one of the sanctions in section 179(b) of the Act, which would remain in effect until EPA determined that the State had corrected the deficiency by submitting a complete corrective program. Moreover, if the Administrator found a lack of good faith on the part of the State, both sanctions under section 179(b) would apply after the expiration of the 18-month period until the Administrator determined that the State had come into compliance. In any case, if, 6 months after application of the first sanction, the State still had not submitted a corrective program that EPA found complete, a second sanction would be required.

If, following final interim approval, EPA were to disapprove the State's complete corrective program, EPA would be required to apply one of the section 179(b) sanctions on the date 18 months after the effective date of the disapproval, unless prior to that date the State had submitted a revised program and EPA had determined that it corrected the deficiencies that prompted the disapproval. Moreover, if the Administrator found a lack of good faith on the part of the State, both sanctions under section 179(b) would apply after the expiration of the 18-month period until the Administrator determined that the State had come into compliance. In all cases, if, 6 months after EPA applied the first sanction, the State had not submitted a revised program that EPA had determined corrected the deficiencies that prompted disapproval, a second sanction would be required.

In addition, discretionary sanctions may be applied where warranted any time after the end of an interim approval period if a State has not timely submitted a complete corrective program or EPA has disapproved a submitted corrective program. Moreover, if EPA has not granted full approval to a State program by the expiration of an interim approval and that expiration occurs after November 15, 1995, EPA must promulgate, administer and enforce a Federal permits program for that State upon interim approval expiration.

III. Administrative Requirements

A. Request for Public Comments

The EPA is requesting comments on all aspects of this proposed interim approval. Copies of the State's submittal and other information relied upon for the proposed interim approval are contained in an informal docket maintained at the EPA Regional Office. This docket is an organized and complete file of all the information submitted to, or otherwise considered by, EPA in the development of this proposed interim approval. The principal purposes of this docket are:

(1) to allow interested parties a means to identify and locate documents so that they can effectively participate in the approval process, and

(2) to serve as the record in case of judicial review. The EPA will consider any comments received by July 24, 1996.

B. Executive Order 12866

The Office of Management and Budget has exempted this action from Executive Order 12866 review.

C. Regulatory Flexibility Act

The EPA's actions under section 502 of the Act do not create any new requirements, but simply address operating permits programs submitted to satisfy the requirements of 40 CFR part 70. Because this action does not impose any new requirements, it does not have a significant impact on a substantial number of small entities.

D. Unfunded Mandates

Under section 202 of the Unfunded Mandates Reform Act of 1995 (Unfunded Mandates Act), signed into law on March 22, 1995, EPA must prepare a budgetary impact statement to accompany any proposed or final rule that includes a Federal mandate that may result in estimated costs to State, local, or tribal governments in the aggregate; or to the private sector, of $100 million or more. Under section 205, EPA must select the most cost-effective and least burdensome alternative that achieves the objectives of the rule and is consistent with statutory requirements. Section 203 requires EPA to establish a plan for informing and advising any small governments that may be significantly or uniquely impacted by the rule.

The EPA has determined that the proposed action promulgated today does not include a Federal mandate that may result in estimated costs of $100 million or more to either State, local, or tribal governments in the aggregate, or to the private sector. This Federal action approves pre-existing requirements under State or local law, and imposes no new Federal requirements. Accordingly, no additional costs to State, local, or tribal governments, or to the private sector, result from this action.

List of Subjects in 40 CFR Part 70

Environmental protection, Administrative practice and procedure, Air pollution control, Intergovernmental relations, Operating permits, Reporting and recordkeeping requirements.

Authority: 42 U.S.C. 7401–7671q.

Dated: June 13, 1996.

Margaret McCue,

Acting Regional Administrator.

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